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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for 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

REPLY COMMENTS OF GLOBAL CROSSING LTD.

Global Crossing Ltd. ("Global Crossing"), by its undersigned counsel, hereby submits these reply comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.[1]

[1] Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third FNPRM in CC Docket No. 96-98, *Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* FCC 99-141, WT Docket No. 99-217, CC Docket No. 96-98 (rel. July 7, 1999).

INTRODUCTION

In response to its inquiry into the proper scope of state and local management of public rights-of-way and the reasonableness of franchise fees imposed upon the users of such rights-of-way, the Commission received a flood of comments which clearly demonstrate that state and local authorities are acting outside the appropriate sphere of permissible regulation, and such overreaching is having a chilling effect upon competition in the telecommunications marketplace. Numerous commenters provided the Commission with explicit examples, involving a variety of different jurisdictions, where state and local governments have imposed or are attempting to impose a "third tier" of regulation upon new entrants, including extracting exorbitant fees that are completely unrelated to the use of the public rights-of-way or the locality's cost in its management.

Furthermore, several commenters also echoed Global Crossing's concern that new providers often have no real choice but to comply with these unfair and unlawful requirements or face impermissible delays in approval of essential inputs to their systems. The National League of Cities and the National Association of Counties seem to ignore the Hobson's Choice providers face, concluding that because facilities-based competition is growing, local rights-of-way requirements could not possibly be impeding entry. However, this conclusion begs the question and assumes that increased competition could not be introduced at a more rapid pace and at less cost to providers.

In sum, the comments filed pursuant to the NOI make a compelling case that the Commission's apparent belief that overall, municipalities are managing their rights-of-way in an efficient, competitively neutral manner, is erroneous. Accordingly, the Commission should act on the weight of the evidence and adopt a national policy defining the proper boundaries of state and local authority that permits government actors to fulfill their legitimate role as managers but prohibits regulatory overreaching.

I. THE COMMISSION HAS AMPLE EVIDENCE THAT A NATIONAL POLICY GOVERNING STATE AND LOCAL REGULATION OF PUBLIC RIGHTS-OF-WAY IS NEEDED AND JUSTIFIED

Incumbent and competitive providers alike appear to be in total agreement that state and local governments are acting outside the scope of the limited authority provided under Section 253(c) of the Communications Act to manage public rights-of-way. Comments submitted by both incumbents and new entrants tell a litany of horror stories about their dealings with state and local governments when attempting to gain access to public rights-of-way, explaining that their abilities to provide service in a timely, efficient and cost effective manner has been hampered by unreasonable and unlawful local regulations. For example, AT&T, Sprint, BellSouth, GTE, SBC, Level 3 Communications ("Level 3"), Teligent and the Association for Local Telecommunications Services ("ALTS") all explain that cities are engaged in substantive regulation under the guise of rights-of-way management, imposing conditions on grants of access that are inappropriate and totally unrelated to local management of public rights-of-way.[2] In addition, MCI Worldcom, AT&T, ALTS, GTE, SBC, Teligent, RCN, ICG Telecom Group ("ICG"), Level 3 and Pirelli Jacobson, Inc. all cite several jurisdictions where discriminatory and excessive fees, including the extraction of in-kind benefits, are being imposed that bear no relationship to the actual costs incurred in managing public rights-of-way.[3] Furthermore, several of these commenters also tell of instances where municipalities refuse to provide a level playing field by continuing to impose significant burdens on some categories of carriers while not on others.[4]

As explained more fully in its initial comments in this proceeding, these are precisely the

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[2] *See* AT&T at 8-14; Sprint at 8-9; BellSouth at Appendix A pp. 3-6; GTE at 9-11, Appendix A; SBC at 6-8; Level 3 at 6-8; Teligent at 6-7; ALTS at 23-25.

[3] *See* MCIWorldcom at 4; AT&T at 23-25; ALTS at 17-21; GTE at 9-11, Appendix A; SBC at 5-6; Teligent at 6-7; RCN at 5; ICG at 4-6; Level 3 at 6-8; Pirelli Jacobson, Inc. at 1-2.

[4] *See* Cablevision Lightpath and Nextlink Communications (together "Cablevision") at 7-16; ICG at 7-8; GST Telecom at 4-5; Level 3 at 9; MCIWorldcom at 2-6; ALTS at 10-17.

types of conduct that Global Crossing has experienced in connection with the deployment of its own terrestrial and subsea systems.[5] Contrary to the claims made by the National League of Cities and the National Association of Counties that there is "no evidence" or "factual basis" warranting Commission intervention,[6] it is evident from these examples, as well as the multitude of others that have been presented in this proceeding, that there is overwhelming evidence that local rights-of-way management is impeding facilities-based entry.

II. A SIGNIFICANT MAJORITY OF COMMENTERS URGE THE COMMISSION TO ADOPT RULES CLARIFYING THE BOUNDARIES OF STATE AND LOCAL GOVERNMENT AUTHORITY OVER MANAGEMENT OF PUBLIC RIGHTS-OF-WAY

Global Crossing agrees with a significant majority of the comments filed that the Commission should immediately proceed with a Notice of Proposed Rulemaking ("NPRM") proposing rules that will establish the permissible scope of state and local authority over rights-of-way, including rules relating to appropriate compensation for rights-of-way access. In its NOI, the Commission discusses several recent court decisions, as well as decisions of its own, interpreting Section 253 and the proper scope of state and local government authority to manage public rights-of-way. Commenters echo Global Crossing's view that these decisions set forth a sound basis for an interpretation of Section 253 that provides clear guidance as to the appropriate scope of state and local management authority, and that the Commission should build on this basis and issue an NPRM to adopt both substantive and procedural rules concerning access to public rights-of-way.[7]

Substantively, the rules should establish parameters of appropriate rights-of-way management, including provisions governing compensation schemes and the requirements being

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[5] *See* Global Crossing at 4-6.
[6] National League of Cities at 4; National Association of Counties at 5.
[7] *See* Sprint at 4-8; ALTS at 7-9; GST Telecom at 19-21; Teligent at 7-8; RCN at 7; AT&T at 3, 5-7, 18; NCTA at 5-11.

imposed as conditions of grant. Procedurally, the rules should set forth a time frame by which state and local governments must act on requests for access to rights-of-way, as well as expedited dispute resolution procedures. Several commenters have suggested streamlined procedures and even more limited time frames than that originally proposed by Global Crossing (21-30 days versus 45 days), within which municipalities must act upon requests for access to public rights-of-way.[8]

A. The FCC Has Plenary Authority To Establish A Governing Framework That Permits State And Local Governments To Fulfill Their Legitimate Role As Managers Of Public Rights-Of-Way But Prohibits Regulatory Overreaching

Contrary to claims made by the National League of Cities that the Commission has no jurisdiction to intercede in this instance,[9] Section 253 provides the Commission with all the authority it needs to adopt a governing framework that permits state and local governments to fulfill their legitimate role as managers of public rights-of-way but prohibits regulatory overreaching that violates the Communications Act and congressional intent.

The Commission is expressly granted authority pursuant to Section 253(d) to preempt any state or local statute, regulation or other legal requirement that may prohibit or may have the effect of prohibiting an entity's provision of telecommunications services in violation of Section 253(a). As discussed below, rights-of-way management and compensation practices that impose significant costs and burdens on telecommunications providers can rise to the level of creating such a barrier to entry in violation of Section 253(a), and therefore may be preempted by the Commission. Furthermore, even if additional authority were needed or the cramped interpretation of Section 253 suggested by some municipalities were correct (and it is not), Global Crossing agrees with several other commenters that the Commission would still have ample statutory authority under the Communications Act (the "Act") to adopt rules and policies

[8] *See* ALTS at 21, 26; RCN at 10; GST Telecom at 21.
[9] *See* National League of Cities at 4-7.

to make the competitive mandates of the Act a reality.[10] For example, RCN cites Section 4(i) of the Act, which grants the Commission broad authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with th[e] Act" as it deems necessary to implement the provisions of the Act.[11] Global Crossing agrees that a unified policy governing local management of public rights-of-way is "necessary to ensure the development of end-to-end, facilities-based competition and to ensure that no American is denied access to advanced communications services" - - an explicit mandate of the Act.[12]

In addition, Cablevision points to Section 201(b) as also providing the Commission with the authority to establish federal rules implementing the "market-opening, competitive neutrality mandate of Section 253," citing the Supreme Court's decision in *Iowa Utilities Board*[13] in support of its conclusion.[14] Level 3 also cites the Supreme Court's confirmation in *Iowa Utilities Board* of the Commission's broad authority to implement the competitive provisions under Title II of the Communications Act.[15]

Global Crossing agrees with these and other commenters that access to municipal rights-of-way is vital to competitive entry, and the public interest would clearly be served by implementing a unified framework governing state and local management of public rights-of-way. The establishment of clear and sound rules would provide regulatory certainty, a decrease in litigation and its attendant costs, and speed deployment of competitive networks.

B. Commenters Agree That The Commission's Rules Should At A Minimum Define The Scope Of State And Local Authority, And Prohibit Unrelated Conditions And Excessive Compensation

Most commenters agree that three major areas of local regulation pose the most

[10] *See* RCN at 14-18, Cablevision at 23-25, Level 3 at 17-18.
[11] 47 U.S.C. § 154(i).
[12] RCN at 14.
[13] *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).
[14] Cablevision at 24 ("The Court expressly stated [in *Iowa Utilities Board*] that 'Section 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.'").
[15] Level 3 at 17.

significant problems, and thus the Commission should at a minimum focus on these matters when issuing an NPRM and adopting a subsequent set of rules: the proper scope of state and local governments' management authority, limitations on unrelated conditions, and excessive compensation schemes imposed upon competitive providers. In adopting such rules, Global Crossing agrees with MCI Worldcom that the Commission should make clear that existing arrangements which violate these provisions may be challenged by providers and set aside by the Commission.[16]

1. Proper Scope of Management Authority

A significant number of commenters recognize that both the Commission and the courts have ruled on the proper scope of state and local governments' authority to manage public rights-of-way and have set forth a limited range of activities that fall within the sphere of appropriate management of public rights-of-way. These activities solely pertain to the "reasonable regulation of time, place and manner of construction of facilities,"[17] including coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them. Global Crossing joins these commenters in urging the Commission to adopt this clear direction into rules plainly delineating the proper scope of state and local government management authority over public rights-of-way.[18]

2. Limitation on Unrelated Conditions

Commenters also point to decisions construing Section 253 that have repeatedly held that franchise authorities cannot impose conditions that are not directly related to the management of local rights-of-way, and that the franchise itself must be conditioned solely on a company's

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[16] *See* MCIWorldcom at 6-7.
[17] ALTS at 26.
[18] *See* GST Telecom at 19-20; ALTS at 26; AT&T at 17-19; GTE at 8-11; Sprint at 8-9; NCTA at 6-9.

agreement to comply with the city's reasonable regulation of its rights-of-way. Global Crossing agrees with these commenters that the Commission should expressly preclude local franchising authorities from imposing unrelated and burdensome conditions that only serve to impede competitive entry, many of which have already been invalidated in previous FCC and court decisions interpreting Section 253.[19]

3. Limitations on Excessive Compensation Schemes

The comments filed in this proceeding present the Commission with an abundance of specific examples of excessive compensation schemes in a variety of jurisdictions across the country, too many to reiterate here. A quick review of these examples provides clear evidence that the incidence of state and local governments not adhering to the statutory requirement of Section 253(c) that all fees be "fair and reasonable" is sufficiently widespread that national rules are required. As explained by Global Crossing in its comments and echoed by other providers, it is hardly uncommon for localities to charge exorbitant franchise fees based upon the perceived "value" of the right-of-way, using the opportunity to generate significant revenues and in-kind benefits. In fact, as reflected in the comments, and has been Global Crossing's experience, gouging telecom companies has virtually become a national past time for rights-of-way holders.

Global Crossing strongly agrees with these commenters and courts 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 [and the costs imposed by such use], otherwise the fees constitute an unlawful economic barrier to entry under section 253(a)."[20] Therefore, any franchise fee based upon a percentage of the telecommunications provider's gross revenues, which bears no relation to the costs imposed by management of the local rights-of-way, should be deemed *per se* illegal under Section 253(a).

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[19] *See* GST Telecom at 19-20; RCN at 11; ALTS at 26; AT&T at 19-20; Sprint at 8-9; NCTA at 6-9.
[20] Global Crossing at 13 (citations omitted). *See also* Level 3 at 19; GST Telecom at 20; RCN at 9-10; ALTS at 26; ICG at 6; Sprint at 7, 9-11; AT&T at 20-23; GTE at 8-11; SBC at 13; NCTA at 9-11.

Global Crossing agrees with the National Association of Counties that "reasonable right-of-way management and compensation" do not act as barriers to entry.[21] However, as described above and as plainly shown by the majority of comments filed in this proceeding, in a plethora of cases across the country, state and local governments are imposing anything but "reasonable" fees.

Accordingly, the Commission should formulate a body of rules addressing these critical areas so that state and local governments are able to fulfill their legitimate role as managers of public rights-of-way, while proscribing the unreasonable price gouging described in this proceeding that has become the rule, not the exception.

III. COMMENTERS ALSO AGREE WITH GLOBAL CROSSING THAT THE COMMISSION'S RULES MUST INCLUDE AN ENFORCEMENT MECHANISM

As Global Crossing urged in its comments, several commenters also recognize that the Commission's rules must include an effective enforcement mechanism. As noted above, other providers have echoed Global Crossing's concern that the ability to rapidly deploy competitive networks is threatened by recalcitrant rights-of-way holders and such delays can have real and costly marketplace consequences. Therefore, given the choice between potential litigation or an immediate right-of-way grant, although such grant is conditioned on unlawful and costly concessions, the provider often has little real choice.[22] Accordingly, an enforcement mechanism must encompass both a time requirement on state and local governments - - commenters have suggested anywhere from 21 to 45 days - - as well as an expedited dispute resolution process.[23]

[21] National Association of Counties at 16, 22.
[22] *See* Teligent at 7-8; Level 3 at 8; GST Telecom at 5; ICG at 7-8; Cablevision at 3; ALTS at 3.
[23] *See* ALTS at 21, 26; RCN at 10; GST Telecom at 21.

CONCLUSION

For the foregoing reasons, Global Crossing respectfully requests that the Commission act expeditiously to ensure that municipalities cease their regulatory overreaching, while protecting those governments' valid interests in maintaining the welfare of their citizens. To achieve this goal, the Commission should quickly issue an NPRM as the first step towards adopting a national policy defining the scope of permissible local authority over rights-of-way under the Communications Act, and put in place an expedited enforcement mechanism to provide regulatory certainty.

Respectfully submitted,

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Dated: December 13, 1999

CERTIFICATE OF SERVICE

I, Joanne Little, do hereby certify that copies of the foregoing Reply Comments of Global Crossing Ltd. have been served on the persons listed below via first class mail delivery on this 13th day of December, 1999.

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