

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

RECEIVED
DEC 13 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Promotion of Competitive Networks)
in Local Telecommunications Markets)

WT Docket No. 99-217

REPLY COMMENTS OF GTE

GTE Service Corporation and its affiliated communications companies (collectively, "GTE")¹ hereby respectfully submit these Reply Comments in response to various comments filed by interested parties in the Commission's Notice of Inquiry ("NOI")² in the above-captioned matter.

I. INTRODUCTION

GTE applauds the efforts of the numerous respondents to the NOI, both telecommunications industries and public entities, in submitting detailed responses to the questions posed in the NOI and in the attempts of all parties to provide the specific information sought by the FCC in this proceeding. The volume and diversity of the views and examples demonstrate the contentious nature of the current relationship between the telecommunications industry and local governments with regard to access and use of public

¹These comments are filed on behalf of GTE's affiliated domestic telephone operating companies, GTE Wireless Incorporated, GTE Media Ventures, and GTE Communications Corporation, Long Distance Division. GTE's domestic telephone operating companies are: GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.

² *Promotion of Competitive Networks in Local Telecommunications Markets*, FCC 99-141, WT Docket No. 99-217 (rel. July 7, 1999) (Notice of Inquiry) ("NOI").

No. of Copies rec'd 24
List ABCDE

rights-of-way ("ROW"). They also highlight the confusion and uncertainty inconsistent ROW policies create for telecommunications providers seeking to enter new markets.

Notwithstanding the "all is well" affirmations of some respondents, the record established in this proceeding clearly indicates the need for the FCC to clarify the limits on local governments' ability to manage ROW under the 1996 Act. In that vein, the Commission clearly has jurisdiction to preclude ROW regulations that impede market entry under Section 253 of the Act. The limited examples of "success stories" given by government commenters are not the norm across the country and they do not diminish the anti-competitive impact of many local ROW regulations. GTE also rejects the notion put forth by a number of respondents that only competitive local exchange carriers ("CLECs") are faced with burdensome or unlawful ROW regulation or policies. In GTE's experience, incumbent local exchange carriers ("ILECs") are targeted with such regulation on a frequent basis.³ Cities appear to be trying to extend regulatory authority, including the ability to assess fees, to all carriers – even where carriers do not use rights-of-way at all.⁴

Finally, GTE notes that the evidence on the record overwhelmingly demonstrates that discriminatory taxation at the state and local level is a pervasive problem, which serves as a substantial barrier to entry. The comments of the taxation authorities submitted in this proceeding do little to counter the evidence of the existence and on-going nature of this discrimination. Contrary to the assertions of such commenters, local legislative and judicial

³ See, e.g., *BellSouth Telecommunications, Inc. v. Town of Palm Beach, Florida*, 1999 U.S. Dist. LEXIS 16904, No. 98-8232-CV (S.D. Fl. Sept. 28, 1999); *AT&T Communications of the Southwest v. City of Austin*, 975 F.Supp. 928, *final judgment entered*, 40 F.Supp. 2d 852 (W.D. Tex. 1997); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F.Supp.2d 763 (N.D. Tex. 1999); *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F.Supp. 1304 (S.D. Fl. 1999).

⁴ See, e.g., *AT&T v. City of Dallas*, *supra*, note 3.

processes do not provide adequate recourse for challenging these discriminatory policies, as these processes can be difficult or impossible for telecommunications carriers to successfully utilize. As a result, the Commission should announce that these taxation policies constitute a barrier to entry and work to eliminate their pernicious effects.

II. THE COMMISSION HAS JURISDICTION OVER MANAGEMENT AND COMPENSATION ISSUES UNDER SECTION 253(c) AND SHOULD PREEMPT ROW REGULATIONS THAT CONSTITUTE BARRIERS TO ENTRY

Contrary to the views put forth by one consortium representing local governments,⁵ the FCC does have jurisdiction over disputes arising under Section 253(c) of the Act. While Section 253(c) acknowledges and affirms the traditional powers of local governments to manage and require fair and reasonable compensation for the use of ROW, it was not intended to enlarge these powers or preclude the FCC from examining state regulation to determine whether it should exercise the preemptive powers of Section 253(d).⁶ Rather, Section 253(c) merely serves to preserve traditional powers so long as they are not exercised in a manner that frustrates the pro-competitive goals of the Act.

As GTE stated in its comments, the statutory language simply makes clear that “[n]othing in [Section 253] *affects* the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation”⁷ The jurisdictions that seek to push the bounds of reasonable compensation and permissible ROW

⁵ Comments of the National League of Cities et. al, WT Docket No. 99-217 at ii, 4, 6 (Oct. 12, 1999) (“League of Cities Comments”).

⁶ As a practical matter, local regulation which falls outside of the Section 253(c) preservation of authority, such as ROW regulation that is discriminatory or unreasonable, probably also violates Section 253(a) because such actions are likely prohibited barriers to entry. See Comments of GTE, WT Docket No. 99-217, at 4, n.6 (Oct. 12, 1999) (“GTE Comments”).

⁷ 47 U.S.C. § 253(c) (emphasis added).

management beyond the limitations proscribed by Congress⁸ are acting in a manner contrary to the pro-competitive goals of the Act and are thus subject to the federal preemptive powers of the FCC. The abuses and exorbitant fee structures imposed on telecommunications providers cannot be left to stand if the overall goals of the Act are to be reached. The Commission is clearly empowered to and should take preemptive action where ROW regulation creates a barrier to entry such as where regulations are discriminatory or localities require unreasonable compensation.

A significant example of discriminatory ROW policy is the Illinois Infrastructure Maintenance Fee ("IIMF") and City of Chicago implementation of such "fee." This taxation scheme is nothing more than a franchise fee imposed under a different name, since the sole purpose of the scheme is to replace existing franchise fees for ROW use.⁹ This tax is levied on all telecommunications providers, including CMRS carriers, regardless of whether they use any ROW. As indicated in GTE's comments, requiring certain carriers to pay ROW fees when they do not use ROWs is unreasonable and discriminatory and clearly violates Section 253(a) of the Act.¹⁰ The FCC should declare this type of blanket ROW fee a barrier to entry and preempt this law pursuant to Section 253.

III. NO TELECOMMUNICATIONS PROVIDER, WHETHER ILEC OR CLEC, SHOULD BE SUBJECTED TO REGULATIONS THAT VIOLATE SECTION 253 OF THE TELECOMMUNICATIONS ACT OF 1996

A number of NOI respondents have pointed out that some jurisdictions have exempted or otherwise failed to enforce new ROW regulation against incumbent

⁸ See generally, League of Cities Comments and the Comments of the National Association of Counties, et al., WT Docket No. 99-217 (Oct. 12, 1999) ("NAC Comments").

⁹ See Comments of the City of Chicago, WT Docket No. 99-217 (Oct. 12, 1999).

¹⁰ See GTE Comments at 7.

telecommunications providers.¹¹ While this may be true in some localities, it has been GTE's experience that the jurisdictions that seek to enforce unlawful ROW policies against all carriers far outnumber those that purport to solely exempt ILECs from such policies.¹² Further, such comments should not prevent the FCC from addressing the very significant concern that many ROW regulations and fees are burdensome and unlawful regardless of the parties to whom they are applied.

Finally, the FCC should reject the arguments that certain situations where providers are strong-armed into entering unlawful or objectionable local ordinances are beyond the reach of the proscriptions of Section 253 of the Act. Such acquiescence merely demonstrates the unfair bargaining powers of local governments in taking advantage of the market pressures faced by competitive providers, not that these providers believe the actions are lawful.

IV. THE RECORD OVERWHELMINGLY SUPPORTS GTE'S POSITION THAT THERE IS PERVASIVE DISCRIMINATION IN TAXATION AGAINST TELECOMMUNICATIONS CARRIERS

The record clearly reflects the pervasiveness of tax discrimination at the state and local level. GTE has already provided specific, comprehensive evidence of this

¹¹ See, for example, Comments of the Association for Local Telecommunications Services, WT Docket No. 99-217 at 10, 16 (Oct. 12, 1999); Comments of Cablevision Lightpath and Nextlink Communications, WT Docket No. 99-217 at 2, 4-5, 7-8 (Oct. 12, 1999); Comments of GST Telecom California, Inc., WT Docket No. 99-217 at 4-5, 18-19 (Oct. 12, 1999); Comments of Level 3 Communications, LLC, WT Docket No. 99-217 at 9 (Oct. 12, 1999); Comments of McLeod USA, Inc., WT Docket No. 99-217 at 2, 4-5 (Oct. 12, 1999); Comments of MediaOne Group, Inc., WT Docket No. 99-217 at 4, 6-7 (Oct. 12, 1999); Comments of MCI Worldcom, Inc., WT Docket No. 99-217 at 2, 4 (Oct. 12, 1999); and Comments of RCN Telecom Services, Inc., WT Docket No. 99-217 at 5-6 (Oct. 12, 1999).

¹² The limited examples of "success stories" given by government respondents are not the norm, and do not diminish the anti-competitive impact of local ROW regulation. See Comments of the League of Minnesota Cities, WT Docket No. 99-217 at 8 (Oct. 12, 1999).

discrimination.¹³ Other commenters have supported GTE's position, citing similarly detailed evidence of rampant discrimination in state and local tax codes.¹⁴

For example, AT&T notes that in its experience, "the proliferation of impermissible local telecommunications ordinances and unfair and unreasonable franchise fees and taxes is creating a substantial barrier to the entry of new communications services and obstructing the ability of new entrants to compete."¹⁵ BellSouth's comments illustrate the scope of the problem: "Since much of the discrimination against the telecommunications industry or against certain parts of the industry is inherent in or results from state law...the only remedy is to change the law...Moreover, in some cases . . . the discriminatory treatment is rooted in the state constitution, making change even more difficult, if not impossible."¹⁶

Comments from the taxation authorities, in contrast, provide nothing to counter the overwhelming evidence of inequitable tax treatment facing telecommunications carriers. Even the National League of Cities, the only party to address this issue, presents no evidence to support its general denials of the discriminatory nature of the taxes at issue.¹⁷ This mere fig leaf of denial cannot hide the naked truth: Taxation authorities are discriminating both among telecommunications providers and between the telecommunications sector and industry generally.¹⁸

¹³ GTE Comments, WT Docket No. 99-217 at 13 (Oct. 12, 1999).

¹⁴ See, e.g., Comments of AT&T Corporation, WT Docket No. 99-217, CC Docket No. 96-98 (Oct. 12, 1999) ("AT&T Comments"); Comments of BellSouth, WT Docket No. 99-217, CC Docket No. 96-98 (Oct. 12, 1999) ("BellSouth Comments"); and Comments of the Cellular Telecommunications Industry Association, WT Docket No. 99-217 at 3-4 (Oct. 12, 1999).

¹⁵ AT&T Comments at 2.

¹⁶ BellSouth Comments at 8.

¹⁷ League of Cities Comments at 17-19.

¹⁸ The League also accuses the wireless industry of seeking "favoritism" through its efforts

(Continued...)

The FCC can play an important role in promoting fair and equitable competition made possible through fair and nondiscriminatory taxation. By declaring that excessive and discriminatory taxes are a barrier to entry, and by urging tax reform advisory panels such as the Advisory Commission on Electronic Commerce (“ACEC”) to recommend non-discriminatory tax rules, the Commission can help eliminate one of the biggest obstacles facing the telecommunications industry and its consumers today. The benefit of removing these tax rules would be immediate, and would include lower rates, better, more affordable access to both basic and advanced services, and enhanced competition among telecommunications providers.

A. State And Local Authorities Have Clear Incentives To Impose Unfair Tax Burdens On Telecommunications Carriers.

In its comments, the National Association of Counties argues that local communities have no incentive to institute discriminatory taxes because local communities have as much interest in fostering the development of competitive networks as the Commission does.¹⁹ This argument could not be further from the truth. The telecommunications industry has been an immensely popular target for taxation in recent years simply because of its success. In the relentless pursuit of politically risk-free tax bases, local jurisdictions have gravitated to the high-growth telecommunications industry as a source of added revenue. Such discriminatory targeting of telecommunications services harms consumers because it

(...Continued)

to promote reform. *Id.* at 17-21. These allegations are without merit. As GTE has indicated before, the wireless industry is only asking to be treated like similarly situated carriers and that CRMS carriers not be forced to pay government fees that should not apply to them. GTE Comments at 7.

¹⁹ NAC Comments at 46.

raises the cost of obtaining services and creates competitive imbalances. It is hardly justifiable to discriminate simply because an industry is successful.

B. The Existence Of Local Legislative And Judicial Means Of Redress Does Not Adequately Protect Against Discriminatory Taxation.

The National Association of Counties contends that there are already adequate means for the telecommunications industry to challenge unfair and discriminatory taxation through “normal mechanisms of legislative and judicial review,” and that action by the Commission is therefore not needed.²⁰ In support of this proposition, the Association notes that the four examples of tax discrimination that the Commission highlighted in its NOI were all resolved without Commission intervention.²¹ While it is true that some taxation disputes are eventually resolved successfully at the local level, it is neither equitable nor efficient to force the telecommunications industry to oppose every discriminatory tax imposed by each of the multitude of state and local tax jurisdictions. As BellSouth has illustrated, the solution to these tax issues can often involve difficult and complex changes in state law, and, in some cases, changes to the state constitution.²² The Commission should recognize that it would be much more efficient and fair if local authorities simply did not impose these inequitable taxes in the first place.

V. CONCLUSION

The evidentiary record established thus far in the NOI clearly demonstrates that in order for the Commission to achieve the pro-competitive goals of the 1996 Act, it must exercise its authority under Section 253 to eliminate state and local government-imposed

²⁰ *Id.* at 47.

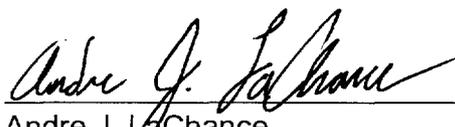
²¹ *Id.*

²² See BellSouth Comments at 8.

barriers to entry. GTE requests that the Commission act promptly to curb the growing state and local trend of increasing public right-of-way regulation and fees so that the pro-competitive goals of the Telecommunications Act can be more quickly achieved. GTE further requests that the Commission acknowledge that state and local authorities discriminate in taxation policies against and among telecommunications providers, and that the Commission provide leadership in encouraging taxing authorities to end such practices.

Respectfully submitted,

GTE Service Corporation and its Designated Affiliates

By: 
Andre J. LaChance
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, DC 20036
(202) 463-5276

John F. Raposa
GTE Service Corporation
600 Hidden Ridge, HQE03J27
Irving, Texas 75038
(972) 718-6969

Dated: December 13, 1999

CERTIFICATE OF SERVICE

I, Jacquelyn Martin, hereby certify that on this 13 day of December, 1999, I caused copies of the foregoing "Reply Comments of GTE" in WT Docket No. 99-217 to be sent via hand-delivery to the following:

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554
(Original and four copies)


Jacquelyn Martin