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# Unplanned Telecom Corridor Markets: The Marketization Of Fiber Optic Easements By Deregulated Network Industries

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**ABSTRACT**

This paper advances the proposition that markets supplanted eminent domain compensation formulas for the acquisition of fiber optic cable easements by deregulated network industries, without predatory pricing or damaging externalities, at least for the period the dot.com and telecom industries were capitalized with equity from the stock market bubble of 1999-2001. More recent court rulings have invalidated deregulated market prices for such property rights arrived at by voluntary exchange. In so doing, the courts have unwittingly substituted one-sided landowner holdout prices with equally one-sided condemnor prices based on non-corridor property values. The predatory pricing and damaging externality arguments for the continued exercise of eminent domain and regulation of utility pole line co-location rights no longer hold in a deregulated environment. Paying incentive prices for telecommunications property rights is the magic elixir that has made deregulation work, resulting in consumer capitalization in time and cost savings as well as incalculable economic benefits. Allowing deregulated telecommunications companies the continued power of eminent domain after establishing voluntary market prices for property rights to accommodate the build-out of the "Information Superhighway" abrogates the Constitutional contract of just compensation.

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# I. Introduction

One of the intended but unforeseen consequences, indeed positive externalities,[2] of the Telecommunications Act of 1996 is the emergence of incentive pricing for telecommunications corridors. There are now market formulas for pricing fiber optic cable easements, co-located utility pole attachment licenses, and natural gas line easements, as well as leases and licenses for wireless antenna

sites.[3] These new market prices may not be perfectly open and competitive, nor do they necessarily conform to our preconceived notions of how price should be obtained and applied, but neither are they products of government fiat, or monopolistic advantage, nor do they reflect landowner "hold-out" prices. While still imperfect and somewhat one-sided, such pricing mechanisms have facilitated the rapid build-out of the telecom infrastructure at a fraction of the transaction costs imposed by regulated prices or fees. And they have provided property owners with compensation equal to or in excess of eminent domain formulas based on across-the-fence (ATF) land values without discernible severance or proximity damages. These prices may be cyclical, vanishing in the more rigorous capital environment that has obtained since the Nasdaq crash of March 2000. They may resume or change in form and quantity. But markets are change. That flexibility is the advantage of market over command economies.

The courts have not reconciled the inconsistency between competitive voluntary pricing of fiber optic cable easements by the deregulated telecommunications industry with the coercive pricing of easements for deregulated natural gas and oil pipeline industries by eminent domain (Exxon vs. Hill, Louisiana Supreme Court, 2001; Exxon vs. Zwahr, Texas Supreme Court, 2002). The incoherency between such policies is all the more remarkable given that "new economy" prices are often equal to or many times more than eminent domain compensation formulas.

Neither have regulatory bodies resolved the rationale behind the imposition of fiat prices for co-located pole line utility attachments where the alternative route in public streets or rail corridors would have been costlier (U.S. Supreme Court vs. Gulf Power II, Case No. 00-843, January, 2001). The legal and regulatory systems have not answered the question: How are "new economy" technologies to replace costlier incumbent technologies if they are not allowed to compete for contested property space?

Sending even more scrambled signals has been the continued ruling by higher state courts that "easements within easements" cannot be valued as a self-contained "economic unit" for their corridor value (Exxon vs. Zwahr, 2002). Rather, state supreme courts have ruled that such easements must be valued based on their next-best use as agricultural or rural residential land despite the fact that a price had evolved for such property rights from deregulated markets and that smaller parcels exist within larger parcels (Exxon v. Zwahr). But such court rulings have neglected another well-established principle from case law, that enhancements due to prior public improvements can be considered in determining the compensation for subsequent property acquisitions (Los Angeles v. Hoe [1955] 138 CA2d 74, 291 p2d 98; People ex real Department of Transp. V. Southern Pac. Transp. Co. [1978] 84 Ca3d 315, 148 CR 535). For example, after acquiring land for public streets, it would be absurd and perhaps impossible to measure subsequent takings of property, as though no streets had ever existed (Merced Irrigation District vs. Woolstenhulme, 4C.3d 478; 93 Cal.

Rptr. 833,483, P. 2d 1; and Norman E. Matteoni and Henry Veit, Condemnation Practice in California, Berkeley, California: Continuing Education of the Bar, 1990: 32).

The perpetuation of eminent domain to assure landowners payment for damages from negative externalities is no longer necessary for miniaturized and unobtrusive fiber optic easements and stealth wireless antennae sites. The negative externalities from such communications infrastructure have effectively been internalized into inconspicuous subsurface easements and indistinguishable antenna base stations. Prices for fiber optic cable easements have been commodified and marketized by the telecommunications industry at levels equal to or much greater than that provided for under eminent domain compensation formulas. Buttressing this argument is that although the courts have unequivocally rejected sellers' and owners' prices as reflections of fair market value for eminent domain purposes, buyers' “going prices” for fiber optic easements reflect market value in the economic sense.

Anachronistic eminent domain law and conventional easement valuation methods are predicated on a liability theory that no longer holds for positive easements in the deregulated marketplace. Both law and applied valuation theory are suffering from a case of regulatory lag when it comes to providing compensation for co-location property rights brought about by deregulation of telecommunications.