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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	
Promotion of Competitive Networks in Local Telecommunications	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 Rulemaking 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

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE TEXAS COALITION OF CITIES ON FRANCHISED UTILITY ISSUES, THE CITY OF DEARBORN, MICHIGAN, THE DISTRICT OF COLUMBIA OFFICE OF CABLE TELEVISION AND TELECOMMUNICATIONS, MONTGOMERY COUNTY, MARYLAND, PRINCE GEORGE'S COUNTY, MARYLAND, THE CITY OF ST. LOUIS, MISSOURI, AND THE CITY AND COUNTY OF SAN FRANCISCO

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SUMMARY

I. Introduction. The Notice of Inquiry provides an opportunity to lay to rest one of the persistent misunderstandings arising in the wake of the Telecommunications Act of 1996 – the notion that local governments stand in the way of competition. In fact, local communities are eager for competition and have taken a wide variety of steps to encourage the development of competitive networks.

The 1996 Act recognized the rights of local governments to control and manage their rights-of-way, and to obtain fair compensation for their use, as well as to raise the funds needed to provide essential services through fair and reasonable taxes (independent of their right to compensation for use of their public rights-of-way). The Commission first addressed some of these issues in the *Troy* decision. Now, with two years of additional experience, it has become evident that competitive entry is proceeding according to market demands, not local right-of-way policies.

II. Competitive Entry is Not Impeded by Local Government Right-of-Way Regulations and Tax Policies. There is no evidence to suggest that local governments' current right-of-way or tax policies have impeded the entry of competitive providers into the market. Telecommunications providers are pursuing entry strategies based on market factors, not local right-of-way policies. These factors include number of potential customers and level of service (potential revenues) and the associated costs – primarily costs of construction and necessary infrastructure. The potential revenues per unit cost tend to be highest in areas of highest density. Thus, competitive networks have tended to focus on highly urbanized areas even though there is often significant local control of the public rights-of-way in such areas,

because of the density and affluence that make those areas attractive markets. The fact that competitive networks are being built – and being built in communities where local governments do reasonably regulate their public rights-of-way – confirms the above analysis. Any potential problems are already discouraged by local communities' competition for the benefits of economic development. Telecommunications providers are aware of, and take advantage of, competition *among localities* for advanced telecommunications services as a bargaining tool in the market for local public rights-of-way. The ability of telecommunications providers to play off one community against another in this respect provides an automatic, market-based bulwark against potential problems. Finally, the mere fact that telecommunications providers must incur costs does not establish an impediment to competition, much less a barrier to entry.

III. Appropriate Right-of-Way Management is Not a Barrier to Entry. Right-of-way management by local governments is necessary to balance the competing demands placed upon local rights-of-way. Local communities frequently work with telecommunications providers and other users to resolve problems and make right-of-way work more efficient. On the other hand, at times local governments face situations in which refusal to cooperate by telecommunications providers makes it much more difficult for the locality to develop effective approaches to right-of-way management. More directly harmful are those cases where providers' failure to abide by sound standards of right-of-way management results in serious damage. Many examples make evident the need for local governments to coordinate work in the right-of-way. Communities must also be able to recover the costs of such management – not only the costs of administration and repair, but those of acquisition and maintenance.

IV. Reasonable Right-of-Way Compensation is Not a Barrier to Entry. Even full cost recovery, however, does not provide the full compensation that is the constitutional right of local communities. A property owner has a right to negotiate compensation for the *value* of an asset, not merely its cost. Compensation requirements, as well as cost recovery, lie outside the sphere of "barriers to entry." The Commission's own spectrum auction policies are directly analogous: spectrum, like right-of-way space, is a scarce resource that is most efficiently allocated through a market price mechanism such as an auction. It would be inconsistent for the Commission to take the position that federally controlled spectrum should be auctioned for the highest possible price, yet that the Commission can force local communities to give away their property to telecommunications companies without market value compensation. Local governments must be free to seek appropriate measures, including revenue-based measures, to establish such compensation.

Compensation requirements are also sound economic policy. Resources will be allocated properly and efficiently only if each enterprise pays a fair price for the resources it uses. Moreover, a federal or state law that prevented a community from charging a fair price for its property would create a forced subsidy of the provider by the community. Such a subsidy is not appropriate in a competitive market, where the variety of services offered by telecommunications providers are largely unconfined by rate regulation and the telecommunications provider does not provide universal service. The full value of right-of-way use cannot be recovered unless indirect use by resellers is taken into account. Thus, local communities seek to apply reasonable right-of-way compensation requirements fairly to all competitors.

V. Section 253 Does Not Prohibit Reasonable Management Of and Compensation For Public Rights-of-Way. Congress sought to promote the entry of multiple, competing telecommunications providers, without transgressing the rights and responsibilities of state and local governments, through the language developed in § 253. Section 253(a) proscribes state and local legal requirements that *prohibit* entry. But the Commission cannot reach this issue if a requirement falls within the categories of right-of-way management and compensation specified in § 253(c). The legislative history shows that Congress inserted § 253(c) specifically to preserve local authority over reasonable right-of-way compensation and management, and drafted § 253(d) to ensure that the Commission did not have jurisdiction over § 253(c) issues. This congressional intent cannot be defeated by appeal to § 332(c)(3).

VI. Any Commission Attempt To Deprive Localities Of Compensation Would Be An Unconstitutional Taking. Local government property enjoys the same constitutional protection as other forms of "private property" under the federal constitution. Any Commission rule, or statutory interpretation, that required local governments to allow telecommunications providers to use and occupy their property without just compensation would violate the Fifth Amendment.

VII. The Commission Has No Authority To Preempt Tax Laws. Because assessment and collection of taxes and other fees is a vital function of state and local governments, Congress specifically excluded Commission jurisdiction over state and local tax policy in § 601(c) of the 1996 Act. Moreover, Executive Order 13,132 requires express authority for federal preemption. In addition, even if the Commission did have the authority to

preempt state and local taxes, there is no evidence that Commission action is needed in this area.

VIII. The Commission Must Take Into Account The Impact On Small Communities Of Any Preemptive Rules. The Regulatory Flexibility Act requires that the Commission look seriously at alternatives that relieve small entities of regulatory burdens, including small local communities. The statute requires substantive consideration in advance of decision-making. Thus, the Commission must take into account ahead of time the impact of any potential rules on small localities, including the financial impact of lost right-of-way and tax revenues and the impact on infrastructure of loss of management control over the public rights-of-way, as well as the more intangible effects of violating the principle of federalism.

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I. INTRODUCTION

The Commission's Notice of Inquiry in these dockets provides an opportunity to lay to rest one of the persistent misunderstandings arising in the wake of the Telecommunications Act of 1996 – the notion that local governments stand in the way of competition. In fact, local communities are eager for competition and have taken a wide variety of steps to encourage the development of competitive networks. In this proceeding we will show that local government policies are *not* the bottlenecks slowing the development of competitive networks. Rather, the Commission is free to turn to its proper role in streamlining the federal regulatory scheme and addressing industry-based competitive issues.

Local governments and the Commission are joined in an unavoidable partnership in dealing with the telecommunications industry. The bedrock principle of federalism ensures that federal, state and local governments all have roles to play in promoting and regulating the growth of the industry. Moreover, the property rights of local governments, which telecommunications providers are eager to use, inevitably place local communities among the players in that industry's development.

The Telecommunications Act of 1996 ratified these fundamental principles in many ways – most notably by expressly acknowledging in § 253 rights of state and local governments that must be respected in any federal regulatory scheme. The Commission's consideration of ways to promote competitive networks must proceed within the context of this respect for local communities both as property owners and as co-regulators.

Local rights-of-way represent a valuable community asset. And it is local governments that are entrusted with the responsibility to ensure that such community assets are used in a manner that benefits their citizens. At the same time, local governments are also charged with the duty to ensure that such use does not threaten the safety of their citizens, impose uncompensated costs, or create unnecessary inconveniences for other users of the public rights-of-way.[1] Local governments must retain the right to control and manage their rights-of-way, and to obtain fair compensation for their use, in order to accomplish these goals.

In addition, as recognized in the 1996 Act, federal law must respect the rights of local governments to raise the funds needed to provide essential services through fair and reasonable taxes (*independent* of their right to compensation for use of their property, the public rights-of-way). The basic principles of our form of government were evolved in part to ensure that any such taxation is imposed only by representative, democratic governments, such as cities and counties. The jurisprudence governing appropriate taxation stretches back as far as our republic itself. Thus, any action by a nonrepresentative federal regulatory agency in tax matters represents an intrusion into an already finely honed democratic mechanism. For this reason, among others, Section 601(c)(2) of the 1996 Act generally prohibits any such intrusion. Like all other businesses, the telecommunications industry must flourish under the democratically controlled burden of taxation *with* representation.

We welcome the Commission's decision to review these issues in the "competitive networks" proceeding. The Commission rightly seeks ways to encourage the entry of competitive facilities-based networks to improve consumer choice and promote advanced

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[1] *Promotion of Competitive Networks in Local Telecommunication, Notice of Proposed*

services. At the same time, the Commission properly recognizes local governments' "important interest in managing the public rights-of-way to promote the public good, and in obtaining fair and nondiscriminatory compensation for the use of the rights-of-way."[2] These comments, and the comments being filed by other local communities and related associations, will show that these two interests are not in conflict. Local communities' reasonable exercise of their rights does not impede competition, and reasonable initiatives undertaken by the Commission to promote competition need not interfere with local communities' rights. The market factors which affect or inhibit competitive entry lie elsewhere.

Many of the issues raised by the Commission in this proceeding were first addressed in the Commission's *Troy* decision, a year and a half after enactment of the 1996 Act.[3] At that time the Commission expressed concern about local government policies as they might develop in the future. Now, with two years of additional experience, it has become evident that competitive entry is proceeding according to market demands, not local right-of-way policies. This proceeding thus provides an opportunity to resolve the concerns the Commission expressed in *Troy* and to move forward.

As the Commission itself notes, "most communities and carriers have arrived at solutions that both protect State and local governments' authority to manage public-rights-of-

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Rulemaking and Notice of Inquiry, FCC 99-141 at ¶ 72 (July7, 1999) ("NOI").

[2] NOI at ¶ 75.

[3] *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, FCC 97-331, 12 FCC Rcd 21396 (Sept. 19, 1997), aff'd, Order on Reconsideration, FCC 98-216, 13 FCC Rcd 16400 (Sept. 4, 1998) (Attachment D).

way and avoid imposing unreasonable or discriminatory burdens on competitive service."[4] The Commission's desire to accelerate competitive entry is a laudable goal, but that goal will not be accomplished by concentrating its efforts on local governments. In particular, in reviewing the record in this proceeding the Commission should take care not to give undue weight to unsupported and anecdotal claims by the telecommunications industry, which has a vested interest in suppressing local property rights. A solid factual basis is a necessary prerequisite for any federal regulation in this area.

It is also essential, while compiling a record regarding local right-of-way management as it affects telecommunications providers, to keep in mind the limits on the Commission's statutory authority to preempt state or local right-of-way management or tax regulations. For the Commission to make federal preemption of local communities a centerpiece of its efforts would not only be bad policy; it would also embroil the Commission and the industry in constitutional and legal problems that would ultimately delay the identification of sound competitive policies.[5] Thus, these comments are directed both to assisting the Commission to clarify the boundaries of federal regulatory authority in this area, and to building a factual

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[4] NOI at ¶ 79.

[5] Thus, for example, Congress intended that the "open video systems" concept move swiftly through the regulatory process so that the market itself could determine whether OVS was a viable market option. *See* 47 U.S.C. § 573(a)(1), (b)(1). An unfortunate attempt to insert into the federal OVS scheme a radical preemption of local property rights, however, forced local communities to take legal action to defend those rights. *See City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999). As a result, it was not until this essentially unnecessary legal dispute was resolved that potential entrants could be clear as to the status of OVS and thus make informed decisions as to the economic viability of that regulatory model. This history underlines the importance of avoiding *unnecessary* constitutional and legal disputes that hamstring the development of competitive networks.

record that will assist the Commission in effectively targeting its efforts to the true bottlenecks to competition.[6]

II. COMPETITIVE ENTRY IS NOT IMPEDED BY LOCAL GOVERNMENT RIGHT-OF-WAY REGULATIONS AND TAX POLICIES.

A. There Is No Evidence That Local Right-Of-Way Or Tax Policies Have Impeded Entry of Competitive Telecommunications Providers in the Market.

The central fact in this docket is that there is no evidence to suggest that local governments' right-of-way or tax policies have impeded the entry of competitive providers into the market. Indeed, the Commission acknowledges that it "is confident that the majority of State and local governments . . . are managing their rights-of-way in a competitively neutral way."[7] *Only if the telecommunications industry submits hard statistical evidence in this docket demonstrating that right-of-way or tax policies are barriers to entry can there be any possible basis for regulatory intervention by the Commission in the marketplace.*

To date, industry claims of difficulties with local governments have typically been made in anecdotal form, often in *ex parte* communications of which the maligned local government itself may not hear until long after the industry's discussion with the Commission.[8] The

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[6] The commenters have set in motion investigations to develop a more complete factual basis for these dockets. These comments draw upon the information available thus far. We expect to continue supplementing the record in this Inquiry as further information becomes available.

[7] NOI at ¶ 72.

[8] We once again urge the Commission to adopt a rule – both generally and, on an interim basis, for this proceeding – that requires any industry claims regarding local governments to be served on the local governments referred to, so that the affected communities have an opportunity to respond.

Commission properly seeks information in the NOI as to the "prevalence" of such experience. The experience of local communities, as indicated below, is that telecommunications providers are pursuing entry strategies based on market factors and not on local right-of-way policies; that entry into the rights-of-way is in fact proceeding; and that telecommunications providers are aware of, and take advantage of, competition *among localities* for advanced telecommunications services as a bargaining tool in the evolving market for local public rights-of-way.

The inescapable conclusion is that competitive network entry is not being *prohibited* by local right-of-way policies (the criterion required by Section 253(a)) – and that the industry has failed to show even that it is being significantly *impeded* by those factors.

B. Competitive Entry By Telecommunications Providers Is Based On Market Factors, Not Local Government Policies.

Local governments' experience is that telecommunications providers do not base their decisions to enter a particular market on local government policies in that area, but on the attractiveness of the market involved. While each provider may employ a slightly different analysis when determining whether to enter a market, generally the most attractive market will be the one with the largest number of potential consumers of the provider's service, particularly high-volume users, such as businesses. Thus the hottest markets for competitive entry to date include those with the largest volume of potential business for the telecommunications provider – such as the Boston-New York-Washington corridor in the east

and the San Francisco-Los Angeles areas in the west – even though many local governments in these areas are quite active in right-of-way compensation and management.[9]

Weighed against the market demand are the costs associated with serving these potential customers. The dominant costs in the introduction of a new facilities-based competitive network are the costs of construction, together with the necessary infrastructure (technical personnel, customer service personnel, trucks and service equipment, and the like). The lowest costs *per potential customer* (or, more precisely, per unit of revenue) tend to be found in the areas of highest *density*, where the provider can foresee the maximum revenue per plant mile.[10] Thus, competitive networks have tended to focus on dense urban areas even when these include regions with relatively low income profiles, as, for example, in the network expansion plans proposed by RCN subsidiary Starpower in the Washington, D.C. metropolitan

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[9] *See, e.g.*, "Under Mr. Leeolou's direction, the Company will pursue a new strategy of focusing its operations exclusively along the Northeast corridor." *Vanguard Cellular Systems Names Stephen Leeolou CEO; Announces New Strategic Direction Focusing On Northeast Corridor And Expansion of Stock Repurchase Program*, P.R. Newswire, March 11, 1998; said RCN Chairman and CEO David C. McCourt, "With more than 500,000 homes under local license in Washington and Maryland, RCN has now achieved the critical milestone of having negotiated and signed local agreements covering a half million homes in each of its initial target markets – New York, Boston, Washington and Northern California." *RCN Doubles Size of Washington Market with Approval to Serve Montgomery County*, P.R. Newswire, August 3, 1999 (Attachment A).

[10] For example: "RCN is already developing numerous markets from Boston to Washington D.C. in the East and San Francisco to San Diego in the West with average densities ranging from 150 to 300 homes per mile, roughly five to ten times the national average." *RCN Corporation to Serve One of Nation's Highest-Density Communities: Long-term Agreement With City of Hoboken Will Allow RCN to Pass More Than 550 Homes Per Mile of Network*, P.R. Newswire, August 25, 1999 (Attachment A).

area.[11] Similarly, wireless data carrier Metricom had as of August, 1999, initiated service only in the areas surrounding Washington, D.C., Seattle, Washington, and San Francisco, California.[12] Yet many of the jurisdictions in these areas have entered into right-of-way agreements with Metricom providing both for right-of-way management conditions and for compensation.[13] It appears that right-of-way requirements are less important in actual investment decisions than are the kinds of market factors outlined above.

Local right-of-way costs may figure into such telecommunications providers' analyses at some level. However, there is no evidence that this is by any means a determinative factor. And unless hard evidence can be produced that manipulating this factor alone would substantially change the development patterns of competitive networks, there is no reason to suppose that any rule by the Commission on the subject would significantly advance the cause of competition.

The above analysis finds support in the fact that telecommunications carriers are far less emphatic about the impact of right-of-way requirements when describing their market strategies generally than when they address the Commission specifically to seek federal

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[11] Thus, for example, Michael Mahoney, President of RCN, in a speech at the NATOA national conference, September 17, 1999, stated that RCN determined where to build its competitive networks based on market factors, and specifically on density. RCN has stated: "RCN's East and West Coast local fiber optic networks target densely populated areas comprising nearly 40% of the U.S. residential communications market spread over just 6% of its geography." RCN's Internet site at http://www.rcn.com/investor/index.html (reviewed Oct. 11, 1999).

[12] *PC Magazine*, August 1999, at 124 (Attachment A).

[13] For example, Montgomery County and Prince George's County, Maryland, each have such agreements with Metricom.

regulatory preemption. Market demand and system cost factors are far more prominent here than right-of-way issues.

In fact, the number of competitive providers does not seem to vary substantially between communities with substantial right-of-way policies and those that do not, as one might expect it to do if these government policies were regarded by telecommunications providers as a serious factor in determining competitive entry. For example, the City of Chicago imposes a telecommunications tax of 5%[14] and a Telecommunications Infrastructure Maintenance Fee of 2%.[15] The FCC's Local Competition Report, released in August of 1999, identified approximately 13 local telephone service competitors in the Chicago LATA.[16] Yet Minneapolis, Minnesota, which does not have in place such right-of-way compensation or tax policies, has approximately seven such competitors.[17] If right-of-way policies were a significant deterrent to competitive entry, one would expect the community with fewer requirements to attract more competitors – but it does not.

In general, it appears that telecommunications providers are converging in just those highly urbanized areas where there *is* significant local control of the public rights-of-way – along with the density and affluence that make those areas attractive markets for the providers. Indeed, part of the attraction of such areas may well be that these jurisdictions effectively manage their public rights-of-way, overseeing construction patterns and averting cable cuts and

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[14] Chicago Municipal Code Section 3-70.

[15] Chicago Municipal Code Section 3-75.

[16] FCC Local Competition Report: August 1999, Table 4.2

[17] FCC Local Competition Report: August 1999, Table 4.2

similar conflicts among right-of-way users, and thus making it easier and less costly for a telecommunications business to operate there.

C. Competitive Entry Is Proceeding In the Current Regulatory Environment.

The fact that competitive networks are being built - and being built in communities where local governments do reasonably regulate their public rights-of-way - confirms the above analysis. Almost daily the media apprise us of new deployments or upgrades of competitive networks.[18] If nothing else, a short drive down a key street in any major downtown area - such as M Street in Washington, which runs past the Commission's former offices - makes it palpably apparent that the surfaces of such streets are being torn up, hastily patched, and torn up once again in the race by telecommunications carriers to install new facilities.

The spread of competitive networks is acknowledged in the NOI itself, which states that "[c]ompetitive LECs are rapidly building customer base and gaining market share" and that "[o]ver the last several years, legal and market developments have come a long way toward

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[18] *MFS Network Technologies Signs with Norlight Telecommunications to Expand Fiber Optic Network In Michigan*, P.R. Newswire, March 3, 1999; *Teligent Introduces Revolutionary, Lower-Cost Communications Services in New Orleans*, P.R. Newswire, February 25, 1999; *Teligent Introduces Revolutionary, Lower-Cost Communications Services in Richmond, Baltimore, Milwaukee and West Palm Beach*, P.R. Newswire, February 8, 1999; *Teligent Introduces Revolutionary, Lower-Cost Communications Services in Atlanta, Boston, Philadelphia and Wilmington*, P.R. Newswire, January 20, 1999; *RCN Corporation Agrees to Serve Three New Boston-Area Communities*, P.R. Newswire, August 31, 1999; Randi Feigenbaum, Queens Inc. / Fidelity Holdings OKD for Local Phone Service [in New York and California], Newsday, February 5, 1999, at A56 (Attachment A).

bringing competition to all United States communications markets."[19] This makes clear at a minimum that any sweeping application of Section 253 of the Communications Act (which requires a *prohibition* of entry, as discussed below) would be unsupported by the facts. This proceeding thus poses to the industry the much more difficult challenge of showing that federal preemption would produce some *incremental improvement* in competitive entry that would nonetheless be so substantial as to provide a basis for seeking to override local property rights. To date, no such case has been made.

Competition in the provision of telecommunications services is increasing. Although this may not occur as quickly as either the Commission or local governments would like, when one compares the telecommunications industry with any other industry, it becomes evident that the telecommunication industry is indeed making progress at a tremendous rate.[20] In this light it is difficult to perceive local governments as competitive barriers that would justify the drastic step of federal regulatory intervention.

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[19] NOI at ¶¶ 11, 86. The Commission, of course, wishes to accelerate this process as much as possible. *See* NOI at ¶¶ 13, 18-19.

[20] "The communications segment of our economy has grown by over $140 billion, the revenues of new local service providers more than doubled in 1997 and they almost doubled again in 1998," [Commission Chairman] Kennard said." Susan Biagi, *Competitive Carriers Celebrate Progress*, Telephony, February 15, 1999, at 16. "CLEC revenues will increase at a compound annual growth rate of 45.6 percent until 2003 and will reach an estimated $40.5 billion, or about 25 percent of the $162 billion local market forcasted for 2003." Victor Guzman, Jerry Holt, *CLEC Improves Market Share Efficiency With Next-Gen OSS Solution*, Telecommunications (Americas Edition), September 1999, at 60 (Attachment A).

D. Any Potential Problems Are Already Discouraged by Local Communities' Competition for the Benefits of Economic Development.

The Commission should not overlook the strong incentive that communities have to encourage the development of competitive networks.[21] Competition in telecommunications services benefits both citizens, and the local government itself as a consumer of such services, in the form of reduced prices and new and innovative offerings. Nor are local governments blind to this fact. Hardly any community is without its economic development agency, tasked specifically to encourage businesses to locate in the community.[22] The availability of the necessary infrastructure for business – including telecommunications – is a recognized factor in this marketing effort.

What may be less obvious at the federal level is that local communities in fact compete *with each other* for business development and economic growth. The recent bidding war between Maryland and Virginia with respect to the possible relocation of Marriott International's headquarters exemplifies the generally cordial, but intense, rivalry among jurisdictions for economic opportunities – a rivalry made concrete in offers of tax benefits and

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[21] The NOI expresses the Commission's belief that most state and local governments "recognize the advantages to their citizens of encouraging new telecommunications competitors." NOI at ¶ 72.

[22] *See e.g.*, Indianapolis, Indiana Department of Metropolitan Development; Jacksonville, Florida Economic Development Commission (JEDC); City of Boston, Massachusetts Office of Business Development; Cincinnati, Ohio Department of Economic Development; Albuquerque, New Mexico Office of Economic Development; City of Dallas, Texas Economic Development Department (Attachment B).

other economic incentives.[23] The same is true of competitive networks. Each community is eager to be the first in its area to see competitive entry, not only for its citizens' sake at the consumer level, but also for its infrastructure implications. In effect, there is a market here as well – a market in local economic opportunities, in which local communities are the buyers and telecommunications companies the sellers.

Moreover, telecommunications companies know this and are happy to use such inter-community competition as bargaining leverage in discussing right-of-way arrangements. Communities discussing such policies with telecommunications companies frequently hear – and take seriously – the argument that if the community takes certain steps, the providers will go elsewhere.[24]

In effect, the ability of telecommunications providers to play one community against another in this respect – like that of a seller to play off bidders in an auction – provides an automatic, *market-based* bulwark against potential problems. The telecommunications provider is far from defenseless before local governments: it is free to build in the areas it

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[23] *See, e.g.*, "A Suite Deal At Steep Cost; Maryland Is Offering Generous Incentives to Keep Marriott. But Is It Selling Its Soul?", *Washington Post*, March 8, 1999, at F12 (Attachment A).

[24] A similar position may be seen more publicly – though with respect to a different issue, which is not addressed in these comments – in cable operators' statements that they will delay rollout of high-speed Internet access selectively in communities that resist their market plans. Thus, for example, Media One announced it would "stand down" plans to introduce Road Runner service in Somerville, Massachusetts after the city requested an advisory opinion for the Commission on whether cities could require Internet open access as part of the franchise transfer process, and Cox Communications Inc., threatened to "pull back from further deployment of the RoadRunner service" after the City of Fairfax, Virginia, required unbundling as a requirement to approve the transfer of the cable franchise from Media General to Cox. Joe Estrella and Linda Haugsted, *Portland May Seek AT&T Alternatives*, *Multichannel News*, October 4, 1999, at 1, 70 (Attachment A).

deems most profitable. Thus, to the extent the provider *does* wish to take into account any costs associated with the public rights-of-way (in addition to the more significant costs discussed above), those costs simply become part of the provider's business decisions as with any other costs of doing business, and local communities' incentives to attract such providers also provide incentives for restraint in right-of-way management and compensation requirements.

The Commission has frequently expressed its reluctance to intervene in the marketplace until it has been established that federal intervention is necessary.[25] That same reluctance should be applied to *this* market (the negotiations between local communities and telecommunications companies) pending a solid statistical showing of need.

Indeed, there are still stronger reasons for the Commission to adopt a stance of deliberate restraint in the marketplace of local community development than in the national consumer markets that are within the Commission's purview. A key aspect of the principle of federalism is that the diversity of local communities forms a "thousand laboratories" for trying out the best ways to encourage competition.[26] This diversity is not a drawback, but rather an opportunity for the nation as a whole to learn from the approaches to right-of-way policy taken by the different jurisdictions. This experimental approach is particularly effective here because

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[25] *See, e.g.*, William E. Kennard, Consumer Choice Through Competition: Remarks at the National Association of Telecommunications Officers and Advisors, (September 17, 1999) (transcript available at http://www.fcc.gov/Speeches/Kennard/spwek931.html). (The analogy is not intended to imply that the Commission's policy with respect to Internet open access either is, or is not, appropriate.)

[26] Paragraph 84 of the NOI seems to reflect this sense that the Commission can profitably draw upon the experience of varying state and local jurisdictions in formulating a national policy.

state and especially local governments are closer to their constituents than is the federal government, and thus especially responsive to the concerns of those constituents (*including* the affected telecommunications providers in the community).

Local initiative is the engine of such an evolutionary approach, but what works in one jurisdiction will quickly be duplicated in others once it is seen to work.[27] The Commission should encourage such experimentation by localities to find the best ways to combine pro-competitive policies with proper right-of-way management and compensation arrangements. The heavy hand of premature federal regulation would only interfere with this process.

E. The Costs Associated With Reasonable Right-Of-Way Management And Compensation Do Not Impede Competition.

One final point that must be kept in mind in reviewing the evidence on competitive policies is this: the fact that there is a cost to a telecommunications provider does not by itself establish an impediment to competition, much less a barrier to entry. Of course, telecommunications providers will always prefer not to have to incur any cost. But the costs associated with reasonable right-of-way management and compensation are no more an impediment to competition *per se* than are the costs of other resources used by the companies, such as equipment costs for fiber or real estate costs for office space. Thus, to show a need for federal intervention, the telecommunications industry must do more than show that it are

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[27] There are numerous state and local government organizations formed precisely to assist in sharing experiences and disseminating information on useful techniques in government. The National Association of Telecommunications Officers and Advisors, for example, functions as a clearinghouse for such ideas and information through media such as its national and regional conferences and electronic mailing list.

forced to incur costs in using local government property: it must show that federal law exempts them from having to pay such costs.[28]

It should be noted that, if the need for telecommunications providers to pay the costs of their right-of-way usage were to be treated *per se* as a barrier to entry, the same argument would also require preemption of all other legal regulation of telecommunications facilities, and any other rule or law that imposed a cost on the provider. Such an interpretation would turn the congressional mandate to *encourage* competition into a sword to be wielded against all other rights and interests. On the contrary, the legitimate costs of right-of-way usage (discussed below) should be treated as any other cost of doing business.

III. APPROPRIATE RIGHT-OF-WAY MANAGEMENT IS NOT A BARRIER TO ENTRY.

The various and often competing interests of the telecommunications providers, utilities and the public who use local rights of way must be coordinated if *any* of the parties are going to use the local public rights-of-way effectively. For this reason alone it is imperative that there be an entity that can coordinate these uses of the local rights-of-way, taking into account the needs of the local community. Local governments are in the best position to balance these interests and preserve the local rights of way for future use.[29]

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[28] In fact, if a telecommunications provider sought and obtained a right to use property belonging to a private entity, it would undoubtedly treat the costs associated with obtaining and maintaining that arrangement as a cost of doing business. Costs for obtaining the use of local government property should be treated no differently.

[29] *See* NOI at ¶¶ 72, 75.

A. Right-Of-Way Management Is Necessary To Balance the Competing Demands Placed Upon Local Rights-of-Way.

Since the passage of the 1996 Act, the number of companies seeking to offer telecommunications services has exploded. While not every provider will seek to enter every market at the same time, local communities are increasingly finding themselves faced with a myriad of telecommunications providers seeking access to their public rights-of-way — property often already occupied by other providers or utilities. With each new user of the local rights-of-way comes, in addition to increased physical burdens on the local right-of-way, an increase in the possibility that a new user will interfere with an existing user.

Appropriate right-of-way management has not in fact proven to be a barrier to entry. Local communities frequently work with telecommunications providers and other right-of-way users to resolve problems and make right-of-way work more efficient. For example, the permitting process affords a community the opportunity to be aware of the various activities occurring in the public rights-of-way and to spot any potential conflicts.[30] Local governments may also be involved in arranging for common trenching or joint undergrounding of utilities and similar facilities when new developments are built or existing areas rebuilt.[31] Such

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[30] Currently, 19 states require persons who intend to dig to call a statewide coordination phone number, usually called "Miss Utility," to prevent accidental cuts of wires and pipelines. See for example, Maryland Code Article 78, § 28A(c) (1991 Rep. Vol). Many localities require franchisees to comply with state "Miss Utility" regulations as part of their franchise permitting process. See for example, Austin City Code § 18-8-17 (1998); Denver Municipal Code, § 10.5.2 (1999).

[31] Officials "hire consultants to devise plan to coordinate requests from companies that want to string wires or lay underground cables." Carri Karuhn, *Hoffman Drawing the Lines for Future; Town Out to Control Disruption of Cables*, Chicago Tribune, October 9, 1997, at News 1. *See also* Cecilia M. Quick, *Mastering Telecommunications: Milpitas [California] Develops A Master Plan*, Government Finance Review, February 1997, at 48; James W.

construction- and restoration-related requirements are characteristic of right-of-way use agreements and telecommunications ordinances.

On the other hand, at times local governments face situations in which refusal to cooperate by telecommunications providers makes it much more difficult for the locality to develop effective approaches to right-of-way management. For example, before Prince George's County, Maryland, enacted the telecommunications ordinance referred to in the NOI to establish fair and uniform rules for allowing telecommunications companies to use the public rights-of-way,[32] the County expressly and repeatedly asked affected telecommunications providers to provide detailed written input and to meet for discussions, seeking concrete suggestions to assist the County in making the ordinance workable and fair. However, at no point did the providers attempt to work seriously with the County to refine and improve the right-of-way arrangements. Rather, the telecommunications carriers adopted a policy of flat opposition, responding with diatribes against the bill as a whole (including a newspaper ad campaign) rather than proposing concrete changes. In such cases as this, it appears that telecommunications providers' belief that they can escape local governance completely – for example, through some variety of FCC preemption – actually works to impede the development of fair competitive rules and of a uniform set of conditions for right-of-way use.

More directly harmful are those cases where failure of telecommunications providers (or other right-of-way users) to abide by sound standards of right-of-way management results

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Crawley, *The Dream is a Wonderland of Information and Entertainment. But for now, San Diego's Ambitious Rewiring in ...IN THE TRENCHES*, San Diego Union-Tribune, at I-1 (Attachment A).

[32] *See* NOI at ¶ 78.

in serious damage due to the use of the same physical space by multiple companies.[33] For example, in early July, 1999, a subcontractor for Touch America struck a 48-inch water line in Irving, Texas, resulting in water rationing for an entire part of the city.[34] A different sort of hazard, interruption of 911 telephone service, was cited in a news report of phone line cut by a Southwestern Bell contractor in Arlington, Texas in July, 1999.[35]

Accidental cutting of natural gas lines poses still greater dangers. For example, in Overland, Kansas, in 1996, K&W Underground replaced a cable television line using trenchless digging technology. The construction crew bored through an unseen gas main. Gas seeped into the home and was ignited, causing an explosion that leveled the house and severely injured two women. A gas line installed through a sewer line led to an explosion that killed a woman in Poplar Bluff, Missouri, in December 1996, and in November 1997, a similar

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[33] In some urban areas the degree of crowding already causes significant problems for work in the right-of-way. For example, a sewer repair crew in San Francisco recently reported having to repair a three-by-five sewer pipe from *inside* the pipe because there was no other room left to work. Joanna Glasner, *High Bandwidth Bureaucracy*, Wired News, March 25, 1999 (Attachment A).

[34] Rachel Horton, *City Urges Conversation After Water Line Slashed*, Irving News, July 11-14, 1999, 1A (Attachment A).

[35] Rani Cher Monson and Melissa Borden, *3,600 Lose Emergency Phone Service*, Arlington Morning News, July 16, 1999 at 1A (Attachment A).

A 1997 article regarding construction in St. Paul stated that "several city workers who helped restore the streets' blacktop said [construction] crews continued to fail to address construction and safety procedures, such as setting up warning lights around open trenches." Ann Baker, "Utility's fiber optics street work draws fire," *St. Paul Pioneer Press*, Wed., Dec. 17, 1997 (Attachment A).

misinstallation lead to an explosion that blew up a house and injured a 72-year old woman in Merriam, Kansas.[36]

Such incidents make evident the need for local governments to coordinate work in the right-of-way by telecommunications providers and other right-of-way users. Such oversight can not only prevent accidents, but, if it is employed to coordinate installation through common trenching, it can save money for all concerned, avoiding cases such as that of Sierra Pacific Power Company in Reno, Nevada, which ended up paying $90,000 in additional costs when it dug up a newly resurfaced street for a new installation.[37] In a similar case, Constitution Avenue N.W. in Washington, D.C., after being resurfaced in 1998, was being reopened by e.spire in early 1999 to install communications lines.[38]

Reasonable right-of-way management does not prevent competitive entry. Indeed, it may fairly be characterized as essential to competitive entry, insofar as the local government must make sure that entrants do not interfere with other telecommunications providers or other right-of-way users. If each telecommunications provider were permitted to occupy the public rights-of-way in any manner it saw fit, some users would inevitably interfere with the use of

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[36] Grace Hobson, The Kansas City Star, November 17, 1997, at A1 (Attachment A).

[37] *See Nevada Briefs,* Las Vegas Review Journal, Sunday, August 8, 1999, at 4B (Attachment A).

[38] Stephen C. Fehr, *Road Kill on the Information Highway,* Washington Post, Sunday, March 21, 1999, at A1 (Attachment A).

others. The coordinating function of the local government is thus crucial to advancing competitive networks.[39]

B. Communities Must Be Able To Recover the Costs of Right-Of-Way Management.

For local communities to make the public rights-of-way available for use by telecommunications providers involves substantial costs to the communities. The most obvious such costs are the costs of administering that use - processing applications, reviewing the qualifications of users (and their subcontractors), overseeing installations, and the like. But in addition, a community incurs the cumulative cost of telecommunications companies' incursions into the public rights-of-way. Numerous studies have documented, for example, how repeated street cuts reduce the useful life of a street, even if the surface is "repaired" by the company making the cut.[40] This cost is massive, and it is increasing. For example, the D.C.

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[39] As the Commission has stated, "Management of the rights-of-way is a traditional local government function. Local governments should be able to manage the rights-of-way in their usual fashion." Third Report and Order and Second Order on Reconsideration In the Matter of Open Video Systems, at ¶ 194, 197.

[40] *See* Indirect costs of Utility Placement and Repair Beneath Streets, University of Minnesota, Raymond L. Sterling, Report No. 94-20, p. 28; The Effect of Utility Cuts on the Service Life of Pavements isn San Francisco, Volume I: Study Procedure and Findings, Ghassan Tarakji, PH.D, P.E., Final Report, May 1995, p. 19; Estimated Pavement Cut Surcharge Fees For the City of Anaheim, California Arterial Highway and Local Streets, IMS Infrastructure Management Services, Inc., December 9, 1994, p. 2; The Effects of Utility Cut Patching on Pavement Performance in Phoenix, Arizona, Project 499, City of Phoenix, July 18, 1990, p. 5.; Impact of Utility Cuts on Performance of Street Pavements, Final Report, Andrew Bodocsi, Prahlad D. Pant, Ahmet E. Aktan, Rajagopal S. Arudi, Cincinnati Infrastructure Institute, Department of Civil & Environmental Engineering, University of Cincinnati, 1995, Exec. Summ. at 1 (Attachment C).

government's average of 9,000 street cut applications had swelled to 15,000 by 1998.[41] A news item from San Francisco reported: "In the past three months, three different telecommunications companies have torn up exactly the same strip of road in almost the exact same spot. Three more companies are lined up to do the same."[42]

Further, neither of these categories of costs takes account of the communities' original cost of obtaining and maintaining the public rights-of-way. Full recovery of the asset cost of these rights-of-way for the communities thus represents substantial amounts in addition to the superficial cost of administration alone. If these costs are not recovered from those who profit from using the public rights-of-way, they will in effect be paid by all citizens of the community, through tax dollars that must be used in place of the costs not recovered.

In effect, failure to recover these costs represents a subsidy to telecommunications companies by the community. Such a subsidy is, of course, something the community may choose to provide, perhaps as a means of stimulating business development. That choice, however, belongs purely to the community, not the Commission.

It cannot be overemphasized, however, that even full cost recovery does not provide the full compensation that is the constitutional right of local communities. A property owner has a right to negotiate compensation for the *value* of an asset, not merely its *cost*. Thus, cost recovery leads necessarily to the next issue – fair compensation – via the caveat that, although local communities do need to recover their costs, it would be misguided to focus on recovery of costs as if this were the sole purpose of right-of-way compensation.

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[41] Fehr, *op. cit.*