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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF MEDIAONE ON NOTICE OF INQUIRY

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COMMENTS OF MEDIAONE ON NOTICE OF INQUIRY

MediaOne Group, Inc. ("MediaOne") submits these comments in response to the Commission's Notice of Inquiry in the above-captioned docket.[1/] MediaOne supports the FCC's efforts to ensure that competitive providers of local telecommunications services are treated in an

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[1/] In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-17 (rel. July 7, 1999) ("Notice").

evenhanded and equitable manner by state and municipal governments. These comments describe a number of specific abuses by local authorities that have interfered directly with the Telecommunications Act of 1996's mandate to facilitate the emergence of telecommunications competition.

MediaOne is the parent company of one of the largest cable television multiple system operators ("MSOs") in the United States.[2/] MediaOne is a leader in bringing broadband communications – including voice, video, and data services -- to residential customers. MediaOne subsidiaries provide residential facilities-based competitive local telecommunications service in Atlanta, Georgia; Los Angeles, California; Pompano Beach and Jacksonville, Florida; several communities surrounding Boston, Massachusetts; Detroit, Michigan; and Richmond, Virginia. MediaOne plans to begin serving more residential markets in the near future.

In too many communities, municipal officials seem to view the arrival of telecommunications competition as an opportunity to milk a new revenue stream rather than a chance for consumers to obtain innovative services. The Commission can assist MediaOne in its efforts to introduce competition by clearly telling municipalities that their actions are inconsistent with the policy choices made by Congress in the Telecommunications Act of 1996 ("1996 Act").

INTRODUCTION AND SUMMARY

The 1996 Act was designed to open local markets to competition and to encourage the rapid development of new telecommunications technologies and services.[3/] MediaOne is at the

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[2/] MediaOne expects to complete a merger with AT&T Corp. in the first quarter of 2000.

[3/] See H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) ("Conference Report") at 1.

forefront of efforts to introduce competition to local residential telecommunications markets that have long been dominated by incumbent local exchange carriers ("LECs"). As the Commission has acknowledged, competitors such as MediaOne who use their own network facilities to reach their customers are more likely to introduce meaningful competition than new entrants that rely on infrastructure controlled by incumbent LECs.[4/]

By definition, facilities-based competitors like MediaOne must be able to operate telecommunications facilities in each local market where they intend to provide service. Unfortunately, local officials often seek to restrict the deployment and use of such facilities, and they sometimes attempt to exercise their powers to manage public rights-of-way to impose conditions or extract fees that have nothing whatsoever to do with land use planning or the recovery of actual costs to the municipalities associated with the deployment of telecommunications networks.

While several local telecommunications ordinances have been stuck down by the courts as inconsistent with Section 253 of the Communications Act, other courts have upheld similar laws. This has encouraged some municipal governments to continue to try to subject carriers such as MediaOne to burdensome franchise rules and arbitrary fee structures. MediaOne provides several examples below to demonstrate why the FCC should use this proceeding to clarify the proper boundaries of local telecommunications franchise and fee requirements under the 1996 Act and clearly state that discriminatory burdens -- that is, rules that do not apply equally to incumbent LECs and new entrants alike -- are illegal under federal law.

[4/] See Notice at ¶ 4.

I. LOCAL GOVERNMENTS ARE IMPOSING UNREASONABLE AND DISCRIMINATORY REQUIREMENTS AND FEES ON MEDIAONE AND OTHER COMPETITIVE LECS THAT CHALLENGE THE INCUMBENT PROVIDER

Some municipal governments recognize that competition is in the best interests of their constituents and earnestly attempt to minimize regulation of telecommunications facilities used by competitors such as MediaOne. Others, however, continue to subject new entrants to cumbersome franchising requirements. Several municipalities have attempted to impose unreasonable and unlawful conditions on MediaOne's ability to offer telecommunications services. In each case, these fees and other requirements are either wholly unrelated to management of local rights-of-way or grossly disproportionate to the public burden created by MediaOne's use of such rights-of-way. Even worse, incumbent LECs are typically exempted from the charges and regulatory barriers applied to MediaOne, giving incumbents an unfair competitive advantage.

A. Michigan Cities Are Subjecting MediaOne to Time-Consuming, Expensive Procedures and Onerous Fees

Several communities in Michigan have created time-consuming and expensive procedures for approval of MediaOne's plans to use its cable facilities to deliver telecommunications services to customers. For example, one Michigan city, Belleville, insists that MediaOne obtain a "franchise" to offer local telecommunications service within its boundaries. Belleville's officials assert that no such franchise may be awarded for a period extending beyond one year without holding a referendum on its approval, and they demand that MediaOne pay a $2,000 fee to renew the franchise each year.

Ann Arbor's municipal attorney initially demanded that MediaOne produce a narrative description of all 400 miles of its network before the company begins providing

telecommunications services, even though the same facilities have been occupying the same rights of way for 20 years under the terms of the city's cable franchise agreement. During this time, MediaOne previously has submitted detailed maps of its cable system. Ann Arbor's application for approval to use the rights-of-way to provide telecommunications services is 25 pages long, with questions about MediaOne's plans in other geographic areas, its financial qualifications, and its willingness to commit to build out the network.[5/]

In order to roll out its telecommunications services in Michigan as planned, MediaOne will need to obtain approval from 57 Michigan cities and townships. The application fees for each community range from $2,500 to $10,000, and the procedural requirements for each application are different.

Many Michigan municipalities have adopted ordinances requiring carriers to pay a per-foot fee for the use of rights-of-way to provide telecommunications services, and in some cases they are levying the charges on cable television networks that are already in place. While local governments are entitled to recover the costs of managing public rights-of-way occupied by telecommunications facilities, these Michigan charges do not appear to be based on any attempt to estimate the actual costs associated with the use of rights-of-way, particularly when applied to cable operators who do not propose to construct any additional facilities. For instance, the Michigan cities of Belleville and Romulus have ordinances that levy a 40-cent-a-foot fee for

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[5/] MediaOne often has been able to obtain better arrangements than the terms initially presented by some municipalities. For example, Ann Arbor recently relented and decided that it will allow MediaOne to file an electronic description of its system. Even so, the need to negotiate over these kinds of requirements wastes time and diverts precious resources that are better devoted to providing competitive local communications services to Michigan residents.

construction of new facilities on new carriers. The township of Canton has adopted a resolution calling for carriers to pay $1.87 per foot of right-of-way used.

The Belleville and Romulus fees apply only to new construction, so MediaOne is not required to pay to use its existing facilities to provide telecommunications services. Canton, however, plans to impose its charge for the use of rights-of-way to provide telecommunications services on top of the fees already collected under MediaOne's cable franchise agreement with the township. If only one-half of MediaOne's Canton facilities are located in public rights-of-way, MediaOne would have to pay $1.8 million a year -- more than $65 for each of the 27,000 homes passed by the company's system -- to provide telecommunications services, in addition to cable franchise fees.

The problem of discriminatory treatment of competitive LECs is most serious in places like Michigan where state and local laws explicitly exempt incumbent LECs from the charges and regulatory requirements applicable to new local carriers. The Commission has itself recognized in its Troy decision that local governments in Michigan have maintained that "the incumbent providers occupy a favored position vis-à-vis the state and local governments because of the way the provision of telephone service and its regulation have evolved over the last century," ignoring the pro-competitive, market-opening policies embodied in the 1996 Act. As a result, incumbents have been afforded "substantially less burdensome and more favorable terms"[6/] than competing providers.

[6/] 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, 12 FCC Rcd 21396 (1997); reconsideration denied, 13 FCC Rcd 16400 (1998) ("Troy").

Even where municipal officials recognize the importance of competitive neutrality, they are reluctant to deny favorable treatment to incumbent LECs, who often claim they are exempt from local fees or rules governing their use of public rights-of-way under the terms of statewide telephone franchises granted in the distant past, before local telecommunications competition was considered feasible or even desirable. Incumbent LECs generally overstate the scope of protection created by these statewide franchises, but local governments are usually unwilling to assert their rights to subject incumbent LECs to the same requirements imposed on competitors.

B. Cities In Other MediaOne Markets Are Also Attempting To Impose Similarly Discriminatory Fees on the Use of Rights-of-Way

In one major city where MediaOne is currently engaged in negotiations to provide telecommunications service, a municipal ordinance calls for competitive LECs to pay three percent of gross revenues from all telecommunications services delivered over their facilities within the city limits, presumably including long distance, dial-up Internet access, and other services as well as basic local exchange services. By contrast, the incumbent LEC that serves this city is required to pay three percent of recurring local service revenue and revenues derived from a limited group of other services, such as local directory assistance, paging, and pay phone services. Of course, even if the gross revenue formula applied to competitive LECs were not discriminatory on its face, it would be illegitimate, because revenue-based fees are by definition not based on any estimate of public costs associated with the use of rights-of-way.

II. THE FCC SHOULD CLARIFY THE LIMITS OF LOCAL AUTHORITY TO REGULATE LOCAL TELECOMMUNICATIONS CARRIERS

To correct the problems faced by MediaOne and other LECs, the Commission should clarify its views concerning the appropriate scope of local authority to regulate local

telecommunications carriers. Competitors have challenged discriminatory and unreasonably burdensome local regulations in the courts, and in some cases these local rules have been struck down. Litigation, however, is often impractical in light of its time and expense, and the number of disputes over local authority to manage rights-of-way continues to grow in the absence of clear pronouncements from the FCC. The Commission should announce that local telecommunications ordinances and administrative rules must meet the three basic standards outlined below in order to allow competition to develop with a minimum of unnecessary delay and distraction.

A. Incumbent LECs Must Be Subject To The Same Burdens As Competitors

The Commission and the courts have recognized that in order to meet the competitive neutrality test of Section 253 of the 1996 Act, a municipal ordinance must treat providers making similar uses of the rights-of-way similarly. In reviewing a municipal ordinance in Troy, Michigan that imposed rights-of-way obligations on new entrants but not on the incumbent LEC, the FCC said:

> One clear message from Section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither neutral nor nondiscriminatory.[7]

Under this reasoning, laws that excuse incumbent LECs from the obligations imposed on competitors violate the principle of competitive neutrality absent a showing that the incumbent's

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[7] Troy, 12 FCC Rcd at ¶¶ 107-09.

use of the rights-of-way is different in some relevant and material way. The Commission should announce that in the event state law precludes the application of local right-of-way regulation to incumbents, competitive LECs must be exempt as well, because blanket exemptions for incumbent LECs cannot, by definition, satisfy the competitive neutrality requirement.

B. Local Regulation Must Be Directly Tied to the Actual Burden Placed by a Carrier on the Local Rights-of-Way

Any requirement or fee imposed as a condition of approval to provide telecommunications services must bear a direct and proportionate relationship to the local interests recognized as legitimate under Section 253 of the Communications Act -- that is, management of local rights-of-way.

Earlier this year, in Bell Atlantic v. Prince George's County, a federal court acknowledged that local governments are authorized to assess fees for the use of rights-of-way but struck down the county's fee system as basically inconsistent with Section 253. "The crucial point," the court explained, "is that any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use of the local rights-of-way, otherwise the fees constitute an unlawful barrier to entry under section 253(a).[8/]

Local ordinances requiring carriers to submit to wide-ranging approval procedures should be considered unlawful, and a local government that seeks to impose a fee for the use of rights-of-way should have the burden of showing that the fee is based on a reasonable estimate of the costs it expects to incur in managing such rights-of-way. Fees based on gross revenues or other

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[8/] Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, 1999 U.S. Dist. LEXIS 7978 at *35 (D. Md. 1999) ("Bell Atlantic").

measures unrelated to the actual burden imposed by a carrier's use of rights-of-way should be conclusively presumed to violate Section 253.

C. Duplicative Regulation of Cable-Based CLECs Such as MediaOne Should Be Prohibited

Cable operators, as well as other entities, that have paid franchise fees or other charges for the use of public rights-of-way should not be compelled to pay additional amounts as a condition of using existing facilities to provide telecommunications services. The FCC should expressly state that where a franchised cable operator does not plan to construct new facilities, it cannot be subjected to new fees simply because it plans to fulfill the promise of the 1996 Act by becoming a competitive LEC.

In virtually every instance where the issue has been squarely presented, federal courts have concluded that Section 253 preempts municipal regulations that impose different requirements for the use of rights-of-way depending on the types of services to be provided. For example, when the City of Dallas claimed that the principle of competitive neutrality required it to charge additional fees for AT&T's use of rights-of-way when the company began offering new local telephone services via existing facilities, a federal court had little trouble rejecting the city's contention. The court found that because AT&T's new services would not create any added burden on the Dallas rights-of-way, Dallas could not subject it to new fees.[9/] Likewise, another federal court ruled that AT&T could not be compelled to pay the City of Austin's rights-

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[9/] See AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d 582 (N.D. Tex. 1998).

of-way fees when providing service over another entity's facilities. AT&T's use of existing facilities, the court noted, placed no added burden on Austin's rights-of-way.[10/]

Where MediaOne plans to provide telecommunications services, MediaOne's cable television infrastructure already in place will be adapted to offer voice and data services. The practice of charging an additional fee when a cable operator wants to offer telecommunications services over existing cable television facilities cannot be justified by the need of municipalities to recover the costs of managing public rights-of-way. Cable operators already have paid franchise fees and other charges to reimburse local governments for these costs. The Commission should require local governments to demonstrate that they will incur additional costs in managing local rights-of-way before allowing them to collect additional fees from a cable franchisee that wants to provide new services over its existing network.

CONCLUSION

For these reasons, MediaOne urges the FCC to clarify the limits imposed by federal law on the power of state and local government to manage the public rights-of-way and to impose fees for their use. At a minimum, the Commission should announce that (1) discriminatory treatment of competitive LECs is unlawful, (2) regulations must be directly related to the legitimate interest of local governments in managing public rights-of-way, and (3) local governments are not entitled to impose additional regulations on cable operators who previously

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[10/] See AT&T Communications of the Southwest, Inc. v. Austin, 975 F. Supp. 928 (W.D. Tex. 1997) ("Austin I") (granting motion for preliminary injunction); AT&T Communications of the Southwest, Inc. v. Austin, 1998 U.S. Dist. LEXIS 11508 (W.D. Tex. 1998) ("Austin II") (granting permanent injunction).

have paid for the use of rights-of-way and seek to use existing facilities for telecommunications without showing that the new services will raise the cost of managing such rights-of-way.

Respectfully submitted,

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by Casey Anderson
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October 12, 1999

CERTIFICATE OF SERVICE

I, Jette Ward, hereby certify that on this 12th day of October, 1999, I caused copies of the foregoing "COMMENTS OF MEDIAONE ON NOTICE OF INQUIRY," to be served by hand delivery on the following:

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