

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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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 Services )  
)  
Cellular Telecommunications Industry )  
Association Petition for Rule Making 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 )

WT Docket No. 99-217

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 96-98

REPLY COMMENTS OF AT&T CORP.

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Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
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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	)	
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Cellular Telecommunications Industry Association Petition for Rule Making 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 AT&T CORP.**

AT&T Corp. ("AT&T"), by its attorneys, hereby replies to the comments filed in response to the Commission's Notice of Inquiry on access to public rights-of-way, franchise fees, and state and local taxation.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

The comments filed in this proceeding clearly demonstrate that local governments are using their limited rights-of-way management authority as a pretext to engage in the substantive

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<sup>1/</sup> In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 99-141 (rel. July 7, 1999) ("Notice").

regulation of telecommunications carriers and collect excessive fees. The proliferation of such impermissible ordinances and unfair and unreasonable fees is creating a substantial barrier to the entry of new telecommunications services. The discriminatory application of rights-of-way ordinances and fees is also obstructing the ability of new entrants to compete.

AT&T therefore urges the Commission to use its authority under Sections 253(a) and (d) of the Communications Act to adopt a national policy defining the permissible scope of local authority over telecommunications services:

- Municipalities are limited to management of the public rights-of-way, such as regulating the time, place, and manner of excavations and construction. Municipalities may not impose requirements on telecommunications carriers that are unrelated to the use of the public rights-of-way.
- Municipalities may not engage in substantive telecommunications regulation. Substantive telecommunications regulation includes, but is not limited to, regulating or mandating interconnection among carriers, regulating rates, requiring carriers to complete elaborate application forms or certify their financial, technical and legal qualifications, dictating technical standards, imposing customer service requirements, requiring universal service contributions, enforcing a carrier's compliance with the Communications Act, requiring carriers to waive their rights under federal or state laws, or granting the municipality the right to install or maintain its facilities free of charge on the facilities of a carrier.
- Municipalities are permitted to require fair and reasonable compensation from telecommunications carriers for use of the public rights-of-way. Fair and reasonable compensation is based on the municipality's costs or the burden imposed by the carrier on the public rights-of-way.
- Municipalities must exercise their rights-of-way management and compensation authority on a competitively neutral and non-discriminatory basis.

Such a policy statement would provide guidance to all the parties involved and would alleviate the need for the Commission and the courts to review such ordinances on a city-by-city basis. The Commission also should develop uniform taxation principles to guide states and localities, and should act as an advocate for sound taxation policies.

**I. The Commission Has Jurisdiction to Adopt a National Policy Regarding the Scope of Permissible Local Rights-of-Way Ordinances**

Contrary to the comments of several municipalities,<sup>2/</sup> the Commission has jurisdiction to preempt the enforcement of impermissible rights-of-way requirements. It also has the authority to adopt a national policy regarding the scope of permissible rights-of-way authority, which will provide guidance to the cities and alleviate the need for the Commission to review each impermissible ordinance on a case-by-case basis.

Section 253(a) prohibits states and localities from adopting or implementing any statute, regulation, or legal requirement that prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.<sup>3/</sup> Section 253(d) requires the Commission to preempt any state or local statute, regulation, or legal requirement that violates Section 253(a).<sup>4/</sup> This broad preemptive authority encompasses any measure that acts as a barrier to entry, even those that use rights-of-way management as a cloak for the establishment of entry barriers. As set forth below, there is no question that the Commission has the authority to determine whether actions taken by municipalities fit within the scope of traditional rights-of-way management contemplated in Section 253(c).

Any other interpretation of Section 253(d), such as those proffered by the National League of Cities, National Association of Counties, and the City of Philadelphia, is untenable. These commenters argue that because Section 253(d) does not direct the Commission to preempt the enforcement of state and local laws that violate Section 253(c), the Commission is prohibited

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<sup>2/</sup> See Comments of National Association of Counties at 34-35, 40-41 (arguing that Commission cannot preempt municipal right to manage rights-of-way), Comments of National League of Cities at 4-5 (arguing Commission has no jurisdiction over rights-of-way issues), and Comments of the City of Philadelphia at 6-7 (arguing Commission has no authority to regulate local rights-of-way management).

<sup>3/</sup> 47 U.S.C. § 253(a).

from addressing any disputes regarding local rights-of-way compensation or management.<sup>5/</sup> Such an interpretation would effectively strip the Commission of any authority to preempt a municipal telecommunications regulation that created a barrier to entry, if that regulation was ostensibly premised on municipal right-of-way authority. This was not Congress's intent.

The legislative history of the Telecommunications Act of 1996 supports a common-sense reading of Section 253(d) that permits the Commission to review and preempt municipal telecommunications ordinances that exceed the limits of their legitimate rights-of-way management authority. As the National League of Cities correctly notes, the Senate rejected an amendment that would have deleted Section 253(d) in its entirety, adopting instead an amendment offered by Senator Gorton that simply removed from the Commission's jurisdiction the power to adjudicate violations of Section 253(c).<sup>6/</sup> But the municipal commenters are incorrect about the effect of this amendment. From the Senate floor debate that preceded adoption of Section 253(d) as it was ultimately enacted, it is clear that Congress intended for any exception to the Commission's preemptive authority for rights-of-way management to be narrowly construed.

In excepting Section 253(c) from the Commission's preemption authority, Congress sought only to prevent the Commission from becoming a "super planning board" reviewing such core municipal rights-of-way decisions as how and when construction and excavation may occur.<sup>7/</sup> According to Senator Gorton, the purpose of his amendment removing Section 253(c)

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<sup>4/</sup> 47 U.S.C. § 253(d).

<sup>5/</sup> See, e.g., Comments of the National League of Cities at 5.

<sup>6/</sup> See 141 Cong. Rec. S8308 (daily ed. June 14, 1995).

<sup>7/</sup> Senator Gorton described the types of rules that would constitute rights-of-way "management" not subject to Commission oversight:

from the Commission's preemption authority was to ensure that "purely local matters dealing with rights-of-way" will not be subject to the Commission's review.<sup>8/</sup> On the other hand,

if, under section (b), a City or county makes quite different rules relating to universal service or the quality of telecommunications services -- the very heart of this bill -- then there should be a central agency at Washington, DC, which determines whether or not that inhibits the competition and the very goals of this bill.<sup>9/</sup>

Municipal regulations like those described in AT&T's and others' comments present exactly the situation that Senator Gorton concluded was appropriate for Commission review.<sup>10/</sup> If the cities limit their actions to permissible rights-of-way management, such as regulating the time or place of excavation or determining the amount an operator must pay for any damage done to the public rights-of-way, then the municipal commenters are correct that the Commission has no jurisdiction over these issues. But where the cities impede the ability of any entity to provide telecommunications services, then the Commission has not only the authority to preempt, but a statutory duty to do so. Given this broad preemption authority, the Commission clearly may adopt a national policy to address municipal ordinances that act as barriers to entry, even if such barriers are couched in the language of rights-of-way management authority.

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the rules that a city or county imposes on how its street rights of way are going to utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of purely local concern and, of course, they are exempted by subsection (c) of this section.

141 Cong. Rec. S8306 (daily ed. June 14, 1995).

<sup>8/</sup> Id.

<sup>9/</sup> Id.

<sup>10/</sup> Comments of ALTS at 10-25, Comments of AT&T at 8-14, Comments of BellSouth Corporation at 3, Appendix A, Comments of Cablevision Lightpath and Nextlink Communications at 5, 7-16, Comments of GTE Service Corp. at 8-10, Appendix A, Comments of ICG Telecom Group at 4-11, Comments of Level 3 Communications at 4-8, Comments of MediaOne Group at 4-7.

It also appears that municipalities may be attempting to avoid review of their rights-of-way actions in all forums, a result that could not have been intended by Congress. Despite the claims of several municipal organizations in this proceeding that Congress intended to leave disputes over rights-of-way management and compensation issues to the courts,<sup>11/</sup> when they are before the courts, the municipalities assert that the courts do not have jurisdiction to hear rights-of-way claims.<sup>12/</sup> The Commission should prevent municipalities from avoiding appropriate review of their rights-of-way actions, and instead should use its Section 253 authority to adopt a national framework for permissible rights-of-way management.<sup>13/</sup>

## **II. Section 253 Limits Municipalities to Management of the Public Rights-of-Way**

Certain of the municipal commenters set up strawmen, arguing that the Commission does not have the authority to make itself into a “national agency for rights of way management.”<sup>14/</sup> These commenters protest that only the cities have the requisite knowledge to coordinate work in the rights-of-way, grant permits, and make decisions about construction and restoration-related issues like trenching and joint undergrounding.<sup>15/</sup> They also argue that localities must regulate

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<sup>11/</sup> See, e.g., Comments of National League of Cities at 4-6 (stating that the language and legislative history of Section 253 make clear that Congress limited jurisdiction to the courts).

<sup>12/</sup> See, e.g., Cablevision of Boston, Inc. v. Public Improvement Commission, 38 F. Supp. 2d 46, 57 (D. Mass. 1999) (rejecting city’s argument that Section 253(c) does not imply a private right of action against state and local governments), aff’d on other grounds, 184 F.3d 88 (1st Cir. 1999); TCG Detroit v. City of Dearborn, 977 F. Supp. 836, 838, 841 (E.D. Mich. 1997) (rejecting city’s contention that Section 253(c) does not create a private cause of action); GST Tucson Lightwave, Inc. v. City of Tucson, 950 F. Supp. 968, 969, 971 (D. Az. 1996) (agreeing with city that Section 253(c) does not create a private right of action).

<sup>13/</sup> AT&T agrees with majority of courts that the courts do have a clear role in reviewing municipal conduct and enforcing Section 253(c), but believes that Commission guidance would be helpful in furthering the development of uniform interpretations of Section 253 by the courts, in furtherance of the pro-competitive purpose of the Act.

<sup>14/</sup> Comments of the City of Philadelphia at 5.

<sup>15/</sup> Comments of the National Association of Counties at 16-17.

the rights-of-way to prevent accidents and ensure that water, telephone, and natural gas and sewer lines are not severed.<sup>16/</sup>

But no one disputes that cities have the authority under Section 253(c) to manage the public rights-of-way, and no one is arguing that “each telecommunications provider [be] permitted to occupy the public rights-of-way in any manner it [sees] fit.”<sup>17/</sup> AT&T and others agree that regulation of the time or place of excavations, coordination of construction schedules, and local safety requirements that serve a stated safety purpose are permissible management functions under Section 253(c).<sup>18/</sup>

The issue in dispute is what constitutes permissible “rights-of-way management.” What the industry commenters -- ILECs and CLECs, wireline, cable, and wireless -- object to is burdensome regulation that is not related to rights-of-way management and duplicates or exceeds state and federal requirements.<sup>19/</sup> Congress,<sup>20/</sup> the Commission<sup>21/</sup> and the majority of courts<sup>22/</sup>

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<sup>16/</sup> Id. at 19-20.

<sup>17/</sup> Id. at 20.

<sup>18/</sup> See Comments of ALTS at 6, Comments of Cox Communications at 14-16, Comments of Global Crossing Ltd. at 9-14, Comments of GTE Service Corp. at 5.

<sup>19/</sup> See Comments of ALTS at 2, 6 (“no carrier should be subject to fees or requirements that are wholly unrelated to reasonable regulation of the public rights-of-way”), Comments of BellSouth Corporation at 3, Comments of Cablevision Lightpath and Nextlink Communications at 3 (impermissible third tier of regulation created by municipalities that impose obligations unrelated to management of the rights-of-way), Comments of Cox Communications at 13-19, Comments of Global Crossing Ltd. at 6, Comments of GTE Service Corp. at 8-9, Comments of ICG Telecom Group at 3-10, Comments of MediaOne Group at 4, Comments of National Cable Television Association at 6-9, Comments of Teligent at 2-3.

<sup>20/</sup> See footnotes 6-9, supra, and accompanying text.

<sup>21/</sup> See, e.g., Classic Telephone Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082 (1996), discussed in Comments of AT&T Corp. at 5-6.

<sup>22/</sup> See, e.g., AT&T Communications of the Southwest, Inc. v. City of Dallas, 52 F. Supp. 2d 763, 769 (N.D. Tex. 1999) (city cannot require telecommunications provider to comply with conditions that are unrelated to the use of the City’s right-of-way); Bell Atlantic-Maryland, Inc. v. Prince George’s County, Maryland, 49 F. Supp. 2d 805, 817 (D. Md. 1999) (county’s

also agree that localities may not expand their limited rights-of-way management authority into the substantive regulation of telecommunications. The Commission should use this opportunity to affirm the permissible limits of local rights-of-way authority, by adopting a national policy like that advocated by AT&T:

- Municipalities are limited to management of the public rights-of-way, such as regulating the time, place, and manner of excavations and construction. Municipalities may not impose requirements on telecommunications carriers that are unrelated to the use of the public rights-of-way.
- Municipalities may not engage in substantive telecommunications regulation. Substantive telecommunications regulation includes, but is not limited to, regulating or mandating interconnection among carriers, regulating rates, requiring carriers to complete elaborate application forms or certify their financial, technical and legal qualifications, dictating technical standards, imposing customer service requirements, requiring universal service contributions, enforcing a carrier's compliance with the Communications Act, requiring carriers to waive their rights under federal or state laws, or granting the municipality the right to install or maintain its facilities free of charge on the facilities of a carrier.
- Municipalities are permitted to require fair and reasonable compensation from telecommunications carriers for use of the public rights-of-way. Fair and reasonable compensation is based on the municipality's costs or the burden imposed by the carrier on the public rights-of-way.
- Municipalities must exercise their rights-of-way management and compensation authority on a competitively neutral and non-discriminatory basis.<sup>23/</sup>

AT&T also fully supports the five principles advocated by ALTS, which are consistent with AT&T's prior comments in this proceeding:

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burdensome application requirements, approval processes, and fees, when viewed in combination, exceed its rights-of-way management authority by creating substantial and unlawful barrier to entry and permitting the county to base its approval on issues that "go well beyond the bounds of legitimate local governmental regulation"); BellSouth Telecom, Inc. v. City of Coral Springs, 42 F. Supp. 2d 1304, 1309 (S.D. Fla. 1999) (city "can only" manage its rights-of-way).

<sup>23/</sup> See Comments of AT&T at 17-20 (describing scope of permissible rights-of-way management).

- Local rights-of-way management must be administered in a nondiscriminatory and competitively neutral manner and any local requirements therefore must be imposed under ordinances, regulations and rules of general application.
- Municipalities must rule on applications to construct facilities within a reasonable period of time and may not unreasonably deny carriers permission to construct facilities in the municipal rights-of-way.
- Regulation of interstate telecommunications services is under the exclusive jurisdiction of the Commission. Localities may not regulate intrastate communications unless they have explicit state statutory authority.
- Municipal regulation of use of the rights-of-way is limited to reasonable regulation of the time, place and manner of construction of facilities.
- Fees relating to the use of public rights-of-way should be limited to recovery of the actual costs of administering the rights-of-way and ensuring appropriate restoration of the rights-of-way. Performance or other bonds must be limited to the amount necessary to ensure compliance with restoration requirements. All such fees must be publicly disclosed and should be recovered in a competitively neutral manner.<sup>24/</sup>

### **III. Barriers to Entry Are Being Created by Cities Engaging in Substantive Telecommunications Regulation Under the Guise of Rights-of-Way Management**

All of the telecommunications carriers who filed -- whether they are incumbents or competitors, cable, wireline, or wireless -- agree that localities that engage in substantive telecommunications regulation are creating significant barriers to entry.<sup>25/</sup> While municipal commenters claim that there is “no evidence” in this docket to suggest that such rights-of-way policies have impeded entry,<sup>26/</sup> AT&T and other telecommunications carriers have provided specific examples of impermissible regulations that have impeded the entry of competitive telecommunications providers.

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<sup>24/</sup> Comments of ALTS at 8-9.

<sup>25/</sup> See, e.g., Comments of ALTS at 1, Comments of Cox Communications at 5-12, Comments of Global Crossing Ltd. at 6-8, Comments of Level 3 Communications, LLC at 4-10, Comments of Metricom at 3-6, Comments of RCN Telecom Services at 3, Comments of SBC Communications at 3, 6-8, Comments of Teligent at 7.

For example, GTE described thirty-two excessive and burdensome local government right-of-way provisions that far exceed municipal authority.<sup>27/</sup> McLeod explains that it decided not to install backbone in city that attempted to impose unreasonable conditions on it, depriving city residents of choice of facilities-based provider.<sup>28/</sup> Pirelli Jacobson describes its experience in Washington State, where a supposedly final agreement for use of the rights-of-way was reached with state agency, only to have the agency repeatedly increase its charge to Pirelli Jacobson and in the end, compel it to agree to arbitrary and substantially altered terms.<sup>29/</sup> ICG Telecom Group describes requirements of municipalities that caused significant barriers to entry, including a city where negotiations for construction permits alone took seven months and thousands of dollars in unnecessary expense.<sup>30/</sup> ICG also describes a municipal ordinance that requires all carriers to use one designated construction company to build and manage all underground conduits in the rights-of-way. This municipally-designated company charges exorbitant fees that providers have no option but to pay if they want to construct facilities.<sup>31/</sup> MediaOne describes an ordinance in a Michigan city that requires MediaOne to produce a narrative description of all 400 miles of its cable network before it can begin providing telecommunications services, even though the same facilities have been occupying the same rights-of-way for 20 years under the terms of the city's cable franchise agreement. The city also

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<sup>26/</sup> See, e.g., Comments of the National Association of Counties at 5, Comments of North Suburban Communications Commission at 14, 16-17 (local regulation is not and has never been a serious barrier to entry).

<sup>27/</sup> Comments of GTE Service Corp. at Appendix A.

<sup>28/</sup> Comments of McLeod USA at 2-3.

<sup>29/</sup> Comments of Pirelli Jacobson at 1-2.

<sup>30/</sup> Comments of ICG Telecom Group at 8-9.

<sup>31/</sup> Id. at 9-10.

requires MediaOne to demonstrate financial and other qualifications.<sup>32/</sup> MCI WorldCom recounted its inability to gain approval to expand its existing network in a municipality where it first sought permission for the expansion in 1997.<sup>33/</sup>

AT&T's ongoing experience with the City of White Plains provides a stark example of the degree to which municipalities are willing to use their rights-of-way management authority to force competitive carriers to agree to unlawful conditions, even if those efforts ultimately prevent competitive LECs from entering the market.<sup>34/</sup> In the City of White Plains, where AT&T has been seeking entry since 1992, the City's attempts to impose impermissible rights-of-way regulations and unlawful fees on AT&T continue to prevent AT&T from providing service.<sup>35/</sup> After years of failed negotiations and foot-dragging by the City, AT&T was finally compelled to file a complaint against the City in the United States District Court for the Southern District of New York. Although AT&T has offered to enter into an interim agreement with the City that would reserve both parties' rights in the pending litigation, while allowing AT&T to begin construction in the meantime (subject, ultimately, to any lawful franchising requirements as determined in the litigation), the City has flatly refused to accept AT&T's proposal.<sup>36/</sup>

The fact that CLEC fiber deployment has grown in the past few years does not "prove" that municipalities are not creating barriers to entry.<sup>37/</sup> It is impossible to know how many

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<sup>32/</sup> Comments of MediaOne Group at 4-5.

<sup>33/</sup> Comments of MCI WorldCom at 3.

<sup>34/</sup> In its comments, AT&T provided specific citations to several other ordinances that are or have been the subject of litigation. As AT&T explained, while there are other ordinances that AT&T would like to bring to the Commission's attention, AT&T is reluctant to identify those cities by name, especially where it is involved in ongoing rights-of-way negotiations.

<sup>35/</sup> See declaration of Meredith Harris, attached hereto as Exhibit 1.

<sup>36/</sup> Id.

<sup>37/</sup> See Comments of National Association of Counties at 10-11 (stating that because competition is increasing and networks are being built in the current regulatory environment,

carriers simply abandon their plans to provide service in a city, rather than submit to onerous terms and conditions for use of the public rights-of-way. Competition has increased overall, but it could increase more rapidly if telecommunications providers did not face the barriers created by local rights-of-way ordinances. These barriers prevent competition from flourishing at a faster pace than the telecommunications industry is currently experiencing. They also contribute to wide geographical fluctuations in the degree to which true facilities-based local competition is occurring, as competitive LECs are forced to divert their investment away from municipalities that have maintained barriers to entry and toward those that have implemented rights-of-way management policies that are in keeping with the requirements of Section 253.

Even where states have expressly limited the authority of localities to regulate telecommunications providers, competition has been hindered by cities that continue to enact regulation beyond what state and federal law allow. The Colorado Municipal League claims that Colorado legislation limiting localities' ability to regulate the rights-of-way has not spurred competition in the state or lowered prices for consumers, and asserts that this is evidence that municipal regulation does not create barriers to entry.<sup>38/</sup> But this argument does not recognize that Colorado cities continue to enforce invalid regulations that create barriers to entry. For example, Denver's rights-of-way ordinance has been found to violate the guidelines created by

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local governments can not be creating competitive barriers); Comments of National League of Cities at 13-16 (claiming that exponential growth of CLECs and fiber deployment in the past three years refutes any suggestion that local rights-of-way management and compensation requirements have had an adverse effect on the development of facilities-based competition in local markets and claiming that the fact that CLECs have been deploying ROW fiber capacity faster than ILECs shows that rights-of-way requirements have not had a discriminatory effect on new entrants).

<sup>38/</sup> Comments of Colorado Municipal League at 10-11.

state law.<sup>39/</sup> Cablevision Lightpath, Nextlink, Global Crossing, and ICG Telecom Group described other situations where municipalities have resisted compliance with state laws.<sup>40/</sup>

The commenters also provided evidence that municipalities are attempting to impose their ordinances on carriers that do not use the public rights-of-way.<sup>41/</sup> Contrary to the claims of the National League of Cities and National Association of Counties,<sup>42/</sup> resellers and UNE purchasers cannot be required to comply with such ordinances or pay rights-of-way fees to municipalities. Section 253(c) sanctions the exercise of municipal authority only when a carrier imposes a burden upon the municipality or physically intrudes upon the municipality's right-of-way.<sup>43/</sup> As the court in Dallas found, "the legislative history surrounding the adoption of Section 253(c), and the cases that have since been decided on the issue, have interpreted the provisions to apply to physical occupation of a city's rights-of-way."<sup>44/</sup> Accordingly, a city's authority under Section 253(c) does not reach carriers that do not burden a city's rights-of-way, such as wireless

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<sup>39/</sup> See id. at 9-10 (citing U.S. West Communications, Inc., et al. v. City and County of Denver, Denver District Court, State of Colorado, Case No. 98CV691, appeal pending).

<sup>40/</sup> Comments of Cablevision Lightpath and Nextlink Communications at 16, n. 41, Comments of Global Crossing Ltd. at 5-6, Comments of ICG Telecom Group at 9-11.

<sup>41/</sup> See, e.g., Comments of AirTouch at 5-7, Comments of BellSouth at 7, Comments of Cox at 28, 31, Comments of Teligent at 5-6.

<sup>42/</sup> Comments of National Association of Counties at 29-31 (indirect use of the rights-of-way by resellers must be taken into account by local governments); Comments of the National Association of Counties at 11 (claiming that exempting resellers and other users of ILEC rights-of-way facilities from rights-of-way compensation fees will decrease facilities-based-competition).

<sup>43/</sup> See Comments of AT&T Corp. at 8, Comments of AirTouch Communications at 7, 12, Comments of BellSouth Corporation at 7, Comments of Cox Communications at 28-29, Comments of GTE Service Corp. at 7-8, Comments of Teligent at 4. See also Comments of Cox Communications at 31 (providing additional services over upgraded cable systems does not place any additional burdens on the rights-of-way), Comments of National Cable Television Association at 11-12 (if cable operator's use of the rights-of-way to provide telecommunications services imposes no incremental burden on the rights-of-way, no additional regulation should be necessary).

carriers, resellers, carriers providing service through unbundled network elements purchased from other carriers, and carriers that lease conduit or dark fiber or attach their facilities to the poles of others.<sup>45/</sup> Two federal appeals courts recently reached the same conclusion.<sup>46/</sup>

The National Association of Counties claims that it is “unclear” how local rights-of-way requirements could be entry regulation of CMRS providers that is prohibited by Section 332(c)(3).<sup>47/</sup> Although permissible rights-of-way management is not entry regulation, when localities enact requirements beyond mere management of the rights-of-way, Section 332(c)(3) is violated. Examples of impermissible entry regulation include requirements that wireless carriers certify that they will serve the public convenience and necessity or make showings of character, technical, or financial fitness.<sup>48/</sup> For example, a now vacated Eugene, Oregon ordinance required wireless carriers to register with the city and pay fees, regardless of whether the carrier made use of the rights-of-way.<sup>49/</sup> Because the ordinance required CMRS providers to obtain additional, special licenses and approvals from the city in order to provide CMRS in the city, it impermissibly regulated the entry of CMRS in violation of Section 332(c)(3)(A).<sup>50/</sup>

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<sup>44/</sup> AT&T Communications of the Southwest, Inc. v. City of Dallas, 52 F. Supp. 2d 756, 761 (N.D. Tex. 1998).

<sup>45/</sup> See, e.g., AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F. Supp. 928, 935, 941-43, (W.D. Tex. 1997) (finding Austin had no authority over AT&T when AT&T was providing service via resale and unbundled network elements).

<sup>46/</sup> See City of Chicago, et al. v. Federal Communications Commission, 1999 U.S. App. LEXIS 32008, at \*22 (7th Cir. Dec. 7, 1999) (finding SMATV operator is not cable operator and does not “use” right-of-way); City of Austin v. Southwestern Bell Video Services, 193 F.3d 309, 312 (5th Cir. 1999) (finding that Southwestern Bell Video Services did not need franchise to provide cable services over network of Southwestern Bell Telephone Company).

<sup>47/</sup> Comments of the National Association of Counties at 42-43.

<sup>48/</sup> See Comments of AT&T at 15-16.

<sup>49/</sup> Eugene Code §§ 3.405, 3.415.

<sup>50/</sup> See AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene, Oregon, Case No. 16-98-12672 (Or. Cir. Ct. March 1, 1999) (granting AT&T’s Motion for Summary Judgment).

#### **IV. Discriminatory Rights-of-Way Management Violates Section 253**

As many commenters demonstrated, uneven regulation of incumbents and new competitors exacerbates the advantages that incumbent LECs already enjoy and has a discriminatory effect on new entrants.<sup>51/</sup> For example, Cablevision Lightpath and Nextlink describe franchising and fee obligations imposed on CLECs in municipalities within New York, Michigan, Maryland, Arizona, and Washington State that are not imposed on incumbents in those municipalities, thus putting the CLECs at a competitive disadvantage.<sup>52/</sup> ALTS describes municipal ordinances in these and five other states that discriminate against CLECs in favor of incumbents.<sup>53/</sup> ICG Telecom Group describes a California municipality's subjective, time consuming requirements that delay entry while allowing incumbent carriers unhindered access to the city's rights-of-way.<sup>54/</sup> MCI WorldCom describes similar state and local requirements that treat incumbents more favorably than competitors<sup>55/</sup> and McLeod USA highlights multiple instances where a requirement has been imposed on it but not the incumbent.<sup>56/</sup>

In its initial comments, AT&T described how uneven regulation exacerbates the advantages ILECs have over new entrants and greatly increases the costs of competitive carriers.<sup>57/</sup> One of the clearest examples is the discriminatory imposition of franchise fees. For example, in White Plains, New York, the city required AT&T to pay a franchise fee of five

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<sup>51/</sup> Comments of ALTS at 6, 10-17; Comments of Cox at 11-13; Comments of Global Crossing at 6; Comments of ICG Telecom Group at 7; Comments of Level 3 Communications at 9, 14-15; Comments of MCI WorldCom at 2; Comments of MediaOne Group at 4-7; Comments of National Cable Television Association at 13-14; Comments of RCN Telecom Services at 5-6.

<sup>52/</sup> Comments of Cablevision LightPath and Nextlink Communications at 12-15.

<sup>53/</sup> Comments of ALTS at 10-17.

<sup>54/</sup> Comments of ICG Telecom Group at 7-9.

<sup>55/</sup> Comments of MCI WorldCom at 2-4.

<sup>56/</sup> Comments of McLeod USA at 2-6.

<sup>57/</sup> See, e.g., Comments of AT&T at 28-29.

percent of AT&T's gross revenues, while exempting the incumbent from any gross revenues based franchise fee.<sup>58/</sup> Similarly, in Dearborn, Michigan, AT&T was forced to pay a four percent fee on gross revenues, while the incumbent was exempted from any such fee.<sup>59/</sup> Other carriers described similar experiences. MediaOne has faced a requirement to pay a fee of three percent of gross revenue from all telecommunications services delivered over their facilities within city limits while the incumbent is only required to pay three percent of *recurring* local service revenue and revenue derived from a limited group of other services.<sup>60/</sup> Cox describes an ordinance that levies a five percent right-of-way fee on CLECs, but only a three percent fee on ILECs. Even worse, the higher CLEC fee is drawn from all of the CLECs' gross telecommunications revenues, while the ILEC fee is drawn only from those revenues the ILEC earns from the provision of recurring local services. Additionally, the CLEC is required to install six dark fibers for the city's benefit while this burden is not placed on the ILEC.<sup>61/</sup>

Some municipal commenters claim that such discrepancies in treatment are permissible, arguing that Section 253(c) does not require localities to treat all carriers the same.<sup>62/</sup> As Cablevision and Nextlink explained, however, differences in regulatory treatment may be justified based on the extent to which carriers use the rights-of-way (for example, by requiring carriers that impose a greater burden on the rights-of-way to bear a larger amount of the cost of

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<sup>58/</sup> See declaration of Meredith Harris, attached hereto as Exhibit 1.

<sup>59/</sup> See, e.g., TCG Detroit v. City of Dearborn, No. 98-803937 at 18 (Mich. Cir. Ct., Wayne County June 17, 1999).

<sup>60/</sup> Comments of MediaOne Group at 7.

<sup>61/</sup> Comments of Cox Communications at 11.

<sup>62/</sup> Comments of City of Richmond at 9, Comments of City of White Plains at 9-13.

managing use of the rights-of-way), but they may not be based upon a carrier's regulatory status or the type of services it provides.<sup>63/</sup>

Other municipalities claim to share the concerns of the Commission and competitive providers that rights-of-way arrangements might favor local incumbents, but blame the discriminatory treatment on the incumbents.<sup>64/</sup> Whatever the source of the discriminatory treatment, it violates Section 253(c)'s requirement that rights-of-way management be done on a "competitively neutral and nondiscriminatory basis." The Commission's national policy should make clear that if a locality cannot reach an incumbent provider, it cannot impose the requirements in question on a competitive provider.<sup>65/</sup> Alternatively, the Commission can alleviate the anticompetitive effects of inconsistent state and local treatment of incumbents by promulgating "opt in" rules that provide competitive LECs with the option of using the rights-of-way under the same terms and conditions that the incumbent LEC is using.<sup>66/</sup>

#### **V. Cities Are Limited to "Fair and Reasonable" Cost-Based Compensation for Use of the Public Rights-of-Way**

Cities are permitted to collect cost-based compensation for use of the public rights-of-way, but many cities have imposed excessive fees that are not fair and reasonable and bear little relationship to burdens imposed on the rights-of-way. All segments of the telecommunications industry have provided examples of localities that have attempted to use their Section 253(c) authority to collect unreasonable compensation from companies seeking to use the rights-of-

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<sup>63/</sup> Comments of Cablevision LightPath and Nextlink Communications at 18-19 (citing Dallas I at 593-94, Austin II at 9-14).

<sup>64/</sup> Comments of National Association of Counties at 32.

<sup>65/</sup> If state law is the source of the discrimination, then the locality is free to petition the state legislature and seek to have that discrepancy addressed.

<sup>66/</sup> See Comments of AT&T at 30.

way.<sup>67/</sup> For example, Level 3 Communications describes a municipal requirement that it donate ten strands of fiber and \$200,000 in equipment to a certain city, pay the city fees of five percent of annual gross revenues (including revenues unrelated to the use of the right-of-way), and agree to a minimum annual fee of \$200,000.<sup>68/</sup>

The National Association of Counties argues that localities must be able to recover their costs of administering the rights-of-way,<sup>69/</sup> but no one disagrees. It is “fair and reasonable” for a city to seek to recover the costs it incurs in processing applications, inspecting installations, repairing and maintaining the rights-of-way, and the like. But the municipal commenters provide no evidence for why it is fair and reasonable for them to raise general revenues on the backs of the telecommunications providers, or seek to recover some perceived “value” of the public rights-of-way to the provider of telecommunications services.

Although cities that are acting in a “proprietary” manner often charge what the marketplace will bear for the right to use space in their buildings or other property for commercial purposes, as NCTA notes, the purpose of Section 253 is to preempt the government from acting in a such “proprietary” capacity with respect to the use of the public right-of-way by telecommunications providers.<sup>70/</sup> Section 253 limits the government’s role to the “governmental” function of managing the use of the public rights-of-way, not raising revenue.<sup>71/</sup>

Therefore, as MediaOne notes, any requirement or fee imposed as a condition of approval to provide telecommunications services must bear a direct and proportionate relationship to the

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<sup>67/</sup> See, e.g., Comments of ALTS at 17-21, Comments of Global Crossing Ltd. At 13-14, Comments of ICG Telecom Group at 3-7, Comments of MediaOne Group at 4-7, Comments of SBC Communications at 5-6.

<sup>68/</sup> Comments of Level 3 Communications, LLC at 6-7.

<sup>69/</sup> See Comments of National Association of Counties at 21-22.

<sup>70/</sup> Comments of National Cable Television Association at 10.

local interests recognized as legitimate under Section 253.<sup>72/</sup> Moreover, local governments may collect rights-of-way usage fees only if they are related to the actual incremental costs incurred in managing the public rights-of-way: “[C]ompensation’ [under Section 253(c)] is not restitution for service; it is not rent.”<sup>73/</sup> Fees that are not related to the additional burden that municipalities incur because of the permitting process or any burden that a carrier’s usage of the right-of-way imposes ought not be charged to carriers.<sup>74/</sup>

**VI. Commission Guidance Can Help Ameliorate the Tax Burden Placed on Carriers by Excessive and Discriminatory State and Local Taxes, Which Create a Barrier to Entry**

Certain municipal commenters claim that there is “no evidence” that local or state tax policies have impeded entry.<sup>75/</sup> The COST study submitted by AT&T and numerous other commenters, however, provides ample evidence of the burden on carriers.<sup>76/</sup> The study demonstrates that the existing telecommunications tax system is more burdensome and unmanageable than the complicated transactional tax system applicable to general businesses.<sup>77/</sup> The comments in this proceeding also demonstrate the inaccuracy of the National League of Cities’ claim that most taxes are generally applicable.<sup>78/</sup> For example, AirTouch Communications notes that wireless and wireline carriers are often subject to different

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<sup>71/</sup> Id.

<sup>72/</sup> Comments of MediaOne Group at 9.

<sup>73/</sup> Comments of Cox Communications at 20 (citing Prince George’s County at 10, Dallas I at 593).

<sup>74/</sup> Comments of ALTS at 17-18.

<sup>75/</sup> Comments of National Association of Counties at 5.

<sup>76/</sup> Comments of AT&T Corp. at Exhibit B, Comments of Cellular Telecommunications Industry Association at 4-5, Exhibit 1, Comments of GTE Service Corp. at 13-15, 18, Exhibit B, Comments of SBC Communications at 18. See generally, Comments of Committee on State Taxation.

<sup>77/</sup> Comments of Committee on State Taxation at 1.

requirements,<sup>79/</sup> and GTE describes discriminatory property taxes and discriminatory transactional tax rates in its comments.<sup>80/</sup> Likewise, SBC Communications discusses inconsistent definitions and sourcing methodologies for telecommunications services that give rise to potential double taxation, special taxes for telecommunications services, and transactional taxes on the equipment purchased to provide telecommunications service.<sup>81/</sup> While the Commission may not have authority to preempt state tax law, there are positive steps the Commission can take. The Commission can develop uniform taxation principles to guide states and localities and can act as an advocate for sound taxation policies, as AT&T, GTE, CTIA, and others have recommended.<sup>82/</sup>

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<sup>78/</sup> Comments of the National League of Cities at 17-23.

<sup>79/</sup> Comments of AirTouch Communications at 13.

<sup>80/</sup> Comments of GTE Service Corp. at 17-19.

<sup>81/</sup> Comments of SBC Communications at 9-10.

<sup>82/</sup> See Comments of AT&T Corp. at 44-45, Comments of CTIA at 5, Comments of GTE Service Corp. at 19-20.

## CONCLUSION

The Commission has ample authority under Section 253 to adopt a national policy defining the scope of permissible local authority, which will help eliminate ordinances that act as barriers to entry and will promote the development of competitive networks. The Commission should also develop uniform model taxation principles to guide states and localities, and should act as an advocate for simple and sound taxation policies.

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December 13, 1999

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**DECLARATION OF MEREDITH R. HARRIS  
ON BEHALF OF AT&T CORP.**

I, Meredith R. Harris, do hereby declare as follows:

1. My name is Meredith Harris. My business address is 333 East 79th Street, Suite 55, New York, New York 10021. I was Vice President and Assistant General Counsel at Teleport Communications Group ("TCG") from October 1991 until it merged with AT&T in July 1998. I presently serve as Senior Rights-of-Way Counsel, AT&T Corp. During the last seven years, I have engaged in or supervised right-of-way negotiations with over one thousand local municipalities and other parties, and I am intimately familiar with the costs and delays that these negotiations impose on competitive local exchange carriers ("CLECs"). I have discussed these costs and delays at a 1996 FCC forum on rights-of-way management, and at various professional conferences, including conferences hosted by ALTS, Strategic Research Institute, United States Telephone Association, and the Florida Telecommunications Association. I also have prepared a training manual and a white paper on this subject, and have published an article on this topic entitled "Roadblocks to Competition," which appears in the January 1997 edition of X-Change Magazine.

2. Local municipalities increasingly are adopting ordinances that require telecommunications carriers to obtain rights-of-way agreements before they can offer service in the municipality. While some municipalities limit themselves to management of the rights-of-way, others attempt to use their authority to require service providers to agree to onerous terms and conditions. Because new entrants must enter into such an agreement before they may begin providing service, they are frequently given a Hobson's choice: agree to the municipality's unreasonable and unlawful terms, be denied authorization to provide local services, or engage in protracted negotiation and litigation in order to obtain reasonable terms. Because of the long-term effects a competitive LEC would suffer if it acquiesced to an agreement that contains onerous terms and conditions and places them at a competitive disadvantage relative to the incumbent LECs, most competitive LECs usually choose to engage in lengthy negotiations and litigation. This process may drag on for years, during which time the competitive LEC is

prohibited from providing service in the municipality. AT&T's experience with the City of White Plains, New York is a good example of the barriers to entry that competitive providers face.

3. AT&T has been seeking permission from the City of White Plains, New York, (the "City") to construct, operate, own, and maintain facilities for the purpose of providing telephone and telecommunications services in the City since 1992 -- for almost eight years.

4. On or about January 6, 1992, AT&T, through its predecessor Teleport Communications Group Inc., through Teleport Communications d/b/a TCNY (hereinafter collectively referred to as "AT&T"), requested that the City grant it permission to construct, operate, and maintain facilities in the public rights-of-way for the purpose of providing telephone and telecommunications services to residents and businesses in the City.

5. In response to the City's requests, AT&T provided the City with additional information, including proof of its certification by the New York Public Service Commission. The City, however, never granted AT&T's request.

6. As a result, AT&T chose at that time to temporarily forego constructing its own facilities in the public rights-of-way, and instead, began providing service to customers in the City by reselling private line and switched telephone and telecommunications services obtained from other providers on a wholesale basis. AT&T has continued to provide such service to a limited extent on a resale basis through the present, even though resale requires AT&T to be dependent on the incumbent LEC and thus results in higher costs and poorer service, and therefore fewer customers.

7. Even after deciding to provide service via resale, AT&T continued to communicate with the City regularly from 1993 to the present in an attempt to secure permission to occupy the public rights-of-way.

8. AT&T's communications with the City over this nearly seven-year period have included personal meetings, telephone calls, written correspondence and electronic correspondence ("e-mail").

9. Unable to convince the City to approve its original 1992 request or any of its ongoing requests over six years of meetings and communications, on or about April 10, 1998, AT&T again formally applied to the City for permission to construct telephone and communications facilities in the public rights-of-way of the City (the "1998 Application").

10. On or about June 25, 1998, in response to the 1998 Application, the City, by and through its attorney, Edward Dunphy, provided to AT&T a copy of a franchise agreement between the City and Metromedia Fiber Network Services, Inc., another telecommunications company (the "Metromedia Franchise").

11. In his letter accompanying the Metromedia Franchise, Mr. Dunphy stated that he was required by law to present to AT&T the same agreement as the City had entered into with Metromedia.

12. The City, however, has not required the incumbent telephone company, NYNEX (now Bell Atlantic), to enter into any franchise agreement, and NYNEX has no franchise from the City. The City also has not required NYNEX to pay any franchise fee based on a percentage of its revenues.

13. In his June 25 letter, Mr. Dunphy did not explain why the City has not required NYNEX to enter into any franchise agreement.

14. On or about August 28, 1998, AT&T transmitted to the City comments regarding the Metromedia Franchise, including a "redlined" version of the Metromedia Franchise, which identified to the City the provisions of the franchise agreement that AT&T believed were beyond the City's lawful authority, or otherwise were inappropriate.

15. In transmitting its comments to the City, AT&T expressly reserved its right to challenge the City's authority to require AT&T to enter into such a franchise agreement, and to challenge specific terms and conditions contained in the franchise agreement.

16. Between August 28, 1998 and January 29, 1999, AT&T repeatedly and continuously attempted to communicate with the City regarding the 1998 Application. The City, however, was not responsive to AT&T's attempts.

17. On or about January 29, 1999, I, Meredith R. Harris, counsel for AT&T, was finally able to communicate directly with Mr. Dunphy. Sometime that week, Mr. Dunphy informed me that the City agreed to exclude from any final franchise agreement language that may have subjected revenues derived by affiliates of AT&T, including but not limited to revenues of ultimate parent corporations, to the calculation of a "franchise fee," a payment to the City based on a percentage of revenue.

18. Despite the fact that it had already applied to the City for permission to place and maintain its facilities in the public rights-of-way, on or about February 8, 1999, AT&T filed with the City, pursuant to Section 27 of the New York Transportation Corporations Law, an application for a "franchise" to allow it to place and maintain its facilities in the public rights-of-way. AT&T filed this new application at the insistence of the City, which asserted that the 1998 Application was for a "license" rather than a "franchise," even though the City knew at least as early as June 1998 that AT&T was seeking a franchise (as its transmittal of a model agreement demonstrates).

19. On or about February 10, 1999, AT&T re-filed its application of February 8, 1999, amending it to reflect the fact that in the interim, Mr. Dunphy had informed me that the City agreed to certain provisions that AT&T had requested (the "1999 Application"). Specifically, in the interim, Mr. Dunphy stated that the City had agreed to exclude from any final franchise agreement language waiving AT&T's right to challenge the provisions of the franchise agreement under State and Federal laws. However, on April 26, 1999, the City informed me that Mr. Dunphy had never agreed that "all AT&T income would be excluded from the agreement

nor that the City would add language that would permit the challenge of the franchise agreement in court by the franchisee.”

20. Despite many requests for action on the 1999 Application during the months of February, March, and April of 1999, the City did not forward a proposed franchise agreement for AT&T until May 4, 1999 (the “Franchise Agreement”).

21. Between February and May, the City took numerous actions that led AT&T to believe that action on the 1999 Application was imminent. The City, however, did not take the promised actions. For example, the 1999 Application was not on the Council’s March or April agendas, despite statements by the City’s representative to AT&T that he would try to put it on the agenda.

22. The Franchise Agreement that the City forwarded to AT&T on May 4, 1999 in response to the 1999 Application is essentially identical to the Metromedia Franchise that was forwarded to AT&T by the City on August 28, 1998, and failed to take into account any of AT&T’s comments on the Metromedia franchise.

23. On June 17, 1999, AT&T, through Teleport Communications Group Inc., TC Systems, Inc., and Teleport Communications d/b/a TCNY, filed a complaint for declaratory and injunctive relief against the City in the United States District Court for the Southern District of New York. That case remains pending.

24. After the filing of its Complaint, AT&T proposed to the City an interim agreement that would reserve both parties’ rights, and their right to pursue their respective positions in the litigation, while allowing AT&T to begin construction in the meantime (subject, ultimately, to any lawful franchising requirements as determined in the litigation). The City has flatly refused AT&T’s proposal.

**Harris Declaration**  
**WT Docket No. 99-217**  
**Page 6**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 13 day of December, 1999.

A handwritten signature in black ink, reading "Meredith R. Harris". The signature is written in a cursive style with a horizontal line underneath the name.

Meredith R. Harris

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## CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 13th day of December 1999, I caused copies of the foregoing "Reply Comments of AT&T Corp." to be sent to the following by either first class mail, postage prepaid, or by hand delivery (\*):

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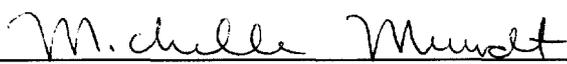
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