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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Chibardun Telephone Cooperative, Inc.	)	
CTC Telecom Inc.	)	
	)	CC Docket No. 97-219
Petition for Preemption Pursuant	)	
to Section 253 of the Communications Act	)	
of 1996	)	

**REPLY COMMENTS  
OF THE  
UNITED STATES TELEPHONE ASSOCIATION**

**INTRODUCTION**

The United States Telephone Association ("USTA") hereby files these reply comments in response to comments addressing the Commission's Public Notice <sup>1</sup> regarding the Petition filed by Chibardun.<sup>2</sup> USTA is the principal trade association of the local exchange carrier industry.

Opposition of cities and localities to Commission preemption of local regulations adopted

<sup>1</sup> Public Notice DA 97-228 released October 20, 1997.

<sup>2</sup> Chibardun *Petition for Section 253 Preemption* ("Petition"), filed October 10, 1997.

*OTC*

by the City of Rice Lake<sup>3</sup> simply ignore the requirements of Section 253.<sup>4</sup> They incorrectly contend that the Commission lacks jurisdiction to preempt regulations regarding state and local government management of rights-of-way, that the regulations are permitted under Section 253(c), that Chibardun is not prohibited from providing telecommunications services in the City of Rice Lake, and that local governments may respond to increased demand for access to rights-of-way by adopting regulations as they see fit, with impunity.

Contrary to the arguments raised by those parties opposing the Chibardun petition, the Commission does have the authority under Section 253 to preempt state and local regulations, including those regulations relating to management of rights-of-way. The regulations adopted by the City of Rice Lake as applied to Chibardun and other new entrants are contrary to the competitively neutral and non-discriminatory provisions of Section 253. In addition, in managing public-rights of way, including increased demand for access to rights-of-ways, state and local governments must adopt regulations which are consistent with Section 253.

The positions taken by those parties opposing preemption is inconsistent with Section 253(c), and contrary to Commission interpretations of its authority to preempt inconsistent statutes and regulations pursuant to Section 253(d). USTA urges the Commission to preempt the requirements imposed by the City of Rice Lake because they violate Section 253.

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<sup>3</sup> See, e.g., *Comments of the City of Rice Lake* (December 3, 1997); *Comments of CMMT Communities* (“CMMT”) (December 3, 1997); *Comments of the League of Wisconsin Municipalities and the Wisconsin Alliance of Cities* (“Wisconsin MAC”) (December 2, 1997).

<sup>4</sup> 47 U.S.C. §253.

**I. THE COMMISSION'S AUTHORITY TO  
PREEMPT STATE AND LOCAL REGULATIONS  
UNDER SECTION 253 IS BEYOND CHALLENGE**

The City of Rice Lake and CMMT argue that Section 253(d) prohibits the Commission from preempting state and local regulations under Section 253(c) regarding the management of rights-of-way.<sup>5</sup> The plain language of the statute clearly rebuts the rhetoric that the Commission has no authority to preempt state and local regulations, including regulations relating to the management of access to rights-of-way. Section 253(a) prohibits a state or locality from enacting a statute or regulation or any other requirement that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>6</sup> Regulations implemented by states relating to universal service, pursuant to Section 253(b), must be imposed on a “competitively neutral basis.”<sup>7</sup> Pursuant to Section 253(c), states and localities may manage access to rights-of-way, or require “fair and reasonable” compensation for such use so long as the exercise of authority is applied on “a competitively neutral and non-discriminatory basis” ... and “the compensation required is publicly disclosed ....”<sup>8</sup> Where state and local statutes and regulations do not comply with Section 253 requirements, Section 253(d) provides the mechanism for the Commission to preempt such inconsistent provisions.<sup>9</sup>

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<sup>5</sup> *Comments of the City of Rice Lake* at 24; *Comments of CMMT* at 2.

<sup>6</sup> 47 U.S.C. §253(a).

<sup>7</sup> 47 U.S.C. §253(b).

<sup>8</sup> 47 U.S.C. §253(c).

<sup>9</sup> 47 U.S.C. §253(d); *USTA Comments* at 3-5.

Those parties arguing that the Commission lacks jurisdiction to preempt statutes and regulations relating to management of rights-of way provide no legal basis for challenging the authority of the Commission under Section 253(d). The Commission should exercise its authority in this proceeding by preempting the regulations adopted by the City of Rice Lake.

**II. REQUIREMENTS REGARDING ACCESS TO RIGHTS-OF-WAY WHICH ARE NOT APPLIED ON A COMPETITIVELY NEUTRAL NON-DISCRIMINATORY BASIS MUST BE PREEMPTED**

Alternatively, those parties opposing the Chibardun Petition contend that the adoption of regulations requiring a licensing agreement as a pre-condition for gaining access to rights-of-way, and the interim excavation permit ordinance, constitute local management of rights-of-way.<sup>10</sup> Moreover, they argue that Chibarbun is not prohibited from providing telecommunications services.<sup>11</sup> Section 253(c) requires states and localities to manage access to rights-of way in a manner that is competitively neutral and non-discriminatory. As correctly argued by others, the Commission has concluded that “[l]ocal requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor non-discriminatory.”<sup>12</sup> Imposition of licensing requirements, interim excavation permit provisions, and demand for compensation applied by the City of Rice Lake to Chibardun and other new entrants, and not to others, violates Section 253(c).

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<sup>10</sup> *Comments of the City of Rice Lake at 53-57; Comments of CMMT at 7-10.*

<sup>11</sup> *Comments of the City of Rice Lake at 32-51; Comments of CMMT at 7-8.*

<sup>12</sup> *MCI Comments at 4; AT&T Comments at 4.*

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### **III. STATE AND LOCAL GOVERNMENTS ARE PROHIBITED FROM VIOLATING SECTION 253 IN RESPONDING TO INCREASED DEMANDS IN MANAGING ACCESS TO RIGHTS-OF-WAY**

The Comments of Wisconsin MAC also support the regulations adopted by the City of Rice Lake while also maintaining that localities must be permitted flexibility to implement new regulations consistent with the demand for rights-of way access.<sup>13</sup> In managing access to rights-of-way, including modifying existing regulations or adopting new requirements, local governments are prohibited from adopting regulations that violate the requirements of Section 253(a), (b), and (c). Regarding Chibardun's requests, the City of Rice Lake could have simply granted access to its rights-of-way under regulations that were already in place. In the interim, the City of Rice Lake could have undertaken a review of its regulations, and adopted modifications or new regulations consistent with Section 253. By imposing requirements upon Chibardun and other new entrants, which are not applicable to others, the City of Rice Lake has violated Section 253.

The fact that Chibardun could conceivably provide telecommunications services under the regulations imposed by the City of Rice Lake cannot serve as a basis for validating the impermissible regulations adopted by the City. Under the circumstances, the Commission should preempt the City of Rice Lake from imposing upon new entrants barriers to entry described in the Chibardun Petition.

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<sup>13</sup> *Comments of Wisconsin MAC* at 4.

**CONCLUSION**

Pursuant to Section 253, state and local governments may adopt regulations, and manage access to rights-of-way, when such action is competitively neutral and non-discriminatory.

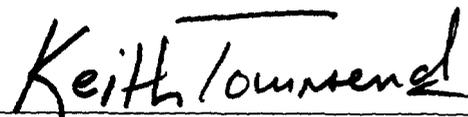
Where regulations are adopted which violate the requirements of Section 253, the Commission is clearly empowered to preempt state and local regulations. The regulations adopted by the City of Rice Lake are inconsistent with the requirements of Section 253 and are barriers to entry. USTA supports action by the Commission that would preempt the City of Rice Lake from imposing its regulations on new entrants.

Respectfully submitted,

**UNITED STATES TELEPHONE ASSOCIATION**

January 6, 1998

By:



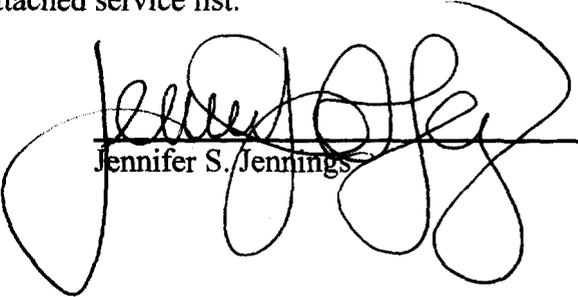
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**CERTIFICATE OF SERVICE**

I, Jennifer S. Jennings, do certify that copies of the foregoing Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

  
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