### B. Local Governments May Collect Rights-of-Way Usage Fees Solely Related to the Actual Incremental Costs Incurred in Managing the Public Rights-of-Way for Telecommunications Services

Section 253(c) authorizes municipalities to recover "fair and reasonable compensation" from telecommunications providers for their use of public rights-of-way. [27] "Compensation" is restitution for a service; it is not rent.[28] The New Shorter Oxford English Dictionary defines the term "compensation" as "the counterbalancing of a deficiency" or as "money given to compensate loss or injury, or for requisitioned property."[29] Indeed, the term "compensate" stems from the latin *compensare*, which means to weigh one against another, and is now used in the sense of to "counterbalance" or to "make amends for."[30] Had Congress actually wanted use Section 253(c) to authorize municipalities across the nation to begin assessing fees on telecommunications providers unrelated to the actual physical burden imposed on the public rights-of-way, it could have done so by granting municipalities unlimited authority to "tax,"

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[27] 47 U.S.C. § 253(c).

[28] *Prince George's County*, 1999 WL 343646 at *10 ("local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of maintaining and improving their public rights-of-way"); *Dallas I,* 8 F. Supp.2d at 593 (finding that any municipal fee under Section 253(c) unrelated to an actual physical use of the public rights-of-way constitutes an unlawful barrier to entry under Section 253(a)). *But see Omnipoint Communications, Inc. v. Port Authority*, __ F. Supp.2d __, 1999 U.S. Dist. LEXIS 10534, *19 (S.D.N.Y. 1999) (dicta) (denying preliminary injunction against port authority regulation and questioning whether "compensation" limited municipalities to recouping costs expended on managing the public rights-of-way); *TCG Detroit v. City of Dearborn*, 16 F. Supp.2d 785, 789 (E.D. Mich. 1998) ("there is nothing inappropriate with the city charging compensation, or 'rent,' for the City[-]owned property that the Plaintiff Seeks to appropriate for its private use").

[29] 1 Lesley Brown, ed., *New Shorter Oxford English Dictionary* 459 (1993).

[30] *Id.* at 458.

"levy," "charge," "assess," "prescribe fees," or "collect revenue" for use of rights-of-way. Congress did not choose any of these words, but instead chose the word "compensation" and then restricted this authority even further by stipulating that the compensation must be "fair and reasonable."[31] As a matter of basic statutory interpretation, therefore, the Commission should affirm the principle that municipal "compensation" for rights-of-way use by a telecommunications service provider cannot exceed the amount directly spent on the actual, incremental costs of managing that use.

Indeed, this analysis has already been embraced by several federal courts. For example, in *Prince George's County,* the court stated that, under Section 253(c), the "crucial point . . . 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 economic barrier to entry under section 253(a)."[32] For the same reason, the court continued, "local governments may 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. Franchise fees thus may not serve as a general revenue-raising measures." [33] These limitations on the authority of local governments to

[31] 47 U.S.C. § 253(c).

[32] *Prince George's County*, 1999 WL 343646 at *10.

[33] *Id.*

impose franchise fees on telecommunications companies, in the court's view, "are necessary to promote the full purposes and objectives of Congress" in adopting the 1996 Act.[34]

The court then concluded that the county had erred by setting its telecommunications franchise fee at the county's estimation of the "value" of the "privilege" of using public rights-of-way to provide local phone service. Instead, the court emphasized, the "proper benchmark is the cost to the County of maintaining and improving the public rights-of-way" that the telephone company actually uses.[35] Furthermore, the court held, to be "fair and reasonable," these costs "must be apportioned [to the carrier] based on its degree of use, not its overall level of profitability."[36] Because the court found nothing in the record to indicate that the county had based its "right-of-way charge" upon these factors, the court found the charge to violate Section 253.

The *Dallas I* court similarly concluded that the Section 253 prevents municipalities from "impos[ing] fees on a telecommunications provider except as compensation for use of the City's rights-of-way."[37] In *Dallas I*, the city of Dallas had passed an ordinance that required telecommunications providers to pay four percent of the gross revenue that resulted from activities conducted in the city. The city defined "gross revenue" broadly as twenty-five potential sources of revenue, including long-distance services and resale of unbundled network

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[34] *Id.* at *11.

[35] *Id.*

[36] *Id.*

[37] *Dallas I*, 8 F. Supp.2d at 593.

elements ("UNEs").[38] AT&T, which was offering services in Dallas as a non-facilities-based carrier, objected to the fee and sought a preliminary injunction in federal court. The court found that AT&T had already paid for its use of city rights-of-way through the ILEC, from which it leased UNEs.[39] Although the court did not speculate on what a reasonable fee for use of the public rights-of-way would be, it concluded that "any fee that is not based on AT&T's use of City rights-of-way violates § 253(a) of the [Telecommunications Act] as an economic barrier to entry."[40]

The Commission so far has not directly addressed limitations on fees that a municipality may assess for the use of public rights-of-way by telecommunications service providers. It can readily do so now by adopting the federal district courts' analysis. The Commission accordingly should establish that Section 253 only permits state and local governments to collect rights-of-way usage fees that are related to the actual incremental costs incurred in managing the public rights-of-way for the provision of telecommunications services. As the courts have observed, such a limitation upon local authority to collect compensation for use of the public rights-of-way is necessary to promote the development of facilities-based competition envisioned by Congress when it adopted the 1996 Act. A similar conclusion has been reached by states such as Colorado

[38] *Id.*

[39] *Id.*

[40] *Id.*

and Florida, which have imposed parallel restrictions on the collection of rights-of-way fees by municipal authorities.[41]

### C. Local Governments May Not Impose More Burdensome Requirements on New Entrants Using Public Rights-of-Way Than on Incumbent Telecommunications Service Providers

In addition to endorsing the reasoning of *Dallas I, Prince George's County* and related cases, the Commission should expressly declare that local governments may not impose more burdensome obligations on new entrants using public rights-of-way than they do on incumbent telecommunications service providers. In the *Troy* decision, the Commission described the "discriminatory application of telecommunications regulation, whether at the state or local level," as "an especially troubling issue."[42] While noting that arguments are often advanced by localities that incumbent providers occupy a favored position because of the way that telephone service and its regulation have evolved over the last century, the Commission added that:

> [o]ne 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*

[41] *See, e.g.,* COLO. REV. STAT. § 38-5.5-107 (West 1999) (limiting "all fees and charges levied by a political subdivision" to "the costs directly incurred by the political subdivision in providing services relating to the granting or administration of permits," restricting local authority to require in-kind services from telecommunications companies and expressly requiring that any local taxes, fees or charges "be competitively neutral among telecommunications providers"); FLA. STAT. ANN. § 337.401 (West 1998) (limiting authority of municipality to levy taxes or fees on telecommunications companies). Adoption of such a federal policy under section 253(c), of course, would not deprive local franchising authorities of any lawful taxing authority they have been delegated by the states to impose taxes on *all* service providers, regardless of their use of the public rights-of-way.

[42] *Troy Preemption Decision,* 11 FCC Rcd at 21442.

> *only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.*[43]

The Commission also addressed the reserved authority of the states under section 253(b) to prescribe competitively neutral regulations that preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. It urged the states to use restraint, in deciding which telecommunications regulatory powers to delegate to localities and which to retain, to avoid redundant layers of regulation and to "not view new entrants as being more susceptible to regulation than incumbents. These efforts would go a long way in hastening the arrival of local telephone competition of many varieties and particularly of facilities-based local competition."[44]

Cox urges the Commission to reaffirm these principles as important components of its overriding policy to foster facilities-based telecommunications competition. Specifically, the Commission should make it clear that federal regulatory policy under section 253 requires that all state and local regulation "managing" public rights-of-way use by telecommunications service providers be competitively neutral and nondiscriminatory. If a locality is disabled under state law from requiring the incumbent to obtain a broad-based local telecommunications franchise, it should be held disabled under section 253(c) from requiring one of the new entrant. Conversely, narrowly tailored franchises, permits or licenses to use the public rights-of-way that do not regulate the terms and conditions of local telephone service or the relations among

[43] *Id.* at 21443 (emphasis added).

carriers should continue to apply on a non-discriminatory basis to all local telephone service providers.[45]

The Commission also should expressly disavow the interpretation of section 253(c) articulated by the federal district court in the *Dearborn* decision. In that case, the city required the new entrant, TCG Detroit ("TCG"), to obtain a telecommunications franchise before providing service in the community. TCG filed suit to preempt the application of Dearborn's telecommunications ordinance, claiming that the requirement was not competitively neutral and nondiscriminatory because it did not apply to the incumbent, Ameritech. Dearborn then demanded that Ameritech enter into a franchise agreement, which Ameritech refused to do on the grounds that it had been granted a state-wide franchise to operate due to its incorporation under an act of the state legislature in 1883. The court refused to address TCG's claim of discrimination insofar as it pertained to the failure of the city to apply its franchise requirement to Ameritech, because the city had initiated that process. However, it ruled that local governments must be able to distinguish between different telecommunications providers, taking

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[44] *Id.*

[45] To the extent that localities choose to manage the rights-of-way, Section 253(c) requires LFAs to do so "in a way that avoids creating unnecessary competitive inequities among telecommunications providers." *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, __ F.3d __,1999 U.S. App. LEXIS 20806, *51 (1st Cir. 1999) ("*Boston Cablevision*"). In *Boston Cablevision*, for example, the court suggested that a policy "under which only certain applicants were required to file public petitions, while others were allowed to keep their petitions private" would not be competitively neutral. *Id.* at *52-53. By extension, a state or local policy that required only new entrants to obtain local telecommunications franchises or to pay certain fees would violate the competitive neutrality mandate of section 253(c).

into consideration the different burdens individual carriers place on the rights-of-way. According to the court, "it is enough that the City imposes (or plans to impose) comparable burdens" to avoid violating section 253(c).[46]

This interpretation of section 253(c) is squarely at odds with congressional intent to promote the prompt deployment of facilities-based telecommunications competition. A city's *plan* to impose comparable burdens on the incumbent at some undetermined future time does not result in neutral and non-discriminatory treatment of new entrants that must labor under those burdens in the present. Moreover, these burdens fall particularly hard on an entrant attempting to build infrastructure because, without the municipality's permission, that entrant cannot install its facilities and begin to compete. For an incumbent that already is providing service, a city's request that it obtain a local telecommunications franchise "after-the-fact" will have little practical or competitive impact. The incumbent has the time to contest such a request, at its leisure. For the new entrant, time-to-market can make the difference between successful competitive entry and no entry at all.

### D. Local Governments May Not Require Cable Operators to Obtain Redundant Authorizations for the Provision of Additional Services Over Cable System Facilities Lawfully in the Public Rights-of-Way Pursuant to Cable Franchises

As the foregoing demonstrates, local authority to impose telecommunications franchises is limited in scope to regulation of the physical occupation of the rights-of-way for the installation and maintenance of telecommunications facilities. Accordingly, a franchised cable

[46] *Dearborn,* 16 F. Supp.2d at 792.

operator should not be required to obtain additional local authorization to provide telecommunications service because the locality's legitimate interests in managing the use of the public rights-of-way already are fully protected under its cable franchising authority. Unfortunately, Cox's experiences in attempting to provide local telecommunications services over its upgraded cable facilities reveal that local imposition of redundant authorizations continues to plague multi-service providers such as cable operators. Such providers would benefit greatly from a clear statement of Commission policy that limits local franchising authorities to "one bite at the apple." As discussed below, the Commission may again establish this policy by following the reasoning set forth in the *Austin, Dallas, Coral Gables,* and *Prince George's County* cases.

1. Local Authorities May Only Franchise Entities That Physically "Use" the Public Rights-of- Way

Federal court decisions have made abundantly clear that, if signals do not physically impact the public rights-of-way, no "use" of the rights-of-way occurs. According to these decisions, the mere passage of additional electrons through a previously authorized wire that lies in a public right-of-way does not "use" the right-of-way and therefore does not vest the local authority with jurisdiction over a service provider that is simply using the wire.[47] Similarly, the

[47] *Austin*, 975 F. Supp. at 943 (describing the city's "assertion that a non-facilities-based provider is 'using'" the public rights-of-way as "wholly unpersuasive"); *Dallas I*, 8 F. Supp.2d at 593 ("Many of Dallas's franchise requirements – such as the submission of a wide range of financial information on the company, the maintenance of detailed records subject to the City's approval, the provision of ubiquitous services, and the dedication of ducts and fiber optic strands to the City's exclusive use – . . . are totally unrelated to use of the city's rights-of-way, and are thus beyond the scope of the City's authority"); *Dallas III*, 1999 WL 324668 at *8 (holding that a

*continued...*

mere passage of light waves and particles through the air does not affect the public rights-of-way and therefore does not grant municipalities regulatory authority over wireless telecommunications providers.[48]

In *Dallas III*, for example, the court granted summary judgment against a municipality that had sought to claim "rights-of-way" jurisdiction over a non-facilities-based CLEC and a wireless provider because neither provider ever physically intruded into the public rights-of-way. For the non-facilities based CLEC, the court held that leasing network elements from an entity that used the public rights-of-way did not mean that the lessee also "used" the rights-of-way. The court held that "[a]lthough a CLEC's purchase of access to a UNE from an ILEC gives the CLEC exclusive control over the functionality over the UNE, the ILEC still retains ownership of the UNE and will continue to repair, maintain, and operate it even when the CLEC purchases exclusive access." The *Dallas III* court also rejected the city's similar argument that a wireless telecommunications provider's transmissions across and through the city somehow resulted in a "use" of the public rights-of-way. The court held that, because the term "use" means a "physical

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CLEC does not "use" the public right-of-way because, "[a]lthough a CLEC's purchase of access to a UNE from an ILEC gives the CLEC exclusive control over the functionality over the UNE, the ILEC still retains ownership of the UNE and will continue to repair, maintain, and operate it even when the CLEC purchases exclusive access"):

[48] *Dallas II*, 1998 WL 386186 at *5; *Dallas III*, 1999 WL 324668 at *8.

occupation" of the rights-of-way, the very nature of the wireless carrier's telecommunications services prevented the carrier from ever "using" the rights-of-way.[49]

Definitions of "use" that extend beyond physical intrusions into property strain the term beyond all recognition.[50] Indeed, as the court in *AT&T Communications of the Southwest* held, definitions of "use" that do not involve actual physical intrusions simply represent "metaphysical interpretation[s] of the term . . . that def[y] logic and common sense."[51] To retain any meaning, the phrase "use of the public rights-of-way" must be limited to actual physical intrusions into property, not to every beam and particle of light that happens to pass over or through a public right-of-way.

2. Franchised Cable Operators Already Are Authorized to "Use" the Public Rights-of-Way

In the case of franchised cable operators, the physical "use" and occupation of the public rights-of-way is regulated by local franchising authorities consistent with the limitations contained in Title VI of the Communications Act. Cox, for example, has lawfully obtained local cable franchises which permit it to use the public rights-of-way for the construction and maintenance of its cable systems in each of its local service areas. These Title VI franchises

[49] *Dallas III*, 1999 WL 324669, *9.

[50] *See* Joseph R. Nolan & Jacqueline M. Nolan-Haley, et al., *Blacks Law Dictionary* 1541 (West 6th ed. 1990) (defining "use" as "the enjoyment of property which consists of its employment, occupation, exercise or practice"); 2 Lesley Brown, ed., *New Shorter Oxford English Dictionary* 459 (1993) (defining "use" as "the holding of land or other property by one person for the profit or benefit of another").

[51] *Austin*, 975 F. Supp. at 942-43.

authorize Cox to upgrade its cable plant so that it can begin providing more reliable and more advanced cable services. These same upgrades, of course, also enable Cox to begin deploying additional services such as telecommunications and information services over its cable infrastructure.

Providing additional communications services over upgraded cable systems does not place any additional burdens on the public rights-of-way. Nevertheless, some communities have demanded that Cox secure a separate local telecommunications franchise to begin providing telecommunications services. Local officials have demanded such franchises even though Cox's telecommunications affiliate already has obtained the requisite certificate from the relevant state PUC authorizing it to provide telecommunications services throughout the state. To avoid delays, costly litigation and hostile relations at the local level, Cox has not resisted requests by local franchising authorities that Cox's certificated telecommunications affiliate obtain separate permission to use public rights-of-way to provide telecommunications services, as long as the additional franchises are narrowly drawn and competitively neutral. Cox, however, consistently has maintained that an incumbent cable operator is not lawfully obligated to obtain additional authority from local governments before it may provide telecommunications service over its cable system. The reasons supporting this position are simple: (1) local governments already regulate the cable operator's use of public rights-of-way through the cable franchise, and (2) as discussed above, apart from overseeing the physical use of the rights-of-way, federal law restricts local government ability to regulate telecommunications service.

Indeed, amendments to Section 621(b)(3) contained in the 1996 Act prohibit a local government from invoking Title VI to impose any franchising or regulatory requirements on a cable operator's provision of telecommunications service.[52] And, as discussed at length in the previous section, the residual, non-Title VI authority that local governments retain with respect to the regulation of telecommunications services is *restricted* to managing the rights-of-way.[53] "Managing" public rights-of-way does not mean imposing requirements and obligations in return for the use of the public rights-of-way. Nor does it mean regulating the types of service that are provided over such rights-of-way. Rather, the term means overseeing the physical manner in which public rights-of-way are encumbered by the construction, maintenance and continuing use of facilities that provide telecommunications services.[54]

The Commission accordingly should clarify federal policy to ensure that, where the provision of telecommunications service will not place a new or additional burden on the public rights-of-way, local authorities cannot require a cable operator franchised under Title VI of the Communications Act to secure a separate telecommunications franchise.[55] If a cable operator offers competitive telecommunications services over its upgraded cable facilities — either directly or through a state certificated affiliate — the public rights-of-way are no more affected

[52] 47 U.S.C. §§ 541(b)(3)(A)(i-ii), 541(b)(3)(B).

[53] *See* 47 U.S.C. § 253(c).

[54] *See Troy Preemption Decision*, 12 FCC Rcd at 21416.

[55] *Dallas II*, 1998 WL 386186 at *4-5.

than they are when the operator offers advanced cable services over the same plant.[56] The mere passage of additional light waves and electrons through the operator's network does not newly implicate the locality's interest in managing the public rights-of-way to preserve public safety and order. Since that management interest already is fully addressed by the cable operator's Title VI franchise, there are no remaining interests that need to be addressed through a separate telecommunications franchise.

For similar reasons, the Commission also should clarify that local authorities may not restrain or preclude cable operators from making their facilities available to third parties for the provision of telecommunications or other communications services. The use of the cable operator's physical *plant* by affiliated or unaffiliated entities to provide telecommunications service does not constitute a "use" of the public *rights-of-way* that triggers an additional franchise obligation on the part of the cable operator.[57] Therefore, local governments may not use the franchise and related permitting processes to attempt to prevent cable operators from making capacity available to other providers of telecommunications services without the "approval" of the franchising authority.[58]

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[56] *See Prince George's County*, 1999 WL 343646 at *12-13 (carriers that use facilities owned, installed, and maintained by others); *Dallas III*, 1999 WL 324668 at *6-9; *Dallas II*, 1998 WL 386168 at *4-5 (wireless service provider); *Austin*, 975 F. Supp. at 942-43 (carrier that provided service only by means of resale and use of unbundled network elements).

[57] *See Entertainment Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14277, 14306-07 (1998) ("*ECI*"); *Dallas III*, 1999 WL 324668 at *8.

[58] *See, e.g., MCI Telecommunications Corp. v. Bell Atlantic-Va., Inc.* No. 3:97CV629 1998 U.S. Dist. LEXIS 17558, at *20-22 (E.D. Va. July 1, 1998) (finding that "since [dark fiber] is not in

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This limitation on local regulatory authority should apply with equal force to any additional communication service provided over the franchised cable operator's facilities, including high-speed Internet access and related data-communications services. The local interest in managing use of the public rights-of-way for communications purposes is satisfied through a single exercise of state-granted local franchising authority. Neither local governments nor the public interest requires any further local authorization before the provider can offer its services to the public. This is particularly true for services that the Commission has already classified as "enhanced" and/or "information" services, such as Internet access.[59]

### E. Local Governments May Not Unreasonably Delay In Processing Cable Upgrade Permits

The Commission also should take this opportunity to re-affirm its policy that unreasonable delays or failures on the part of local franchising authorities to respond to service providers' construction permit applications, or to timely process those applications, violate

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use, dark fibers do not provide any [telecommunications] service"); *In re AT&T Communications of the Southern States, Inc.*, PSC-97-0064-FOF-TP, 1997 WL 41243 at *12 (Fla. P.S.C. Jan. 17, 1997) (finding that dark fiber is not used in provision of telecommunications service); *In re Idaho Power Co.*, 170 P.U.R. 4th 532 (Idaho P.U.C. 1996) (order finding that leasing of dark fiber is not a telecommunications service); *In re Agreements and Arbitration of Unresolved Issues Arising Under Sec. 252 of the Telecommunications Act of 1996*, 174 P.U.R. 4th 75 (Md. P.S.C. 1996) (finding that dark fiber is not a telecommunications service subject to unbundling); *Petition of AT&T Communications of NY, Inc. for Arbitration of an Interconnection Agreement with NY Telephone Co.*, No. 96-31, 1996 WL 765313, *39 (N.Y. P.S.C. Nov. 29, 1996) (finding that dark fiber is not a telecommunications service subject to unbundling).

[59] *See* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

section 621(b)(3)(B). In the *Troy Preemption Decision*, the Commission found troubling "[a]n unexplained failure to respond to a permit application by the incumbent cable operator within a reasonable time" and declared that such a failure "would lead to the assumption that local franchising authority under Title VI is being used for some other purpose, thereby violating section 621."[60] The Commission reiterated that "[u]nexplained administrative failure to provide permit applicants with responses within a reasonable time may lead the Commission to construe the circumstances most favorable to the party aggrieved by the delay."[61]

Cox urges the Commission to take this opportunity to go further, and send a clear and unambiguous message to local franchising authorities that groundless delay in processing franchised operator requests for permits to upgrade and improve their existing facilities will not be countenanced. The public interest in the speedy deployment of advanced cable and telecommunications facilities demands no less.

As described above in Section II.A., Cox's efforts to install back-up power supplies in the public rights-of-way have met considerable resistance from local franchising authorities. However, a local franchising authority unhappy with a cable operator's choice of power supply technology or architecture or the franchisee's decision to provide telecommunications services should not be permitted to simply refrain from processing the requisite permit applications. At the very least, the franchise authority should be required to respond to permit applicants in a timely manner with an explanation of the reason for the delay or denial of the request. Above

[60] *Troy Preemption*, 12 FCC Rcd at 21428.

all, local franchising authorities should be reminded that, consistent with section 621(b)(3)(B), Title VI processes may not be used to prohibit, limit or restrict a cable operator's ability to provide reliable telecommunications services. In the *Troy Reconsideration Order*, the Commission stated that a City's "rights-of-way management authority vis-à-vis the construction and operation of a cable system must be exercised pursuant to the limitations and restrictions contained in Title VI."[62] The Commission could further aid the deployment of telecommunications services by cable operators by reiterating in this proceeding that Title VI limitations include express restrictions on any action that would impair, or have the effect of impairing, the ability of a cable operator to provide such services.

## IV. THE COMMISSION SHOULD CLARIFY THAT FEDERAL POLICY PROHIBITS ARBITRARY, UNREASONABLE OR DISCRIMINATORY LIMITATIONS ON A CABLE OPERATOR'S ABILITY TO INSTALL POWER SUPPLY TECHNOLOGY

As discussed above, Cox has faced great difficulty convincing some communities not to arbitrarily restrict its installation of power supply units needed to ensure network reliability. To aid Cox and other cable telephony providers in the future, the Commission should clarify that, under Section 253 of the 1996 Act, localities may not impose arbitrary, unreasonable or discriminatory limitations on cable operators' ability to install back-up power supply technology in public rights-of-way.

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[61] *Id.*

[62] *Troy Reconsideration Order,* 13 FCC Rcd at 16401.

The Commission has established a framework for analyzing local telecommunications laws and regulations that appear to conflict with the broad federal preemption of Section 253. As explained in the *Texas Preemption Decision*, the Commission:

> first determine[s] whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d). If, however, the challenged law, regulation or requirement satisfies subsection (b), we may not preempt it under section 253, even if it otherwise would violate subsection (a) considered in isolation. This is consistent with the approach taken in prior Commission orders addressing section 253.[63]

Section 253(a). Section 253(a) proscribes state and local actions which "prohibit or have the effect of prohibiting" entry by "any entity" into "any interstate or intrastate telecommunications services."[64] Because local actions which unreasonably restrict CLECs' use of power supply technology impede their ability to provide competitive telecommunications services, those actions must be preempted under Section 253.

The goal of section 253 is to prevent local telecommunications regulation that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and

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[63] *Texas Preemption Decision,* 13 FCC Rcd at 3480 (citing *Silver Star Telephone Company Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15656 (1997); *Classic*, 11 FCC Rcd at 13096-97, 13101-04; *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19720-25 (1996)).

[64] 47 U.S.C. § 253(a).

balanced legal and regulatory environment."[65] In the *Texas Preemption Decision*, the Commission specifically found that section 253(a) bars state or local requirements that "restrict the means or facilities through which a party is permitted to provide service."[66] In that case, the Commission preempted a "build-out" requirement that the State of Texas had imposed on certain CLECs. The Commission determined that the "build-out" provision violated section 253(a) because it would have had the "effect of prohibiting" carriers from providing service due to the substantial financial investment involved in meeting the requirement.

The restrictions that local governments are placing on Cox's use of power supply technology do not meet the standards articulated by the Commission in the *Texas Preemption Decision.* The power supply cabinets that Cox intends to deploy as part of its system upgrades are designed to ensure system reliability for cable, telephone and Internet-based services. If Cox is not permitted to install the cabinets in the public rights-of-way, its ability to provide reliable telecommunications services, including basic lifeline service, will be severely compromised. Accordingly, arbitrary height, area and placement limitations imposed by local governments on Cox's use of power supply technology effectively constrain its ability to provide telecommunications service, thus violating Section 253(a)'s express prohibition on state and local barriers to entry.

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[65] *Texas Preemption Decision*, 13 FCC Rcd at 3463 (*citing California Payphone Association for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253 of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206 (1997) ("*Huntington Park Decision*") (emphasis added)).

[66] *Texas Preemption Decision*, 13 FCC Rcd at 3496.

Pursuant to the Commission's approach to alleged section 253(a) violations, absent a demonstration that these limitations are a legitimate exercise of state or local authority under subsections 253(b) or 253(c), they would be subject to preemption under section 253(d).

Section 253(b). Unlike section 253(c), which refers to both state and local government authority, section 253(b) refers only to the authority of states. As discussed above, the Commission has interpreted the statutory language as not necessarily precluding states from delegating their telecommunications regulatory authority to local political subdivisions.[67] Yet, even where such a specific delegation to local government may be demonstrated, the issue becomes whether the challenged limitation comes within the public policy goals specified in Section 253(b) — preservation and advancement of universal service, protection of the public safety and welfare, continued quality of telecommunications services, or safeguarding the rights of consumers. Thus, section 253(b) limits the scope of authority reserved to the states both in terms of subject matter covered and in terms of the manner of regulating that subject matter. Regulations imposed pursuant to the reservation of authority under section 253(b) must be competitively neutral, must be consistent with section 254 and must be necessary to achieve the state's articulated objective.

At the outset, it is worth noting that the statutory goals of section 253(b) itself include preserving and advancing universal service, and ensuring the "continued quality of telecommunications services." These are precisely the goals Cox's system upgrades are

[67] *See, e.g., Classic*, 11 FCC Rcd at 13100-01.

designed to promote. Local government actions that would impair Cox's ability to provide reliable, high quality, competitive telecommunications services are wholly inconsistent with these fundamental public interest purposes. Unless permitted to install the upgraded cabinets, Cox will be unable to provide unlimited access to its telecommunications services in the event of a power outage.

Given the detrimental impact on Cox's ability to enter local telecommunications markets, local restrictions on power supply cabinets could avoid preemption only if they were "saved" under either Section 253(b) or (c). The first question is whether the state has expressly delegated its Section 253(b) authority to local governments. Absent such express delegation, local governments are precluded from regulating telecommunications providers in the areas described in Section 253(b). For purposes of this Section 253(b) analysis, Cox assumes that the state has appropriately delegated its authority under that provision to the local government. The next question is whether the relevant local restriction falls within the delegated subject matter. In this regard, the only subject matter covered by Section 253(b) that could arguably be claimed to apply to the placement of power supply facilities in the public rights-of-way would be "the public safety and welfare." Yet, as noted above, it is not sufficient for a local authority to merely invoke the concept of public health and safety when regulating the placement of such facilities consistent with the statutory goal of removing barriers to the deployment of telecommunications infrastructure. To the contrary, the municipality must be able to demonstrate affirmatively both that the proposed facilities pose health or safety dangers and that the local limitations are

necessary to lessen such dangers.[68] In this context, the Commission has interpreted the term "necessary" to mean something more than "useful" and closer to "indispensable."[69]

Notably, Cox is aware of no dangers to the public health and safety that could even arguably be ascribed to the power supply facilities it seeks to install in the public rights-of-way. Cox fully shares any plausible safety concerns that might be posed by such facilities. It would not be in Cox's interest to do anything that potentially harms the public and thereby tarnishes its reputation as a reliable provider of quality communications equipment and service. Indeed, these concerns are the very concerns that led Cox to choose the particular power supply system its seeks to install: safety and reliability, particularly when it comes to providing lifeline telephone service. It therefore seems highly unlikely that local governments will be able to meet their heavy burden under section 253(b) and affirmatively demonstrate both that Cox's proposed power supply cabinets threaten the public safety and welfare and that the proposed local restrictions are "necessary" to protect the public from that threat.

Moreover, even assuming *arguendo* that certain restrictions on Cox's power supply facilities could be considered "necessary" to protect public health and safety under section

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[68] In the *Texas Preemption Decision*, the Commission held that the state's build-out provision was not saved from preemption by Section 253(b) because the state could not show that the requirement was "necessary" to achieve the public purposes listed in that section.

[69] *Texas Preemption Decision*, 13 FCC Rcd at 3503 (*quoting New England Public Communications Counsel Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19725 (1996), *recon. denied*, Memorandum Opinion and Order, 12 FCC Rcd 5215 (1997)). The Commission added that its "goal in interpreting the term 'necessary' in this specific context is to foster the overall pro-competitive, de-regulatory

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253(b), those restrictions still would not be "saved" by section 253(b) unless they were applied in a "competitively neutral" manner.[70] Taller power supply cabinets than those Cox proposes to install already are in use by telephone, power, and traffic control equipment providers in many localities. As the Commission previously stated in *Classic*, the "mandate of competitive neutrality requires the Cities to treat similarly situated entities in the same manner."[71] Accordingly, the Commission should declare that where a local government permits the incumbent telecommunications provider and other potential competitors, such as power companies, to place comparable power supply cabinets in the public rights-of-way, it cannot prohibit or inhibit a cable operator's ability to do the same without violating the operator's right under section 253 to compete in a fair and balanced legal and regulatory environment.[72]

Section 253(c). Public safety is also a subject that arguably falls within the scope of authority reserved to local governments under section 253(c)'s mandate to manage the public rights-of-way. Cox maintains that the foregoing analysis of statutory infirmity under section 253(b) applies with equal force to arbitrary restrictions on power supply facilities enacted under

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*...continued*

framework that Congress sought to establish through the 1996 Act and the directive in section 253 to remove barriers to entry." *Texas Preemption Decision*, 13 FCC Rcd at 3503.

[70] As discussed in the following section, this would also violate section 253(c)'s requirement that local government management of the public rights-of-way be "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c).

[71] *Classic Preemption Decision*, 11 FCC Rcd at 13102.

[72] *See Texas Preemption Decision*, 13 FCC Rcd at 3463; *Huntington Park Decision*, 12 FCC Rcd at 14206.

a local government's rights-of-way management authority. Again, assuming the subject matter falls within section 253(c), any local limitations must be applied consistent with the statutory directive that the local government exercise its rights-of-way management authority in a "competitively neutral and nondiscriminatory manner."[73]

Although Cox acknowledges that local authority to manage the public rights-of-way can implicate public safety concerns, the police power to protect public safety cannot be applied to service providers in an arbitrary or discriminatory fashion.[74] For example, as stated above, it should not be sufficient for a locality to simply declare, without supporting evidence, that a particular type of power supply technology is "unsafe" and flatly prohibit its use, leaving the service provider at an economic and competitive disadvantage *vis-à-vis* its competitors. Rather, the local authority should bear the burden of demonstrating that the units to which it objects present an actual, verifiable safety problem before restricting their use. Moreover, the imposition

[73] *But see Boston Cablevision*, 1999 U.S. App. LEXIS 20806 at *38-*44. In dicta, the *Boston Cablevision* court concluded that the phrase "'on a competitively neutral and nondiscriminatory basis' can only apply to compensation schemes, not [rights-of-way] management decisions" because the noun phrase, "reasonable compensation," "traps" the modifying phrase, "competitively neutral and nondiscriminatory." Accordingly, the court found that, "as a matter of bare syntax," the modifying phrase could only apply to the term "reasonable compensation." *Id.* at *38-*39. The court, however, recognized that "the task of statutory interpretation involves more than the application of syntactic and semantic rules to isolated sentences." *Id.* at *39. Therefore, the *Boston Cablevision* court recognized that "the weight of authority" favors a contextual interpretation that applies the "competitively neutral and nondiscriminatory" provisions to both compensation schemes and rights-of-way management decisions and applied that interpretation in rendering its decision. *Id.* at *41.

[74] 7 Eugene McQuillin, *The Law of Municipal Corporations* § 24.323 (3d ed. 1997) (noting that municipalities may not, "under the guise of police regulation of business and industry, . . . .

*continued...*

of restrictions on Cox's proposed power supply technology that are not also borne by competitors using public rights-of-way in a similar fashion is simply unjustified in a competitive telecommunications environment.

Accordingly, the Commission should establish that, to the extent a local government authority imposes restrictions upon the power supply cabinets of cable operators, but not upon the cabinets of other utility users of the public rights-of-way, such actions are not protected under section 253(c) and are therefore subject to federal preemption under section 253(d). Restrictions placed upon only one class of operator — cable television system operators — that "materially inhibit" or limit the ability of such operators to enter and compete in a "fair and balanced legal and regulatory environment" for the provision of any telecommunications services violate section 253(a) and are not saved section 253(c).[75]

Similarly, although Cox is more than willing to help ensure that the power supply cabinets are not visually offensive, localities cannot prevent new entrants from making critical upgrades to their cable systems on the basis of vague assertions of "aesthetic concerns." Local authority to "manage" public rights-of-way does not include the ability to erect regulatory barriers under the guise of "aesthetic" concerns. Although Section 253(c) permits localities to enforce zoning regulations of general applicability, nothing in Section 253(c) authorizes

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arbitrarily interfere with private businesses or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions on them")

[75] *See Texas Preemption Decision*, 13 FCC Rcd at 3463; *Huntington Park Decision*, 12 FCC Rcd at 14206.

municipalities to impose specific restrictions on the physical appearance of telecommunications facilities that are located in the public rights-of-way.

Cox remains sympathetic to local desires to preserve the character and appearance of their neighborhoods and makes every effort to accommodate community tastes. The Commission, however, should establish a clear federal policy regarding aesthetic concerns that delay or prevent competitive providers from deploying competitive telecommunications facilities.

In its *OTARD Order*, for example, the Commission adopted rules governing the installation, use and maintenance of over-the-air reception devices for TV, MMDS and DBS. To address communities' aesthetic concerns, the Commission began by noting that Congress has authorized the Secretary of the Interior to maintain a National Register of Historic Places composed of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." [76] Rather than initiate a wide-ranging and ultimately unanswerable inquisition into which reception devices are of exceptionally poor taste, the Commission established a limited aesthetic exception if antennas were to be located at registered historic preservation areas. Even with the list of potential aesthetic concerns confined to places that appear on the National Historic Register, however, the Commission authorized

[76] National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470a(a)(1)(A).

only those regulations that communities applied "in a nondiscriminatory way," and in a manner "no more burdensome than is necessary to achieve the objective."[77]

In contrast to the OTARD statute, Section 253 does not specifically authorize localities to take aesthetics into account in managing use of the public rights-of-way. Nonetheless, to the extent a locality's otherwise valid zoning authority would permit regulating on the basis of aesthetics, the Commission may wish to consider establishing clear, objective guidelines against which communities can measure their aesthetic concerns in the context of Section 253. In this way, the Commission would not only help communities protect their heritage, but also prevent perceived offenses from thwarting the public interest in facilities-based telecommunications competition.

## V. CONCLUSION

Despite the Commission's prior pronouncements, some local governments continue to insist upon unreasonable fees and conditions. A service provider that manages to defeat an ordinance in one community often must simply revisit the same issues in another community.

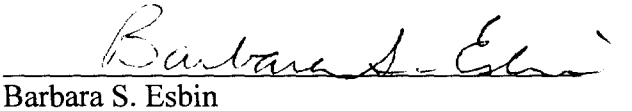
The Commission should issue an unequivocal message that limits state and local regulations, conditions and fees under Section 253 to only those measures necessary to preserve

[77] *Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 (1996) ("*OTARD Order*").

public order and address legitimate safety concerns as a result of actual physical intrusions into the public rights-of-way.

Respectfully submitted,

**COX COMMUNICATIONS, INC.**



Barbara S. Esbin
Trey Hanbury
Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

October 12, 1999