

No. 02-35473

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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QWEST CORPORATION,  
Plaintiff/Appellant,

v.

CITY OF PORTLAND,  
Defendant/Appellee,

CITY OF ASHLAND, CITY OF EUGENE, CITY OF HAPPY VALLEY, CITY  
OF KEIZER, CITY OF NORTH PLAINS, CITY OF PENDLETON, CITY OF  
REDMOND, CITY OF SALEM, AND CITY OF SPRINGFIELD,  
Defendants-Intervenors/Appellees

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APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
DISTRICT OF OREGON  
Docket No. CV-01-01005-JE

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**BRIEF OF AMICUS CURIAE  
LEAGUE OF OREGON CITIES**

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## **CORPORATE DISCLOSURE STATEMENT**

The League of Oregon Cities is an association of governments and is not required by FED. R. APP. P. 26.1 to file a corporate disclosure statement.

## **STATEMENT OF INTEREST**

The League of Oregon Cities (“the League”), founded in 1925, is a state-wide association of Oregon cities. Its membership includes 238 of Oregon’s 240 incorporated cities, representing more than two million Oregonians. Its mission is: “To strengthen and support livable communities.” The League carries out that mission through legislative and legal advocacy for improved quality of municipal services and through training, technical assistance, research and dissemination of information to its members and to the general public. The League appeared as *amicus curiae* in support of the City of Portland and the Intervening Cities (“Cities”) in the District Court.

## **INTRODUCTION AND SUMMARY**

This brief supports the District Court’s ruling that there is no preemption of the Cities’ authority to manage and charge compensation for Qwest’s use of the right of way. The League makes two main arguments: First, it describes the sources and nature of municipal right of way authority and requests that this Court apply the accepted standard of judicial deference to that authority. Second, it establishes that management of the right of way is a valid exercise of municipal police powers and discusses the applicable preemption test in that context. The League’s position is that application of these well recognized standards of review

of municipal enactments will result in a decision affirming the District Court's opinion.

## **ARGUMENT**

### **I. Municipal Right of Way Authority is Well Established and Legislative in Nature.**

Like telecommunications conduit buried deep underground, municipal authority over the right of way is firmly embedded in the law. The nature and purpose of this authority is straightforward. Cities, unlike other entities occupying the right of way, are locally-elected legislative bodies under a duty to protect the right of way. This duty stems from multiple sources, including:

- 1) Long-standing common law doctrines such as the public trust and the public purpose doctrines;
- 2) The home rule provisions of the Oregon Constitution;
- 3) Oregon statutes; and
- 4) The Cities' historical status as the protectors of the public health, safety, and welfare through exercise of their police powers.

At the core of each of these duties is a single, unifying theme – that Cities are the most accountable legislative bodies nearest the right of way, and as such, their decisions deserve judicial deference. There is no better caretaker of the public trust.

### **A. The Public Trust Doctrine and Municipal Right of Way Authority**

The right of way includes more than just public streets; it encompasses the space above and below the streets, as well as the unpaved surface areas and sidewalks. Northwest Natural Gas Co. v. City of Portland, 300 Or. 291, 307-309, 711 P.2d 119 (1985). *See also* Mutual Irrigation Co. v. Baker City, 58 Or. 306, 325, 113 P.9 (1911) (City’s authority over public way includes managing the laying of pipes for gas, water, and other public conveniences). Thus, the right of way is a primary location for utility infrastructure and is often as crowded as the street itself.

No single entity owns the right of way: “[P]ublic highways belong, from side to side, and end to end, to the public.” Savage v. Salem, 23 Or. 381, 31 P. 832 (1893). It is well settled that Cities merely hold the right of way in trust for public use. Northwest Natural Gas, 300 Or. at 307-08; Simon v. Northrup, 27 Or. 487, 502, 40 P. 560 (1895); 10A MCQUILLIN, MUNICIPAL CORPORATIONS § 30.36 (3d ed. Revised 1999).<sup>1</sup> This trust relationship dates back to the fundamental nature of the dedication of a road, because road dedications are for the purpose of creating

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<sup>1</sup> Public use does *not* encompass a business’s use of the right of way for private purposes. Cummins v. Jones, Mayor, 79 Or. 276, 280, 155 P. 171 (1916). An entity may, however, obtain permission to use the right of way for business purposes through a franchise, license, or permit. Northwest Natural Gas, 300 Or. at 308. A franchise may be established through a City ordinance and may require payment of a percentage of the grantee’s gross revenue for the privilege of making commercial use of the City’s right of way. Portland v. Portland Ry., L. & P. Co., 80 Or. 271, 300, 156 P. 1058 (1916).

public thoroughfares. Northwest Natural Gas, 300 Or. at 307-08, *citing* OSCAR L. POND, A TREATISE ON THE LAW OF PUBLIC UTILITIES, 869-70 § 498 (4th ed. 1932). Once a road is dedicated, Cities are under a duty to act “in the interest of the public health and welfare.” Id.

To fulfill this duty as caretakers of the public trust, Cities must make decisions regarding private use of the right of way. These decisions are inherently legislative in nature because they involve the careful balancing of public safety risks against the possible benefits derived from allowing private use of the right of way. Charter Communications v. County of Santa Cruz, 304 F.3d 927, 932 (2002); LaGrande/Astoria v. Pub. Employees Retirement Bd. et al., 281 Or. 137, 142, 576 P.2d 1204, *adhered to on reh’g* 284 Or.173, 586 P.2d 765 (1978). As discussed in detail in Section II below, such legislative decisions should be accorded deference by this Court.

**B. The Public Purpose Doctrine and Municipal Right of Way Authority.**

The public purpose doctrine restricts the spending of public funds, requiring that expenditures be made in furtherance of a public purpose. Hunter v. Roseburg, 80 Or. 588, 156 P. 267 (1916); Churchill v. Grants Pass, 70 Or. 283, 141 P. 164 (1914); 15 MCQUILLIN, MUNICIPAL CORPORATIONS § 39.19 and § 39.26 (3d ed. Revised 1995).

Oregon's public purpose doctrine stems in part from a provision of the Oregon Constitution which prevents municipalities from lending credit to private corporations:

No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall . . . *loan its credit to, or in aid of, any such company, corporation or association.* OR. CONST. art. XI, § 9 (1917) (emphasis added).

Courts have interpreted this language as a risk-avoidance measure intended to protect public tax funds from speculative private-interest commitments. DeFazio v. Washington Pub. Power Supply System, 296 Or. 550, 579, 679 P.2d 1316 (1984); Carruthers v. Port of Astoria, 249 Or. 329, 438 P.2d 725 (1968). The Oregon Supreme Court noted that this provision is likely also “aimed to bar favoritism, corruption, or other misuse of political institutions to aid particular private enterprises as well as to protect public finances against speculation.” DeFazio, 296 Or. at 579. Lastly, this section has been interpreted as a bar against a municipality aiding a corporation by releasing it from a pecuniary burden. Hauke v. J.V. Ten Brook, Mayor, et. al., 122 Or. 485, 259 P. 908 (1927).

Here, Qwest is asking that the Cities provide a valuable public asset to it at little or no cost. Such an arrangement would effectively constitute a long-term lending agreement through which the Cities provide the public right of way (and the attendant, taxpayer-financed services required to maintain the right of way) to a private corporation without any meaningful compensation. Such long-term

arrangements constitute an improper lending of credit. Further, this arrangement would impermissibly aid Qwest by allowing it to avoid the significant pecuniary burden of negotiating hundreds of right of way easements with private landowners. Qwest's arrangement proposes the improper lending of public credit, the misuse of public tax funds to benefit a private interest, and the impermissible avoidance of a significant pecuniary loss in violation of the Oregon Constitution and the public purpose doctrine.

In analyzing an expenditure or action under the public purpose doctrine, the proper inquiry is whether there is a substantial public benefit and whether the proposed project will augment the community's total value as a whole. Carruthers, 249 Or. at 341. This determination has been held to be a legislative matter, and not appropriate for judicial action. Id.

In this case, Qwest's arrangement would not satisfy the substantial public interest test because the inevitable result of unregulated private access to the public right of way is an unsafe, ill-managed, and overcrowded right of way. Nor would such overcrowding serve to "augment the community's value as a whole" because an overcrowded right of way not only fails to provide reliable service, but also poses significant safety problems.

What may constitute a substantial public interest is a determination for the legislature, not the judiciary. Carruthers, 249 Or. at 341. Oregon Cities, as locally-

elected, representative bodies, are the proper decision-makers to weigh the possible public benefit of franchise terms against the local costs of unchecked private access. As discussed in Section II below, the Court should accord deference to these legislative decisions.

### **C. Oregon’s Home Rule Provisions and Legislative Right of Way Authority**

In addition to the public trust and public purpose doctrines, the municipal duty to protect the right of way is provided for in the Oregon Constitution’s home rule provisions. All Oregon Cities are constitutional “home rule” cities, meaning that the Oregon Constitution grants them the authority to determine their own governmental structure and procedures without additional enabling authority from the state legislature. OR. CONST. art. XI, § 2 and OR. CONST. art. IV, § 1; Jarvill v. City of Eugene, 289 Or. 157, 168-169, 613 P.2d 1, *cert den.* 449 U.S. 1013 (1980); LaGrande/Astoria 281 Or. at 142. The authority of home rule cities is established through a charter adopted by the people. Adoption of a City charter is a political act which allows cities to legislate on matters within the scope of the charter. Northwest Natural Gas, 300 Or. at 303-304, n.10; LaGrande/Astoria, 281 Or. at 142.

Home rule cities whose citizens have enacted charters conferring upon them either a general grant of powers or a specific grant of power to collect taxes also

possess the legislative authority to charge compensation for the private use of the public right of way. AT&T Communications v. Eugene, 177 Or. App. 379, 389, 35 P.3d 1029 (2001) (“We therefore conclude that . . . [a] charter confers on the city the power to impose the registration and license fees.”); *See also*, City of Idanha v. Consumers Power, 8 Or. App. 551, 495 P.2d 294 (1972) (upholding City’s authority to require public utilities to obtain a license and pay a gross revenue-based license fee).

This home rule right of way authority, like the authority derived from the public trust and public purpose doctrines, is also *legislative in nature*. DeFazio, 296 Or. at 570; AT&T Communications, 177 Or. App. at 389. This is so because ongoing franchising decisions necessarily involve political balancing of multiple interests, and because the initial determination of the scope of municipal charter authority is a legislative decision. DeFazio, 296 Or. at 570 (“[T]he definition of charter powers is an individual matter for each city, a form of local legislation to be interpreted by the same means as any other legislation, including attention to the intent and purpose of those who adopted it.”). Under these three doctrines of municipal law, then, it is clear that municipal legislative decisions regarding the right of way should be accorded substantial judicial deference. In Oregon, Cities also have clear statutory authority in matters of right of way management.

#### **D. Oregon Statutes Support Legislative Municipal Right of Way Authority**

Oregon statutes reflect the same deferential principles described above concerning municipal authority over the right of way. OR. REV. STAT. § 221.415 expresses the Legislature's recognition of municipal authority:

Recognizing the independent basis of legislative authority granted to cities in this state by municipal charters, the Legislative Assembly intends by ORS 221.415, 221.420, 221.450 and 261.305 to reaffirm the authority of cities to regulate use of municipally owned rights of way . . . . OR. REV. STAT. § 221.415 (1987).

Carrying out this expression of legislative intent, OR. REV. STAT. § 221.420(2) authorizes Cities to regulate and impose charges for use of the right of way by public utilities, electric cooperatives and people's utility districts, and OR. REV. STAT. § 221.450 authorizes a privilege tax for utilities operating without a franchise.<sup>2</sup>

Several other statutes recognize Cities' authority to regulate the activities within the right of way. For example, OR. REV. STAT. § 221.495 authorizes Cities to regulate and grant franchises to taxicabs and similar services.<sup>3</sup> OR. REV. STAT. § 459.015 expresses the same policy regarding solid waste collection services.<sup>4</sup> Similarly, and more pertinent to telecommunications, OR. REV. STAT. § 221.510(2) provides that Cities may regulate telecommunications carriers' use of the City

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<sup>2</sup> See *Intervening Cities'* (excluding the City of Eugene) Addendum of Laws, pp. 8-10 (OR. REV. STAT. § 221.420) and *see* Appendix, p. 1 (OR. REV. STAT. § 221.450).

<sup>3</sup> Appended at pp. 2-3.

streets and that Cities may charge a privilege tax within the limits imposed by OR. REV. STAT. § 221.515.<sup>5</sup>

These statutes signal the Oregon Legislature’s longstanding recognition that municipalities are the appropriate legislative bodies to regulate the right of way. As such, they bolster the Cities’ argument that municipalities, being locally-elected representative bodies, deserve appropriate judicial deference for their decisions regarding right of way management.

## **II. This Court Should Defer to the Cities’ Legislative Authority and Uphold the District Court’s Decision**

Under the public trust doctrine, the public purpose doctrine, home rule authority, and state statutes, it is clear that the Cities’ right of way authority is legislative in nature. In Charter Communications v. County of Santa Cruz, this Court reiterated that municipal discretionary decisions involving right of way rates are legislative:

[G]rants, renewals, and consents to rate increases are all legislative acts “because they involve policy decisions regarding the terms and conditions of the use of the public right of way.” Charter, 304 F.3d at 932 (internal citations omitted).

Municipal legislative decisions have historically been given great deference by the courts. In fact, “no principle of law is better established than that courts

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<sup>4</sup> Appended at pp. 4-6.

<sup>5</sup> See Intervening Cities’ Addendum of Laws at pp. 11-12 (OR. REV. STAT. § 221.510) and 13-14 (OR. REV. STAT. § 221.515).

will not sit in review of proceedings of municipal officers and departments involving legislative discretion except . . . in cases of fraud, corruption, or arbitrary, unreasonable actions amounting to abuse of discretion.” 2A MCQUILLIN, MUNICIPAL CORPORATIONS § 10.33 (3d ed. Revised 1996). *See also*, E. St. Louis v. U.S. ex. rel. Zebley, 110 U.S. 321, 324, 4 S. Ct. 21, 28 L. Ed. 162 (1884) (“[W]hat expenditures are proper and necessary for a municipal administration, is not judicial . . . . No court has the right to control that discretion.”); Kershaw et al. v. City of Willamina et al., 119 Or. 543, 548-49, 250 P. 235 (1926) (“Where the law or charter confers upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to local government, their judgment . . . while acting within the scope of their authority, cannot be controlled by the courts.”).

In the specific context relevant here, this Court has recognized municipalities’ right to deference in regard to right of way management and has provided guidance about how to apply that deference. In Charter Communications, this Court applied a deferential standard to municipal right of way decisions by using a “substantial evidence/rational basis” test. Charter, 304 F.3d at 933. Applying this test, the proper inquiry in this case would be whether the Cities acted without a rational basis or without substantial evidence for their decisions. Id. The

burden, however, is upon Qwest to show that the Cities have not acted consistently with this substantial evidence/rational basis test. Id.

Qwest has failed to carry this burden. In fact, the record clearly establishes that the Cities had a rational basis for their management and compensation requirements for Qwest's use of the right of way. For example, some Cities require Qwest to submit maps of the area in which it proposes to dig. This requirement is rationally related to governmental interests because it allows the City to protect the public safety by avoiding unintended water, gas, or sewer main breaks.<sup>6</sup> The City requirement that Qwest pay compensation for its use of the right of way allows Cities to safely maintain a public asset and assure the efficiency and operability of the rights of way. As such, compensation is rationally related to the governmental purpose of maintaining a municipal asset and protecting the public from harm.<sup>7</sup>

These examples – and many others regarding public safety – are discussed in Section III below. Together, they demonstrate that there is no abuse of discretion here and that the Cities are acting with a rational basis supported by substantial evidence when they manage and charge compensation for Qwest's use of the right

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<sup>6</sup> See 7 Cities' Excerpts of Record ("CER") at ¶ 15 (Affidavit of Leonard Goodwin); 8 CER at ¶ 14 (Affidavit of Pete Wells).

<sup>7</sup> See Portland's Excerpts of Record ("PER") at pp. 348-350, Affidavit of Katherine Thompson (regarding mapping); PER at pp. 25-54A, Affidavit of Brant Williams (regarding utilities' impact on right of way); PER at pp. 379-386, Affidavit of Ed Whitelaw (regarding compensation).

of way. Therefore, the District Court acted properly in according due deference to the Cities' legislative authority to manage and charge compensation for the use of the public right of way. This Court should uphold the decision below.

### **III. The Cities' Right of Way Regulations Are a Valid Exercise of Police Powers and Are Not Preempted by Federal Law.**

#### **A. Right of Way Management is a Recognized Exercise of Police Powers**

A City's duty to protect the right of way stems from its historical status as protector of the public health, safety, and welfare. Cities' authority to manage and charge compensation for the use of the right of way is a recognized exercise of those police powers. Alexander Pearson v. Twohy Bros. et al., 113 Or. 230, 238, 231 P. 129 (1925) ("While municipalities may by ordinance grant . . . the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, and gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety, and convenience . . . ."). Generally, this police powers status stems from the Cities' duty to keep the modes of transport free of hazard or nuisance. McGowan v. Burns, 172 Or. 63, 74, 137 P.2d 994 (1943).

Courts have specifically designated the recovery of fees for use of the right of way as an exercise of police powers. The United States Supreme Court and the

Ninth Circuit have both agreed that right of way fees are an exercise of municipal police powers. *See e.g.*, Postal Telegraph Cable Co. v. Charleston, 153 U.S. 692, 14 S. Ct. 1094, 38 L. Ed. 871 (1894) (ordinance imposing license fee on telegraph company is an exercise of police powers); Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365; 2 S. Ct. 257; 27 L. Ed. 419 (1882) (municipal license fee for ferry transport service is an exercise of police powers); Alaska Elec. Light & Power Co. v. City of Juneau, Alaska, et al., 294 F. 864 (1924) (the power to set fees for public utilities using the right of way is recognized as an exercise of police powers).

The next section shows that the Cities' regulations regarding compensation for use of the right of way are valid exercises of those recognized police powers and are not preempted by federal law.

#### **B. The Cities' Management of the Right of Way is a Valid Exercise of Police Powers**

The Cities' management of the right of way is necessary to protect the health, safety, and welfare of the citizens. Below is a non-exhaustive list of the ways in which Cities protect the public from dangers posed by private right of way use:

- **Protection Against Catastrophe Caused by Crowding:** The capacity of the right of way is finite and cannot accommodate unlimited or haphazard expansion. In addition to telecommunications lines, other essential utilities,

such as water, gas, sewer and stormwater lines occupy the right of way. Electrical wires, television cable and telephone lines may lie below the surface. A crowded, ill-mapped, and poorly-managed right of way will cause disastrous line breaks. These breaks not only pose environmental hazards, they can also interrupt vital emergency phone and electrical services.

These are not hypothetical concerns. In Flower Mound, Texas, installation crews for a telecommunications company cut into two water lines and three gas lines in the span of several weeks.<sup>8</sup> In July, 1999, in Irving, Texas, a telecommunications subcontractor hit a water main, causing disruption in the water supply for a week.<sup>9</sup> In September, 2000, a telecommunications company's subcontractor struck a water main in downtown Dallas flooding several buildings, damaging 30-40 cars, and forcing evacuation of 800 workers and residents.<sup>10</sup> Such incidents occur on a regular basis throughout our nation. A national listing of accidents caused by private use of the right of way can be found at

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<sup>8</sup> Jason Lamers, *Latest Gas Line Break Adds to Woes*, DALLAS MORNING NEWS INSERT, Summer 1999, at 1A. *See generally* Evan Ramsted and Kortney Stringer, *Road Kill: In Race to Lay Fiber, Telecom Firms Wreak Havoc on City Streets*, THE WALL STREET JOURNAL, Feb. 27, 2001, at A1. This article is appended to this brief at pages 7-10.

<sup>9</sup> Rachel Horton, *City Urges Water Conservation After Water Line Slashed*, IRVING NEWS, July 11-14, 1999, at A1.

[www.underspace.com/acfile/acbul.htm](http://www.underspace.com/acfile/acbul.htm). A printout of this listing is appended to this brief at pages 11-18.

- **Protection Against Traffic Accidents, Congestion, and Pollution:** Increased construction for right of way facilities blocks roadways which can cause accidents, increase traffic congestion, lessen air quality, and alter emergency vehicle routes. This construction also frequently requires the City to hire additional municipal public safety and/or engineering staff to oversee or approve the construction or to direct traffic around the site.
- **Protection Against Construction Hazards:** Road cuts pose a variety of safety challenges. Hastily or improperly repaired road cuts can impair road conditions, making travel hazardous. Even when well-repaired, every road cut substantially weakens road integrity, which causes Cities to repave years before otherwise necessary. Without funds to repave, these roads soon become safety hazards.

**C. The Cities' Compensation Requirements are Valid Exercises of their Police Powers**

Like the Cities' right of way regulations, their compensation requirements for use of public right of way are also a valid exercise of police powers. Compensation for the use of the right of way protects the public in two ways.

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<sup>10</sup> Ian McCann and Steve Quinn, *Water Mains Flood Downtown*, DALLAS MORNING NEWS, Sept. 5, 2000, at A1.

First, it assists local governments in managing the finite space of the right of way by acting as a market stabilizer. Second, it covers the high costs of managing the right of way.

The compensation requirement acts as a market stabilizer by providing a deterrent to crowding and by providing assurance that companies within the right of way are financially stable. Failure to attach a charge of compensation to the use of the right of way would lead to unchecked crowding and unwarranted street cuts. Left solely to unconstrained market forces, the streets and underlying infrastructure of our Cities would soon become crowded, unsafe, and inefficient. A charge of compensation is but one tool a local government uses to manage the right of way. Such charges force private businesses to remain accountable to the public and to realize the significant local costs of their actions – including the high cost of preventing line breaks, automobile accidents, air pollution from backed-up traffic, and utility service disruptions.

The compensation requirement also allows Cities to recoup the cost of right of way management by providing Cities with the necessary funds to continue responsible management. Safe right of way management is costly. Such costs necessarily include the following:

- The cost of hiring extra road maintenance, administrative, engineering, and public safety personnel to oversee right of way construction;

- The cost of increased incidences of property damage due to construction in the right of way;
- The cost of increased incidences of personal injury due to construction in the right of way;
- The cost of increased traffic congestion, including increased air pollution and traffic accidents; and
- The cost of increased road repairs and stepped-up road paving schedules due to weakened road integrity.

Congress expressly recognized these local government needs in the Federal Telecommunications Act (“the Act”), and accordingly protected Cities’ authority to manage the right of way and to obtain fair and reasonable compensation for its use. 47 U.S.C. § 253(c).

Therefore, to fully protect their citizens, local governments must both regulate *and* charge compensation for the use of the right of way. A responsible right of way management plan, at minimum, includes: 1) the ability to coordinate construction activities and to maintain accurate records of facilities occupying the right of way, including their precise location within the right of way; 2) the authority to require assurance that companies placing facilities in the right of way are financially stable, technically qualified, and present a low risk of abandoning the facilities after installation; and 3) the authority to require compensation to fund

the protection of citizens from dangers posed by a crowded or misused right of way. Each of these provisions represents a valid exercise of municipal police powers. In light of Congress' intent to save such regulations, this Brief now turns to the question of the preemption test applied by Courts to these police powers.

**D. Qwest Has Failed to Make the Requisite Showing of Congress' Clear and Manifest Purpose to Preempt the Cities' Police Powers**

This Court has repeatedly set forth the proper analysis of federal preemption claims as applied to a state or local government's police powers. Air Transport Ass'n of Am. v. City and County of San Francisco, 266 F.3d 1064, 1071 (2001); Exxon Mobil Corp. v. U.S. Env'tl. Protection Agency, 217 F.3d 1246, 1254 (2000); Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1265 (1998) (*en banc*); Hughes Air Corp. v. Public Utils. Comm'n, 644 F.2d 1334, 1337 (1981).

A preemption analysis starts with the assumption that police powers are not preempted by federal law unless Congress exhibits *a clear and manifest purpose to preempt*. Charas, 160 F.3d at 1265 (emphasis added). *See also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). The Court must give effect to the plain meaning of the language, taking care not to read the language so as to make other provisions superfluous. Charas, 160 F.3d at 1265. Should the Court find that there is a preemption provision, it should construe it narrowly and take into account the law's intent and policy. Id. Lastly, a Court

must consider two presumptions: the presumption that Congress does not cavalierly preempt state law, and the presumption that the purpose of Congress should predominate in any analysis. Id.

In the present case, Qwest has not made an adequate showing that Congress had a clear and manifest purpose to preempt local authority to manage and charge compensation for use of the right of way. At best, Qwest has merely shown Congress's attempt to deregulate the telecommunications industry by alleviating barriers to entry into the telecommunications market. There is no showing of how the Cities' regulation of the right of way constitutes such a barrier.

Having considered Congress' purpose, the Court looks to the plain language of the statute, taking care not to render other provisions superfluous. Here, three sections of the statute are relevant. Section 601(c) of the Act, codified at 47 U.S.C. § 152(c)(1) provides in part:

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.

Far from preemptive, this plain language requires that the Court read the statute provisions to *avoid preemption of local authority* unless such preemption is expressly provided for. Qwest argues, however, that Section 253(a) does preempt. Section 253(a) reads as follows:

No state or local statute, or other State or local legal requirement, *may prohibit or have the effect of prohibiting* the ability of any entity to

provide any interstate or intrastate telecommunications service.  
(Emphasis added.)

This brief leaves the detailed dissection of this “may prohibit or have the effect of prohibiting” language to the parties. However, to appropriately apply a police powers-preemption analysis, two other aspects of the statute should be considered. First, the standard for preemption here is a “clear and manifest” intention to preempt. The vague “may prohibit or have the effect of prohibiting” language neither clearly nor manifestly preempts anything. Second, reading Section 253(a) to infer preemption would impermissibly render another section of the statute superfluous. Section 253(c) *expressly preserves* local right of way authority, stating:

Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights of way, if the compensation required is publicly disclosed by such government.

If, as Qwest argues, Section 253(a)’s vague language does preempt local authority, then Section 253(c)’s express and clear preservation of such authority, applied fairly and reasonably, would be rendered impermissibly superfluous. Thus, according to this Court’s own analysis, there can be no federal preemption of the Cities’ local police power authority here.

These concepts require this Court, should it somehow find a federal preemption of local right of way authority, to construe the preemption narrowly. Taking into consideration that the purpose of the Act is to prevent *barriers to entry* into the telecommunications market, the League suggests that the proper narrow scope of preemption would include only an act by a local government that *bars entry into the market*.

#### **IV. Conclusion: The District Court Did Not Err in Finding that the Cities' Regulations Are Not Preempted by Federal Law**

Municipal authority over the right of way is embedded in the law. This authority stems from many sources, including the common law public trust and public purpose doctrines, home rule charters, Oregon statutes, and municipal police powers. No matter what the source, municipal right of way decisions are inherently legislative and should be accorded judicial deference. The District Court properly applied this deference and this Court should uphold its decision. Lastly, using this Court's own police-powers preemption test, there cannot be preemption here because Qwest has failed to show a clear and manifest purpose to preempt.

Cities possess right of way authority *not* because they are the foremost telecommunications or construction experts, but because there is no other locally-elected entity invested with the duty to uphold the public trust. No other entity can better represent the public interest and protect our citizens in matters regarding the right of way. If this Court were to preempt the Cities' authority to manage and

charge compensation for this asset, the public would eventually be left with a crowded, crumbling right of way, streets and infrastructure of uncertain integrity, and a fractured trust of local government. No one will benefit from such an arrangement.

Therefore, the League respectfully submits that the District Court ruling should be affirmed.

DATED this 15<sup>th</sup> day of November, 2002

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## **STATEMENT OF RELATED CASES**

The League of Oregon Cities is not aware of any related cases pending in this Court.

