

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Promotion of Competitive Networks
In Local Telecommunications Markets

Wireless Communications Association
International, Inc. Petition for Rulemaking to
Amend Section 1.4000 of the Commission's
Rules To Preempt Restrictions on Subscriber
Premises Reception or Transmission Antennas
Designed To Provide Fixed Wireless Service

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 of the Telecommunications
Act of 1996

WT Docket No. 99-217

CC Docket No. 96-98

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc., on behalf of itself and its subsidiaries, (collectively referenced as "SBC") respectfully encourages the Commission to heed the Comments filed by various parties in response to the Notice of Inquiry and initiate a rulemaking proceeding to address the administration of rights-of-way by local governmental authorities (LGAs) and the disparate taxation of telecommunications providers. As SBC and other commenters related, LGAs frequently exceed the limitations on their authority to regulate the use of public rights-of-way by telecommunications service providers as imposed by Section 253(c) of the

Telecommunications Act of 1996.¹ These LGAs assess right-of-way fees which do not reflect actual administrative costs and impose requirements unrelated to their police powers and interests in the efficient management of rights-of-way.

I. Rights-of-Way Fees Are Being Assessed Which Exceed The “Fair and Reasonable Compensation” Requirement.

Section 253 (c) states that LGAs have the continued authority to require “fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis....” The Commission in the NOI acknowledges that the “fair and reasonable compensation” provision has been interpreted by a growing number of courts as allowing LGAs to assess fees based on the costs of rights-of-way administration and a carrier’s use.² Fees in excess of these costs are not considered to be “fair and reasonable.” Yet, despite this clear judicial interpretation, LGAs continue to improperly assess fees in excess of the cost incurred for rights-of-way management.³ As AT&T correctly recognizes, the fees levied on telecommunications providers by some LGAs are not only unrelated to costs but also “are often simply unauthorized

¹ The Commission must note that Section 253 does not confer additional authority on LGAs with regard to rights-of-way regulation. Rather, it simply preserves their existing authority subject to the limitations that this authority must be exercised consistent with the principles of non-discrimination and competitive neutrality and that fees assessed must not exceed fair and reasonable compensation. If state law limits rights-of-way fees to a level below that which the LGAs could assess under the federal “fair and reasonable” standard, the lower state level must apply.

² NOI, ¶ 75-78 wherein the Commission cites and discusses various judicial decisions, including *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F.Supp.2d 582 (N.D. Tex. 1998) and *Bell Atlantic-Maryland v. Prince George’s County*, 199 WL 343646 (D. Md. May 24, 1999). Contrary to the decision in *TCG Detroit v. City of Dearborn*, 1998 WL 493128 (E.D. Mich. August 14, 1998) cited by the Commission, SBC contends that fees should be assessed on an equitable basis. In other words, competitive local providers should not be charged fees greater than those which the municipality charges incumbent local exchange providers, as well as the converse.

³ “Reasonableness” in the assessment of fees has long been defined by the courts being as integrally related to the associated costs incurred by the governmental authorities. *See, e.g. Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), and *Evansville-Vanderburgh Airport Authority v. Delta Airlines*, 405 U.S. 707 (1972).

taxes disguised as fees and are clearly designed to be revenue-raising measures.”⁴ Additional commentators, including ALTS,⁵ Cox,⁶ CTSI,⁷ ICG⁸ and others⁹ cite similar instances in which state and municipal entities have exceeded their Section 253(c) authority.

Despite judicial decisions to the contrary, it remains the contention of certain LGAs that “fair and reasonable compensation” is not limited to the recovery of costs associated with the maintenance and administration of rights-of-way. As argued in the Comments filed by the National Association of Counties, *et al.*, “[e]ven full costs recovery does not provide the full compensation that is the constitutional right of local communities...it would be misguided to focus on recovery of costs as if this were the sole purpose of rights-of-way compensation.”¹⁰ SBC respectfully disagrees. To adopt the position of these governmental entities is to state that the Telecommunications Act is in contravention of some undisclosed constitutional *right* and that the “fair and reasonable” qualifier is irrelevant. Moreover, LGAs do not *own* public rights-of-way. They simply serve as the administrators of rights-of-way and, on this basis, only are entitled to their costs in serving this administrative function. The property interests involved are those of the *users* of the rights-of-way.

⁴ Comments of AT&T Corp., p. 23. (AT&T Comments)

⁵ Comments of the Association for Local Telecommunications Services, p. 17. (ALTS Comments)

⁶ Cox Communications Inc. Comments, p. 20. (Cox Comments)

⁷ Comments of CTSI, Inc., p. 20.

⁸ Comments of ICG Telecom Group, Inc., p. 6.

⁹ *See, e.g.*, Comments of Level 3 Communications, LLC, p. 12 and Comments of the National Cable Television Association, p. 3. *See, also* position of the Florida Power and Light: “Fees imposed by local governments pursuant to their limited authority are regulatory fees. Thus, the amount of such fees must be reasonably related to, and may not exceed, the actual costs of regulating utility use of public rights-of-way and must be used solely to defray such costs.” Comments of the Florida Power & Light Company on the Notice of Inquiry of Access to Public Rights-of-Way and Franchise Fees, p. 14.

¹⁰ 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, p. 22.

There is clearly a need for the Commission to intervene in this matter. Unless the Commission initiates a rulemaking proceeding and releases guidelines in preemption of differing state interpretations, there will remain the risk that the intent of Section 253(c) will be significantly compromised.

II. Fees Assessed Against Only Facilities-Based Providers Defeat the Competitive Neutrality Requirement of the Act.

Not surprisingly, there is a conflict within the telecommunications industry as to those entities which must bear the burden of rights-of-way fees. Certain entities, most notably AT&T¹¹ and Cox,¹² would have the Commission believe that LGAs are somehow barred by Title VI of the Communications Act¹³ from assessing rights-of-way fees and other requirements related to the administration of the rights-of-way against telecommunications service providers using cable facilities. Yet, the scope of Title VI pertains only to the provisioning of cable service, not to telecommunications service. It does not contain a prohibition against the imposition of fees on entities whose use of a right-of-way results in the government incurring costs.

Moreover, the provisioning of telecommunications service through the use of cable facilities does not mean that governmental entities are not subjected to additional burdens in relation to rights-of-way administration. It is undeniable that rights-of-way are being continually torn up as a direct result of the upgrading of cable facilities to transmit telecommunications services.

The “competitive neutrality” language of Section 253(c) clearly envisions that all telecommunications service providers will be subject to the same regulation and comparable compensation requirements by local and state authorities. To allow one group of telecommunications providers to escape this responsibility on the basis that, despite their use of

¹¹ AT&T Comments, p. 16.

¹² Cox Comments, pp. 27, 34.

¹³ Communications Act of 1934, Title VI – Cable Communications, 47 U.S.C. 521, et al. (Title VI).

the rights-of-way, they are not *physically* located within the rights-of-way because they share cable facilities, is disingenuous. This is particularly true given that without the use of these cable facilities, these carriers could not provide telecommunications service. The competitive disadvantage imposed upon facilities-based providers was not contemplated, and is contrary to, the Act's provisions. As NEXTLINK reflects in its Comments, "[t]o be 'competitively neutral,' local ordinances cannot give one service provider an appreciable cost advantage over another or have a 'disparate effect on the ability of competing service providers to earn normal returns on their investment.'"¹⁴ As SBC presented in its Comments, rights-of-way regulations which are being applied only to facilities-based providers place this group of telecommunications providers in a disadvantageous position. This result is particularly true given the significant magnitude of the fees being assessed.

III. Local and State Authorities Must Adopt Rights-of-Way Processes and Procedures Which Will Facilitate the Expedient Entry of New Telecommunications Providers into the Market.

SBC concurs with various commenters that local and state authorities need to proceed expeditiously in their review and approval of applications to construct facilities in public rights-of-way.¹⁵ ALTS suggests that a reasonable time would be 21-30 days from the submission of the application.¹⁶ Experience suggests that even ALTS's suggested timeframe is too long in newly competitive markets.

"Third tier" regulation in the form of bonding requirements and other seemingly superfluous obligations is acting as a barrier to new entry and delaying the introduction of new services by existing carriers. While there is no debate that state and local authorities, pursuant to their police powers, are entitled to administer rights-of-way, they appear to take the view that the

¹⁴ Comments of Cablevision Lightpath, Inc. and NEXTLINK Communications Inc., p. 18, citing *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry*, 11 FCC Rcd. at 8421 ¶135.

¹⁵ See, e.g., Cox Comments, p. 34 and Comments of Global Crossing Ltd., p. 9.

¹⁶ ALTS Comments, p. 21.

provisioning of telecommunications service by additional providers is superfluous and therefore, expeditious action is not required. This attitude is obviously contrary to the Commission's goal of facilitating increased competition. The Commission must set the record straight that the administration of rights-of-way must facilitate, rather than impede, competition.

IV. Conclusion

SBC again urges the Commission to initiate a rulemaking proceeding in which the issues raised above are addressed. As demonstrated in its Comments in response to the NOI, the LGAs' continued practice of assessing rights-of-way fees greatly in excess of their actual cost of administering the rights-of-way is in contravention of the "fair and reasonable" standard of Section 253(c). However, unless the Commission releases guidelines defining this standard as one limited to associated cost recovery, prolonged and repetitive litigation is inevitable.

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CERTIFICATE OF SERVICE

On this 13th day of December 1999, I, Mary Ann Morris, hereby certify that the Reply Comments of SBC Communications Inc. in CC Docket No. 96-98, WT Docket No. 99-217 have been served upon the parties listed in the Service List attached to the Reply Comments of SBC Communications Inc.

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