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

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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 CTSI, INC.

Mark DeFalco
Director, Regulatory Affairs
CTSI, Inc.
300-A Laird Street
Wilkes-Barre, PA 18712
(570) 208-3291

L. Elise Dieterich
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 945-6983

Counsel for CTSI, Inc.

October 12, 1999

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SUMMARY

Access to public rights-of-way controlled by local governments is a lynchpin in the development of competitive facilities-based telecommunications service. As the Commission observed in its Notice of Inquiry, "incumbent LECs have long been granted authority to use public rights-of-way for [placement of wireline facilities], and they have extensive facilities in place."[1] In order for CLECs to compete effectively with the ILECs, it is essential that CLECs have the same ability that the ILECs have long enjoyed to access public rights-of-way – on a timely basis and at a reasonable cost – for purposes of installing and maintaining telecommunications facilities.

In many local jurisdictions, however, CLEC access to public rights-of-way is impeded by: 1) protracted approval processes for rights-of-way access or franchise agreements, and 2) the imposition of unreasonable and unlawful terms, conditions, and fees on rights-of-way use. Large disparities in the requirements imposed from one jurisdiction to the next, and the unpredictability of the process for gaining rights-of-way access, hamper business planning and retard competitive entry into new markets. CTSI believes that clarification from the Commission regarding the scope and nature of local government authority under Section 253 of the Telecommunications Act would greatly alleviate these barriers to market entry for competitive telecommunications providers.

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[1] *Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees*, *supra* n.1, ¶ 70.

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COMMENTS OF CTSI, INC.

CTSI, Inc. ("CTSI"), by its undersigned counsel, is pleased to have this opportunity to respond to the Commission's Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees.[2] CTSI is a competitive local exchange carrier (CLEC) currently serving both

[2] *Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees*, FCC 99-141 (rel. July 7, 1999), issued in *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, as supplemented by *Order Extending Pleading Cycle* (rel. August 6, 1999).

business and residential customers in local markets in Pennsylvania and New York.[3] Access to public rights-of-way controlled by local governments is a lynchpin in the development of competitive facilities-based telecommunications service. As the Commission observed in its Notice of Inquiry, "incumbent LECs have long been granted authority to use public rights-of-way for [placement of wireline facilities], and they have extensive facilities in place."[4] In order for CLECs to compete effectively with the ILECs, it is essential that CLECs have the same ability that the ILECs have long enjoyed to access public rights-of-way – on a timely basis and at a reasonable cost – for purposes of installing and maintaining telecommunications facilities.

In many local jurisdictions, however, CLEC access to public rights-of-way is impeded by: 1) protracted approval processes for rights-of-way access or franchise agreements, and 2) the imposition of unreasonable and unlawful terms, conditions, and fees on rights-of-way use. Large disparities in the requirements imposed from one jurisdiction to the next, and the unpredictability of the process for gaining rights-of-way access, hamper business planning and retard competitive entry into new markets. CTSI believes that clarification from the Commission regarding the scope and nature of local government authority under Section 253 of the Telecommunications

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[3] CTSI's expansion plans forecast entry into numerous additional local markets within the next 24 months. Unlike many CLECs, CTSI targets residential as well as business customers, thus providing service that is truly competitive with the incumbent provider.

[4] *Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees*, *supra* n.1, ¶ 70.

Act would greatly alleviate these barriers to market entry for competitive telecommunications providers.

I. The Ability to Achieve Timely Access to Local Rights-of-Way at a Reasonable Cost Is Key to Enabling Competitive Market Entry.

The Commission has recognized that construction of new, facilities-based infrastructure by competitive providers is essential to the growth and development of competitive telecommunications services.[5] While this is true, the fact is that from a business perspective, construction of new facilities requires an enormous investment of capital. Installation of the fiber optic cable and electronics necessary to build out a state-of-the-art competitive telecommunications network in even a small to mid-sized market requires an investment of $10,000,000 or more. Even where leased facilities or unbundled network elements are used to complete the network initially, the investment to enter a new geographic market can easily top $5,000,000. Thus, the decision by a CLEC to enter a new market represents both a huge investment and, concurrently, a substantial business and financial risk.

The decision by a CLEC (and its investors) to take those risks depends, in part, on the time it predicts will be involved in obtaining rights-of-way access, and the fees it will pay to

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[5] The Commission stated in the Notice of Inquiry, correctly in CTSI's view, that: "Full and fair competition in the provision of local telecommunications service requires that competing providers have comparable access to the means of transporting signals. For competitive carriers using wireline technology, this may involve the ability to utilize public rights-of-way in a manner, on a scale, and under terms and conditions similar to those applicable to the incumbent LEC's use of public rights-of-way." *Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees*, *supra* n.1, ¶ 71.

place facilities in the rights-of-way. In CTSI's experience, however, the time and costs involved are extremely variable, because the nature and scope of the requirements imposed by local governments on rights-of-way access varies dramatically from place to place. In some jurisdictions, pole attachments may require no special permissions, and underground construction may require only ordinary street cut permits. In others, the local government requires negotiation of an individualized franchise agreement, which then may be subject to notice, comment, and public hearings, and must be legislatively enacted as a local ordinance by the City or County Council. Consequently, in the current climate, a CLEC considering entry into a given market can predict neither the cost of rights-of-way access nor the length of time that will be required to obtain the necessary permissions from the multitude of jurisdictions (urban, suburban, county, and state) through which its network will pass.[6] Business planning is thus hampered, construction may be curtailed where permission to access the rights-of-way cannot be obtained on a timely basis, and the development of competition in the market is retarded or delayed.

The deployment of competitive facilities depends, in large measure, on ensuring that every local jurisdiction manages is public rights-of-way on a competitively neutral and nondiscriminatory basis, within the bounds proscribed by Section 253. As the Commission

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[6] As an example of the number of jurisdictions with which a CLEC must negotiate to gain access to a single market, CTSI has been in discussions since April of this year with 9 municipalities in mid-state New York in an effort to obtain rights-of-way access for a single planned local network.

notes, public rights-of-way often offer the only viable route for new telecommunications networks. A single network in a metropolitan area, however, can require access to the public rights-of-way of a dozen jurisdictions, including towns, cities, counties, local park or transportation authority property, and state lands. The actions of a single local government can, therefore, impact the deployment of a network serving an entire region.

II. Section 253 Was Intended by Congress to Eliminate Unwarranted Local Barriers to Competitive Market Entry.

Local government authority to manage public rights-of-way used by telecommunications providers is defined – and limited – by Section 253 of the Communications Act of 1934, enacted by the Telecommunications Act of 1996.[7] The House and Senate Conference Report on the Telecommunications Act of 1996 states simply that this section, adopted from the Senate bill, "is intended to remove all barriers to entry in the provision of telecommunications services."[8] Consistent with this expression of Congressional intent, the Commission has read Section 253 to prohibit local government authorities from imposing a third tier of regulation on

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[7] 47 U.S.C. § 253 (1999).

[8] *Joint Explanatory Statement of the Committee of Conference*, January 31, 1996.

telecommunications providers,[9] from treating incumbent and competitive providers disparately,[10] and from charging fees for rights-of-way use that are not "fair and reasonable" and assessed on a competitively neutral and nondiscriminatory basis.[11] The Commission has expressed concern that administrative delay in granting rights-of-way access may constitute an unlawful barrier to entry.[12] And, the Commission has stated unequivocally:

> We make clear . . . the Commission's serious concerns about the potential adverse effect on the development of local exchange competition caused by unreasonable delay by local governments in processing franchise applications and other permits. . . . [W]e also note that regulatory delays may threaten the viability of financing arrangements for new entry or transactions for the purchase of existing facilities. Such results would seriously undermine the development of local competition, and run counter to Congress' procompetitive goals in the 1996 Act. More specifically, in certain circumstances a failure by a local government to process a

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[9] *See In the Matter of Classic Telephone, Inc., Petition for Emergency Relief, Sanctions and Investigation*, CCB Pol. 96-10, Memorandum Opinion and Order, FCC 97-355, 12 FCC Rcd. 15,619 at ¶ 34 (rel. Sept. 24, 1997) (hereinafter "Classic Telephone"); *In the Matter of TCI Cablevision of Oakland County, Inc.*, CSR-4790, *Memorandum Opinion and Order*, Commission 97-331, 12 Commission Rcd. 21,396 at ¶¶ 103-05 (rel. Sept. 19, 1997) (hereinafter "*City of Troy*").

[10] *See New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCB Pol 96-11, *Memorandum Opinion and Order*, FCC 96-470 11 FCC Rcd. 19713 at ¶ 18 (rel. Dec. 10, 1996) (hereinafter "*New England Public Communications*"); *City of Troy* at ¶ 107 (noting that a municipality's discrimination in favor of ILECs with respect to right-of-way access is "especially troubling" and rejecting arguments that incumbents somehow occupy a favored position).

[11] *See City of Troy* at ¶ 108.

[12] *See Classic Telephone* at ¶ 1. *See also,* City of Troy at ¶ 76 ("Unexplained administrative failure to provide permit applicants with responses within a reasonable time may lead Commission to construe the circumstances most favorable to the aggrieved party by delay.").

> franchise application in due course may "have the effect of prohibiting" the ability of the applicant to provide telecommunications service, in contravention of section 253.[13]

Moreover, the Commission has promised that, in accordance with Congress' intent expressed in section 253, the "national competition policy for the telecommunications industry . . . [can]not be frustrated by the isolated actions of individual municipal authorities."[14] Nonetheless, competition does continue to be frustrated by the undue delay and unreasonable demands imposed by some municipalities, and local governments and telecommunications providers continue to disagree on the scope of the local government authority preserved by Section 253(c).

In several cases, disagreement between local decision makers and competitive telecommunications providers regarding the scope of local government authority has precipitated litigation, prompting the federal courts to weigh in on the proper interpretation of Section 253. In these decisions, certain themes have emerged. For example, the courts have repeatedly concluded that "the authority of a State or local government to manage the public rights-of-way" preserved by Section 253(c) does not permit municipalities to impose upon telecommunications providers requirements unrelated to the providers' use of those rights-of-way.[15] Similarly, the

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[13] *Classic Telephone* at ¶ 28.

[14] *In the Matter of the Public Utility of Texas*, CCB Pol 96-13, *Memorandum Opinion and Order*, FCC 97-346, 12 FCC Rcd. 3460 at ¶ 3 (rel. Oct. 1, 1997) (preempting Texas statute that, for example, imposes build-out requirements on certain classes of carriers, because they "restrict the means of facilities through which a party is permitted to provide service in violation of section 253").

[15] *See AT & T Communications of the Southwest, Inc. v. City of Dallas*, Civ. No. 3:98-CV-0003-R, slip opinion at 9 (N.D. Tex. May 17, 1999); *Bellsouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1309 (S.D. Fla. 1999).

courts have concluded that "use" of the public rights-of-way for purposes of triggering a local jurisdiction's right to compensation under Section 253(c) is limited to physical occupation of the rights-of-way, as occurs when facilities are installed, and does not encompass a provider's transmission of data through facilities owned by another.[16] A majority of courts have also concluded that the "fair and reasonable" compensation for use of the rights-of-way permitted by Section 253(c) means compensation for the burdens placed on municipalities in managing their rights-of-way, and does not embrace the charging of "rent" or the imposition of fees that are, in effect, general revenue raising measures.[17]

III. In CTSI's Experience, Local Rights-of-Way Access Policies Pose Significant Barriers to Market Entry.

Despite these legal pronouncements, it is CTSI's experience that many local jurisdictions are continuing to hold up providers' construction efforts and to impose upon telecommunications providers requirements that go well beyond the bounds of local government authority under Section 253.

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[16] *See AT & T Communications of the Southwest, Inc. v. City of Austin*, 40 F. Supp. 2d 852, 855 (W.D. Tex. 1998); *Bell Atlantic - Maryland, Inc. v. Prince George's County*, 1999 WL 343646 (May 24, 1999).

[17] *AT & T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998); *AT & T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997); *Bell Atlantic - Maryland v. Prince George's County*, 1999 WL 343646 (May 24, 1999).

A. Local Governments Often Unduly Delay Competitive Market Entry.

As cited above, the Commission has expressed its concern about the potential adverse effect on the development of local exchange competition caused by unreasonable delay by local governments in processing franchise applications and other permits. This concern is well founded. CTSI's construction of competitive telecommunications facilities has frequently been stymied by local government officials who refuse to answer requests for information regarding the requirements to access the public rights-of-way, or are extremely slow in processing an access request.

Typically, the provider must first negotiate with city staff an agreement that staff is willing to recommend for legislative approval. If the city has hired a consultant, staff will typically forward any draft agreement to the consultant for its recommendations. The consultant, in an effort to demonstrate "value added" to the city, can be expected to propose additional compensation or other terms generous to the city but onerous to the provider. Finally, once staff has signed off on a form of agreement, the legislative approval process commences. This frequently entails the introduction of a proposed ordinance, referral to a Council committee for review and consideration, further negotiation with relevant Council members to insert additional terms favorable to the municipality, first and second readings, sometimes a public hearing process, and finally, Council enactment. The provider may then be required to sign the ordinance to indicate its acceptance, a procedure apparently designed to bind the provider

contractually to terms that may exceed the legislative authority of the jurisdiction or that may otherwise be subject to preemption under Section 253(d) of the Telecommunications Act.

In one recent example, CTSI contacted 9 local jurisdictions in a single metropolitan area to inquire into their rights-of-way access policies, so that CTSI could determine the time and cost involved for business planning purposes.[18] One jurisdiction failed to respond in any way, even after repeated verbal and written requests.[19] Four jurisdictions, after several months of attempts by CTSI to obtain definitive information and, in one case, education by CTSI's attorneys as to the scope of local government authority, eventually indicated that no franchise or rights-of-way use agreement would be required. Another three jurisdictions indicated that they were still in the process of deciding what to require of telecommunications providers and, thus, could not define the time or cost that would be involved. Two of these jurisdictions requested that CTSI prepare

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[18] Because CTSI is still in negotiation with some of these jurisdictions, it has chosen not to identify the municipalities involved. Indeed, because competitive providers expect to remain in and do business with the communities in which they construct facilities for years to come, the importance of maintaining a cordial working relationship with the local government authorities often makes resort to the Commission or the courts to enforce the provider's rights under Section 253 an unrealistic and unacceptable option.

[19] This kind of "stonewalling" by local governments, which appears to be occurring more frequently in smaller municipalities that are only now beginning to receive requests by competitive providers for access to their rights-of-way, is especially troubling. In these instances, the provider often does not know until the time comes to obtain street cut or other construction permits whether the municipality will elect to engage the provider in lengthy franchise negotiations. At that point, the cost to the provider, which may have construction crews on standby and customers waiting for service, is enormous. When, at the eleventh hour, a municipality bars a provider from accessing the rights-of-way pending negotiation of a franchise, the provider has little choice but to acquiesce to the municipality's demands, however unreasonable, or to bypass the jurisdiction. In either event, the development of competition in the local market is obviously harmed.

and submit a proposed rights-of-way use agreement for the local government's consideration. Only one jurisdiction was able to clearly identify its requirements and, even then, multiple points required individual negotiation. Altogether, three jurisdictions required negotiation and approval of a formal rights-of-way use or franchise agreement, subject to legislative review and approval. All of these jurisdictions requested compensation from CTSI in excess of the municipality's rights-of-way management costs. Although CTSI began the process of obtaining rights-of-way access six months in advance of the time it intended to commence construction, not a single rights-of-way access agreement had been finalized as of the date construction was to have begun. Despite the fact that, in this market, CTSI elected to lease rather than build its own fiber backbone, multiple jurisdictions engaged CTSI in months of negotiation and delay before the company could access the public rights-of-way to make the minimal connections necessary for CTSI to begin providing service.

In another local market, where CTSI did eventually obtain the necessary permissions to enter the public rights-of-way, the process also took many months and resulted in an agreement extracting from CTSI thousands of dollars in compensation. This is so notwithstanding that CTSI's construction was nearly all aerial, not underground, and accomplished by attaching to existing utility poles pursuant to existing agreements CTSI has with the pole owners and notwithstanding that many customer connections to the network were initially achieved using unbundled network elements from the ILEC. Moreover, because the jurisdiction had no established procedures in place, CTSI was required to negotiate on an *ad hoc* basis a separate

rights-of-way use agreement (with additional fees) for each phase of CTSI's network construction.

Increasingly, and especially in smaller jurisdictions, CTSI is encountering local governments that have become aware of their right to impose compensation and other requirements on telecommunications providers using the public rights-of-way, but have not yet developed policies and procedures for doing so. In some instances, these jurisdictions do not want to permit any construction of facilities in the rights-of-way until such time as final policies have been enacted. In others, the process is delayed because the provider must negotiate all terms of its rights-of-way use from scratch, and because local decision makers are uncertain as to how they should proceed.

B. Local Governments Often Condition Rights-of-Way Access on Unreasonable and Unlawful Demands.

In those jurisdictions with policies and procedures in place, there remain a startling number of local ordinances governing the use of public rights-of-way by telecommunications providers that have terms similar or identical to those struck down in recent federal cases. For example, many jurisdictions continue to seek in-kind contributions of fiber or other facilities, impose fees well in excess of the local government's rights-of-way management costs, and purport to regulate not just rights-of-way use but also the provision of local telecommunications service. Despite the fact that both the Commission and the courts have indicated that such requirements exceed local government authority under the Act, several of the federal cases are on appeal, the federal decisions are not binding outside the district or circuit in which they were

decided, and the Commission has issued no rules or other definitive guidance. Competitive telecommunications providers, because of their imperative need to access the rights-of-way, have little negotiating power to avoid such terms, and are often confronted with the argument that, because other providers have previously acquiesced to unlawful terms, the principles of competitive neutrality and nondiscrimination require newcomers to do likewise.

C. Local Governments Vary Widely in Their Approach to Rights-of-Way Management, Thus Creating Huge Uncertainty for New Market Entrants.

Some jurisdictions, recognizing the benefits of vigorous competition, are quite willing to limit their regulation of competitive providers consistent with the strictures of Section 253. Other jurisdictions, however, apparently perceiving a revenue raising opportunity, respond that the existing cases construing Section 253 are not binding upon them or are unclear, and that absent binding and definitive guidance from the courts or the Commission, they will continue to construe their authority pursuant to Section 253(c) as a blanket exception to the prohibition in Section 253(a) on barriers to competitive market entry. This situation exists perhaps because municipalities recognize that competitive providers' need to access the public rights-of-way to install their facilities is so great, and the alternatives so few, that providers have little choice but to tolerate protracted processes and to agree to even blatantly unlawful demands. Whatever the reason, however, the fact remains that facilities-based competitive telecommunications providers are frequently confronted with unexpected costs and delays in the deployment of new networks as a consequence of uncertain and inconsistent local rights-of-way management policies and procedures.

IV. Commission Guidance Clearly Defining the Bounds of Local Government Authority to Regulate Rights-of-Way Access Will Facilitate the Development of Local Competition.

CTSI recognizes the right and duty of local government authorities to manage the public rights-of-way and to obtain fair and reasonable compensation for their use. At the same time, Congress has provided a mandate in Section 253 of the Telecommunications Act prohibiting local governments from erecting barriers to market entry by competitive telecommunications providers. As Congress recognized, there is a tension between the pro-competitive purposes of the Act, and the need for local management of, and compensation for, rights-of-way use. Currently, there is an imbalance in the process in favor of local compensation and control, which telecommunications providers have little leverage to correct. Consequently, local government regulation of CLECs in the guise of rights-of-way management continues to burden competition, despite Section 253(a)'s clear prohibition.

The Commission should provide guidance as to the limits of local government authority under Section 253(c) of the Act, such that a proper and pro-competitive balance may be achieved. Existing pronouncements by the Commission, together with the decisions of a majority of federal courts that have considered Section 253, provide a framework within which meaningful parameters for rights-of-way management could readily be defined.

CONCLUSION

Absent guidance from the Commission clearly establishing the proper scope of local government authority to manage use of public rights-of-way by telecommunications providers, the national competition policy for the telecommunications industry will fail to be fully realized, and consumers will be unable to reap the full benefits of the robust and rapid deployment of competitive telecommunications facilities promised by the Telecommunication Act in 1996. CTSI therefore urges the Commission to exercise its authority to provide prompt and definitive guidance that balances local government authority with the pro-competitive mandate of Section 253.

Respectfully submitted,

L. Elise Dieterich, Esq.
Swidler Berlin Shereff Friedman LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Counsel for CTSI, Inc.

October 12, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 12th day of October, 1999, to the following:

Magalie Roman Salas, Secretary (Orig. + 6)
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

International Transcription Services, Inc.
445 Twelfth Street, S.W.
Room CY-B402
Washington, D.C. 20554

Joyce A. Gustavson