

fiber optic cable and provide a right of use to the DCIU. The system also has the capacity to serve customers other than the DCIU. See id. ¶¶ 5-7.

The Project includes a "buildout" in Haverford to link the Haverford School District to the telecommunications system. As part of this buildout, portions of the fiber optic cables were to be installed on rights-of-way--specifically, on utility poles that PECO has maintained for years--that Haverford Township controls. See id. ¶ 11. On June 1, 1999, PECO began attaching the fiber optic cables to the utility poles.

On June 25, 1999, Thomas J. Banner, Haverford's Township Manager/Secretary, sent PECO a letter ordering it to "cease and desist" its construction activities until it had obtained the requisite permits.² On July 16, 1999, Banner sent a letter to Exelon advising it that, on July 12, 1999,³ Haverford had adopted Ordinance No. 10-99 (the "Ordinance"), which

² Banner's June 25, 1999 letter stated, in part, that:

[B]efore Exelon . . . may enter upon any Township right-of-way to resume construction activities, it must obtain the appropriate authorization from the Township. Until such time as Exelon obtains the appropriate authorizations from the Township, Exelon must cease and desist its construction activities in the Township's rights-of-way.

Compl. Ex. B.

³ Contrary to Banner's letter, however, Haverford Township did not actually enact the Ordinance until three months later, i.e., October 12, 1999.

provides, in part, that "[n]o person shall install, erect, hang, lay, bury, draw, emplace, construct, or reconstruct any communications facility upon, across, beneath, or over any public right-of-way . . . without first entering into a franchise agreement, license agreement, or lease." The letter advised Exelon that, before it could resume construction on the Project, it would have to obtain the appropriate authorizations from Haverford Township. It also stated that "failure to cease and desist from further construction activities will subject you and/or your contractors to the imposition of . . . penalties."⁴ PECO stopped its construction on the Project when it received the July 16 letter.

On September 24, 1999, PECO filed this action for declaratory and injunctive relief, alleging that the Ordinance is preempted by and invalid under the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. ("TCA"), the Supremacy Clause of the United States Constitution, 42 U.S.C. § 1983, and Pennsylvania law. Along with its complaint, PECO also filed a motion for a preliminary injunction, but, after a Rule 16 conference on October 4, agreed to withdraw the motion. The parties agreed to resolve this matter on cross-motions for summary judgment.⁵

⁴ The "penalties" Banner spoke of are quite severe. They include fines of \$1000 per day and imprisonment for not more than thirty days.

⁵ Under Fed. R. Civ. P. 56(c), a motion for summary
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The Ordinance

PECO has asked us to declare the Ordinance invalid and unenforceable under federal and state law. It also has asked us to permanently enjoin Haverford from seeking to enforce the Ordinance against it.

Ordinance 10-99 prohibits telecommunications providers from constructing telecommunications facilities in the public rights-of-way without first obtaining a franchise or license agreement from Haverford Township. It provides that the Township "may grant one or more franchises," Pl.'s Mot. for Summ. J. Ex. C (Ord. 10-99, § 3A) and states that the Township Manager shall "negotiate all franchise and license agreements in accordance

⁵(...continued)

judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of proving that there is no genuine issue of material fact in dispute, see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986), and we view all evidence in the light most favorable to the nonmoving party, see id. at 587. When responding to a motion for summary judgment, the nonmoving party "must come forward with specific facts showing there is a genuine issue for trial." Id.; see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

Haverford has styled its motion as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) or, in the alternative, for summary judgment. Because we are looking at matters beyond the pleadings, and because we reject its argument that this matter should be dismissed for lack of subject matter jurisdiction, we will treat Haverford's motion as one for summary judgment.

with the terms and procedures specified in this ordinance." Id. (§ 5(A)(4)). No "terms and procedures" are specified in the Ordinance.

The Ordinance mentions four different fees to be imposed on telecommunications providers but does not specify the amount or (with one exception) the purpose of those fees. It requires (1) application and hearing fees; (2) annual fees for all cable, "OVS" (an undefined term), or telecommunications service providers occupying public rights-of-way; (3) annual per-lineal-foot fees from communications service providers; and (4) franchise and license fees. See id. § 5(A). Haverford has not published a schedule of any of these fees.

A violation of the Ordinance can result in harsh penalties. It provides that any person, firm or corporation who violates it shall

[Play a fine not exceeding \$1000 and costs of prosecution; and in default of one payment of the fine and costs, the violator may be sentenced to the county jail for a term of not more than 30 days. Each and every day in which any person, firm or corporation shall be in violation of [the Ordinance] shall constitute a separate offense.

Id. § 6(A). The Ordinance also provides for the forfeiture of any facility in violation:

Any communications facility constructed, maintained, or operated upon, across, beneath, or over any public right-of-way in this Township . . . in violation of

this ordinance, including default as timely payment of annual fees or any franchise or license fee due hereunder, is hereby declared to be subject to forfeiture; and the Township . . . may seize, disable, remove, or destroy such facility upon thirty days' advance notice in writing to the owner or operator thereof

Id. § 6(B).

Threshold Matters

1. Ripeness

Haverford raises several preliminary arguments in its motion. First, it argues that we should dismiss this matter for lack of jurisdiction, or should decline to exercise our jurisdiction over this case, because the matter allegedly is not yet "ripe" since PECO has not to date applied for a franchise under the Ordinance.

Article III of our Constitution limits the jurisdiction of the federal courts to actual "cases" and "controversies." U.S. Const. art. III, § 2. The "case and controversy" requirement ensures that the federal courts do not issue advisory opinions. See, e.g., Flast v. Cohen, 392 U.S. 83, 96 (1968).

To satisfy the case and controversy requirement, an action must present:

- (1) [A] legal controversy that is real and not hypothetical,
- (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and
- (3)

a legal controversy so as to sharpen the issues for judicial resolution.

Armstrong World Indus. v. Adams, 961 F.2d 405, 410 (3d Cir. 1992); see also City of Los Angeles v. Lyons, 461 U.S. 95, 101-05 (1983).

This case or controversy requirement must be met even when the plaintiff is seeking declaratory relief. In Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941), our Supreme Court held that:

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgement Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Id. (footnote omitted).

The "ripeness" doctrine is part of Article III's case and controversy requirement and determines when a party may bring an action. "[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), overruled on other grounds, 430 U.S. 99, 104 (1977).

Generally, a court determines if a matter is ripe for adjudication by looking to "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." Id. at 149. In the declaratory judgment context, our Court of Appeals has given us a three-part test to determine if a matter is ripe. We are to focus on the "adversity of interest" between the parties, the "conclusivity" that a declaratory judgment would have on the legal relationship between the parties, and the "practical help, or utility" of a declaratory judgment. Armstrong, 961 F.2d at 411; see also Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 647 (3d Cir. 1990).

Applying these factors here, it is clear that this matter is ripe for adjudication. There is a palpable adverse interest between the parties, as PECO is claiming real world harm based on the very existence of the Ordinance. Furthermore, our Court of Appeals had held that "a plaintiff need not suffer a completed harm to establish adversity of interest In some situations, present harms will flow from the threat of future actions." Armstrong, 961 F.2d at 412. Thus, to the extent that the parties' adversity of interest is contingent on future events, we hold that the threat of future harm is sufficiently real and immediate to satisfy this requirement.⁶

⁶ Also, Haverford through its Township Manager has already ordered PECO to "cease and desist" its construction on the Project, further demonstrating the parties' adversity of
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With respect to the second factor, there is no doubt that the issuance of a declaratory judgment would provide relief of a conclusive nature, and would not merely be "an opinion advising what the law would be upon a hypothetical state of facts." Step-Saver, 912 F.2d at 649 (quotations omitted). There is nothing "hypothetical" about this Ordinance.

And the third factor--the practical help, or utility, of a declaratory judgment--is satisfied here. Without a declaratory judgment, PECO would be forced to comply with an allegedly invalid ordinance, risk heavy penalties, or fail to perform its contract with the DCIU.

Also, with respect to the "general" ripeness factors, we find that this matter is fit for judicial decision, since PECO is challenging the very existence of the Ordinance. The Ordinance has been enacted, PECO is subject to it, and the complete text of it is before us. No purpose would be served by our refraining from deciding this matter, other than forcing PECO to choose between the unpleasant alternatives noted above. Similarly, the hardship of withholding court consideration is blatantly obvious, as it is likely to land PECO (or its representatives) in debt, in jail, or at the defense table in the DCIU's breach of contract suit.

We therefore hold that this matter is ripe for adjudication. This decision conforms with what other courts have

⁶(...continued)
interest and the immediacy of PECO's actual injury.

held. In AT&T Communications v. City of Austin, 975 F. Supp. 928, 937-38 (W.D. Tex. 1997), the district court, in a nearly identical factual situation, held that:

This case is ripe for adjudication. . . . [I]t is the existence of the Ordinance itself that gives rise to the plaintiff's claims. Furthermore, a determination of AT & T's claims simply requires an examination of the Ordinance in light of federal and state law; no further factual development is required. Finally, the harm to AT & T in this case is present and real. It goes without saying that delayed entry into the local telephone service market can have profound effects on the success of AT & T's venture . . . Considering the Ordinance's threat of criminal penalties and fines, AT & T was left with the Hobson's choice of either applying for a municipal consent or challenging the Ordinance in an appropriate forum. In short, AT & T's failure to apply for a municipal consent is irrelevant to the merits of this case, and the plaintiff should be delayed no more in its ability to seek relief under the Act.

See also AT & T Communications v. City of Dallas, 8 F. Supp. 2d 582, 595 (N.D. Tex. 1998) (holding, in a similar situation, that "it is not necessary for AT & T to expose itself to [criminal penalties] to be entitled to challenge the City's requirements. It is also not necessary . . . for AT & T to comply with the city's onerous, and potentially illegal franchise requirements as it awaits a decision on the merits of its claim.").

2. Abstention

Haverford also argues that we should abstain from deciding this case under Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1974) and Burford v. Sun Oil Co., 319 U.S. 315 (1943). We disagree.

a. Pullman Abstention

In Pullman, the Supreme Court held that when a federal court is presented with both a federal constitutional question and an unsettled issue of state law, and the resolution of the state-law issue could narrow or eliminate the federal constitutional question, the federal court may be justified in abstaining under principles of comity to avoid "needless friction with state policies." Pullman, 312 U.S. at 500.

In United Servs. Auto. Ass'n v. Muir, 792 F.2d 356, 363 (3d Cir. 1986), our Court of Appeals held that "a federal court should not abstain under Pullman from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a nonconstitutional process of statutory construction." See also 17A Wright, Miller, & Cooper, Federal Practice and Procedure § 4242, at 33-34 (2d ed. 1988) (stating that Pullman abstention is inappropriate in a Supremacy Clause case).

Because PECO argues that the TCA preempts the Ordinance, we find that Pullman abstention is inappropriate here. See also City of Austin, 975 F. Supp. at 940 (refusing to abstain under Pullman in a nearly identical matter).

b. Burford Abstention

Burford abstention applies when a federal court is asked to enjoin a state administrative order that will injure the plaintiff. See, e.g., New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989); Keeley v. Loomis Fargo & Co., 183 F.3d 257, 273 n.13 (3d Cir. 1999).

As there are no state administrative orders at issue here, and because the Ordinance is one of general applicability, abstention under Burford is inappropriate. See, e.g., Keeley, 183 F.3d at 273 n.13 (stating that “[c]ases implicating Burford abstention involve state orders against an individual party that a federal-court plaintiff seeks to enjoin” and holding that a state regulation applicable to all trucking industry employers did not make Burford abstention appropriate).

The TCA

Having disposed of all of Haverford’s preliminary matters, we can now address the validity of the Ordinance under the TCA.⁷

⁷ Haverford argues that the TCA is inapplicable here because “PECO is not engaged in the provision of telecommunications service within the meaning of [the TCA].” Def.’s Br. at 32. It argues that, because PECO’s contract with the DCIU provides that PECO is merely responsible for providing the infrastructure--in other words, the cable by itself--it is not engaged in providing telecommunications service.” Because Haverford has not pointed us to any authority holding that the TCA is inapplicable in this situation, we reject its hypertechnical argument as devoid of merit.

On February 8, 1996, Congress adopted the TCA, 47 U.S.C. § 151 et seq. Its purpose is to decrease regulation and increase competition in the telecommunications industry. To this effect, it imposes significant limitations on the authority of state and local governments to regulate the industry. See, e.g., Reno v. ACLU, 117 S. Ct. 2329, 2337-38 (1997) (stating that the TCA's "primary purpose was to reduce regulation and encourage the rapid deployment of new telecommunications technologies" (internal quotation omitted)); Paging, Inc. v. Board of Zoning Appeals, 957 F. Supp. 805, 807 (W.D. Va. 1997) ("Congress passed the [TCA] in order to provide a procompetitive, deregulatory 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" (internal quotation omitted)).

To foster this deregulatory, procompetitive atmosphere, § 253 of the TCA, entitled "Removal of barriers to entry," provides in subsection (a) that "[n]o state or local statute or regulation, 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." 47 U.S.C. § 253(c) provides a "safe harbor" for state and local governments. This subsection provides that:

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 use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

1. The Ordinance is Not
Entitled to "Safe Harbor" Protection

Haverford argues that the Ordinance is concerned only with regulating the public rights-of-way and therefore falls completely within the safe harbor of § 253(c). Because the Ordinance is so broad and vague, however, we find that it is not entitled to safe harbor protection.

The Federal Communications Commission, which is the federal agency charged with implementing the TCA, has offered interpretations of this provision of the 1996 statute. In In re Classic Telephone, Inc., 11 F.C.C.R. 13082 (F.C.C. 1996), the FCC, quoting from the congressional testimony of Senator Diane Feinstein, offered examples of the types of restrictions that Congress intended to permit under § 253(c). These include:

Regulat[ing] the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize noise impacts;

[R]equir[ing] a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;

[R]equir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations;

Enforc[ing] local zoning regulations, [and]

[R]equir[ing] a company to indemnify the city against any

claims of injury arising from the company's excavation.

Id. Thus, all of this permissible state or local government authority relates to the physical use and occupation of the public rights-of-way.

We find that the Ordinance, as it currently reads, is not limited to matters involving the mere regulation of the public rights-of-way, for several reasons. First, it gives the Township Manager total discretion in deciding whether to grant or deny a franchise, without providing any guidelines for how that decision should be made. Also, the Ordinance fails to disclose the required compensation and fees, or even the basis for calculating and imposing those fees.

This apparently limitless discretion of the Township Manager to grant or deny a franchise places the Ordinance outside the ambit of the TCA's safe harbor. Given the purpose behind the TCA--the deregulation of the telecommunications industry--and the very specific nature of the authority preserved to state and local governments in the safe harbor provision, we find that the breadth and vagueness of the Ordinance renders it invalid. There is nothing in the Ordinance that limits the discretion of the Township Manager to matters involving the physical use and occupation of the public rights-of-way. Also, because the Ordinance does not specify how a telecommunications provider is to apply for a franchise or what the contents of such an application should be, we (as well as any provider who wishes to

obtain a franchise) cannot discern whether the Township will look only at matters involving the public rights-of-way or other factors impermissible under the TCA.

In so holding, we agree with the district court in Bell Atlantic-Maryland v. Prince George's County, 49 F. Supp. 2d 805, 815-17 (D. Md. 1999). In Prince George's County, the Court, in striking down a local ordinance similar to the one at issue here, held that "[m]ost objectionable is the fact that the ordinance vests the County with complete discretion to grant or deny a franchise application [T]he ordinance provides no criteria to guide the county executive in carrying out his or her responsibility to negotiate franchise agreements." Based on this apparently unfettered discretion, the Court concluded that the ordinance was not entitled to safe harbor protection. See also City of Dallas, 8 F. Supp. 2d at 592-93 (holding that a local government's complete discretion to grant or deny a franchise placed an ordinance outside the safe harbor of the TCA).

We also find that the Ordinance violates § 253(c)'s rules regarding reasonable compensation. A local government may demand compensation from telecommunications providers for their use of the public rights-of-way. See 47 U.S.C. § 253(c). Any fee, however, must be directly related to the company's use of the right-of-way. See, e.g., Prince George's County, 49 F. Supp. 2d at 817 ("If local governments were permitted under section 253(c) to charge franchise fees that were unrelated either to a telecommunication's company's use of the public rights-of-ways or

to a local government's costs of maintaining and improving its rights-of-way, then local governments could effectively thwart the [TCA's] pro-competition mandate and make a nullity out of section 253(a)); See also City of Dallas, 8 F. Supp. 2d at 593.

The Ordinance, as noted above, mentions at least four different fees to be imposed on providers. It does not, however, state the amount of the fees, how they are to be calculated, or how they relate to use of the public rights-of-way. It is not at all clear, from reading the Ordinance, that the fees do in fact relate to use of the public rights-of-way. Also, it is highly unlikely that four separate fees are all related to the use of the rights-of-way.

Because other Haverford ordinances impose fees for the use of "streets and sidewalks" and "poles and wires",⁸ it also appears that Haverford is already being compensated for the use of its public rights-of-way. In any event, the mere fact that we must speculate about exactly what the Township is being compensated for demonstrates that the Ordinance is invalid. The TCA is clear: any fees charged must be related to use of the rights-of-way. The Ordinance does not, on its face, comply with this mandate.

In addition, the Township's failure to publish a schedule of fees is in direct violation of § 253(c), which

⁸ See generally The General Laws of the Township of Haverford ch. 134 (Poles and Wires) and ch. 157 (Streets and Sidewalks).

requires that "the compensation required [must be] publicly disclosed by [a local] government." The failure to publicize the fees also renders us unable to determine if Haverford has complied with § 253(c)'s requirement that compensation be imposed "on a competitively neutral and nondiscriminatory basis."

Finally, Section 5 of the Ordinance states that the franchise and license fees and the per-lineal-foot fees should be "audit[ed]". This suggests that the fees will be based on a percentage of the provider's revenue. Revenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way. See, e.g., Prince George's County, 49 F. Supp. 2d at 818 (holding that a fee based on a percentage of gross revenue was not related to the provider's use of the rights-of-way); City of Dallas, 8 F. Supp. 2d at 593 (same). Again, however, the fact that we must speculate means that the Ordinance does not comply with TCA's very specific requirements.

Haverford argues that we should read the Ordinance in a way that would not violate the TCA--in other words, we should assume that the Township Manager and any other local officials charged with implementing it will do so in a manner consistent with the TCA. This flies in the face of the TCA, which preserves very specific authority to local governments. We will not just assume, based on nothing more than faith in the goodwill of the Township and its Manager, that Haverford has not overstepped that authority. Furthermore, it raises the very real possibility that Haverford will find itself in court every time it seeks to

enforce the Ordinance, given § 253(c)'s requirement that different providers be regulated on a competitively neutral and nondiscriminatory basis. Haverford's "case-by-case" approach to adding flesh to the bones of the Ordinance thus does not satisfy the TCA. Rather than trusting Haverford lawfully to implement the Ordinance -- as it would have us do -- we find that the better course is to send the Township back to the drafting table.

In sum, the safe harbor provision of § 253 does not give Haverford Township the right to impose whatever regulations it chooses on telecommunications providers whose equipment happens to pass through public rights-of-way.

2. The Ordinance is Invalid Under § 253(a)

Because we have concluded that the Ordinance is not entitled to safe harbor protection, we must analyze whether it prohibits or has the effect of prohibiting PECO's ability to provide telecommunications services.

In Prince George's County, 49 F. Supp. 2d at 814, the Court held that a similar ordinance had the effect of prohibiting the provision of telecommunications services, stating that "any process for entry [into the market] that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way [violates § 253(a)]" (internal quotations omitted).

Here, the barriers to entry are even greater than in Prince George's County. The Ordinance provides absolutely no guidance to a provider about how to apply for a franchise or what the contents of such an application should be. Nor is there any guarantee that applications under this Kafkaesque regime, once submitted, will be processed expeditiously. Also, under the express terms of the Ordinance, the Township Manager, in his sole discretion, can completely prohibit the provision of telecommunications services, as the Ordinance merely provides that he "may" approve an application. Finally, the Ordinance imposes fees of uncertain amounts, a fact which, by itself, may serve as a significant barrier to entry.

We therefore conclude that the Ordinance violates §253(a). Because we have determined that the Ordinance is not entitled to safe harbor protection, we hold that the Ordinance is preempted by, and violates, the TCA and thus must be struck down.⁹

⁹ Because we are granting PECO's requested relief on TCA grounds, we need not consider its claims under § 1983, the Contracts Clause of the United Stat

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PECO ENERGY CO. : CIVIL ACTION
:
v. :
:
TOWNSHIP OF HAVERFORD, :
DELAWARE COUNTY : NO. 99-4766

ORDER

AND NOW, this 20th day of December, 1999, upon consideration of the parties' cross-motions for summary judgment and all responses thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED;
2. Defendant's motion for summary judgment is DENIED;
3. JUDGMENT IS ENTERED in favor of plaintiff PECO Energy Co. and against defendant Township of Haverford;
4. Defendant's Ordinance No. 10-99 is declared NULL AND VOID, and defendant is ENJOINED from enforcing the Ordinance against plaintiff; and
5. The Clerk shall CLOSE this case statistically.

BY THE COURT:

Stewart Dalzell, J. es Constitution,
and Pennsylvania law.

