

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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DEC 3 - 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Chibardun Telephone Cooperative, Inc., )  
CTC Telcom, Inc. )  
)  
Petition for Preemption Pursuant to )  
Section 253 of the Communications Act )  
of Discriminatory Ordinances, Fees )  
and Rights-of-Way Practices of the )  
City of Rice Lake, Wisconsin )

CC Docket No. 97-219

**OPPOSITION OF GTE TO PETITION FOR SECTION 253 PREEMPTION**

GTE Service Corporation, on behalf of its  
affiliated domestic telephone operating,  
wireless and video companies

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## SUMMARY

On October 10, 1997, Chibardun filed its Petition for preemption pursuant to Section 253 of the 1996 Act, challenging certain actions, practices, and requirements concerning use of rights-of-way by the City. Chibardun requests that the Commission preempt the following actions of the City (1) that the City may not require execution by Chibardun of the License Agreement as a precondition to the grant of excavation permits; (2) that the City not enforce the Interim Ordinance; (3) that the City not adopt or enforce any future right-of-way ordinance "placing higher fees, and more stringent conditions and restrictions" on competitive entrants; and (4) "from otherwise engaging in practices which impose anti-competitive and discriminatory costs, delays and conditions upon Chibardun and others." Chibardun alleges that each of these actions by the City runs afoul of Section 253 of the 1996 Act.

GTE supports enactment of state-wide standards for local government regulation and administration of right-of-way use and of cost-based compensation to local governments for such use, so long as they are applied on a competitively neutral and nondiscriminatory basis and any compensation demanded by a municipality is publicly disclosed, all as required by the 1996 Act. Local ordinances or the administration of rights-of-way access cannot create any barrier to entry for new telecommunications providers in any location.

With respect to the specific claims advanced by Chibardun, Chibardun does not allege that the City has prohibited it from the provision of telecommunications service. Therefore, the question is whether the entry requirements imposed by the City "materially inhibit[] or limit[] the ability of [Chibardun] to compete in a fair and balanced

legal and regulatory environment.” Chibardun bears both the burden of proof and the burden of production to establish that Section 253(a)’s test is met, and must present a fully developed factual record to the Commission.

The Interim Ordinance, is by its very terms an interim regulation, which was adopted in contemplation that a permanent ordinance would replace it before the end of 1997. Similarly, the License Agreement is intended, by its very terms, to be effective until the City adopts a permanent ordinance. GTE understands that the City intends to adopt a permanent ordinance early in 1998. At that time, Chibardun will be subject to the permanent ordinance and not to either the Interim Ordinance or the License Agreement. In its Petition, Chibardun unequivocally states that it has “suspended its Rice Lake construction plans for 1997,” due to “the onset of the 1997-1998 Wisconsin winter.” In other words, Chibardun admits that it has no plans to construct before Spring, 1998, when it is anticipated that the permanent ordinance will be in effect. Therefore, neither the Interim Ordinance nor the License Agreement have any effect on Chibardun’s *present ability* to move forward with construction *next Spring*, because the permanent ordinance will control Chibardun at that time. Because Chibardun will not be attempting to construct “before the onset of cold weather” and the City is anticipated to adopt a permanent ordinance before Spring, 1998, the present petition is premature and not ripe for consideration.

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**OPPOSITION OF GTE TO PETITION FOR SECTION 253 PREEMPTION**

GTE Service Corporation, on behalf of its affiliated domestic telephone operating, wireless and video companies, respectfully submits these comments in opposition to the Petition for Section 253 Preemption ("Petition") filed by Chibardun Telephone Cooperative, Inc. and CTC Telcom, Inc. (collectively, "Chibardun") with respect to the City of Rice Lake, Wisconsin (the "City"). A GTE wireline telecommunications provider, GTE North Incorporated, is the franchised incumbent local exchange carrier in the City. GTE opposes Chibardun's Petition as premature at this time.

**I. THE NATURE OF CHIBARDUN'S PETITION.**

On October 10, 1997, Chibardun filed its Petition for preemption pursuant to Section 253 of the Telecommunications Act of 1996,<sup>1</sup> challenging certain actions,

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<sup>1</sup> The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 53 (February 8, 1996), *codified at* 47 U.S.C. § 151 *et seq.* (the "1996 Act").

practices, and requirements concerning use of rights-of-way by the City. Chibardun requests that the Commission preempt these allegedly discriminatory actions, practices, and requirements pursuant to its authority under Section 253(d). Chibardun contends that the City: (A) has refused to grant the ministerial excavation permit necessary for construction of Chibardun's proposed competitive telecommunications facilities, allegedly in violation of Section 253(a); and (B) imposed anti-competitive and discriminatory right-of-way requirements and fees upon Chibardun and other entities seeking to compete with the existing telecommunications provider in the City, allegedly in violation of Section 253(c).

In its Petition, Chibardun requests that the Commission preempt the actions of the City in three specific, and one unspecific, ways: (1) that the City may not require execution by Chibardun of the License Agreement<sup>2</sup> as a precondition to the grant of excavation permits; (2) that the City not enforce Ordinance No. 849 (the "Interim Ordinance");<sup>3</sup> (3) that the City not adopt or enforce any future right-of-way ordinance "placing higher fees, and more stringent conditions and restrictions" on competitive entrants; and (4) "from otherwise engaging in practices which impose anti-competitive and discriminatory costs, delays and conditions upon Chibardun and others". Petition, at 2. Chibardun alleges that each of these actions by the City runs afoul of Section 253

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<sup>2</sup> License Agreement for Use of City Rights-of-Way, draft June 6, 1997, Exhibit E to the Petition.

<sup>3</sup> Ordinance No. 849, Exhibit G to the Petition.

of the 1996 Act. GTE herein addresses the three specific requests for preemption advanced by Chibardun.

**II. THE 1996 ACT REQUIRES ADOPTION OF A NONDISCRIMINATORY POLICY WITH RESPECT TO THE USE OF RIGHTS-OF WAY. GTE SUPPORTS A PRO-COMPETITIVE POLICY APPLICABLE TO ALL TELECOMMUNICATIONS CARRIERS.**

Contrary to the positions of some local communities advanced in various fora, the 1996 Act is not a *carte blanche* to "create an unnecessary 'third tier' of regulation that extends far beyond the statutorily protected interests in managing the public rights of way." *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e) and 253*, CSR-4790, Memorandum Opinion and Order, FCC 97-331, 1997 FCC LEXIS 5164 (released September 19, 1997), at ¶ 102 ("*Troy, Michigan Decision*"); see also *Classic Telephone Inc. Petition for Preemption, declaratory ruling and Injunctive Relief*, CCBPol 96-10, Memorandum Opinion and Order, FCC 96-397, 11 FCC Rcd 13082, 13101 (¶ 34) (1997) ("*Classic Telephone Decision*"). In other words, the introduction of competition into the local telecommunications marketplace envisioned by the 1996 Act did not open the door to *local* telecommunications regulation -- or revenue generation -- as some communities would aver. Rather, the 1996 Act largely preserved the *status quo* as to the oversight and use of public rights-of way and did not provide municipalities or other local government entities with any new authority while, for the first time ever, imposing a federal requirement that telecommunications providers using public rights-of-way must be treated in a competitively neutral and nondiscriminatory manner by state and local governments regarding such use.

GTE supports enactment of state-wide standards for local government regulation and administration of right-of-way use and of cost-based compensation to local governments for such use, so long as they are applied on a competitively neutral and nondiscriminatory basis and any compensation demanded by a municipality is publicly disclosed, all as required by the 1996 Act. Local ordinances or the administration of rights-of-way access cannot create any barrier to entry for new telecommunications providers in any location. GTE also supports the proposition that local government entities should be entitled to recover their *actual cost* of governmental oversight of the providers' presence in the public rights-of-way. This position is in accord with the 1996 Act, which did not create any new regulatory or compensation jurisdiction as claimed by some local governments (but instead clarified limitations with respect to that jurisdiction).

GTE believes that the 1996 Act requires that right-of way ordinances, requirements and practices be applied on a consistent basis which favor neither the incumbent telecommunications provider nor its competitors. Further, because the 1996 Act created no *new* authority in local governments, local requirements may not establish a "third tier" of regulation by asserting regulatory control over telecommunications providers with regard to service area, service quality, service offerings, infrastructure upgrades or rates where none existed before.

Similarly, while GTE concurs in local governments recovering their costs associated with management of public rights-of-way, GTE believes that the 1996 Act prohibits the imposition of right-of-way use, maintenance or franchise fees that are not based on the actual cost of directly related government oversight of facilities physically

located in the public right-of-way. In addition, imposition of "in-kind" compensation for use of right-of-way (e.g., free or discounted government use of poles, ducts or wires; free or discounted dark fiber; provision of free or discounted CPE and/or service) is correspondingly impermissible as inherently discriminatory and not competitively neutral.<sup>4</sup>

### III. THE REQUISITES OF SECTION 253(d) PREEMPTION.

Section 253(a) bars states and their political subdivisions from enforcing statutes, regulations and other legal requirements which prohibit, or have the effect of prohibiting, the ability of a putative carrier to provide any interstate or intrastate telecommunications service. Chibardun does not allege that the City has prohibited it from the provision of telecommunications service. Therefore, the test is whether the entry requirements imposed by the City "materially inhibit[] or limit[] the ability of [Chibardun] to compete in a fair and balanced legal and regulatory environment." *Troy, Michigan Decision*, at ¶ 98 (emphasis added); *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCBPol 96-26, Memorandum Opinion and Order, FCC 97-251, 1997 FCC LEXIS 3773 (released July 17, 1997), at ¶ 31 ("*Huntington Park Decision*").

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<sup>4</sup> In contrast to Section 253(c) of the 1996 Act, in Sections 611, 624 and 625 of the 1984 Cable Act, 47 U.S.C. §§ 531, 544 and 545, Congress explicitly permitted local communities, which are specifically vested with franchising authority for cable service, to establish requirements for facilities and equipment and provide for public, educational and governmental access.

As Section 253(d) petitioner, Chibardun bears both the burden of proof and the burden of production to establish that Section 253(a)'s test is met, and must present a fully developed factual record to the Commission.

"With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement ... must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c). We will exercise our authority only upon such fully developed factual records."

*Troy, Michigan Decision*, at ¶ 101.

As set forth below, Chibardun has failed to meet section 253(a)'s burden of proof.

**IV. BECAUSE CHIBARDUN HAS NO PLANS TO CONSTRUCT DURING THE 1997-98 WISCONSIN WINTER AND A PERMANENT ORDINANCE WILL BE IN EFFECT IN EARLY 1998 -- REPLACING THE INTERIM ORDINANCE AND THE LICENSE AGREEMENT WHICH CHIBARDUN CHALLENGES -- THE PETITION IS PREMATURE AND NOT RIPE FOR CONSIDERATION AT THIS TIME.**

Quite recently, the Commission dismissed a Section 253(d) petition as premature finding, *inter alia*, that the petitioner did not have the present intention of serving the community whose ordinance was challenged in its petition. The Commission unequivocally stated that "we will not issue what would be a purely advisory opinion." *Troy, Michigan Decision*, at ¶ 99. In this case, Chibardun lacks the *present ability* to serve the City, and therefore its Petition should also be dismissed as premature.

Ordinance No. 849 is, by its very terms an interim regulation, which was adopted in contemplation that a permanent ordinance would replace it before the end of 1997. Interim Ordinance, §§ 4, 5. Similarly, the License Agreement is intended, by its very terms, to be effective until the City adopts a permanent ordinance. License Agreement, Recitals ¶ C and Agreement ¶ 15. GTE understands that the City intends to adopt a permanent ordinance early in 1998. At that time, Chibardun will be subject to the permanent ordinance and not to either the Interim Ordinance or the License Agreement. Until then, it cannot be determined whether all telecommunications providers -- whether incumbent or new entrants -- will be subject to the same terms and conditions.

In its Petition, Chibardun unequivocally states that it has "suspended its Rice Lake construction plans for 1997," due to "the onset of the 1997-1998 Wisconsin winter." Petition, at 10, 12. In other words, Chibardun admits that it has no plans to construct before Spring, 1998, when it is anticipated that the permanent ordinance will be in effect. Therefore, neither the Interim Ordinance nor the License Agreement have any effect on Chibardun's *present ability* to move forward with construction *next Spring*, because the permanent ordinance will control Chibardun at that time; and only then can it be determined whether all providers are treated consistently by the City for purposes of the 1996 Act.

Because Chibardun will not be attempting to construct "before the onset of cold weather" (Petition, at 12), and the City is anticipated to adopt a permanent ordinance before Spring, 1998, the present petition is premature and not ripe for consideration. Chibardun's Section 253 challenge, if any, must be to the permanent ordinance -- once

adopted -- if Chibardun believes that that ordinance will "materially inhibit[] or limit[] [its] ability ... to compete in a fair and balanced legal and regulatory environment." Rather than expend its scarce resources on Chibardun's premature Petition, GTE believes that the Commission should dismiss the Petition with leave to refile so that Chibardun may challenge the permanent ordinance once it is adopted, if Chibardun believes that the permanent ordinance fails to meet the requisites of Section 253.<sup>5</sup>

**V. GTE BELIEVES THAT THE MAJORITY OF THE INTERIM ORDINANCE AND THE LICENSE AGREEMENT COMPORT WITH SECTION 253(a). THEREFORE, EVEN IF CHIBARDUN'S PETITION WERE NOT PREMATURE (WHICH IT IS), PREEMPTION WOULD BE INAPPROPRIATE.**

The majority of the Interim Ordinance and the License Agreement meet the requirements of Section 253(a). With respect to the management of local rights-of-way, the Commission has made clear that in enacting the 1996 Act, "Congress recognized the need for State and local governments to continue [to] respond to truly local needs." *Troy, Michigan Decision*, ¶ 107. Consequently, even if Chibardun's Petition were ripe for consideration at this time -- which it is not -- it would be inappropriate for the Commission to exercise its preemption powers under Section 253(d) in this case.

"We have previously described the types of activities which fall within the sphere of appropriate rights-of-way management ... . These matters include coordination of construction schedules, determination of insurance, bonding, and indemnity requirements, establishment and

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<sup>5</sup> This is not to suggest that dismissal of the Petition should enable the City to avoid Chibardun's claims by delaying adoption of the permanent ordinance. If the City does not adopt the permanent ordinance in a timely fashion, Chibardun should be permitted to reassert its instant claims, since the Interim Ordinance and the License Agreement will still be in effect. To address this concern, the Commission could grant Chibardun leave to refile this Petition if the permanent ordinance is not adopted by March 15, 1998.

enforcement of building codes, and keeping track of the various systems using rights-of-way to prevent interference between them."

*Troy, Michigan Decision*, ¶ 103.

Particular provisions of the License Agreement challenged by Chibardun comport with Section 253(a).

- ✍ Submission of a construction plan and schedule. License Agreement, § 9.a
- ✍ Submission of a list of independent contractors. License Agreement, § 9.b
- ✍ The imposition of reasonable insurance requirements. License Agreement, § 20
- ✍ Application of the interim ordinance to major constructions projects, while exempting routine repair and maintenance work. Interim Ordinance, §§ 2, 3

**VI. NOTWITHSTANDING THE PREMATURITY OF CHIBARDUN'S PETITION, SEVERAL ASPECTS OF THE ANTICIPATED PERMANENT ORDINANCE APPEAR INCONSISTENT WITH SECTION 253(a) AND SHOULD BE CORRECTED BY THE CITY PRIOR TO ADOPTION.**

The License Agreement appears to set forth a number of provisions which will ultimately be included in the permanent ordinance, and which will apply to all telecommunications providers, incumbents and new entrants alike. While much of the License Agreement is nondiscriminatory, several provisions merit reconsideration by the City prior to the adoption of the permanent ordinance. GTE does not believe that these provisions comport with Section 253(a), and therefore should be corrected by the City prior to adoption.

- ✍ The provision of Recital C that mandates acceptance of application of ordinance to grantee upon adoption. License Agreement, § 1.
- ✍ The application of the provisions to more than management of the use of public rights-of-way. License Agreement, §§ 2i, 2j, 10c, 11c.

- ✍ The provision of poles, conduits and other structures. License Agreement, § 13.
- ✍ The provision of a \$10,000 administrative fee. License Agreement, § 14.
- ✍ The unlimited obligation to reimburse the City. License Agreement, § 14.
- ✍ The provision requiring removal of facilities from public rights-of-way upon the city's decision to terminate the License Agreement. License Agreement § 17.
- ✍ The requirement for City approval for sale of facilities. License Agreement, § 17.
- ✍ The imposition of unreasonable indemnification requirements. License Agreement, § 19.
- ✍ The imposition of jurisdiction for authority to utilize and occupy City Rights-of-way. License Agreement, § 3.
- ✍ The imposition of grandfathering provisions which may be discriminatory. License Agreement, § 5c.<sup>6</sup>

## VII. CONCLUSION.

GTE supports competition and recognizes the benefits to citizens of the City that competition can bring. We have urged the City to be fair to all telecommunications providers - incumbents and new competitors alike; and to not impose charges on telecommunications providers that exceed their cost to manage city right-of-ways. The costs to do business in any community are ultimately borne by its residents, either

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<sup>6</sup> Section 15 of the License Agreement requires Chibardun to agree to comply with the permanent ordinance once adopted. GTE sees nothing sinister in this provision, as it only states the obvious -- that Chibardun, like any telecommunications provider in the City, will be subject to the permanent ordinance. Of course, to the extent that the City was interpreting this provision to be a waiver of Chibardun's right to challenge the permanent ordinance, it would clearly be improper.

through higher costs of service or the limiting of competitors which are willing to provide service.

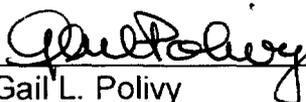
While Chibardun may have some legitimate concerns if certain provisions of the License Agreement were to be adopted in the permanent ordinance, Chibardun's own decision not to move forward with construction during the 1997-1998 Wisconsin winter, and the City's expressed intention to adopt a permanent ordinance prior to Spring, 1998, make the instant Petition premature. Therefore, the Commission should dismiss Chibardun's Petition as premature, but permit Chibardun to refile if the deficiencies of the permanent ordinance are not corrected or if the City fails to adopt a permanent ordinance in a timely fashion.

Respectfully submitted,

GTE Service Corporation, on behalf of its  
affiliated domestic telephone operating,  
wireless and video companies

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