

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 12 1999

FEDERAL COMMUNICATIONS COMMISSION  
BY THE SECRETARY

In the Matter of )  
)  
Promotion of Competitive Networks )  
in Local Telecommunications Markets )  
)  
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 )

WT Docket No. 99-217

CC Docket No. 96-98

COMMENTS OF AT&T CORP.

Howard J. Symons  
Michelle Mundt  
Ghita Harris-Newton  
Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004  
(202) 434-7300

Of Counsel

Mark C. Rosenblum  
Steve Garavito  
Room 324511  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920  
(908) 221-8984

Douglas I. Brandon  
AT&T Wireless Services, Inc.  
1150 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 223-9222

Douglas Garrett  
AT&T Broadband and Internet Services  
9197 S. Peoria Street  
Englewood, CO 80112  
(720) 875-5500

October 12, 1999

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION AND SUMMARY .....	1
DISCUSSION .....	4
I. THE PROPER ROLE OF CITIES .....	5
A. Section 253 Limits Localities to Management of Public Rights-of-Way .....	5
B. Cities Are Engaging in Substantive Telecommunications Regulation Under the Guise of Rights-Of-Way Management .....	8
1. Interconnection. ....	9
2. Financial, Technical, and Legal Qualifications. ....	9
3. Technical Standards. ....	11
4. Customer Service. ....	11
5. Universal Service. ....	11
6. Compliance With Federal and State Law. ....	12
7. Waiver of Legal Rights. ....	12
8. Municipal Facilities. ....	13
9. Exclusive Agreements. ....	13
C. Section 332 Prohibits Local Rate and Entry Regulation of CMRS Providers .....	14
D. Title VI Limits Local Authority over Telecommunications Services Offered by Cable Operators .....	16
E. The Commission Should Adopt A National Policy Regarding the Scope of Permissible Local Rights-Of-Way Ordinances .....	17
1. Scope of Rights-of-Way Management. ....	18
2. Prohibitions on Requirements Unrelated to Rights-of-Way Management. ....	19
II. FAIR AND REASONABLE COMPENSATION .....	20
A. Cities Are Permitted to Collect Fair and Reasonable Compensation for Use of the Public Rights-of-Way .....	20
B. Many Cities Have Imposed Excessive Fees for Rights-Of-Way Use That Are Not "Fair and Reasonable" and Bear Little Relationship to the Burdens Imposed on Rights-Of-Way by Providers of Telecommunications .....	23
III. LOCAL LAWS FAVOR INCUMBENT LECS .....	25
A. Section 253 Requires Localities to Exercise Their Authority on a Competitively Neutral and Non-Discriminatory Basis .....	25

B.	Cities Are Not Exercising Their Authority in a Competitively Neutral and Non-Discriminatory Manner .....	28
IV.	STATE AND LOCAL TAXES ARE EXCESSIVE AND OFTEN APPLIED IN A DISCRIMINATORY MANNER.....	30
A.	Extraordinary Compliance Burdens Imposed On Telecommunications Services .....	31
B.	Property Tax.....	36
C.	Lack Of Notice.....	40
D.	Lack Of Clarity Of Definition.....	40
E.	Tax Preference To Manufacturers.....	42
F.	FCC Guidance Can Ameliorate the Disproportionate Tax Burden on Carriers.....	44
	CONCLUSION.....	46

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

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 AT&T CORP.**

AT&T Corp. ("AT&T"), by its attorneys, respectfully submits these comments in response to the Commission's Notice of Inquiry on access to public rights-of-way, franchise fees, and state and local taxation.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

The Commission has asked for comment on telecommunications carriers' experiences regarding access to public rights-of-way, franchise fees, and state and local taxation in order to evaluate the effect of these issues on the development of facilities-based competition and to

determine whether further Commission action is appropriate.<sup>2/</sup> AT&T's experience demonstrates that the proliferation of impermissible local telecommunications ordinances and unfair and unreasonable franchise fees and taxes is creating a substantial barrier to the entry of new communications services and obstructing the ability of new entrants to compete.

The Telecommunications Act of 1996 divides regulatory responsibilities among federal, state, and local governments. Within this framework, local governments are limited to their traditional role of overseeing the use of public rights-of-way. Unfortunately, an increasing number of municipalities have adopted ordinances that subject providers of telecommunications services to a third layer of regulation in addition to that imposed by the Commission and state public utility commissions. While many of these proposals are characterized as rights-of-way management, they address matters such as interconnection and universal service that far exceed the cities' legitimate authority. Such ordinances impose substantial impediments to competition and usurp the Commission's and the states' traditional regulatory authority over telecommunications.

Cities also are imposing excessive fees for rights-of-way use that are not "fair and reasonable," as the 1996 Act requires, and bear little, if any, relationship to the burdens imposed on rights-of-way by providers of telecommunications services. For example, municipalities are imposing fees in order to raise revenues, despite lack of lawful authority to do so.

Even where cities engage in permissible rights-of-way management and collection of fees, Section 253(c) mandates that cities do so on a "competitively neutral and

---

<sup>1/</sup> In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 99-141 (rel. July 7, 1999) ("Notice").

<sup>2/</sup> Notice at ¶¶ 72, 79, 84.

nondiscriminatory” basis. This language prohibits the differential treatment of incumbents and new entrants with respect to rights-of-way fees or other requirements, which can exacerbate the advantages incumbent LECs already enjoy. In order to address such inequities, the Commission should promulgate “opt in” rules that provide competitive LECs with the option of using the public rights-of-way under the same terms and conditions as the incumbent LEC.

The Commission, the States, and the courts all have examined these issues and found that a number of cities have overstepped the bounds of their lawful authority. While the law is clear, cities persist in adopting ordinances that exceed their limited authority to manage the public rights-of-way and collect compensation for such use. Indeed, two cities stated in their comments in this very proceeding that attempts to limit their ability to adopt such ordinances are simply “wrong.”<sup>3/</sup>

AT&T therefore urges the Commission to adopt a national policy defining the scope of local authority that is consistent with the Communications Act and builds upon the Commission’s precedents and those of the courts. The policy should describe permissible activities, such as regulation of the time and place of excavations, and should prohibit impermissible actions, including any requirement that a carrier waive its rights under federal or state law. Such a policy statement would provide guidance to all cities, and alleviate the need for litigation on a city-by-city or legislation on a state-by-state basis.

Finally, disproportionately high state and local tax burdens faced by telecommunications companies are outmoded, discriminatory, and inappropriate in today’s competitive and highly

---

<sup>3/</sup> Comments of the City of White Plains on the Notice of Inquiry on Access to Public Rights-Of-Way and Franchise Fees, WT Docket No. 99-217, Aug. 13, 1999, at i, 14; Comments of the Dept. of Information Technology and Telecommunications of the City of New York on the Notice of Inquiry on Access to Public Rights-Of-Way and Franchise Fees, WT Docket No. 99-217, Aug. 13, 1999, at ii, 7, 15.

dynamic environment. Increased competition and the development and convergence of new and emerging technologies create considerable uncertainty in the application of such taxes and could lead to double taxation and an unlevel playing field. In addition, the administration of the plethora of taxes on telecommunications services, with the varied definitions of taxable services, rates, and exemptions, makes filing accurate tax returns extremely expensive and burdensome. The Commission should develop uniform taxation principles to guide states and localities, and should act as an advocate for sound taxation policies.

### **DISCUSSION**

AT&T agrees with the Commission that, in the long term, the most substantial benefits to consumers will come from facilities-based competition.<sup>4/</sup> Unfortunately, numerous factors are combining to prevent new entrants from providing facilities-based services. One of the main barriers is the proliferation of local telecommunications ordinances.

The Telecommunications Act of 1996 divides regulatory responsibilities among federal, state, and local governments. The linchpin of this framework is Section 253, which prohibits state and local legal barriers to the provision of interstate or intrastate telecommunications services. Within this framework, local governments retain their traditional role of overseeing the use of public rights-of-way, while the states regulate intrastate telecommunications services. To carry out the federal policy of open entry and competition, the Commission is charged with preempting any state- or locally-imposed entry barrier.

Maintaining the appropriate balance of authority among federal, state, and local governments is critical to achieving the goals of the 1996 Act. Unfortunately, an increasing number of municipalities have adopted ordinances that subject providers of telecommunications

---

<sup>4/</sup> Notice at ¶ 4.

services to a third layer of regulation in addition to that imposed by the Commission and state public utility commissions. While many of these proposals are characterized as rights-of-way management, they address matters such as interconnection and universal service that far exceed the cities' legitimate authority over public rights-of-way. They also impose excessive fees for rights-of-way use that are not "fair and reasonable," as the 1996 Act requires, and bear little, if any, relationship to the burdens imposed on rights-of-way by providers of telecommunications services. These fees and ordinances impose substantial impediments to competition and usurp the Commission's and the states' traditional regulatory authority over telecommunications.

## **I. The Proper Role of Cities**

### **A. Section 253 Limits Localities to Management of Public Rights-of-Way**

Congress reserved to states and localities only two limited spheres of authority over telecommunications service providers. First, Section 253(b) provides that the states retain their authority to impose competitively-neutral requirements "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 USC § 253(b). Second, under Section 253(c), state or local governments may "manage the public rights-of-way" and "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way." 47 USC § 253(c).

The Commission's previous orders have made clear the limited role that localities should play in the regulation of telecommunications. In Classic Telephone, the Commission enumerated a narrow range of "permissible management functions under Section 253(c)," including "regulat[ion of] the time or location of excavation," requirements that a company

“place its facilities underground, rather than overhead,” requirements that a company pay its share of “street repair and paving costs,” “enforce[ment of] local zoning regulations,” and requirements that a company “indemnify the city against claims of injury arising from the company’s excavation.”<sup>5/</sup> The Commission also has expressly warned municipalities against imposing “a redundant ‘third tier’ of telecommunications regulation” on telecommunications providers at the local level because of the likelihood that such requirements will impede competition and impose unnecessary delay on new entrants.<sup>6/</sup>

Relying in part on the Commission’s previous rulings regarding the permissible scope of local authority, several federal courts have affirmed that the 1996 Act confines local governments to management of the rights-of-way and the collection of fees for their use. In those cases, the courts invalidated local ordinances that exceeded the limited reservation of authority contemplated by Congress in Section 253(c). For example, in AT&T Communications of the Southwest, Inc. v. City of Dallas, the court stated that “the management of and requirement of fees for use of the City’s rights-of-way,” set forth in Section 253(c), is “the only remaining role of local government.”<sup>7/</sup> The City of Austin’s ordinance likewise was invalidated because the City attempted to regulate in areas that were beyond its legitimate interest in the

---

<sup>5/</sup> Classic Telephone Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082 at ¶ 39 (1996) (“Classic Telephone”), citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Senator Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco).

<sup>6/</sup> TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 USC §§ 541, 544(e) and 253, Memorandum Opinion and Order, 12 FCC Rcd 21396 at ¶ 105 (1997), aff’d, Order on Reconsideration, 13 FCC Rcd 16400 (1998) (“TCI Cablevision of Oakland County”).

<sup>7/</sup> AT&T Communications of the Southwest, Inc. v. City of Dallas, 52 F. Supp. 2d 756, 760 (N.D. Tex. 1998) (“Dallas II”).

public rights-of-way.<sup>8/</sup> In BellSouth Telecom, Inc. v. City of Coral Springs, the court ruled that a city “can only” manage its rights-of-way.<sup>9/</sup> A fourth court invalidated a Prince George’s County ordinance because the county’s burdensome application requirements, approval processes, and fees, when viewed in combination, exceeded its rights-of-way management authority by creating a substantial and unlawful barrier to entry and permitted the county to base its approval on issues that “go well beyond the bounds of legitimate local governmental regulation.”<sup>10/</sup>

In the most recent Dallas decision, the court explained that the City could not require AT&T to comply with “conditions that are unrelated to the use of the City’s right-of-way” such as “disclosure of detailed financial and operational information, dedication of fiber optic strands and conduits to the City for the City’s free and exclusive use, submission to detailed City audits, notification to the City of all communications with the FCC, SEC, and PUC related to services provided in Dallas, and payment of four percent of all AT&T revenue, of whatever source, arising out of AT&T’s operations in Dallas.”<sup>11/</sup> The court found that such conditions were “unrelated to the City’s management, or fair and reasonable compensation for the use, of the City’s rights-of-way” and were therefore “beyond the scope of the City’s authority under § 253(c).”<sup>12/</sup>

---

<sup>8/</sup> See AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F. Supp. 928, 942-43 (W.D. Tex. 1997) (“Austin I”); AT&T Communications of the Southwest, Inc. v. City of Austin, 40 F. Supp. 2d 852, 853 (W.D. Texas, 1998) (“Austin II”).

<sup>9/</sup> 42 F. Supp. 2d 1304, 1309 (S.D. Fla. Jan 25, 1999) (“Coral Springs”).

<sup>10/</sup> Bell Atlantic-Maryland, Inc. v. Prince George’s County, Maryland, 49 F. Supp. 2d 805, 817 (D.Md. 1999) (“Prince George’s County”).

<sup>11/</sup> AT&T Communications of the Southwest, Inc. v. City of Dallas, 52 F. Supp. 2d 763, 769 (N.D. Tex. 1999) (“Dallas III”).

<sup>12/</sup> Id. at 769-770.

Moreover, municipal authority under Section 253(c) is implicated only when a carrier imposes a burden upon the municipality or physically intrudes upon the municipality's right-of-way. In Dallas II, the court addressed Dallas' regulatory authority over a fixed-wireless provider that leased some "wires in conduits" located in the City's rights-of-way from other carriers, but essentially used its own facilities, which were located on private property.<sup>13/</sup> The court noted that "[a]ll of the legislative history surrounding the adoption of section 253(c), and the cases that have since been decided on the issue, have interpreted the provisions to apply to physical occupation of a city's rights-of-way."<sup>14/</sup> Because Teligent did not "use" rights-of-way, the City was prohibited from requiring Teligent to obtain a franchise. Likewise, a city's authority under Section 253(c) does not reach other carriers that do not burden a city's rights-of-way, such as wireless carriers, resellers, carriers providing service through unbundled network elements purchased from other carriers, and carriers that lease conduit or dark fiber or attach their facilities to the poles of others.

B. Cities Are Engaging in Substantive Telecommunications Regulation Under the Guise of Rights-Of-Way Management

While many ordinances are characterized as rights-of-way management, they address matters that far exceed cities' legitimate authority over public rights-of-way, such as interconnection and universal service. The limited rights-of-way management authority recognized by Section 253(c) of the Communications Act is not a charter for cities to engage in the substantive regulation of telecommunications. As the examples described below make clear,

---

<sup>13/</sup> Dallas II at 758.

<sup>14/</sup> Id. at 761.

however, local governments are doing just that. These examples are drawn from actual pending or enacted municipal ordinances.<sup>15/</sup>

### **1. Interconnection.**

The Communications Act bars cities from regulating or mandating interconnection among carriers -- whether to facilitate universal service, to accommodate the possibility of additional facilities-based carriers, or for other purposes. Interconnection is a matter for the Commission and the state commissions. Even a requirement for interconnection with municipal telecommunications facilities should be handled at the state level so that carriers are not faced with multiple, inconsistent policies governing such a requirement. But cities often attempt to regulate interconnection under the guise of rights-of-way management. For example, the City of Dearborn, Michigan's ordinance allows the city to mandate interconnection.<sup>16/</sup>

### **2. Financial, Technical, and Legal Qualifications.**

Cities also are requiring carriers to demonstrate that they are financially, technically and legally qualified to offer telecommunications service. Such requirements are inappropriate whether they duplicate the fitness reviews conducted by state public service commissions or exceed the scope of such reviews. Nonetheless, cities impose such requirements on carriers under the guise of rights-of-way management. For example, a now vacated ordinance adopted by the City of Eugene, Oregon empowered the Eugene City Manager to grant licenses to telecommunications providers and to deny licenses to parties he or she deemed to be unqualified

---

<sup>15/</sup> AT&T has provided specific citations to several local ordinances that are or have been the subject of litigation. While there are other ordinances that AT&T would like to bring to the Commission's attention, AT&T is reluctant to identify the cities by name, especially where it is involved in ongoing negotiations regarding rights-of-way issues.

<sup>16/</sup> TCG Detroit v. City of Dearborn, No. 98-803937 at 17 (Mich. Cir. Ct., Wayne County June 17, 1999).

under criteria developed pursuant to the ordinance.<sup>17/</sup> A license applicant could have been rejected if the City Manager determined that the applicant was not “financially, technically, and legally qualified.”<sup>18/</sup>

A model ordinance adopted by the League of Oregon Cities similarly states that municipalities shall evaluate telecommunications providers’ financial, technical, and legal ability when considering franchise renewal applications.<sup>19/</sup> The City of Coral Springs, Florida, also has attempted to force telecommunications providers to prove “financial, technical, and legal qualifications” to the City’s satisfaction.<sup>20/</sup> A federal district court found that the Coral Springs requirements violate federal and Florida law.<sup>21/</sup>

The court in AT&T Communications of the Southwest, Inc. v. City of Dallas invalidated similar licensing procedures precisely because they exceeded Dallas’ rights-of-way management authority. The court found that while Section 253 and Texas law permitted the city to require a company to obtain a franchise in order to use its rights-of-way, it did not have the authority to “grant or deny that franchise based on its own discretion,” “require a comprehensive application,” or “consider such factors as the company’s technical and organizational qualifications to offer telecommunications services.”<sup>22/</sup> Rather, the grant of a franchise could

---

<sup>17/</sup> Eugene Code § 3.430(b). Under the administrative rules implementing the ordinance, a franchise applicant had to prove, among other things, that it had not violated antitrust laws before it could use the rights-of-way. Eugene Administrative Order No. 44-97-05-F (Aug. 28, 1997) at § 2.3. Eugene did not even attempt to demonstrate a relationship between rights-of-way management and antitrust compliance.

<sup>18/</sup> Eugene Code § 3.430(b).

<sup>19/</sup> League of Oregon Cities Master Telecommunications Infrastructure Ordinance § 39 (Nov. 7, 1998).

<sup>20/</sup> Coral Springs, 42 F. Supp. 2d at 1310. See also Coral Springs Code § 20-21(1).

<sup>21/</sup> Coral Springs at 1310.

<sup>22/</sup> 8 F. Supp. 2d 582, 592-593 (N.D. Tex. 1998) (“Dallas I”).

only be conditioned on a company's agreement to comply with the city's reasonable rights-of-way regulations and to pay reasonable fees for the use of those rights-of-way.<sup>23/</sup>

### **3. Technical Standards.**

Local ordinances also attempt to dictate the technical standards of proposed telecommunications networks or require competitive LECs to build out their networks to municipally determined standards. For example, certain municipalities impermissibly require telecommunications carriers to make "dark fiber" available, regardless of demand, while others include a "most favored nation" provision requiring carriers to upgrade their facilities in the city if they provide better facilities or greater capacity in any other part of the state.

### **4. Customer Service.**

Cities have imposed customer service, record-keeping, and customer complaint resolution requirements on telecommunications carriers. Such requirements are unrelated to the use of the public rights-of-way and encroach on the traditional authority of the state utility commissions.

### **5. Universal Service.**

Cities often impose universal service requirements on carriers, even though the Communications Act bars cities from requiring carriers to contribute to the preservation of universal service, either through the payment of a fee or by dedicating capacity on their networks. For example, the City of Coral Springs, Florida required telecommunications franchisees to comply with the City's universal service requirements.<sup>24/</sup> Section 253(b) reserves

---

<sup>23/</sup> Id.

<sup>24/</sup> Coral Springs Code § 20-21(6).

authority over universal service to the states in accordance with Section 254, as the court found in striking down this portion of the Coral Springs ordinance.<sup>25/</sup>

#### **6. Compliance With Federal and State Law.**

Certain cities have tried to enforce a carrier's compliance with the Communications Act, by requiring demonstrations of compliance with the Communications Act or the Commission's regulations, even though such issues are reserved to the Commission and the courts.

#### **7. Waiver of Legal Rights.**

Cities often impermissibly require a carrier to waive rights under federal or state law -- such as the right to nondiscriminatory treatment -- as a condition of getting a right-of-way permit. Similarly, cities force carriers to waive the right to challenge the cities' authority to impose a franchise fee or require a telecommunications franchise, or the right to use the courts as a forum for disputes with the cities. For example, the City of White Plains, New York has required franchisees to waive their rights to "seek to void or challenge . . . any terms or conditions [contained in the franchise agreement] or the processes or procedures pursuant to which [the] Agreement was entered."<sup>26/</sup>

In other contexts, the Commission has found that a requirement that a licensee waive its right to federal, state, or local regulatory relief "would be per se unreasonable and an act of bad faith in negotiation."<sup>27/</sup> The Commission concluded that it is per se unreasonable in pole attachment negotiations for an ILEC or any other utility to request that a pole attachment

---

<sup>25/</sup> Coral Springs at 1310-11.

<sup>26/</sup> See Revised Telecommunications Franchise Agreement Between the City of White Plains and TC Systems, Inc., ¶ 13.6.

<sup>27/</sup> Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-251, Report and Order, FCC 98-20, 63 FR 12013 at ¶ 21 (rel. Feb. 6, 1998) ("Pole Attachment Order").

agreement include a clause waiving the attacher's statutory rights to file a complaint with the Commission.<sup>28/</sup> Just as the utility holds all the cards in pole attachment negotiations, the municipality holds all the cards in public rights-of-way negotiations. And there are no statutory procedural protections for competitive carriers seeking to negotiate access, such as time limits or arbitration rights. The Commission should find that a request by localities for a carrier to waive its rights would be per se unreasonable.

#### **8. Municipal Facilities.**

Some cities impermissibly grant themselves the right to install or maintain facilities free of charge on the poles or in the conduits of other telecommunications carriers. Construction of a municipal telecommunications network under such advantageous conditions will undermine competition from private sector carriers who will not obtain these benefits for free. Such requirements overstep a city's authority to manage and also may interfere with the integrity of the carrier's network.

#### **9. Exclusive Agreements.**

Certain cities and state departments of transportation are attempting to limit access to the public rights-of-way by signing exclusive agreements with certain companies or contractors. As the Commission is well aware, the State of Minnesota has requested an expedited declaratory ruling from the Commission that its proposal to grant ICS/UCN LLC and Stone & Webster Engineering Corporation preferential access to State freeway rights-of-way to install fiber optic facilities, subject to certain obligations to make such capacity available to all telecommunications service providers, is consistent with section 253.<sup>29/</sup> As Minnesota explained in its petition, many

---

<sup>28/</sup> Id.

<sup>29/</sup> In the Matter of the State of Minnesota's Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b), and (c) of the Telecommunications Act of 1996 on an Agreement

other States are also considering installing privately sponsored telecommunications projects in their highway rights-of-way,<sup>30/</sup> and in AT&T's experience, cities are attempting to enter into similar agreements. Because of the importance of rights-of-way to the development of telecommunications services and networks, the Commission should ensure that cities and states do not restrict access in a manner that establishes monopoly control over telecommunications facilities or otherwise imposes barriers to the competitive availability of interstate or intrastate telecommunications services.

C. Section 332 Prohibits Local Rate and Entry Regulation of CMRS Providers

In addition to the limits imposed by Section 253, Section 332 of the Communications Act further limits rate and entry regulation of wireless companies by cities and states. The Budget Act of 1993 established a comprehensive federal framework for the regulation of mobile services.<sup>31/</sup> Section 332(c)(3) of the Communications Act, added by the Budget Act of 1993, provides that "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 USC § 332(c)(3). The legislative history of this provision affirms that Congress intended to preempt all entry regulation by state and local governments in order "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications

---

to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, CC Docket No. 98-1, filed December 30, 1997.

<sup>30/</sup> Id. at 5.

<sup>31/</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 6002 (b) - (d), 107 Stat. 312, 393-397 ("Budget Act of 1993").

infrastructure.”<sup>32/</sup> The Commission’s exclusive jurisdiction over CMRS has been affirmed on numerous occasions.<sup>33/</sup>

The Commission has held that state and local statutes requiring wireless carriers to certify prior to construction and operation that they will serve the public convenience and necessity are prohibited CMRS entry regulation.<sup>34/</sup> This is consistent with the Commission’s long-standing position that statutes or regulations obligating wireless carriers to make showings of character, technical, or financial fitness also are impermissible entry regulations.<sup>35/</sup>

A now vacated Eugene, Oregon ordinance provides an example of how cities are overstepping their proper roles under Section 332. The ordinance required operators of communications facilities, including wireless carriers, to register with the city, obtain a license, and obtain a permit before providing service through facilities maintained or operated upon any public right-of-way.<sup>36/</sup> The ordinance also instructed the city manager to evaluate “whether the

---

<sup>32/</sup> H.R. Rep. No. 103-111, at 260 (1993).

<sup>33/</sup> See, e.g., Iowa Utilities Board v. FCC, 120 F.3d 753, 800 n.21 (8th Cir. 1997), cert granted sub nom AT&T v. Iowa Utilities Board, 118 S.Ct. 879 (1998); Connecticut Dept. of Public Util. Control v. FCC, 78 F. 3d 842 (2d Cir. 1996) (recognizing FCC’s exclusive jurisdiction over CMRS).

<sup>34/</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15763 ¶ 1026 (1996) (“Local Competition Order”).

<sup>35/</sup> See Preemption of State Entry Regulation in the Public Land Mobile Service, Report and Order, 59 RR 2d 1518, 1519 (1986), remanded on other grounds, National Association of Regulatory Commissioners v. FCC, slip op. No. 86-1205 (D.C. Cir. March 30, 1987), affirmed on remand, Preemption of State Entry Regulation in the Public Land Mobile Service, Memorandum Opinion and Order, 2 FCC Rcd 6434 (1987). In this order, which was issued before the enactment of current section 332(c), the FCC preempted various State and local regulations that had the effect of “prohibiting or impeding the entry of” public land mobile services.

<sup>36/</sup> Eugene Code §§ 3.405, 3.410, 7.290(1).

applicant is financially, technically, and legally qualified” to complete a facility.<sup>37/</sup> In effect, the city required CMRS providers to obtain local regulatory approval before they could provide service in Eugene, despite the fact that the Commission already requires CMRS providers to demonstrate that they are financially, technically and otherwise qualified to provide service before it authorizes them to construct and operate CMRS systems.<sup>38/</sup> Because the ordinance required CMRS providers to obtain additional, special licenses and approvals from the city in order to provide CMRS in the city, it impermissibly regulated the entry of CMRS in violation of Section 332(c)(3)(A).<sup>39/</sup>

D. Title VI Limits Local Authority over Telecommunications Services Offered by Cable Operators

Local governments may not use their franchising authority under Title VI of the Communications Act to regulate or restrict the telecommunications services offered by cable operators. Section 621(b)(3)(B) of the Communications Act bars cities from “prohibiting, limiting, restricting or conditioning the provision of telecommunications services by a cable television operator.” In response to a complaint by TCI, the Commission specifically ruled that a city may not impose a condition on a cable construction permit in order to force the cable operator to comply with a municipal telecommunications ordinance.<sup>40/</sup>

To the extent that cable operators offer telecommunications services, such services are subject to regulation under Title II. But if such telecommunications services are provided over

---

<sup>37/</sup> Eugene Code § 3.430(b).

<sup>38/</sup> 47 USC § 308(b).

<sup>39/</sup> See AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene, Oregon, Case No. 16-98-12672 (Or. Cir. Ct. March 1, 1999) (granting AT&T’s Motion for Summary Judgment).

<sup>40/</sup> TCI Cablevision of Oakland County at ¶ 75.

existing cable facilities, and they impose no additional burden on the public right-of-way, then, as set forth above, there would be no municipal authority under Section 253(c).

In addition, Section 624(e) of the Communications Act states that no franchising authority may “prohibit, condition, or restrict a cable system’s use of any type of subscriber equipment or any transmission technology.” The Commission has held that Section 624(e) prohibits localities from regulating “in the area[] of transmission technology,”<sup>41/</sup> and that it “eliminates the authority of franchising authorities to interfere with a cable operator’s choice of the . . . transmission technology to be used in its cable system.”<sup>42/</sup>

E. The Commission Should Adopt A National Policy Regarding the Scope of Permissible Local Rights-Of-Way Ordinances

The Commission should adopt a clearly articulated national policy regarding the scope of permissible local rights-of-way management activity. Recognizing that municipal telecommunications regulation can discourage competition and prevent the development of seamless, statewide networks,<sup>43/</sup> numerous states have taken steps to limit local governments to permissible rights-of-way management activities and prevent municipal telecommunications ordinances from usurping the states’ traditional regulatory authority over telecommunications.<sup>44/</sup>

---

<sup>41/</sup> See Implementation of Cable Act Reform, 14 FCC Rcd 5296, 5350-56 (1999).

<sup>42/</sup> TCI Cablevision of Oakland County, 12 FCC Rcd at 21399.

<sup>43/</sup> See, e.g., Letter from Hon. Susan Clark, Chairman, Florida Public Service Commission, to the Hon. Reed Hundt, CSR-4790 (Dec. 11, 1996) (asking the FCC to give appropriate consideration to the authority over telecommunications granted to State commissions pursuant to State law, noting that Florida law gives the FPSC exclusive jurisdiction over telecommunications services); Letter from California Public Utilities Commission to City Attorney, Cupertino, CA (Dec. 9, 1996) (local telecommunications ordinance addressing matters other than disruptions to public rights-of-way exceeds the city’s lawful authority and amounts to the “impermissible municipal regulation of telecommunication services, a function expressly reserved to [the CPUC] and the Federal government”).

<sup>44/</sup> See, e.g., Colo. Rev. Stat. §§ 38-5.5-101-108; Fla. Stat. ch. 364.0361, 337.401; Mich. Comp. Laws §§ 484.2251-2253; Minn. Stat. §§ 237.162-163; Ohio Rev. Code §§ 4939.02-03; see also

While these state efforts can be helpful, a state-by-state approach to reining in impermissible municipal actions is time consuming and leads to a patchwork of differing regulatory regimes. Cities also have challenged these statutes as unconstitutional, tying the states up in litigation and limiting their effectiveness.<sup>45/</sup> A national solution for this problem is clearly needed.

A national policy that clearly establishes the scope and substance of permissible local rights-of-way authority is vital to ensuring the future growth of facilities-based competition. Ideally, carriers and local governments would resolve rights-of-way disputes amicably, but this has proved difficult in practice. Efforts to find “common ground” between carriers and cities should not lead to a muddling of what, for the foregoing reasons, needs to be a clear articulation of principles. Instead, the Commission should adopt principles that are consistent with the requirements of the Communications Act and adhere to the Commission’s own and judicial precedent on matters of local authority over rights-of-way.

#### **1. Scope of Rights-of-Way Management.**

The Commission should restate its prior holdings that permissible management functions under Section 253(c) are limited to:

- Regulation of time or place of excavations;
- Non-discriminatory requirements that a company place its facilities underground rather than overhead;

---

“Legislatures Continue Examination of Municipal ROW Policies,” Cable Monitor, Feb. 2, 1998, 2-3.

<sup>45/</sup> See, e.g., Complaint for Declaratory and Injunctive Relief, City of Dublin and City of Upper Arlington v. Ohio (Ct. Common Pleas, Franklin County filed Aug. 25, 1999); TCG Detroit v. City of Dearborn, No. 98-803937 (Mich. Cir. Ct., Wayne County March 8, 1999). Even though the State of Florida adopted a statewide rights-of-way statute, and a federal court struck down the City of Coral Spring’s ordinance, several Florida cities continue to insist that carriers comply with impermissible requirements before they may provide service.

- Requirements that a company pay its share of street repair and paving costs;
- Enforcement of local zoning regulations;
- Reasonable requirements that a company indemnify the city against claims of injury arising from an excavation;
- Coordination of construction schedules;
- Establishment of standards and procedures for constructing lines across private property;
- Determination of reasonable insurance and indemnity requirements;
- Establishment of local building codes; and
- Local safety requirements that serve a stated safety purpose.

## **2. Prohibitions on Requirements Unrelated to Rights-of-Way Management.**

The national policy enacted by the Commission should specifically prohibit cities from regulating or mandating interconnection among carriers, regulating rates, requiring carriers to complete elaborate application forms or certify their financial, technical and legal qualifications, dictating technical standards, imposing customer service requirements, requiring universal service contributions, enforcing a carrier's compliance with the Communications Act, requiring carriers to waive their rights under federal or state laws, or granting the municipality the right to install or maintain its facilities free of charge on the facilities of a carrier.

The policy promulgated by the Commission should also prohibit cities from imposing conditions requiring prior municipal review of the sale of a carrier; requiring carriers to cut or move carrier facilities at the sole discretion of the city unless the city establishes valid public health and safety reasons; requiring carriers to furnish confidential carrier records such as financials, customer lists, business plans, and customer agreements; requiring a competitor to build underground where the incumbent would be permitted to use poles; prohibiting use of

existing aerial facilities by overlashing; requiring a separate permit to provide additional services; restricting resale; permitting a city to take possession of facilities at no cost after the rights-of-way agreement expires or is terminated; or failing to give carriers a cure period in the event of a default under the rights-of-way agreement.

## II. Fair and Reasonable Compensation

### A. Cities Are Permitted to Collect Fair and Reasonable Compensation for Use of the Public Rights-of-Way

Section 253(c) also permits cities to require “fair and reasonable compensation” from telecommunications carriers for use of the public rights-of-way. A “fair and reasonable” fee is one based on the city’s costs or the burden imposed by the provider on the right-of-way. If fee requirements are not limited to compensation necessary to defray local right-of-way management costs, they violate federal standards for “reasonableness.” Thus, municipalities may not impose fees for the improper purpose of raising revenues, nor may the amount of rights-of-way fees be based on the perceived “value” of the public rights-of-way to the provider of telecommunications services.

Under established federal standards for “reasonableness,” usage fees must be cost-based. In Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972), the Supreme Court developed the principle that a usage levy is “reasonable” if it is “based on some fair approximation of use of the [State’s] facilities,” and is not “excessive in relation to the benefits conferred.” This test has been applied repeatedly since Evansville to determine if a municipal usage fee is reasonable.<sup>46/</sup>

---

<sup>46/</sup> See Northwest Airlines, Inc. v. County of Kent, 114 S.Ct. 855, 864 (1994) (adopting Evansville test); see also American Trucking Ass’n v. Scheiner, 483 U.S. 266, 290 (1987) (invalidating taxes because “they do not even purport to approximate fairly the cost or value of the use of Pennsylvania’s roads”).

In adopting Section 253, Congress supplied no other standard for judging the reasonableness of a municipal rights-of-way fee. Moreover, the language of Section 253(c) strongly suggests that there must be a nexus between the charges for the use of public rights-of-way and the costs imposed on the municipality by such use. First, there is the principal meaning of the word “compensation”: “Indemnification; payment of damages; making amends; making whole.”<sup>47/</sup> This definition of compensation is consistent with the view that franchise fees must be cost-based. In addition, Section 253(c) only allows municipalities to recover compensation “for use” of public rights-of-way. The use of the words “for use” indicates that some linkage between the amount of compensation and the extent of use is required.<sup>48/</sup>

In Dallas I, the court concluded that any fee not based on use of the rights-of-way is an economic barrier to entry under section 253(a).<sup>49/</sup> Similarly, in Bell Atlantic-Maryland, Inc. v. Prince George’s County, Maryland, the court found 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 economic barrier to entry under section 253(a).”<sup>50/</sup> The Prince George’s County court explained that cities could not set their franchise fees above a level that is “reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way.” Id. The fee challenged by Bell Atlantic, which was based on three

---

<sup>47/</sup> Black’s Law Dictionary (6th ed. 1990).

<sup>48/</sup> This reading finds support in the legislative history. See, e.g., 141 Cong. Rec. S8170 (daily ed. June 12, 1995) (statement of Senator Feinstein explaining that Section 253(c) was intended to permit localities to require carriers to “pay[] the full costs they impose on State and local governments for the use of public rights-of-way,” including “an appropriate share of increased street repair and paving costs that result”).

<sup>49/</sup> Dallas I, 8 F. Supp. 2d 582 (N.D. Tex. 1998).

<sup>50/</sup> 49 F. Supp. 2d 805, 817 (D. Md. 1999).

percent of very broadly defined “gross revenues,” was impermissible because it did not appear to be “directly related to Bell Atlantic’s actual physical use of the County’s public rights-of-way.” Id. at 31. The court also concluded that any fee must be apportioned based on actual use, not the carrier’s overall level of profitability.<sup>51/</sup>

Because a “fair and reasonable” fee must be linked to the burden imposed on the rights-of-way by the carrier, if a carrier’s provision of telecommunications services does not impose any additional burdens on a city’s rights-of-way, and the city is compensated already for the rights-of-way costs generated by the carrier, then the city is not entitled to additional compensation.<sup>52/</sup> For example, a cable operator compensates a city for the costs of using the public rights-of-way through the franchise fee paid by the cable operator.<sup>53/</sup> If the cable operator provides telecommunications services over its existing cable television network, it may not impose any additional burdens on a city’s rights-of-way. The city would not be entitled to additional compensation under its rights-of-way authority for the operator’s provision of the additional telecommunications services, if such services impose no additional burdens on the rights-of-way.<sup>54/</sup>

---

<sup>51/</sup> Id. at 32. The Bell Atlantic court respectfully disagreed with the contrary conclusion reached by another federal court in Michigan. See TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998); appeal docketed, (6th Cir Aug. 28, 1998) (finding four percent fee to be fair and reasonable based on facts of case). In a subsequent Michigan state court case, TCG Detroit v. City of Dearborn, No. 98-803937-CK (Mich. Cir. Ct., Wayne County June 17, 1999), the city’s four percent franchise fee was invalidated under state law because the city did not examine the costs it incurred from maintaining the rights of way when it set the fee.

<sup>52/</sup> See Austin I at 941-43; Austin II at 5-7.

<sup>53/</sup> Moreover, the Federal Cable Act limits the compensation that cities and localities may collect from cable operators to five percent of the cable operator’s gross annual revenues from the provision of cable services. 47 U.S.C. § 542(b).

<sup>54/</sup> See Austin I, at 941-43.

Non-cost-based fees levied on telecommunications providers by municipalities are often simply unauthorized taxes disguised as fees, and are clearly designed to be revenue-raising measures. In most cases, the authority to institute a tax is vested with the state legislature or state constitution, and municipalities may not use their police powers over public right-of-way to generate revenue.<sup>55/</sup> A user fee that is calculated not just to recover a cost imposed on the municipality or its residents, but to generate revenue, is by definition a tax.<sup>56/</sup> Such attempts to impose illegal taxes can be precluded by limiting municipalities to cost-based fees.

B. Many Cities Have Imposed Excessive Fees for Rights-Of-Way Use That Are Not “Fair and Reasonable” and Bear Little Relationship to the Burdens Imposed on Rights-Of-Way by Providers of Telecommunications

Rather than imposing reasonable, cost-based fees, many cities see the entry of competitive carriers as an opportunity to generate additional revenues, far beyond the city’s costs or the burdens imposed by the provider on the rights-of-way. Municipalities appear to believe that they may use their control over the right-of-way and their “police powers” to extract revenues above costs from telecommunications providers that use the public rights-of-way. Indeed, many municipalities have used “municipal leagues” or hired consultants to advise them precisely how to use this monopoly power to generate local revenues. These consultants often pursue their own interests in generating consulting and legal revenues by convincing

---

<sup>55/</sup> See, e.g., Or. Rev. Stat. § 307.215 (“On or after January 1, 1982, no county, city, district, or other political subdivision in this state shall levy or impose a tax on amounts paid for exchange access or other telephone services.”).

<sup>56/</sup> See, e.g., Diginet, Inc. v. Western Union ATS, Inc., 985 F.2d 1388, 1399 (7th Cir. 1992) (“If the fee imposed is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality’s regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.”). See also Hager v. City of West Peoria, 84 F.3d 865, 870 (7<sup>th</sup> Cir. 1996).

municipalities that there is substantial revenue to be obtained from competitive LECs, even if such aspirations violate state and federal law.<sup>57/</sup>

For example, even though a percentage of revenues fee is not based upon a city's costs, the City of Eugene, Oregon required all telecommunications providers to pay an annual registration fee equal to two percent of the provider's gross revenue derived from telecommunications activity within the city.<sup>58/</sup> The ordinance also imposed an annual license fee of seven percent of gross revenue on telecommunications providers that construct, place or locate any telecommunications facilities on or over public property rights of way.<sup>59/</sup> In addition to an annual occupancy fee intended to recover right-of-way costs, the City of Coral Springs, Florida imposed a franchise fee on telecommunications providers of ten percent of gross revenue in order to "reflect the value of the right-of-way."<sup>60/</sup> This fee structure was invalidated.<sup>61/</sup>

At least one city has required competitive LECs to provide facilities and services to the city for the city's use free of charge. Others have included "most favored nation" clauses in their franchise agreements that limit the amount the carrier can charge the city for services. For example, the City of Dearborn, Michigan requires that a competitive LEC provide services to the city at the lowest rate it charges any commercial customer for comparable service.<sup>62/</sup> A model

---

<sup>57/</sup> Under one model ordinance, a city could deny a franchise based on the compensation to be paid to the city.

<sup>58/</sup> See Eugene Code §§ 3.405, 3.415.

<sup>59/</sup> See Eugene Code §§ 3.410, 3.415.

<sup>60/</sup> Coral Springs Code §§ 20-3(1), 20-21(5).

<sup>61/</sup> Coral Springs at 7.

<sup>62/</sup> TCG Detroit v. City of Dearborn, No. 98-803937 at 15 (Mich. Cir. Ct., Wayne County June 17, 1999) (finding this requirement to be unrelated to the management of the public rights-of-way).

ordinance adopted by the League of Oregon Cities contains similar requirements.<sup>63/</sup> Such requirements effectively are additional fees that have no relationship to the burdens imposed on the rights-of-way by the carrier.

Cities are not limiting themselves to impermissible franchise fees, however. Certain cities also impose unreasonable application fees, up to as much as \$10,000 for a single application, that bear no relationship to the costs of processing the application. Other cities have required excessive bonds. The City of Eugene required all carriers wishing to provide service in Eugene to pay a registration fee, regardless of whether they planned to make use of the City's rights-of-way.<sup>64/</sup> There can be little doubt that such duplicative fees constitute a barrier to entry. Competitors like AT&T simply are not permitted to "enter" a particular market unless and until they pay thousands of dollars in fees, and they may also have to agree to pay an additional percentage of gross revenues fee on top.

In its national policy, the Commission should make clear that a fair and reasonable fee is one based on the burdens imposed on rights-of-way by a provider of telecommunications services or the costs a city incurs as a direct result of a carrier's occupation of the rights-of-way. The Commission should prohibit cities from collecting discriminatory or non-cost-based rights-of-way fees, including but not limited to in-kind services and the construction of municipal facilities.

### **III. Local Laws Favor Incumbent LECs**

#### **A. Section 253 Requires Localities to Exercise Their Authority on a Competitively Neutral and Non-Discriminatory Basis**

---

<sup>63/</sup> League of Oregon Cities Master Telecommunications Infrastructure Ordinance § 50 (Nov. 7, 1998).

<sup>64/</sup> Eugene Code §§ 3.405, 3.415.