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Right way wrong way: The fading legal justifications for telecommunications infrastructure rights-of-way

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ABSTRACT

Telecommunications providers use rights-of-way to build physical network infrastructure on lands they do not own. Agreements to use these lands are usually made with public landowners such as local governments. Traditional rules for these negotiations are based on public utilities law and the common law of land ownership. Specific rules for telecommunications providers are also based on common carriage and Carrier or Last Resort regulations. Furthermore, the exercise of property rights by local landowners are often mischaracterized by telecommunications companies as burdensome regulation, with policy and jurisprudence following suit. This paper argues that in an era of technological convergence and the erosion of traditional pubic interest responsibilities, there are now fewer justifications for the unfettered usage of publicly-controlled lands by telecommunications firms.

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1. Introduction

Per common practice, telecommunications providers use rights-of-way to build physical network infrastructure on lands they do not own, for deploying cable aboveground or underground and for placing wireless transmission towers. Agreements to use these lands are usually made with public landowners such as local governments and the agencies that oversee national parks, state forests, and the like.

This article focuses on American policies and regulations that govern the use of such publicly-controlled lands by telecommunications providers. The procedures for interacting with and compensating landowners in order to obtain rights-of-way have been established per regulation and court precedent. In short, private landowners should be justly compensated;[1]; public landowners may be compensated directly, but more often the firm using the land must offer some sort of remedy that is in the public interest. Traditionally, the particular responsibilities of telecommunications firms have been codified in common carrier regulations in which the firms received the authorization to use the land in return for delivering public interest benefits like universal service. Meanwhile, governments exercised the rights of landowners under traditional property ownership laws. This article focuses on the histories of these legal traditions as applied to telecommunications networks, arguing that the existing legal justifications for allowing telecommunications firms to use publicly-controlled lands (i.e. lands overseen by local or state governments in the interests of citizens) for rights-of-way are becoming untenable due to recent developments in the industry and the services that it delivers.

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[1] Compensation from telecom firms to private landowners for rights-of-way is a matter of contract law with its own complexities and controversies; this topic is beyond the scope of the present paper.

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While the 1996 Telecommunications Act includes some specific rules for rights-of-way as needed by telecom service providers, much of the law regarding this matter descends from utilities regulation and the common law of land ownership. More specifically, utilities that operate aboveground power lines or underground pipelines are designated as franchisees that have been granted certain privileges for using land that is controlled by someone else, and in return these franchisees face various public interest obligations. For example, per statutes like the Clean Water Act, a fossil fuels company that lays a pipeline through a state forest is often required to satisfy the public interest by vowing to repair ecological damage. Historically, telecommunications firms have been subjected to similar requirements.

This article will introduce rights-of-way policy for private operators that make use of publicly-controlled lands, including the corresponding regulations in the telecommunications industry. Recent actions by telecommunications firms in which they have sought to be released from public interest responsibilities – including the maintenance of universal service programs, serving as common carriers, and serving as Carriers of Last Resort – have eroded their legal justifications for unfettered use public rights-of-way, which is one of the most important benefits they receive from the regulations that they hope to escape. The telecommunications industry also commonly mischaracterizes the exercise of property rights by local governments as burdensome regulation or punitive taxation, swaying policy decisions and judicial rulings in the event of land use disputes. The article will conclude with a discussion of whether this conundrum can be resolved via existing telecommunications regulations, or if a new focus on local property rights and public utilities law should be considered.

2. Rights-of-way for telecommunications infrastructure

2.1. The history of telecommunications land usage

In the words of NextLink Engineering Vice President Ed Koops back in 1999, “It doesn’t matter how high-tech the industry is. You still have to dig in the dirt” (quoted in Glasner, 1999). Modern telecom consumers may feel fully mobile and untethered from archaic wired infrastructures, but such networks still require a great amount of on-the-ground construction and placement of facilities. And these requirements will most likely grow in the near future. Policymakers are aware of this; for example, issues surrounding the acquisition and maintenance of rights-of-way received considerable attention in the Federal Communications Commission's 2010 National Broadband Plan (FCC, 2010, pp. 112–115). Nancy Victory of the National Telecommunications and Information Administration stated in 2002 that there is “no issue more fundamentally important to the widespread deployment of broadband and really, just about any other network technology, than rights-of-way” (FCC, 2002, p. 133).

For burgeoning wireless networks, increasing numbers of transmission towers are becoming necessary, often being placed in remote locations with significant impacts on the natural environment (Cramer, 2012). For wired networks, aboveground cables are strung on telephone poles; these arrangements typically require contractual agreements among telecom providers and power companies (among others) that are beyond the scope of the present article. On the other hand, wherever underground conduits are more desirable or practical, those in urbanized areas are typically placed under streets, which are owned by the public; while longer-distance networks may take shortcuts between cities under publicly-owned lands like state forests.[2]

Many existing long-distance telecom networks are descended from lines strung along transportation corridors, for which the transportation rights-of-way issues were already settled. Some of these arrangements go back as far as telegraph lines constructed alongside railroad tracks in the 1830s, becoming a widespread practice with the completion of nationwide rail systems by the late 1880s. Those lines were gradually replaced over time with more modern infrastructure that in turn has been inherited by modern telecom providers. For example, Sprint arose from the communications division of Southern Pacific Railway, which used its existing rights-of-way for tracks to build its own private communications network. Similarly, MCI laid much of its fiber optic network along Amtrak rights-of-way and also inherited many rights-of-way dating back to early telegraph lines used by Western Union (Melody & Møller, 1997, pp. 119–130).

2.2. Franchise law and network infrastructure

For cases in which early telecom lines needed to be placed in corridors that were not already alongside railroad tracks or roadways, such arrangements fell under the existing law of land ownership. In turn, telecom providers are considered to be franchisees, and the rights-of-way arrangements are typically managed by state public utility commissions. A “franchise” is a legal designation for a party that receives special rights and privileges from a government that are not enjoyed by all the citizens of the territory.[3] In the present discussion, a telecom company using a plot of publicly-controlled land is a franchisee

[2] One phenomenon of interest is the practice of stringing new fiber optic cables through abandoned underground pipelines that were once used for natural gas and other fluids, which is becoming more common in former fossil fuel hubs like rural Pennsylvania. This practice raises the same issues as those analyzed throughout this paper, because the pipelines often traverse publicly-owned state forests and state parks, and digging is required to reach the old pipelines, clean them up, and reuse them (see for example Myerson, 1994).

[3] This article uses the public law definition of “franchise” as described in the accompanying text. The term has different meanings in other areas of law, such as contract law regarding for-profit franchised businesses, which are beyond the scope of this article.

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