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Contract Clause: Virgin Islands' Reduction of Contracted Government Salaries Is Unconstitutional

United Steel Paper and Forestry Rubber Manufacturing Allied Industrial and Service Workers International Union v. Virgin Islands, No. 14-4357 (3d Cir. Nov. 15, 2016)

Reversing the lower court, the Third Circuit has found that the Virgin Islands' reduction of government workers' salaries violates the Contract Clause, which prohibits states from passing any law which impairs the obligation of contracts. Salient in the decision was the fact that the when the Virgin Islands negotiated the original collective bargaining agreement, it was already well aware of the fiscal crisis which would later give rise to the attempted salary reductions, making the State's actions unreasonable.

In 2009 the Virgin Islands faced a severe economic recession, to which the government responded by passing the Virgin Islands Economic Stability Act of 2011 (VIESA). VIESA reduced most government employees' salaries by 8%. Notwithstanding this Act many government employees worked under collective bargaining agreements detailing benefit and salary schedules they were to be paid. In response to VIESA, a variety of unions filed suit against the Virgin Islands on behalf of their workers, alleging VIESA violated the Contract Clause of the United States Constitution. The district court held a bench trial, after which it held the Clause was not violated. On appeal the Third Circuit reversed.

The Contract Clause provides that no State shall pass any law "impairing the Obligation of Contracts," but to harmonize this command with the states' reserved police powers,

the Supreme Court developed a three-part test to determine whether legislation violates the Contracts Clause. The evaluation requires courts to "analyze whether the law has operated as a substantial impairment of a contractual relationship; whether the government entity, in justification, had a significant and legitimate public purpose behind the regulation; and whether the impairment is reasonable and necessary to serve this important public purpose."

The Virgin Islands agreed that it entered into the collective bargaining agreements and that if VIESA impaired the contractual agreements then the impairment would be substantial, thus leaving the Third Circuit to determine first whether VIESA impaired the agreements. The Court quickly found substantial impairment, noting that the worker expectations were clearly thwarted given they had made concessions to the Virgin Islands – including the right to strike – and had the expectation that the benefits and salaries agreed to in exchange for the concessions would be paid.

Looking at the second prong - whether the Government had a significant and legitimate public purpose in enacting VIESA – the Court found this prong easily satisfied, given even the unions did not contest that VIESA was enacted to address a widespread fiscal crisis.

That left the case down to the final element – whether the impairment was both necessary and reasonable to meet the purpose advanced by the Government in justification – and on this issue the Court disagreed with the Virgin Islands. It found impairment of the collective bargaining agreements was not necessary, noting the government could have used provisions in the collective bargaining agreements to furlough and lay off workers that would have saved the government similar monetary amounts VIESA did, leaving the Court concerned the government may even have taken more drastic measures than necessary. Nonetheless the Court found this to be a "close case" of necessity and was relieved of making the tough call, because it found, no matter the necessity, VIESA was unreasonable. This was an easier call to make since the Supreme Court has previously held that it is not reasonable to impair a contract if the problem sought to be resolved existed at the time the contractual obligation was incurred. Here the Virgin Islands knew of the economic crisis at the time it was negotiating with the unions, making the impairment unreasonable. The Third Circuit thus reversed the district court.

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Education: School's Failure to Fire Disrespectful Teacher Does Not Give Rise to §1983 Action for Retaliation or State-Created Danger

L.H. v. Pittston Area School District, No. 15-3465 (3d Cir. Nov. 21, 2016)

A school's failure to terminate the employment of a teacher who had spoken disrespectfully to a student did not constitute grounds for a §1983 retaliation or state-created danger; inaction cannot be the basis for either retaliation or state-create danger.

In 2011 a Pittston (Pennsylvania) Area School District teacher was teaching class for an absent colleague. The children became unruly and the teacher asked them to calm down, but they failed to do so, leading the teacher to move one student, A.H., from the back to the front of the classroom, telling him to "shut up;" that "it's day 13 and I can't stand you already;" that "I'm not the only teacher who can't stand you;" and that A. H. was "going to have the [worst] year ever." She asked A.H. whether he "had a problem," and whether he suffered from Tourette's. The student recorded this on his cell phone and provided it to his parents, who followed up by meeting with the superintendent and seeking to have the teacher fired. She was not fired, the school having determined she did not violate Pennsylvania's School Code, but instead had to apologize and take a remedial class. A.H.'s parents then filed suit under §1983, alleging a First Amendment retaliation claim and a substantive due process charge. The district court granted summary judgment to the school, prompting an appeal from A.H.'s parents.

A.H.'s parents theorized that in failing to dismiss the teacher, failing to appropriately inform them about the investigation, and failing to inform them about the discipline imposed on the teacher, the school caused them to remove A.H. from the school and home school him for five months and that this amounted to retaliation. The Third Circuit pointed out, however, that inaction cannot form the basis of a §1983 claim. Instead, an adverse action must be taken to satisfy such an allegation. This left the appellate court no choice but to affirm the district court.

A.H.'s parent's second theory – that the school district violated A.H.'s substantive due process right by subjecting him to a state-created danger – fared no better. The Third Circuit imposes a four-pronged test for this claim, including that a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. This prong was not met here; the Circuit noted again that A.H.'s parents' only allegation of inaction was that the school failed to properly train and monitor the teacher. The Court agreed the teacher's behavior was troubling and "obviously [a] disturbing breach of decent behavior," but refused to find that it rose to the level of a constitutional violation, thus affirming the lower court.

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Preemption: Ordinance Establishing Municipal Court Jurisdiction of Automated Traffic Enforcement System Is Not Preempted by State Code

Brooks v. City of Des Moines, No. 15-2781 (8th Cir. Dec. 1, 2016)

Rebuffing a litany of arguments raised by traffic ticket recipients, the Eighth Circuit has upheld a Des Moines ordinance which authorized an Automated Traffic Enforcement (ATE) system operated by a third-party contractor and established municipal court jurisdiction over ATE violations. The drivers' unsuccessful arguments included due process, preemption, right to travel, privileges and immunities, unjust enrichment and more.

Six drivers sued the City of Des Moines, Iowa (City) and Gatso USA, Inc. (Gatso), who operates the City's Automatic Traffic Enforcement (ATE) system, which photographs motorists speeding or running red lights and mails a Notice of Violation to the vehicle owner. ATE violations may be contested in municipal court.

The drivers sued in Iowa state court, arguing that the ATE system violates their right to procedural due process, their fundamental right to travel and provisions of the Iowa Code, and causes unjust enrichment for the City and Gatso. The City and Gatso removed the case to federal court.

The district court dismissed for failure to state a claim. On appeal, the drivers contended that the district court erred by failing to address their standing and by dismissing their complaint.

The Eighth Circuit reviewed the requirements to establish Article III standing: a plaintiff must show 1) an injury in fact, 2) a sufficient causal connection between the injury and the conduct complained of, and 3) a likelihood that the injury will be redressed by a favorable decision. Here, the drivers received a Notice of Violation, which was sufficient injury in fact. That injury was directly traceable to the City and Gatso, and was redressable if the court awarded damages to the drivers. Thus, standing was established.

The drivers argued that municipal oversight of ATE violations is preempted by the Iowa Code, which establishes the jurisdiction of the Iowa District Court as "exclusive, general, and original jurisdiction of all actions . . . except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body." However, Article III of the Iowa Constitution provides home rule power, authorizing a municipality to determine local affairs so long as the municipality does not act inconsistently with state law. Another section of the Iowa Code expressly states: "A city by ordinance may provide that a violation of an ordinance is a municipal infraction."

An Iowa Supreme Court precedent had established that "A local ordinance is not inconsistent with state law unless it is *irreconcilable* with the state law." Here, the home rule power and other Iowa law allowed the City to create municipal infractions, and the Iowa Code allowed for concurrent jurisdiction between the administrative body and the Iowa District Court over ATE infractions.

The drivers also cited a provision of Iowa law which states “An officer authorized by a city to enforce a city code or regulation may issue a civil citation to a person who commits a municipal infraction," arguing that the City’s process improperly delegated power to Gatso, a third party. The court cited a similar ATE case, *Hughes v. City of Cedar Rapids*, No. 15-2703 (8th Cir. 2016), which had articulated that a municipality may delegate properly duties which do not involve discretion or judgment. Because such delegation was proper, there was no unjust enrichment by Gatso.

The *Hughes* decision also put to rest the drivers’ claims that the ATE system violated their right to interstate travel and their Privileges and Immunities protections. It found that the ATE system did not discriminate against drivers of any jurisdiction and did not impair travel.

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See also ***Hughes v. City of Cedar Rapids*****:**

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Preemption: Ordinance Regulating Commercial Use of Pesticides is Preempted by Comprehensive State Law Intended to be Uniform

Syngenta Seeds, Inc. v. County of Kauai, No. 14-16833 (9th Cir. Nov 18, 2016)

The Ninth Circuit, agreeing with the lower court, has held that a county ordinance requiring commercial farmers to create buffers around pesticide-use areas and notify residents of pesticide use was preempted by a state-wide pesticide law intended by the legislature to be “uniform” across the state.

After residents reported reactions from pesticide applications in Kauai County, Hawaii (County) and a study showed pesticides present in indoor and outdoor air samples, the County passed an ordinance to regulate pesticides and genetically-engineered (GE) plants. The ordinance required commercial farm operations to maintain buffer zones between areas where pesticides are applied and surrounding properties, to provide notifications to neighbors about applications, and to file a report annually about GE crop cultivation. Syngenta Seeds, Inc. and other industrial agriculture firms filed suit alleging the ordinance was preempted by Hawaii’s state law (at issue in the appeal) as well as federal laws. The district court granted Syngenta’s motion to dismiss, agreeing that the County has authority under state law to regulate agricultural activities, but holding the pesticide provisions of the ordinance were preempted because the same subject matter is regulated by a comprehensive statutory scheme that the Hawaiian legislature intended to be uniform and exclusive. The County and various intervenors appealed to the Ninth Circuit, arguing the district court erred in holding the ordinance was impliedly

preempted and that the court erred in denying its request to certify the question to the Hawaiian Supreme Court.

Although Hawaiian counties may enact ordinances that are not inconsistent with or tend to defeat the intent of any state statute, the Hawaii Supreme Court will invalidate any ordinance that "conflicts with state law or legislates in a field that the legislature reserved for uniform and exclusive state regulation." Thus a "local law is preempted if it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state." Syngenta argued that there is no presumption against preemption in Hawaii since counties only have the power delegated to them by the state, while the County posited that there is a presumption against preemption just like federal law, meaning the legislature's intent to preempt must be "clear." The Ninth Circuit found that the ordinance was on the same subject as state law and that the state legislature set forth a comprehensive scheme, leaving only the question of the legislature's intent. On this issue the Court found that the pervasiveness of the scheme showed the legislature intended to regulate the entire field of pesticides for the state. The Court pointed out that the legislature included the intent in the statute, designating it as "uniform," and that the legislature allowed for local variations from the statute, but only through the state Department of Agriculture – not the counties. Lastly, the Ninth Circuit also found the district court did not abuse its discretion by not certifying the question to the state supreme court since it found the state's preemption test rather well-defined, certainly enough so to answer the question in this matter, thus it affirmed the lower court.

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Speech: Issuance of "Be On the Lookout" Advisory for Officer Who Complained about Racial Profiling Was Unconstitutional Deterrence of Speech

Bailey v. Wheeler, No. 15-11627 (11th Cir. Nov. 28, 2016)

The issuance of an advisory by a Sheriff's office to all area law enforcement to be on the lookout for an officer who had complained about racial profiling and racial intolerance in the department –calling him a "loose cannon" and advising recipients of the notice to "act accordingly"—was a sufficient deterrent to the plaintiff's free speech rights to sustain a § 1983 action and overcome qualified immunity defenses.

Derrick Bailey had more than 17 years law enforcement experience when he joined the Douglasville, Georgia Police Department (DPD) in 2010. In 2011 he made a written complaint to his superiors that the DPD was racially profiling minorities and that other officers used racially demeaning terms. In late 2012, he was requested to re-write his

complaint, which he declined to do given that it violated DPD policies. He was terminated shortly thereafter.

He unsuccessfully appealed his termination to the city, again asserting that the DPD was engaging in racially-motivated conduct, and that he had been terminated in retaliation for his statements. In response, Major Tommy Wheeler of the Douglas County Sheriff's Department issued a "BOLO" (be-on-the-lookout) advisory including Bailey's photo and the statement that Bailey was a "loose cannon" and a danger to law enforcement, and that authorities should "act accordingly." Bailey was followed around town by various officers thereafter.

He filed § 1983 action, asserting First Amendment retaliatory termination and Georgia defamation claims. Wheeler moved to dismiss on the grounds of qualified immunity.

Affirming the district court, the Eleventh Circuit denied Wheeler's motion. In order to determine whether Wheeler had denied Bailey's "clearly established" constitutional rights, the Court of Appeals was required to analyze whether Bailey had engaged in protected speech, whether there was a causal connection between the speech and the defendant's actions, and whether those actions would likely deter the plaintiff's speech.

The defendant did not challenge Bailey's contention that his speech was protected, constituting commentary by a private citizen on a matter of public concern. Looking at the question of deterrence, the Circuit found more than enough evidence that Wheeler's actions would deter complaints about the DPD: the BOLO notice essentially put law enforcement in the area in high alert for an encounter with a mentally unstable man where use of deadly force might well be justified.

The Circuit also found sufficient indicia of malice—the intent to do harm to Bailey's reputation—implicit in Wheeler's issuance of the BOLO and his related actions, such that Bailey's state law defamation claim could not be dismissed.

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Speech: Whistleblower Status Applies for Mistaken but Reasonable Belief of Illegality of Employer Policy; Critiquing Policies as Internal Disciplinary Process is Not Protected

Fraternal Order of Police v. City of Camden, D.C. No. 1-10-cv-01502 (3d Cir. Nov. 17, 2016)

Officers critiquing what they considered to be a racist patrol policy were deemed whistleblowers despite the court finding the policy in question to be legal; however, officers' critiques of the policy, which were written on internal forms as a part of a disciplinary procedure, were not considered protected speech.

In 2008, Camden implemented a policy known as "directed patrols," which required police officers to engage with city residents despite residents not being suspected of any wrongdoing. The purpose of the program was to obtain information about the community while simultaneously making the police presence more visible; however, unlike similar past policies, these encounters were to be tracked, recorded, and logged. Officers on directed patrols were expected to conduct a minimum of 27 directed patrols per shift. Officers on regular patrols were expected to perform a minimum of 18 encounters. According to plaintiffs, failure to comply with numerical requirements was cause for disciplinary action.

Several officers who had expressed disagreement with the policy alleged retaliation from the City in the form of disciplinary charges, revocation of vacation time, disciplinary limits on sick leave, and surveillance by Camden's Internal Affairs unit. When completing internal police counseling forms as a part of their disciplinary process, the officer-plaintiffs indicated their objection to the directed patrol policies in writing.

In April 2009, the Fraternal Order of Police filed a complaint against the City, claiming Camden had imposed an unlawful quota policy in violation of a state statute (N.J.S.A. 40A:14-181.2) and retaliated against officer plaintiffs in violation of the First Amendment, CEPA and the FMLA. In response, the City argued that the directed patrol policy did not violate the state anti-quota law and that, consequently, there was no causal link established between the officers' whistleblowing activities and the alleged adverse actions. In short, the plaintiff-officers had not proven that their belief in the illegality of the patrol policy was *objectively reasonable* since the statute clearly indicated in plain language that the banned quotas were limited to citations and arrests. The district court agreed with the City's argument in its entirety and granted summary judgment for Camden. The plaintiffs appealed.

The Third Circuit upheld the district court's finding that the directed patrol policy did not violate the anti-quota statute since the policy dealt with civilian encounters rather than arrests or citations and the statute was intended to be narrowly construed. In regards to the CEPA claim, however, the Third Circuit reversed the district court's dismissal. It first noted that New Jersey courts had created a four-pronged test: (1) reasonable belief; (2) performance of whistleblowing activity; (3) adverse employment action; and (4) causal connection between whistle blowing activity and adverse action. Specifically, the Third Circuit disagreed with the district court's assessment of the first prong, emphasizing that the plaintiffs did not need to prove *actual illegality* to demonstrate reasonable belief. This is because, as the court indicates, CEPA was not intended to require conscientious employees to become lawyers but rather to prevent retaliation against those employees who object to employer conduct that they *reasonably believe* to be unlawful.

In regards to the officers' First Amendment claims, the Third Circuit agreed that the plaintiffs had compelling arguments that their critiques of the directed patrol policy were a matter of public concern. However, because the critiques of the policy were on internal police counseling forms, the plaintiffs were not considered to be speaking as

citizens. Consequently, the Third Circuit affirmed the district court's decision to dismiss the First Amendment claims.

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Trials: Prospective Intervenor's Consent not Required for Magistrate to Decide Motion to Intervene

Robert Ito Farm, Inc. v. County of Maui, No. 15-15246 (9th Cir. Nov. 18, 2016)

Agreeing with the Seventh Circuit's position on the issue, and in a case of first impression before it, the Ninth Circuit has held that a magistrate has jurisdiction to decide on a prospective intervenor's motion to intervene, without having to obtain consent of the potential intervenor.

In 2014 Maui County, Hawaii (County) residents passed an ordinance prohibiting the growth, testing, and cultivation of genetically-engineered (GE) crops until the County conducted a health impact study. Industrial agricultural producers sued in federal court to enjoin the ordinance. The parties to the suit agreed to have a magistrate hear the case. Thereafter two public interest groups – Shaka and Moms on a Mission (MOM) – filed motions to intervene on the same day and the magistrate, in the same motion, granted Shaka's motion to intervene but denied MOM's. Deeming Shaka then a party to the case, the magistrate moved the case to the district court, noting that Shaka had not consented to having the case heard by a magistrate. Meanwhile, MOM "appealed" the magistrate's denial of its motion to intervene to the district court. The district court found the magistrate had jurisdiction to rule on the intervenor motions, since it had consent from both initial parties to hear the case, but that appeals on that final ruling had to go to the Ninth Circuit. MOM thus filed a timely appeal on the district court's jurisdictional ruling but not the magistrate's order denying its motion to intervene.

The Ninth Circuit framed the first issue on appeal as "whether MOM's consent as a prospective intervenor was necessary for the magistrate judge to exercise jurisdiction over its motion to intervene under 28 U.S.C. § 636(c)(1)." The Ninth Circuit looked to the Federal Magistrate Act of 1979 and found the initial parties consented to the magistrate, thus giving the magistrate jurisdiction over the case and the power to act as a district court and making any orders appealable immediately to the Circuit Court. The novel question then before the Court was "whether a prospective intervenor must also consent for the magistrate judge to rule on the motion to intervene." It found only two circuits had answered the question and split the difference: the Second held a magistrate lacks jurisdiction to decide such a motion without consent of the intervenor (making any decision by the magistrate the equivalent of a report and recommendation) and the Seventh held that the power to rule on a motion to intervene was necessary and proper incident to the magistrate's power to decide the underlying case.

The Ninth Circuit agreed with the Seventh, finding that a prospective intervenor is not a "party" as the term is employed in the Federal Magistrate Act of 1979. Such an actor does not become a "party" under federal law unless and until they are allowed to actually intervene, meaning once the existing parties give consent to the magistrate a prospective actor's consent is not required for the magistrate to hear the case, unless and until that intervenor actually becomes a party itself. MOM argued that "party" must be more than the actual parties in a suit or it would not have the ability to appeal the denial of its motion to intervene, but the Circuit disagreed handily, saying an intervenor, like MOM, has the right to appeal a denial to the circuit court but that the right does NOT derive from the Federal Magistrate Act of 1979, but rather from the collateral order doctrine. The Court closed noting, interestingly, the MOM failed to appeal the denial of its motion to intervene to the Circuit and thus it expressed no opinion on that matter, but agreed with the district court that such an appeal should have been to itself and not the district court.

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Trials: States Cannot Satisfy Standing Requirements by Alleging Private Parties' Causes of Action

State of Missouri ex rel. v. Kamala D. Harris, No 14-17111 (9th Cir. Nov. 17, 2016)

The Ninth Circuit has upheld a district court's denial of standing to six states who challenged a California law requiring that eggs sold in California had to be produced by chickens in cages larger than a minimum specification. The Circuit agreed with a lower court's determination that the states could not assert claims that should properly have been brought by private egg producers.

In 2008 California voters adopted Proposition 2 which regulated the conditions under which chickens had to be raised in order for their eggs to be sold in California. Six states, including Nebraska, Oklahoma, Alabama, Kentucky, Iowa, and Missouri, filed suit to prevent the regulations from taking effect. California, along with a couple non-profit intervenors, filed a motion to dismiss for lack of subject matter jurisdiction, arguing the plaintiff states lacked standing – specifically under the *parens patriea* doctrine. The district court agreed that the states lacked standing, and an appeal reached the Ninth Circuit.

The Ninth Circuit first noted that the parens patriea doctrine requires meeting all three elements of Article III standing and two additional requirements – that "the State articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party . . ." [and s]econd, [that] "[t]he State express a quasi-sovereign interest." The Court found all three arguments put forth by the six plaintiff states unconvincing. First, the plaintiffs alleged there would be harm to the egg

farmers in their respective states, however, the Circuit held this did not articulate any interest different from the private egg producers who could have filed their own suit. Second, the Court was unpersuaded by the plaintiff states' charges that the law would cause fluctuations in egg prices that would harm consumers in those states and give rise to standing. The Court pointed out that the plaintiff states had filed suit before the law even took effect, and therefore concluded the fears of an economic impact from the law were only speculative. Third, the plaintiff states charged that the California law was discriminatory and thus gave the states standing to sue on behalf of their citizens. The Court disagreed with this as well, noting charges of discrimination were misplaced since the law does not distinguish eggs according to their state of origin, but rather it distinguishes eggs that can and cannot be sold in California based on the standards under which the chickens are kept.

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THIS JUST IN: A Cautionary Word About Industry Efforts to Weaken Local Cell Tower Regulation

Yesterday, IMLA member Gerry Lederer provided this notice to members regarding efforts by Mobilitie to obtain new interpretations of portions of the Federal Communications Act:

Dear Colleagues:

The most talked about entity . . . over the past year . . . has been Mobilitie, or as they were known, the company seeking to deploy the 120 foot poles in your rights-of-way.

It seems that earlier this month, and just after the elections were decided, Mobilitie LLC, filed a petition for declaratory ruling asking the FCC to interpret and clarify three phrases in section 253(c) of the Communications Act of 1934. (See below) In so doing, Mobilitie stated that the Commission would facilitate the deployment of wireless infrastructure by making it easier to get access to public rights of way (ROWs).

Section 253(c), 47 U.S.C. § 253(c), states, "Nothing in this section affects the authority of a State or local government to manage the public right-of-way or ***to require fair and reasonable compensation*** **from** telecommunications providers, on a ***competitively neutral*** ***and*** ***nondiscriminatory*** ***basis***, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is ***publicly disclosed by such government***." (emphasis in Mobilitie filing, not in original)

Specifically, Mobilitie's petition calls on the FCC to adopt a declaratory ruling interpreting and clarifying Section 253(c) to mean:

- Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional

charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are unlawful.
- Localities must disclose to a provider seeking access to rights of way the charges that they have previously assessed on others for access.

While not listed above, they also want it made clear that Section 253 (c) applies to deployment of wireless infrastructure.

I wish that I had a url/link to share with you of the petition, but it does not yet exist as the FCC has not posted the Petition for comment. I have the Petition as a PDF and would be more than happy to share with folks that email me directly. I suspect that this will be posted for comment and a number of us will seek to assemble coalitions to take this very dangerous petition on. I hope many of you will participate in the docket.

Finally, I am not sure if this is the first shot across the bow of local government in the new world outlook taking over DC, but it is a good time for all of us to remind DC that deregulation is not synonymous with preemption.

(Editor's Note: The FCC has not yet officially released the petition nor has it pushed timelines for commenting on it).