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I. INTRODUCTION

The May 2002 issue of Volume 54 of the *Federal Communications Law Journal* contained a lengthy article titled *The Concrete Barrier at the End of the Information Superhighway: Why Lack of Local Rights-of-Way Access Is Killing Competitive Local Exchange Carriers*, by Christopher R.

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Day, a graduate fellow at the Institute for Public Representation, Georgetown University Law Center, with the assistance of two former colleagues at the law firm of Swidler, Berlin, Shereff, Friedman, LLP, which represents a multiplicity of competitive local exchange carriers ("CLECs").[1] The thrust of Day's article is that local governments, in franchising use of their rights-of-way, are improperly obstructing development of CLECs in violation of Section 253 of the Telecommunications Act of 1996[2] (1996 Act), as added to the Communications Act of 1934. Day first proposes that Congress amend Section 253 to create a national rights-of-way access standard.[3] Alternatively, he proposes that the Enforcement Bureau of the Federal Communications Commission ("FCC"), without further legislation, create a "rocket docket" that could resolve rights-of-way access disputes between CLECs and local franchising authorities.[4] The editors of the *Journal* are to be complimented on the timely publication of an article on an issue that is very hotly contested across the country, and on which the courts have not fully agreed. The factual predicate, which Day marshals for his legislative proposal, and its substance and constitutionality are no less debatable than his construction of Section 253, with which the courts have struggled since 1996.[5] Similarly, the existing statutory and constitutional bases for his alternative administrative proposal are equally dubious. The purpose of this Article is to question the factual and analytical bases of Day's proposals.

Day offers no persuasive evidence that "lack of local rights-of-way access is killing competitive local exchange carriers."[6] While acknowledging that "some of the blame for the failure of local competition may be placed on failed business models and the withdrawal of venture capital from the market,"[7] Day's article charges that the Congress's and

1. Christopher R. Day, *The Concrete Barrier at the End of the Information Superhighway: Why Lack of Local Rights-of-Way Access is Killing Competitive Local Exchange Carriers*, 54 FED. COMM. L.J. 461 (2002).

2. 47 U.S.C. § 253 (2000).

3. Day, *supra* note 1, at 487-90.

4. *Id*. at 490-91.

5. Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston, 184 F.3d 88 (1st Cir. 1999); N.J. Payphone Ass'n v. Town of West New York, 299 F.3d 235 (3d Cir. 2002). *Compare* BellSouth Telecomms., Inc. v. City of Coral Springs, Fla., 42 F. Supp. 2d 1304 (S.D. Fla. 1999) *with* City of Auburn v. Qwest Corp., 247 F.3d 966 (9th Cir. 2001). *But see* Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250 (D. Or. 2002); AT&T Comms. of the Pac. Northwest, Inc., v. City of Eugene, 35 P.3d 1029 (Or. App. 2001); Qwest Comms. Corp. v. City of Berkeley, 146 F. Supp. 2d 1081 (N.D. Cal. 2001). *See also* TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002); TC Sys., Inc. v. Town of Colonie, N.Y., 213 F. Supp. 2d 171 (N.D.N.Y. 2002).

6. Day, *supra* note 1, at 461.

7. *Id.* at 462.

FCC's "failure to adequately address municipal rights-of-way access for CLECs" is a "regulatory failure" creating an "inhospitable environment" for CLECs.[8] The view that lack of access to local rights-of-way is a major factor in CLEC failures does not appear to be the prevailing view among CLECs, even in two states that have experienced vigorous right-of-way litigation—Michigan and Maryland. In responding to an earlier survey by the Michigan Public Service Commission to identify barriers to entry, none of the CLECs identified local rights-of-way as an obstacle to the development of competition.[9] Kraemer and May's study, "Local Exchange Competition: Progress in Maryland," concluded that "competition exists in Maryland; there appear to be no barriers to entry."[10]

Recent publication of a book setting forth an insider's view of the CLEC debacle barely mentions local rights-of-way franchising as a CLEC issue.[11] Rather, because the managers of the CLECs did not grow up in the telephone business, but the inter-exchange carrier ("IXC") business, they were simply slow to realize that obtaining rights-of-way across farmland was uncomplicated compared to rights-of-way within a city.[12] In fact, large numbers of CLECs overcame any such urban problems—47 in Atlanta, 38 in Chicago, 46 in Dallas, 38 in Los Angeles, and 45 in New York.[13] McDermott attributes the failures of CLECs to management failures as mundane as incorrect billing.[14] His final chapter anticipating "Rebound" of the industry relies on neither changes in local rights-of-way policies nor amendment of the 1996 Act.[15]

Day's assumption that local right-of-way franchising is a significant barrier to CLECs is highly questionable as a factual matter. It has been my experience in representing numerous municipalities in right-of-way franchising matters that carriers that have accepted the local franchising process have been readily franchised. After all, for area economic development purposes, local governments are anxious to have competitive telecommunications services available to local businesses and residents are

8. *Id.*

9. MICHIGAN PUBLIC SERVICE COMMISSION, REPORT ON LOCAL TELEPHONE INTERCONNECTION (1998) (submitted to the Governor and Michigan Legislature).

10. Joseph S. Kraemer and Randolph J. May, *Local Exchange Competition: Progress in Maryland*, The Progress and Freedom Foundation: Progress on Point 28 (May 2002).

11. *See* MARTIN F. MCDERMOTT III, CLEC: TELECOM ACT 1996: AN INSIDER'S LOOK AT THE RISE AND FALL OF LOCAL EXCHANGE COMPETITION (2002).

12. *Id.* at 5, 11.

13. *Id.* at 57 (citing 2001 CLEC Report published by New Paradigm Resources); *see also id.* at 204, 206.

14. *Id.* at 222, 241, 304.

15. *Id*. at 316.

also anxious to derive compensation for their investments in local rights-of-way.[16] It is only those telecommunications carriers, misapprehending the language and intent of Section 253, that resist local franchising or rights-of-way, resist paying compensation based on value instead of on costs, or resist paying compensation partially in-kind that may encounter "concrete barriers" to their exploitation of the public rights-of-way. A mere increase in cost is not a barrier to entry.[17]

II. SECTION 253 WAS NOT INTENDED TO PREEMPT LOCAL AUTHORITY

Day misconceives the original intent of Section 253(c). In Section II of his article, Day states "the premise that the overarching intent of Section 253 is to eliminate anything that could constitute a barrier to entry in the newly deregulated telecommunications market."[18] Contrary to Day's certitude, such a Section 253(c)-specific premise is at most highly controversial. The interpretational controversy arises in part from the fact that courts say, "Section 253 is quite inartfully drafted and has created a fair amount of confusion."[19] Much of these courts' difficulty in interpreting Section 253 arises out of their failure to recognize that the overall procompetitive purpose of the 1996 Act, as described in the conference report, but not in the act itself,[20] is subservient to the specific purpose of Section 253(c) to preserve local governments' jurisdiction over local rights-of-way. Thus, while Section 253(a) is manifestly designed to carry out the general, procompetitive purpose of the 1996 Act, Section 253(c) carries an interpretational instruction to the courts that nothing in subsection (a) shall affect prior existing authority of the local governments.

16. There has never been a definitive study done on the value of the public rights-of-way. *But cf.* 141 CONG. REC. 22035 (1995) (statement of Rep. Stupak) (mentioning the figure of $100 billion per annum of municipal rights-of-way investment); TeleCommUnity, *Valuation of the Public Rights-of-Way Asset* 5 (Mar. 2002), *at* http://www.telecommunityalliance.org/images/valuation2002.pdf (noting that during the debate it was mentioned that "using a conservative assumption, the value ranges from $1.1 Trillion for the improvements alone to $4.7 Trillion for the improvements and the ATF land value").

17. *See* AT&T v. Iowa Utils. Bd., 525 U.S. 366, 389-90 (1999).

18. Day, *supra* note 1, at 468.

19. N.J. Payphone Ass'n v. Town of West New York, 299 F.3d 235, 240 (3d Cir. 2002); *see also* Cablevision of Boston v. Pub. Improvement Comm'n of Boston, 184 F.3d 88, 102 (1st Cir. 1999) (stating that "the weight of authority seems to favor [a] contextual interpretation of [Section] 253(c) over a literal, syntactically accurate one").

20. S. CONF. REP. NO. 104-230, at 1 (1996) (stating that the purpose of the legislation was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"), *quoted in* Day, *supra* note 1, at 487 n.131.

This result is not as strange as it might seem to the uninitiated. In enacting Section 253 in 1996, Congress made a conscious political decision to leave right-of-way franchising in the hands of the local franchising authorities where it has always been.[21] Day criticizes governmental action to date as failing to advance the "pro-competitive, de-regulatory national policy framework" of the 1996 Act, citing the legislative history of the Act.[22] It is commonplace in statutory construction, however, that the general purpose of an act does not control the construction of a provision with a specific legislative purpose.[23] Allowing the general purpose of promoting competition to control the specific provisions of Section 253 improperly "undermine[s] limitations" on federal authority embodied in Section 253.[24] That is the case here. It is apparent from the course of the legislative bill that the purpose dominating the enactment of Section 253(c) was largely the preservation of existing local rights and responsibilities with respect to local rights-of-way. The Guaranty Clause[25] and the Tenth Amendment to the U.S. Constitution require no less.

In enacting Section 253 of the 1996 Act, Congress adopted a policy of fostering the entry of multiple providers into the local rights-of-way on a free-market basis. But Congress then stepped aside, leaving the traditionally local processes of managing public rights-of-way and collecting compensation for the value of local property under these changed conditions to the local governments, as the regulators and owners of those rights-of-way.

Underpinning his call for amendment, Day argues under Section III.B. of his article that municipalities have misinterpreted Section 253(a)-(c) as empowering their regulation of rights-of-way, rather than as the "safe harbor" Congress intended. As evidence of their claim to empowerment, he cites Metromedia Fiber Network Services' comments to the FCC.[26] The

21. Atchison, Topeka & Santa Fe Ry. Co. v. Pub. Utils. Comm'n of Cal., 346 U.S. 346, 355 (1953) (stating that "use of public streets is a matter peculiarly of local concern, and great leeway is allowed local authorities, . . . even though interstate commerce may be subject to material interference").

22. Day, *supra* note 1, at 487 n.131.

23. Rodriguez v. United States, 480 U.S. 522, 526 (1987) (stating "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law"); Bd. of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986) (stating "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise"); *Cablevision of Boston*, 184 F.3d at 96, 101-02 (Section 253 reflects a balancing of conflicting views).

24. *See* Varity Corp. v. Howe, 516 U.S. 489, 511 (1996).

25. U.S. CONST. art. IV, § 4.

26. Day, *supra* note 1, at 469 n.31.

citation does not satisfy the "best evidence" rule. In point of fact, I know of no instance in which a local government has pursued the claim—with the FCC or with a federal court—that it derives right-of-way franchising powers from Section 253(c) of the Act, rather than from state law.

Under Section III.B. of his article, Day argues that four local right-of-way practices violate Section 253 of the Act. Each of the supposed violations of purpose that Day cites were specifically considered by Congress and rejected. Where Congress specifically rejects a particular approach, that approach cannot be a valid interpretation of the statutory text ultimately adopted.[27] As the Supreme Court said in *INS v. Cardoza-Fonseca*, of Congress's enacting the language from a House bill rather than the language from the companion Senate bill: "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[28] Thus, Congress's intent to preserve local authority is embodied in the carefully drawn structure and language of the section.

The language that became subsection (c) originated by amendment in both houses, but only on the House side was adoption of the amendment

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> Petition for Declaratory Ruling, City Signal Communications, Inc. v. City of Cleveland Heights, CS Docket No. 00-253, Comments of Metromedia Fiber Network Services, Inc. at 8 (filed Jan. 31, 2001).
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> > Access to public rights-of-way is almost routinely conditioned on MFNS' provision of monetary or in-kind compensation that clearly violates the [1996] Act and/or state law. In most cases, the Municipality is clearly prohibited under state law from requiring compensation for use of the rights-of-way, *but the municipality makes the argument that the law is no longer valid in light of the* [*1996*] *Act*, changing technology, or an absurd interpretation of the law.
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> *Id.* (emphasis added).

Id. (hereinafter omitted).

27. People v. Adamowski, 65 N.W.2d 753, 757 (Mich. 1954); *accord* INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987); Allstate Ins. Co. v. Dept. of Ins., 491 N.W.2d 616, 620 (Mich. Ct. App. 1992); *see also* HCSC-Laundry v. United States, 450 U.S. 1, 6-8 (1981); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 306 (1933); NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 48.18 (5th ed. 1992):

> One of the most readily available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments which are proposed to be made during the course of consideration in the legislature. Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute as finally enacted. . . . Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment.

Id.

28. *Cardoza-Fonseca*, 480 U.S. at 442-43 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

accompanied by illuminating controversy. Subsection (c) was first added to the Senate bill, S. 652, in committee markup.[29] The amendment was sponsored by Senator Kay Bailey Hutchison, who had raised in the Senate Commerce Committee's hearings her concern that Congress should protect local governments' rights. She argued that local governments had to retain full power to manage and to receive compensation for telecommunications providers' use of public rights-of-way.[30] The Senate passed the amendment without significant change in its language. The House's substitute bill, H.R. 1555, was originally more preemptive of the local governments' interests:

> (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 provider'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.[31]

That bill was voted out of committee only after a so-called managers' amendment on the floor to soften any federal preemption. Ultimately, the managers' amendment did not satisfy the House members who opposed preemption of local governments' police power and property rights. The issue was debated on the floor between the proponents of the managers' amendment and the proponents of an amendment by Congressmen Barton and Stupak.[32] The floor debates led to rejection of the managers' amendment to Section 253 and the substitution of the Stupak-Barton amendment by a floor vote of 338-86.[33] During the floor debates, Congressman Stupak explained the effect of his amendment:

> [I]f our amendment is not adopted, if the Stupak-Barton 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 simply is not fair to ask the taxpayers to continue to subsidize telecommunication companies.[34]

Congressman Barton confirmed the protection of both police power and property rights of the local governments in these words:

29. 141 CONG. REC. 15986 (1995).
30. *Id.* at 15648.
31. H.R. REP. NO. 104-204, title 1, pt. 2, at 5 (1995).
32. 141 CONG. REC. 22035-52 (1995).
33. *Id.* at 22052.
34. *Id.* at 22035.

> [The amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way. . . .
>
> The Chairman's [managers'] amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way.[35]

In the end, the managers' preemptive amendment was rejected because it did not go "the entire way" in protecting local governments' property rights in and police power over rights-of-way.

Day's objection to expressions of local authority, which he sees as inconsistent with the general competitive thrust of the 1996 Act, were the same objections raised by Congressman Shaefer and others in the House debate of the bill.[36] But Congressman Shaefer's position was resoundingly rejected in the House's adoption of the Stupak-Barton amendment. Since the amendments to Section 253(a), (b), and (c) that passed the two houses were "identical or similar,"[37] the House debate and vote stand as a considered and deliberate congressional rejection of Day's assumption, viz, the general procompetitive purpose of the bill requires a broadly preemptive reading of the language of Section 253 instead of a narrowly preemptive reading.[38] In arguing, essentially, for implied preemption in Section 253 by relying on a generalized purpose—contrary to the teaching of *Medtronic*, *Inc. v. Lohr*[39] and the instruction of Section 601(c)(1) of the 1996 Act[40]—Day attempts to reopen issues that were conclusively settled by Congress. Moreover, where Congress has expressly defined the scope of preemption, any implication of preemption arising out of the Commerce

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35. *Id.* at 22036.

36. *Id.*

37. H.R. CONF. REP. NO. 104-458, at 127 (1996).

38. *Cf.* Bd. of Governors v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986).

39. 518 U.S. 470, 484-86 (1996) (stating federal statutes should be construed to minimize federal preemption); *accord* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (stating "we must construe these provisions in light of the presumption against the pre-emption of state police power regulations").

40. 47 U.S.C. § 152 note (2000).

> Sec. 601. Applicability of consent decrees and other law. . . .
>
> (c) Federal, State, and Local Law.—
>
> (1) No Implied Effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Id. In the course of passage, Section 601(c) evolved into its present form, "prevent[ing] affected parties from asserting that the bill impliedly pre-empts other laws." H.R. CONF. REP. NO. 104-458, at 201 (1996).

Clause is foreclosed.[41] The silent or dormant Commerce Clause does not override Congress's express limitation of preemption in subsection (c). Day's objections to local rights-of-way regulation and compensation have already been considered by Congress and explicitly rejected.

A. Right-of-Way Fees Are Not Limited to Costs

Day believes that local governments' charging a fee in an amount beyond the cost of actual rights-of-way management activities for use of the public rights-of-way is a misinterpretation of Section 253.[42] Anything more than recovery of costs, he argues, constitutes an unlawful barrier. However, his assumption that Section 253 allows only recovery of "actual costs incurred by [local governments] for their use of the public rights-of-way,"[43] fails as directly contrary to the legislative history of that section. Congress expressly preserved the local governments' authority to obtain "compensation from . . . providers . . . for use of the public rights-of-way," not just to recover the local governments' costs related to occupancy.[44]

Day's objection to fees and in-kind compensation was debated and rejected on the House floor. Indeed, his very point was raised by opponents of the Stupak-Barton amendment to subsection (c) and rejected in the vigorous floor debate between the managers' amendment and the Stupak-Barton amendment.[45] The legislative history shows a dominant intention on the part of Congress to give the local governments great latitude as to charges.[46] During the debate on the rule under which the committee bill was to be brought to the House floor, the manager for the bill, Congressman Bliley, a former mayor of Richmond, Virginia, and a former president of the Virginia Municipal League, assured the members, in answer to a question from Congressman Goss, also a former mayor, that

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41. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154-55 (1982); Northeast Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 174 (1985); Transp. Co. v. Parkersburg, 107 U.S. 691, 701 (1883) (stating "[i]t is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce"); Willson v. Black Bird Marsh Creek Co., 27 U.S. 245, 252 (1829); *see also* So. Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945) (stating in dictum the "undoubted power" of Congress).

42. Day, *supra* note 1, at 470.

43. *Id*.

44. *See* TCG Detroit v. Dearborn, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998) (stating that "there is nothing inappropriate with the city charging compensation, or 'rent', for the City owned property that the Plaintiff seeks to appropriate for its private use"), *aff'd* 206 F.3d 618 (6th Cir. 2000); *see also* City of Auburn v. Qwest Corp., 260 F.3d 1160, 1176 n.11 (9th Cir. 2002) (acknowledging—if not adopting—the Sixth Circuit's decision upholding the city's gross receipts-based right-of-way franchise fee).

45. 141 CONG. REC. 21683 (1995).

46. *Id*.

even the managers' amendment allowed:

> [T]he councils . . . and the mayor [to] make any charge they want provided they do not charge the cable company one fee and they charge a telephone company a lower fee for the same right-of-way. They should not discriminate, and that is all we say. Charge what you will, but . . . . [d]o not discriminate in favor of one or the other.[47]

Bearing in mind that franchise fees for cable companies were expected to be based on gross receipts, limited to 5% of gross revenues under Section 622(b) of the Cable Act,[48] it is apparent from the colloquy that the members expected the franchise fees on telecommunications providers to be on a comparable basis with cable fees, i.e., a percentage of gross revenues. When the Stupak-Barton amendment was on the floor of the House two days later, both of the proponents argued competitive effect in gross receipts-based terms. Congressman Schaefer attacked the Stupak-Barton amendment on the grounds that it would allow "8[%] of the gross, the gross, of the [providers] who are coming in,"[49] and argued that unless his amendment was adopted, providers in one city would be "assessed up to 11[%] of gross revenues as a condition for doing business there."[50] Eleven percent, he argued, had nothing to do with "control of right-of-way."[51] Congressman Bliley opposed the Stupak-Barton amendment to the committee bill on the grounds that the amendment allowed the municipalities to charge the telecommunications providers more than the cable operators.[52]

Congressman Fields objected that:

> When a percentage of revenue fee is imposed by a city on a telecommunication provider for use of rights-of-way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anticompetitive.
>
> . . . [W]hat does control of right-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.
>
> Such large gross revenue assessments bear no relation to the cost of using a right-of-way and clearly are arbitrary. It seems clear that the cities are really looking for new sources of revenue.[53]

The proponents, on the other hand, made it clear that the intent of their amendment was to make sure that the cities were fairly compensated

47. *Id.*
48. 47 U.S.C. § 542(b) (2000).
49. 141 CONG. REC. 22036 (1995).
50. *Id*.
51. *Id.*
52. *Id.*
53. *Id*.

for the use of public property, in which they invested $100 billion a year.[54] The intent was that they be compensated at the free-market rate.[55] Congressman Barton urged the House to vote for his amendment on the grounds that it went "the entire way" in rejecting any kind of federal price controls over franchise fees.[56] Thus, Day's objections to a gross revenues-based franchise fee already have been raised and were rejected in the 338-86 vote adopting the Stupak-Barton amendment.[57] Since both the proponents and opponents of the amendment agreed on the effect of the amendment, that vote is conclusive as to its meaning.

A gross receipts-based fee yields compensation proportionate to the providers' use of the rights-of-way. What Day misapprehends in his argument against gross receipts-based fees is that gross receipts are a reasonable proxy for intensity of use. The providers' use of the rights-of-way is to carry voice and data from one place to another—that is the business of a telecommunications common carrier. Local governments can reasonably use gross receipts as a measure of the amount of "information" being carried by the carriers through the rights-of-way—the number of bytes being "pumped" through the rights-of-way, if you will. This measure is not different in principle from the railroads charging by the pound, whether it is for freight carried in their boxcars or in a trucking company's trailers loaded on a flat car.

Rather than being a barrier, a right-of-way charge based on percentage of gross revenues favors developing competition and the entry of competitors to the incumbent local exchange carrier ("ILEC"). During start-up when cash flow is low, a new company's franchise fee expense is proportionally low. Most start-ups would like to have all their landlords charge rent during the early years, capped by a percentage of gross revenues.

Section 253(a)-(d) does not clearly treat compensation the way that Day thinks it ought to. In that sense, an amendment to make it mean what Day thinks it ought to mean is an appropriate proposal for him to make. I submit, however, that Congress got it right in 1996, because there are legal barriers to enactment of Day's proposal for congressional action. Aside from constitutionally based considerations of intergovernmental relations informing a proper interpretation of Section 253, the Fifth Amendment limits the extent to which Congress went under Section 253 and might properly go under Day's proposal. As valuable public property, the public

54. *Id*. at 22035.
55. *Id*.
56. *Id.* at 22036.
57. *Id*. at 22052-53.

rights-of-way are protected from federal takings for use in private businesses for profit.[58] The local franchising authorities—whether outright owners or as trustees of their streets and roads under state law—have an obligation to their taxpayers to receive fair compensation for such use by private enterprises.[59] The CLECs have no greater claim to use of the public rights-of-way for their lines than they do to the use of landlords' private property to house their switches or support their lines.[60]

Telecommunications providers who place their cables in the county's rights-of-way enjoy no less a permanent physical occupancy requiring compensation than the cable company hanging its cables from and across Mrs. Loretto's apartment building in *Loretto v. Teleprompter Manhattan CATV Corp.*[61] and providers placing their switching equipment in a telephone company's central offices in *Bell Atlantic v. FCC*.[62] As to streets, the question has actually been decided by the U.S. Supreme Court in *St. Louis v. Western Union Telephone Co.*, where the Court held that the city was entitled to rent as a demand of proprietorship.[63]

Section 253(c) allows the county to recover "fair and reasonable compensation . . . for use of public rights-of-way"[64] from the telecommunications companies. Day contends that this language should limit local governments to cost-based fees. But cost recovery is not the measure under the Fifth Amendment. Whatever value a court might ultimately settle upon under the cost calculus, it obviously understates the appropriate compensation for the loss of the "economically beneficial or productive use of land."[65] Compensation for loss of the value of the property over its cost is not fully captured by a cost-based measure.

58. *See* United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984) (holding that the "reference to 'private property' in the Takings Clause of the Fifth Amendment encompass[es] the property of . . . local governments when it is condemned by the United States"); *see also* United States v. Carmack, 329 U.S. 230, 242 (1946) (explaining that the takings doctrine applies to the federal government's acquisition of state and local government property).

59. *See* City of Gary v. Ind. Bell Tel. Co., 732 N.E.2d 149, 156 (Ind. 2000) (declaring a rights-of-way fee "based in part on a percentage of the company's gross revenues" represents fair compensation for use of public property).

60. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Bell Atl. Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

61. *Loretto*, 458 U.S. 419.

62. *Bell Atl. Tel. Cos.*, 24 F.3d 1441.

63. St. Louis v. W. Union Tel. Co., 148 U.S. 92, 97 (1892), *on reh'g*, 149 U.S. 465 (1893); *accord* City of Dallas v. FCC, 118 F.3d 393, 397-98 (5th Cir. 1997).

64. 47 U.S.C. § 253(c) (2000).

65. Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 285 (4th Cir. 1998) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)).

Section 253 can be read in a manner consistent with the intentions of Congress and good public policy, without infringing on Fifth Amendment concerns, by allowing recovery of full market value. Any other reading effects a taking of the county's property, whether held in fee or in trust for others or otherwise controlled. Congress could not have intended a different result in Section 253(c). Aside from the extensive and explicit legislative history that endorses valuation-based pricing for franchise rights conveyed, Congress was *silent* on the issue it had to address if it had intended a taking of local government property. Congress created no authorization or appropriation of federal funds to compensate local governments for a federal taking of the value that is otherwise conveyed through right-of-way franchises. There is no indication Congress thought its actions constituted a taking or that the federal government should be prepared to pay the bill for the transfer of the value of the rights-of-way from local taxpayers to private telecommunications companies.[66] The negative implication is unavoidable. Congress must have intended that the telecommunications companies keep the taxpayers whole and pay the appropriate amount for the value of the rights-of-way received through rights-of-way franchises to the extent permitted by state law.

Under whatever theory, it is equally clear that Congress did not intend to shift the financial shortfall to the local governments. In the debate on the Stupak-Barton amendment on the House floor, the potential applicability of the Unfunded Mandates Act[67] was raised.[68] Had the Stupak-Barton amendment not been substituted for the managers' amendment, so that Section 253 would have imposed a financial loss on the local governments, the Unfunded Mandates Act would have been invoked. The Stupak-Barton amendment was intended to avoid, in the words of the co-author of the language finally adopted, a $100 billion unfunded mandate.[69] Read as a limitation to costs, the bill that became the 1996 Act would have been subject to a point of order under Section 2(6) of the Unfunded Mandates

66. In fact, this approach stands in stark contrast to Congress's explicit endorsement of the FCC's auctioning off the federal rights-of-way in the form of electromagnetic spectrum frequencies. *See* 47 U.S.C. § 309(j)(3) (2000). The spectrum auctions, as the FCC states publicly, were carefully designed to force the companies to pay "full market value" for the use of frequencies. Implementation of Section 309(j) of the Comm. Act, *Memorandum Opinion and Order*, 14 F.C.C.R. 8724, paras. 50-51, 15 Comm. Reg. (P & F) 714 (1999). Yet no one argues that a cellular company's use of frequencies imposes additional costs on the federal government comparable to the more than $40 billion raised through the auction process. FCC Auctions Summary, *at* http://wireless.fcc.gov/auctions/summary.html (last updated Jan. 2, 2003).

67. 2 U.S.C. § 1501 (2000).

68. 141 CONG. REC. 22035 (1995).

69. *Id*.

Act.[70] Thus, it is proper to infer from the absence of such a point of order that the House, by adopting Stupak-Barton, knowingly dodged the unfunded mandate bullet by not depriving the local governments of revenues from their rights-of-way properties.

B. Differential Compensation Is Not Discriminatory

Day also argues that favorable municipal treatment of incumbent providers is a barrier that unfairly disadvantages new entrants to the market.[71] He complains that such unfair treatment occurs when a new entrant is charged a gross receipts-based fee or certain upfront charges not required of the incumbent. The circuit courts are divided on this question.[72]

Here again, this issue was thoroughly debated and decided in the House. Congress clearly intended to include franchise fees within the subsection (c) safe harbor, even to the extent that fees might be applied differently to ILECs and CLECs. Congress having decided the question, there is no basis in original meaning for Day's argument to the contrary.

Section 243 of the House bill, which as amended became Section 253, contained the so-called "parity" provision in a fifth subsection:

> (e) PARITY OF FRANCHISE AND OTHER CHARGES.—Notwithstanding section 2(b), [47 U.S.C. § 152(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.[73]

In his remarks on the House floor during the debate on H.R. 1555, Congressman Stupak particularly stressed that the Stupak-Barton amendment would delete the requirement for parity between the ILEC 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 telecommunication providers. . . .

70. § 1501.

71. Day, *supra* note 1, at 471.

72. *See* TCG New York v. City of White Plains, 305 F.3d 67, 77-78 (2d Cir. 2002) (declining to decide the question, while noting that the circuits have split on the issue of gross receipts-based fees and citing *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000) and *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1179 (9th Cir. 2002)). The Second Circuit's reading of *City of Auburn* is not, as noted *infra*, the only reading possible.

73. H.R. REP. NO. 104-204, pt. 1, at 6 (1995).

> 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 right-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 Stupak-Barton 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 simply is not fair to ask the taxpayers to continue to subsidize telecommunication companies.[74]

Clearly the Stupak-Barton amendment contemplated different fees between new entrants and any grandfathered ILEC. Over the vigorous opposition of Congressman Schaefer, the author of the "MFS amendment," the House debated and adopted the Stupak-Barton amendment by an overwhelming vote of 338-86. In arguing vigorously (and unsuccessfully) against the Stupak-Barton amendment, Congressman Schaefer made many of the same arguments that Day makes. For example, Congressman Schaefer claimed that acceptance of the Stupak-Barton amendment "is going to allow the local governments to slow down and even derail the movement to real competition."[75] Congressman Fields claimed that cities are allowed to charge incumbent telephone companies 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 telecommunication infrastructure."[76] It was common ground between the sponsors and opponents that the Stupak-Barton amendment would permit grandfathering of ILECs where constitutional law required.

After hearing Congressman Schaefer's arguments, the House rejected them and adopted the Stupak-Barton amendment by a vote of 338-86. By adopting Stupak-Barton, the House rejected the Schaefer-Fields arguments for the Schaefer parity language. By adopting Stupak-Barton, which was the same as the Senate's bill in reference to fair and reasonable compensation for right-of-way use, the House overwhelmingly endorsed the result that differential compensation in such cases is not impermissibly discriminatory.

74. 141 CONG. REC. 22035 (1995).
75. *Id.* at 22036.
76. *Id*.

C. The So-Called "Third Tier" of Regulation Is a Red Herring

Day asserts that the so-called "third tier" of regulation constitutes another barrier to entry prohibited by Section 253.[77] Neither the 1996 Act nor its legislative history mentions "third-tier" regulation, much less prohibits it. The concept of a "third tier" of regulation is a creation of the FCC,[78] based on a fundamental disregard of the federal structure of our government. To the extent that "third tier" refers to local regulations that duplicate federal regulations of "the rates, terms, and conditions under which telecommunications service is offered to the public,"[79] such regulation of interstate services is federally preempted, whether imposed on the state or local level.[80] To the extent that the "third tier" refers to the allocation of legislative responsibility among the levels of state and local government, that is a matter constitutionally reserved to each individual state and to its people. Congress should not be interpreted to have presumed to tell a state government at which level of government to place non-federal responsibilities.[81] Such a presumed meaning of Section 253 must be rejected, because it would violate the Guaranty Clause, Article IV, Section 4, and the Tenth Amendment. In any case, the FCC did not state that all "third-tier" regulations were "automatically prohibited;" it merely cautioned that such regulation would be subject to scrutiny. Against the specific examples of "third-tier" regulation that Day cites[82] must be set the various court decisions recognizing the priority of such housekeeping regulations.[83] Contrary to Day's citation of the South Carolina Public Utility Act,[84] *BellSouth v. City of Orangeburg* recognizes local

77. Day, *supra* note 1, at 473 (stating "[m]unicipal regulations that impose operational requirements on providers seeking access to the public rights-of-way serve as another barrier to competitive telecommunications providers").

78. TCI Cablevision of Oakland County, *Memorandum Opinion and Order*, 12 F.C.C.R. 21396, para. 105, 9 Comm. Reg. (P & F) 730 (1997).

79. *Id.* para. 106.

80. La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) (stating that a federal agency may preempt state law when it is acting within the scope of its congressionally delegated authority).

81. *See* City of Columbus v. Ours Garage, 536 U.S. 424, 437-440 (2002).

82. *See* Day, *supra* note 1, at 474-75.

83. *See*, *e.g.*, Bell South Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1182-86 (11th Cir. 2001); BellSouth Telecomms., Inc. v. City of Mobile, 171 F. Supp. 2d 1261, 1270 (S.D. Ala. 2001); Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250, 1256 (D. Or. 2002), *appeal pending* Ninth Circuit.

84. Day, *supra* note 1, at 486 n.127.

governments' authority over rights-of-way.[85] Day's characterization of *City of Auburn v. Qwest* as "a strong opinion"[86] overlooks the fact that the opinion was limited to wireless carriers, the issues as to wireline carriers having been disposed of on state-law grounds.[87] Unlike the panel's earlier withdrawn opinion, the revised opinion did not consider the cities' regulatory measures as prohibitive on a disaggregated basis.

D. *Municipal Delay Is Not Prohibition*

Day accuses local governments of "continu[ing] to block rights-of-way access as a means of extracting additional compensation from telecommunications providers"[88] and appears to argue that municipal "delay" in granting access is an unlawful barrier to entry.[89] There is no doubt that unreasonable delay is a barrier to entry, but negotiations over the amount of compensation clearly were contemplated by the Stupak-Barton amendment. "Section 253(a) speaks in terms of prohibition, not in terms of minor delays . . . . and occasional inconvenience."[90] The fact that a provider of telecommunications service can be denied the opportunity to install or maintain its facilities in public rights-of-way if it fails to register, enter into a lease, and pay a fee to the owner of those rights-of-way does not necessarily mean that all such requirements have a per se prohibitory effect under Section 253.[91] A mere increase in cost does not impair the ability to enter.[92]

E. *The States Have Responded to Right-of-Way Issues in Different Ways*

In Section IV of his article, Day relies on the fact that a handful of states "have taken action to rein in municipal demands and foster the further development of facilities-based competition in the local telecommunications market"[93] as evidence for his general proposition that

85. BellSouth Telecomms., Inc. v. City of Orangeburg, 522 S.E.2d 804, 807 (S.C. 1999).

86. Day, *supra* note 1, at 482.

87. City of Auburn v. Qwest Corp., 247 F.3d 966 (9th Cir. 2001).

88. Day, *supra* note 1, at 476.

89. *Id.* at 475.

90. BellSouth Telecomms., Inc. v. City of Mobile, 171 F. Supp. 2d 1261, 1281-82 (S.D. Ala. 2001).

91. *See* TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000); Qwest v. City of Portland, 200 F. Supp. 2d 1250, 1256 (D. Or. 2002), *appeal pending* Ninth Circuit.

92. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 389-90 (1999) (construing similar language in Section 251); GTE Serv. Corp. v. FCC, 205 F.3d 416, 424 (D.C. Cir. 2000).

93. Day, *supra* note 1, at 484.

direct fees, in-kind compensation, local regulations, and municipal "delays" constitute barriers to entry in violation of Section 253. First, it is certainly not surprising that in a federal system various states would have varying approaches to compensation and other rights-of-way management issues. The federal structure allows states to respond to local conditions and priorities. That is what Congress intended to allow by enacting Sections 253(c) and 602(c)(1)[94]. Second, Day neglects to make note that other states—far from "rein[ing] in municipal demands"[95]—have chosen since 1996 to enact legislation expressly establishing municipal authority for gross receipts-based charges[96] including, for example, Illinois (up to 6% or 7%, depending on population)[97] and Washington (up to 6%, but may charge more if approved by a majority of voters).[98] Many states have intricate relations between fees and taxes, e.g., Florida, Oregon, and Arizona.[99] Congress itself placed the taxes "off-limits" from preemption by Section 601(c)(2),[100] and the compensating credits, allowances, and exemptions between taxes and fees are no less valid than the

94. 110 Stat. 143-44, 47 U.S.C. § 152 note (1996).

95. *Id*.

96. ARK. CODE ANN. § 14-200-101(a)(1)(A) (Michie 1998) (fees not higher than those in effect on Jan. 1, 1997, or up to 4.25% may be required, but higher fees may be collected if agreed to by the provider or agreed to by voters); IDAHO CODE § 62-701A (Michie 2002) (reasonable fees may be required); NEV. REV. STAT. ANN. 354.59883 (Michie 1999) (cities and counties may not charge fees greater than "5 percent of the utility's gross revenue from customers located within the jurisdiction," and not greater than "5 percent of its gross revenue from the first $15 charged monthly for each line of access" on wireless service); N.D. CENT. CODE § 49-21-26 (1999) (unless local voters approve authority to impose fees other than management costs, political subdivisions may recover only "management costs," which are "costs incurred" by the political subdivision "by the telecommunications company activity in the public right-of-way").

97. 35 ILL. COMP. STAT. ANN. 636/5-15 (2002).

98. WASH. REV. CODE ANN. § 35.21.870 (West 1990 & Supp. 2002).

99. FLA. STAT. ANN. § 202.19 (West Supp. 2003); OR. REV. STAT. § 221.515 (2001); ARIZ. REV. STAT. § 9-582 (Supp. 2002).

100. 110 Stat. 143-44, 47 U.S.C. § 152 note (1996).

> TITLE VI—EFFECT ON OTHER LAWS
>
> SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAWS. . . .
>
> (C) FEDERAL, STATE, AND LOCAL LAW. . . .
>
> (2) STATE TAX SAVINGS PROVISIONS.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

Id.

"compensating taxes" which the Supreme Court has reviewed in relation to the Commerce Clause.[101]

III. THE FEDERAL COMMUNICATIONS COMMISSION LACKS JURISDICTION TO ADJUDICATE PROPERTY RIGHTS

Day's proposal to revamp the FCC's procedure for adjudication fails to take into account the agency's lack of subject matter jurisdiction.[102] Here again, the language and the legislative history of subsection (d) reflect a specific congressional intent to preclude the FCC from adjudicating matters of state law.

During the hearings on the Senate bill, Senator Kay Bailey Hutchison raised the concern that local governments' right to manage and receive compensation for use of public rights-of-way by telecommunications providers be preserved. The Commerce Committee marked up S. 652 on March 23, 1995.[103] Her principal concern was reflected in the provision which ultimately became Section 253(c).

But the bill as reported by the Commerce, Science, and Transportation Committee also contained a stealth amendment in the form of subsection (d) that was not sought by Senator Hutchison, and for which no senator or committee staff member has publicly claimed responsibility. That amendment gave the FCC the authority to preempt local government action under subsection (c), as well as to preempt state regulatory action under subsection (b). 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.[104]

Local governments were pleased with the affirmation of their authority over rights-of-way reflected in the Hutchison amendment that became subsection (c).[105] 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 adjudication of local right-of-way management and compensation authority in subsection (d) became the

101. *See*, *e.g.*, Tyler Pipe Indus. v. Wash. Dept. of Revenue, 483 U.S. 232, 240-48 (1987).

102. Day, *supra* note 1, at 490.

103. S. REP. NO. 104-23, at 14 (1995).

104. *Id.* at 96.

105. *Id.*

focus of local government concerns regarding S. 652 as it moved to the Senate floor in 1995.

Senators Dirk Kempthorne and Diane Feinstein offered a floor amendment to strike subsection (d) entirely.[106] This amendment would have entirely eliminated FCC jurisdiction over barriers to entry and over disputes under subsections (a), (b), and (c), leaving those disputes to the courts. The Feinstein-Kempthorne amendment failed by a vote of 44-56 on June 14, 1995.[107] The Senate then adopted, by voice vote, a substitute amendment offered by Senator Slade Gorton and supported by 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.[108]

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 other forms of telecommunications business regulation by state or local regulators.[109]

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. In explaining the Feinstein-Kempthorne amendment, Senator Feinstein had stated that, for example, "the FCC lacks the expertise to address cities' concerns."[110] Senator Kempthorne also gave rights-of-way examples from his days as mayor of Boise, Idaho, "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."[111]

In explaining his amendment, which was adopted, Senator Gorton made clear that the amendment was intended to remove the FCC's

106. 141 CONG. REC. 15604 (1995).
107. *Id.* at 15986.
108. *Id.* at 16353 (emphasis added to indicate changes from Hutchison amendment).
109. *See id.* at 15986.
110. *Id.* at 15591.
111. *Id.* at 15593.

jurisdiction over barriers to entry—the very kinds of management and compensation requirements that Senators Feinstein and Kempthorne described. He stated:

> I am convinced that Senators Feinstein and Kempthorne are right in the examples that they give . . . . And 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.[112]

He reiterated: "[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."[113]

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 a jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances."[114] That is the intended effect of the "[n]othing in this section" language in subsection (c).[115] The Gorton amendment was adopted by the conference committee.[116] Such a result is driven by Congress's conscious political decision in the interests of intergovernmental relations not to embrace primary agency jurisdiction.

Under the foregoing reading of the statute and legislative history, implementation of Day's alternative administrative proposal would go beyond the Commission's statutory authority. Even under a liberal reading of the primary jurisdiction doctrine, the Commission's views should be accorded little weight. Section 253(c) is not a section of the Act administered by the Commission, and consequently, under principles of statutory interpretation, its substantive views should carry little weight.[117]

112. *Id.* at 15984.

113. *Id.* at 15986. This approach would be consistent with the difference in the venue provisions in Sections 402(a) and 402(b) of the Communications Act of 1934. 47 U.S.C. § 402(a), (b) (2000).

114. 141 CONG. REC. 15984 (emphasis added).

115. *Id.* at 15593.

116. S. REP. NO. 104-230, at 16 (1996).

117. *See* Potomac Elec. Power Co. v. Dir. of Office of Workers' Comp., 449 U.S. 268, 278 n.18 (citing Hastings v. Earth Satellite Corp., 628 F.2d 85, 94 (D.C. Cir.) (declining to follow numerous Board decisions interpreting the statute), *cert. denied*, 449 U.S. 905 (1980); Tri-State Terminals v. Jesse, 596 F.2d 752, 757, n.5 (7th Cir. 1979) (stating the "[b]oard is not a policy-making body")); *see also* Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-51 (1991) (according deference to the interpretation of a statute by the Secretary of Health rather than to a determination of the commission, even

IV. BOTH PROPOSALS SHOULD BE REJECTED

In sum, Day's article does not make the case either for amendment of Section 253 or for the Commission's adopting a more aggressive adjudicative role on substantive issues. Obviously, if the courts were to continue to divide on the meaning of Section 253, remedial legislation by Congress to reestablish its original meaning might become appropriate. But it is far from clear that the substantive outcome of legislation would be, or should be, as Day seeks.

though the commission's determinations are deemed "conclusive" under the statute, since the secretary's power to render authoritative interpretations of his regulations is a necessary adjunct of his policymaking powers.); Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 801 (D.C. 2002).