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FEDERAL COMMUNICATIONS COMMISSION
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October 6, 1999

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EX PARTE OR LATE FILED

Chairman William Kennard
Federal Communications Commission
445 12th Street SW
Washington DC 20554

RE: EX PARTE FILING IN CASES WT 99-217; CC 96-98

Dear Chairman Kennard:

The City of Tucson, Arizona, an Arizona municipal corporation, submits the following comment in response to the Notice of Inquiry promulgated by the Commission on June 10, 1999, and released July 7, 1999, regarding implementation of the local competition provisions in the Telecommunications Act of 1996 (the "Act"). Specifically, the City of Tucson contends that the retention of local control and management of rights-of-way is mandated by the Act and is completely consistent with the requirements of the Act that competitors in the telecommunications industry have access to local rights-of-way. The provisions of Section 253(c) of the Act confirming that state or local governments may manage their public rights-of-way and that they may require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis result in ample and sufficient access for telecommunications providers to utilize public rights-of-way. At the same time they ensure that the taxpaying citizenry who must pay for the acquisition, maintenance, and repair of these public rights-of-way are fairly compensated for the additional burdens presented by the proliferation of communications facilities in publicly owned properties.

PUBLIC RIGHTS-OF-WAY ARE VALUABLE ASSETS

The fundamental concept behind the traditional imposition of license and franchise fees by municipal corporations for use of public rights-of-way by profit making entities stems from the simple consideration that it costs cities money to acquire streets, to maintain streets, to repair streets, and to replace streets, sidewalks, alleys and rights-of-way that are damaged or disrupted by repeated

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intrusions and excavations for the placement of utility and other facilities. The very nature of public property in rights-of-way represents a significant expense to the public that pays the taxes and fees for their acquisition, maintenance, and upkeep. Article 2, Section 17, of the Arizona Constitution, consistent with the Due Process provisions of the Federal Constitution, requires that private property shall not be taken or damaged for public use without just compensation having first been made, paid into court for the owner, and that full compensation must be made in money to the owner for the value of the property taken. Streets and rights-of-way are therefore acquired by cities at a substantial cost to the public for whose benefit they are created. When entities such as telecommunications companies, or any other profit making utility, enter the public rights-of-way for their profit making activities, this imposes a burden on the public, for which the companies should pay their fair share of the cost.

In 1997, the City of Tucson retained Dr. John Buehler, the former chair of the Economics Department of the University of Arizona, to perform an analysis of the value of rights-of-way for use by profit making telecommunications companies. Dr. Buehler's analysis demonstrates that public right-of-way, like other private and public property, has a market value. Prudent asset management dictates that this value should be recovered by the municipality in determining whether to allow profit making entities to use publicly owned property for furnishing a service to be sold for a profit. In his report, Dr. Buehler concluded that for the managers of a municipality not to charge for the use of a valuable asset under their control would be evidence of their irresponsibility with respect to the tax paying electorate.

Dr. Buehler's position is consistent with the positions taken by other governmental entities, including the Federal Communications Commission, which has historically auctioned off available broadcast spectrum to the highest bidding communications provider. As the FCC stated in the "FCC Report To Congress Spectrum Auctions" dated October, 1997:

> By requiring firms to use their own resources to compete for valuable spectrum, auctions encourage firms who value the spectrum the most to use it productively in innovative ways. Auctions also provide valuable information about the opportunity cost spectrum because they reflect the value that the next most efficient firm places on the spectrum license. This information allows both the private market place and policy makers to manage spectrum more effectively... .

The Commission in that report concluded that spectrum auctions encourage new entry, encourage competition, and encourage the provision of innovative services to the public. Cellular telephone providers pay the Federal government millions of dollars to use portions of the public spectrum. The result has been not only explosion within the industry, but there have also been resulting benefits to taxpayers in the form of revenues returned to the government. Similarly, the General Services Administration, in its Bulletin D-240 relating to public buildings and space, has mandated that the lease of Federally owned properties be at fair market value. In that Bulletin, the General Services Administration states:

> **PRINCIPLE #5**
>
> **INCOME/EXPENSES COMPARABLE TO THE MARKET**
>
> Any income realized by a real property asset during its useful life should approximate that generated by a comparable commercial property; while any expense by such an asset during its life cycle should approximate that incurred by a comparable commercial property.
>
> **DEFINITION:**
>
> All income and expenses associated with a Federal real property asset should be approximate to current fair market value. <u>The income generated by such an asset should approximate the income that a similar commercial real property asset would generate.</u> Likewise, the expenses of leasing space or of maintaining a Federal real property asset should approximate the expenses of a comparable commercial property.
>
> <u>Income associated with real property assets includes the income that an asset derives in the form of Rent paid to the Government by an occupying agency or any outlease tenant</u>, as well as income generated by the disposal of the real property asset. Expenses associated with real property include the rent for the space if leased by the Government, as well as the cost of materials, goods and services associated with an asset's utilization.

EXAMPLE:

> Income derived from real property assets is realized through the rent stream that the occupants pay to the owner, or through the disposal of the asset through sale or other means. Rental income generated by Federal real property assets applies when rent is paid by a tenant to GSA or the agency that is the Federal custodian of the real property asset, and should approximate the rent paid by tenants in the commercial market. When a Federally-owned real property asset is disposed of, the income generated should approximate that associated with the disposal of a similar commercial real property asset. Emphasis added.

The notion that publicly owned property has just as much inherent value as privately owned property is a principle that is recognized without exception at the Federal, state, and local level.

CHARGING REASONABLE COMPENSATION FOR PROFIT MAKING USE OF PUBLIC RIGHTS-OF-WAY DOES NOT DIMINISH COMPETITION IN THE MARKETPLACE

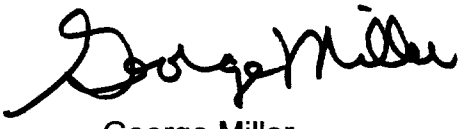
The City of Tucson, Arizona, has first-hand experience in creating a flourishing market for telecommunications companies, while at the same time ensuring to the public that it receives a reasonable return for these profit making activities conducted in publicly owned rights-of-way. In 1995, following intensive studies of right-of-way valuation and surveying of licensing and franchising requirements in other jurisdictions, City staff determined that a fair return to the public of a portion of the public's investment in right-of-way infrastructure was required from telecommunications providers who propose to utilize City rights-of-way for profit making activities. Negotiations ensued between the City and three major telecommunications providers who wanted to enter the Tucson market. The result of these negotiations was the adoption of Chapter 7B of the Tucson Code, which provides requirements for licensing and franchising of competitive telecommunications providers who have facilities within City rights-of-way. Under Chapter 7B, the licensing and franchising of competitive access providers has resulted in robust competition among these entities. Three providers are currently licensed and franchised under Chapter 7B of the Tucson Code: GST Telecommunications, MCI Worldcom, and e.spire Communications. Additional companies are considering also becoming licensed and franchised to provide competitive services within the City of Tucson.

There is an inherent unfairness in requiring the taxpaying public as a whole to subsidize telecommunications companies, many of whom service and benefit only high-end and high-volume business users. In the past few years, many new services are being offered only to select portions of the population who can best afford to pay for them. The newest and most high tech services are very often offered to only a few select upper income individuals and to high-end businesses. If the taxpaying public generally cannot take advantage of these services, there is no reason for them to subsidize the delivery platform for these services.

CONCLUSION

For all of the foregoing reasons, the City of Tucson, Arizona, respectfully suggests that there is no inconsistency between the existing management of local rights-of-way by local jurisdictions with the mandate of the Act that telecommunications providers have access to public rights-of-way on a competitively neutral and nondiscriminatory basis. Competition flourishes in our nation in the telecommunications area with the reasonable right-of-way regulations that are in place in most jurisdictions.

Very truly yours,



George Miller
Mayor

GM:BD:TR:cds

cc:

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Commissioner Gloria Tristani
Commissioner Susan Ness
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