

Reply Comments of Williams Communications, Inc.
WT Dkt No. 99-217; CC Dkt No. 96-98
December 16, 1999



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December 16, 1999

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, S.W.
Washington, DC 20554

**Re: *Commission's Notice of Inquiry in
WT Docket No. 99-217 and
CC Docket No. 96-98***

Dear Secretary:

Williams Communications, Inc. ("Williams"), hereby submits its reply comments to the Commission's Notice of Inquiry in the above-captioned dockets via the Electronic Comment Filing System. Williams respectfully requests that the Commission accept these late-filed comments because several of the key company resources needed to draft and review the document were unavailable due to business out of the state or country.

If you have any questions with respect to this filing, please contact me at (918) 573-4865.

Sincerely,

/s/ William H. Gault

William H. Gault

WHG:psn

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

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)	CC Docket No. 96-98
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	
)	

**REPLY COMMENTS OF
WILLIAMS COMMUNICATIONS, INC.
ON ACCESS TO PUBLIC RIGHTS-OF-WAY
AND FRANCHISE FEES**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	2
II. MANY STATE AND LOCAL GOVERNMENTAL ENTITIES IMPOSE REQUIREMENTS THAT VIOLATE SECTION 253 OF THE TELECOMMUNICATIONS ACT.....	3
III. UNREASONABLE DELAY GRANTING AUTHORIZATIONS TO ACCESS PUBLIC RIGHTS-OF-WAY VIOLATES SECTION 253 OF THE TELECOMMUNICATIONS ACT.....	9
IV. THE COMMISSION SHOULD ENCOURAGE STATE GUIDELINES GOVERNING THE REQUIREMENTS LOCAL AUTHORITIES MAY IMPOSE ON CARRIERS SEEKING TO ACCESS PUBLIC RIGHTS-OF- WAY, PROVIDED THAT THE GUIDELINES ADHERE FEDERAL LAW	12
V. THE COMMISSION SHOULD CONSIDER ISSUING SELF-POLICING PROCEDURES IN A RULEMAKING PROCEEDING AND ISSUE A SPECIFIC STATEMENT THAT CERTAIN NOW-COMMON PRACTICES VIOLATE THE LAW AND ARE THEREFORE NOT BINDING ON CARRIERS	13
VI. CONCLUSION.....	15

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the Commission's Rules to Preempt)	
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Reception or Transmission Antennas)	
Designed to Provide Fixed Wireless)	
Services)	
)	
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and Assessments)	
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of 1996)	

**REPLY COMMENTS OF
WILLIAMS COMMUNICATIONS, INC.
ON ACCESS TO PUBLIC RIGHTS-OF-WAY
AND FRANCHISE FEES**

Williams Communications, Inc. ("Williams") hereby respectfully submits these reply comments to the Commission's Notice of Inquiry ("NOI") in the above-captioned matter.

I. INTRODUCTION AND SUMMARY

In its Order dated August 6, 1999, the Commission established separate pleading cycles for comments and reply comments submitted in the NOI. A significant number of parties filed comments relating to the NOI, and Williams is pleased to have an opportunity to respond to those comments.

The NOI is relevant to Williams because its Network Services unit is rapidly constructing a nationwide fiber-optic network that will consist of 32,000 route miles by the end of 2001. This network is one of the most advanced telecommunications intercity networks in the world and currently connects over 80 major markets in the United States. Unlike older networks that were primarily designed to support traditional voice communications, Williams' network architecture is designed for a future in which voice traffic will represent a very small proportion of total intercity telecommunications traffic. Williams and its communications affiliates utilize this network to offer a wide range of intercity telecommunications services, including high-speed data, voice, video, and Internet transport services. Williams' primary customer base consists of other telecommunications carriers and Internet service providers.

Because Williams is rapidly expanding its nationwide fiber-optic network, it has a great deal of experience obtaining permits and other authorizations from local governments and state agencies that are necessary to access public rights-of-way. Although the company did not initially file comments in this proceeding, it believes that its experiences are very similar to those expressed in the comments of other telecommunications carriers that filed comments in this matter. These reply comments discuss some of those similarities, noting examples specific to Williams.

When taken as a whole, Williams believes that the comments filed in this proceeding suggest that rapid Commission action is required to facilitate access to public rights-of-way and curb abusive practices. To encourage deployment of telecommunications infrastructure in accordance with the plain language and intent of the Communications Act of 1934, as amended (the "Act"), Williams proposes that the Commission consider self-policing mechanisms designed to quickly resolve challenges to local regulations (or failures to act) in a rulemaking and issue an interpretive statement that certain now-common practices violate the law.

Finally, while Williams believes that state laws enacted to govern right-of-way access that comply with federal law may be helpful, the Commission should be prepared to preempt those that conflict with federal law.

II. MANY STATE AND LOCAL GOVERNMENTAL ENTITIES IMPOSE REQUIREMENTS THAT VIOLATE SECTION 253 OF THE TELECOMMUNICATIONS ACT

Most governmental entities welcome or at least facilitate the construction of intercity fiber-optic facilities through their jurisdictions. These entities presumably recognize the significant public interest accorded by intercity fiber-optic networks or at least acknowledge their obligations under federal law. However, several governmental entities that issue authorizations to access public rights-of-way have attempted to impose or have imposed terms and conditions on Williams that appear to violate Section 253 of the Act, similar to those noted by other carriers that filed comments in this matter. More particularly, the following are examples of demands that Williams believes to violate the Act, and, in some cases, the Constitution's Commerce Clause:

- regulation of Williams' right to provide infeasible rights of use (IRUs) in "dark fiber" or similar rights to other carriers;
- prohibitions on providing local service;
- prohibitions on providing intrastate service over constructed facilities;
- in-kind compensation, such as dark fiber or additional duct, some which have little or no use to the governmental unit;¹
- annual or monthly recurring fees that are far above the costs related to Williams' use of public rights-of-way or are formulated in a manner that bears no relation to the actual burden imposed;²
- one-time fees that far exceed any legitimate costs incurred in processing an application for a permit or other authorization;
- requirements that Williams provide detailed information to demonstrate its financial, managerial, and technical ability despite the fact that Williams is additionally required to post a bond protecting the permitting authority's interest prior to construction, possesses state authority to offer intrastate service, and is clearly authorized by the Commission to construct interstate facilities;³

¹ See also Comments of Level 3 Communications, LLC, at 6.

² See also Comments of ICG Telecom Group, Inc., at 4.

³ See 47 C.F.R. § 63.01 (1999) (authorizing construction of interstate facilities by entities that are or would be interstate common carriers). See also Comments of GTE Service Corporation at 9-11 (citing examples of attempts to impose a "third tier" of regulation). Williams has observed that in some cases, the information requested by permitting authorities is more extensive and detailed than that which a typical state utility commission requires in the context of an application to provide or resell intrastate telecommunications services.

- requirements that Williams maintain certain records within the state;
- “MFN” provisions that require Williams to increase the compensation it makes to an authority to equal the compensation made to another governmental entity within a given geographic area;
- requirements that Williams relocate its facilities upon unreasonably short notice;
- requirements that Williams waive any legal rights to challenge the terms and conditions of the existing authorization, any future regulations promulgated by the authority, and any due process rights that have been violated;⁴ and
- requirements that other telecommunications carriers who provide service over Williams’ facilities or lease a portion of the facilities, also obtain a franchise or permit, even though such users will not physically “use” or access the public rights-of-way in question.⁵

⁴ See also Comments of Level 3 Communications, LLC, at 8 (“the most outrageous demand of any city government is that a new entrant waive rights it possesses under the Act as a condition of receiving a franchise”) and Comments of AT&T Corp. at 12 (“[c]ities often impermissibly require a carrier to waive rights under federal or state law – such as the right to nondiscriminatory treatment – as a condition of getting a right-of-way permit”).

⁵ See also Comments of Telegent, Inc., at 2 (“some local governments seek to assess right-of-way fees and impose right-of-way franchise requirements on carriers, such as fixed wireless carriers and resellers, that do not dig up the public streets or . . . otherwise use the public rights-of-way”). One commenting party suggested that the “simple solution” to the problem of “double payment” resulting from the imposition of franchise agreements upon resellers or other providers that do not use public rights-of-way would be to allow the reseller a credit against the franchise fees paid by the ILEC on its underlying “wholesale” price to the reseller. Comments of the National League of Cities at 12. However, if the Commission adopted this approach, the result would be a complex and colossal administrative burden that would be difficult to apply to modern services and facilities. For instance, carriers often offer local and long-distance service over the same facilities that extend across several jurisdictions, resellers often, in turn, resell service to other resellers, and there are numerous other means by which facilities-based carriers can allow other customers (including other carriers) to benefit from their facilities but not use

Because permitting authorities typically wield a virtual monopoly power over access to rights-of-way dedicated to public use and those seeking access currently have no means to obtain prompt legal relief from illicit conditions, carriers have little practical ability to curb abusive practices.⁶ Williams also concurs with Level 3 Communications, LLC, that the monopoly power of permitting authorities creates the ability to “whipsaw” one carrier seeking an authorization against another.⁷

Williams acknowledges that state and local permitting authorities may impose reasonable restrictions on carriers that are directly tied to the management of public rights-of-way, such as requirements formulated to preserve the integrity of streets and highways, control traffic, and track the location of multiple utility facilities. However, Williams, like other parties that contributed comments, has observed that the imposition of terms and conditions such as those discussed above, reflect that many permitting authorities view the advent of telecommunications competition as a means to extract exorbitant compensation and unreasonable or illegal concessions from telecommunications carriers under the cloak of legitimate authority to manage rights-of-ways.⁸

rights-of-way, such as through grants of infeasible rights of use in dark fiber or optical wave services.

⁶ See Comments of Level 3 Communications, LLC, at 8.

⁷ *Id.*

⁸ See *e.g.*, Comments of the Association for Local Telecommunications Services at 2 (“the members of ALTS have found that significant numbers of municipalities have been very wary of CLECs and/or have seen them as a potential new source of revenue”) and Comments of AT&T Corp. at 2 (noting that some municipalities have adopted ordinances that are characterized as “rights-of-way management” but address matters such as interconnection and universal service).

Unfortunately, these impermissible barriers to entry often delay deployment of facilities and divert funds to local governments that carriers could otherwise invest in existing or additional facilities. Thus, Williams does not agree with the conclusory proposition that because fiber deployment has reportedly increased in the last three years, it necessarily follows that local right-of-way management and compensation requirements have not had any adverse effect on the development of facilities-based competition.⁹ Although new entrants have installed a significant amount of fiber within the last few years, this achievement, by itself, lends little support to the question of whether impermissible barriers to entry have discouraged or delayed deployment of facilities. It is reasonable to expect new entrants to aggressively seek to construct facilities, despite the imposition of barriers to entry, because telecommunications providers understand that existing facilities in certain markets will be woefully insufficient to meet exploding demand. Moreover, many governmental units do not implement or otherwise enforce right-of-way management or compensation requirements that create barriers to entry. Thus, the correct inquiry should instead focus on whether more facilities could have been deployed or deployed more rapidly in the absence of authorities that impose illegal conditions or delay applications for access. Unfortunately, this information is more difficult to quantify.¹⁰ However, the

⁹ See Comments of the National League of Cities at 13-17.

¹⁰ For example, the Association for Local Telecommunications Services stated that “[i]t is not possible to determine how often carriers have simply given up the quest of providing service in a particular city rather than agreeing to onerous provisions for the use of the right-of-way,” although they noted that there are no facilities-based local competitive providers in Sante Fe, New Mexico, a city with restrictive requirements. Comments of the Association for Local Telecommunications Services at 7, n.13.

Commission may rely on the numerous specific examples cited by telecommunications carriers that filed comments in this matter.¹¹

Despite the clear prohibition against discrimination in Section 253 of the Act, Williams also believes that in many cases it is not accorded the same rights granted to similarly situated carriers. Several other parties that filed comments in this matter similarly noted that incumbent providers, in particular, are often not subjected to the less favorable terms and conditions imposed upon new entrants.¹² Williams, like CTSI, Inc., has further encountered permitting authorities that justify discriminatory treatment or unreasonable terms and conditions because another new entrant previously acquiesced to them.¹³

Ultimately, Williams fears that in every state where it constructs intercity facilities, it could be “held up for a monopoly toll,” as if each of the state’s various permitting authorities were “so many little medieval German principalities.”¹⁴

¹¹ See *id.* at 22 (citing examples of egregious delays). In some instances, Williams has experienced delays in excess of ten months after the date applications for authority to access public rights-of-way were submitted.

¹² See *e.g.*, Comments of MCI WorldCom at 2-4 (citing examples of discriminatory treatment by authorities such as Montgomery County, Maryland).

¹³ See Comments of CTSI, Inc., at 13.

¹⁴ *Dignet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1400 (7th Cir. 1992), quoted in *City of Hawarden v. U S WEST Communications, Inc.*, 590 N.W.2d 504, 509 (Iowa 1999).

III. UNREASONABLE DELAY GRANTING AUTHORIZATIONS TO ACCESS PUBLIC RIGHTS-OF-WAY VIOLATES SECTION 253 OF THE TELECOMMUNICATIONS ACT

The Commission has expressed “serious concerns” about the “adverse effect” that can be caused by delays by permitting authorities that process applications for authorizations.¹⁵ As examples of these concerns, the Commission stated that “regulatory delays may threaten the viability of financing arrangements . . . or transactions for the purchase of existing facilities,” and that failure to process an application in “due course may ‘have the effect of prohibiting’ the ability of the applicant to provide telecommunications service, in contravention of section 253.”¹⁶ Despite the Commission’s warning, several parties that filed comments in this proceeding cited numerous instances of unreasonable delays in connection with permit applications to access public rights-of-way.¹⁷

Williams has also experienced unreasonable delays obtaining permits to access public rights-of-way. Although delays arise primarily because permitting authorities simply fail to take timely action on applications, Williams has also experienced serious delays where permitting authorities attempt to impose unreasonable and illegal terms and conditions. Applicants often resist such terms and conditions and attempt negotiation, but ultimately acquiesce after months have passed and the economic viability of a project is in jeopardy.¹⁸

¹⁵ *In the Matter of Classic Telephone, Inc. Petition for Emergency Relief, Sanctions and Investigation*, FCC 97-335, 12 FCC Rcd. 15,619 at ¶ 28 (Sept. 24, 1997).

¹⁶ *Id.*

¹⁷ *See e.g.*, Comments of the Association for Local Telecommunications Services at 21-23.

¹⁸ Knowledgeable advisors in one state warned that challenges to city requirements will result in applications for construction permits being “lost.”

Much of the problem is due to the fact that there are no specific legal guidelines interpreting the Act's entry requirements that carriers can rely upon in their negotiations. Although a majority of courts interpreting Section 253 of the Act have issued consistent opinions, a small minority of decisions are inconsistent. Inconsistent decisions, the fact that many decisions are on appeal, and the lack of sufficiently specific Commission guidelines, allow permitting authorities to obviate arguments that certain terms and conditions in their agreements are contrary to the law.¹⁹ Often, after carriers attempt to negotiate in good faith without success, the resulting delay leaves them the alternative of seeking relief through costly and lengthy court or Commission proceedings, or reluctantly consenting to the demands.²⁰

However, applications for authority to access public rights-of-way are not the sole means by which a governmental entity can create delay that may rise to a barrier to entry. Williams has also experienced unreasonable delays, which it considers violative of Section 253 of the Act, in connection with applications for zoning variances from local governments for telecommunications facilities, although it does not believe that this problem was raised by other carriers filing comments.

Preventing unreasonable delays in obtaining authorizations to access public rights-of-way is critical to the deployment of intercity fiber-optic facilities. For instance, many of Williams'

¹⁹ Williams notes that this argument was also applied to the NOI by at least one party. *See* Comments of the National League of Cities at 7 (“[a]s an initial matter, it is important to note that two of the court decisions on which the *NOI* relies heavily – the *Prince George’s County* and *Austin* decision – are the subject of pending appeals. Since the courts of appeals will speak directly to the issues decided by the district courts in these cases, any reliance on those decisions for guidance at this point seems a bit premature”).

²⁰ *See also*, Comments of the Association for Local Telecommunications Services at 7, n.12 (“[m]any times carriers have made the business decision that it is better to sign a bad agreement

large carrier customers (such as long-distance companies and CLECs) desire to purchase commitments to long-haul capacity before new fiber-optic facilities are placed in service due to increasing demand. Similarly, emerging competitors in the IXC and LEC markets have made long-term commitments to obtain dark-fiber IRUs from companies such as Williams, IXC, and Qwest. To satisfy these demands and concurrently contribute capacity to the telecommunications and computer engine that powers much of our economy, long-distance carriers must act quickly. The ability to confidently estimate the time needed to construct facilities encourages facilities-based providers to contractually obligate themselves to delivery dates in long-term capacity or IRU agreements. These agreements, in turn, may, in the case of intercity carriers, encourage aggressive deployment of advanced facilities on routes that were previously considered financially risky, such as those connecting smaller markets. With respect to CLECs, the agreements encourage deployment of local facilities in smaller markets.

In the case of actual construction activities, even a few weeks delay caused by a governmental agency on an intercity fiber-optic backbone deployment project can seriously disrupt plans, particularly when companies have formulated plans to avoid seasonal constraints (e.g., mud, high water levels in rivers and streams, frozen ground, environmental regulations designed to protect certain fauna during sensitive migration and mating periods, agricultural growing seasons, and prohibitions on street construction during holiday periods). In short, an unreasonable delay in obtaining authorizations to access public rights-of-way or other necessary governmental authorizations to construct facilities delays the availability of needed capacity and discourages infrastructure deployment.

and be able to complete its business plans and provide service than to continue to incur the expense and delay of fighting the municipality”).

**IV. THE COMMISSION SHOULD ENCOURAGE STATE
GUIDELINES GOVERNING THE REQUIREMENTS LOCAL AUTHORITIES MAY
IMPOSE ON CARRIERS SEEKING TO ACCESS PUBLIC RIGHTS-OF-WAY,
PROVIDED THAT THE GUIDELINES ADHERE TO FEDERAL LAW**

Williams agrees with MCI WorldCom that state statutes or guidelines can have a beneficial effect on achieving the pro-competitive goals embodied in the Act.²¹ Specifically, Williams has observed that many local and state authorities are generally more aware of and more likely to adhere to state guidelines on conditions for access to public rights-of-way. This may be due to the fact that many state laws prescribe guidelines more specific than Section 253 of the Act or that Commission instruction in this area has been exclusively case and fact specific.

Unfortunately, many state laws are vague in key respects, or may be contrary, in part, to the weight of authority interpreting Section 253. Some state statutes or other guidelines also only address local exchange providers or are designed for LECs, leaving a state law “vacuum” in which local authorities can impose conditions on carriers constructing intercity facilities.

Thus, while Williams supports the promulgation of state laws that adhere to the requirements of federal law, the FCC should, as MCI WorldCom suggests, “remain open to preemption petitions”²² and establish specific guidelines prohibiting the apparent abuses discussed in Sections II and III, *supra*, that state legislators can use as a guide to design state laws governing access to public rights-of-way without conflicting with federal law.

²¹ See Comments of MCI WorldCom at 7-8.

²² *Id.* at 7.

**V. THE COMMISSION SHOULD CONSIDER ISSUING
SELF-POLICING PROCEDURES IN A RULEMAKING PROCEEDING
AND ISSUE A SPECIFIC STATEMENT THAT CERTAIN NOW-COMMON
PRACTICES VIOLATE THE LAW AND ARE THEREFORE NOT
BINDING ON CARRIERS**

Congress delegated broad authority to the Commission to ensure that state and local regulations do not obstruct deployment of telecommunications facilities. In comments filed with the Commission by Williams in a prior matter,²³ Williams urged the Commission to consider self-policing procedures in a rulemaking proceeding and issue a specific interpretive statement that now-common practices, such as those discussed in Sections II and III, *supra*, violate the law. Although other parties that filed comments also suggested various forms of self-policing procedures,²⁴ Williams would like to redirect the Commission's attention to its previous proposals. More specifically, with respect to self-policing procedures, Williams suggested the following:

1. Any interstate common carrier²⁵ may provide notice to a local governmental unit of its intent to construct telecommunications facilities in the unit's rights of way.
2. Within ten days of delivery of the notice, the unit must provide any applicable drawings of rights of way designated by the carrier to the extent such drawings are not publicly available and are necessary for the carrier to plan such construction.

²³ Comments of Williams Communications, Inc., filed Sept. 14, 1998, *Inquiry Concerning the Development of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket 98-146.

²⁴ See e.g., Comments of the Association for Local Telecommunications Services at 8.

²⁵ This would include almost all local and interexchange carriers; under the Act, the Commission appears to have the authority to apply this regulation to intrastate services as well.

3. Within fifteen days of receiving a copy of the carrier's engineering drawings showing detailed construction plans, the unit must either approve the plans or give specific written reasons why the plans are not acceptable. Such rejections must be based on reasonable, nondiscriminatory, and objective engineering, operational, or safety reasons.

4. The unit may charge a reasonable amount for copying drawings and for processing applications and may impose reasonable bonding requirements. The Commission could establish a charge that is presumptively reasonable and could do the same for bonding requirements. The carrier would have the burden of proving lower charges (or bond requirements) were reasonable and the unit would have the burden of proving higher charges (or bond requirements) were reasonable.

5. The carrier could challenge any unit determination through private arbitration conducted within twenty days of notice to the unit. If the unit refused to arbitrate, the carrier could construct pursuant to its plans but must observe reasonable construction practices (including any generally applicable environmental regulations) and must post a bond.

A number of parties also suggested that the Commission issue specific guidelines regarding permissible practices with respect to public rights-of-way.²⁶ Williams similarly believes that a specific interpretive statement issued by the Commission that certain now-common practices violate the law would also be very useful for carriers negotiating with local

²⁶ See *e.g.*, Comments of RCN Telecom Services, Inc. at 7 (urging the Commission to initiate a Notice of Proposed Rulemaking to propose a broad and comprehensive interpretation of § 253).

governments, would assist state legislators considering state laws governing access, and would aid local governments that wish to adhere to the law. Williams believes that the Commission could issue such an interpretive statement without the delays inherent in a notice-and-comment rulemaking. Finally, Williams also believes that AT&T Corp.'s suggestion that the Commission enact rules allowing carriers the option to "opt in" to existing agreements would be a useful tool, complimenting those discussed above, to specifically curb discriminatory practices.²⁷

VI. CONCLUSION

The comments filed by telecommunications carriers in this matter indicate that a growing number of local permitting authorities employ terms and conditions or practices relating to access to public rights-of-way that are unreasonable and appear to be contrary to federal law. The comments further suggest that these barriers to entry create a serious impediment to the deployment of the modern facilities essential to the growth of the nation's economy. Williams has also encountered similar barriers to entry and proposes that the Commission adopt self-policing procedures to quickly resolve disputes (or failures to take action) and issue an interpretive statement certain now-common practices are contrary to federal law. To help curb discriminatory practices, Williams urges the Commission to further consider AT&T Corp.'s proposal to allow carriers to "opt in" to the terms and conditions of existing agreements granting

²⁷ Comments of AT&T Corp. at 30.

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WT Dkt No. 99-217; CC Dkt No. 96-98
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access to public rights-of-way. Finally, while Williams believes that state laws enacted to govern right of way access that comply with federal law may be helpful, the Commission should preempt those that conflict with federal law.

Respectfully submitted,

WILLIAMS COMMUNICATIONS, INC.

/s/ William H. Gault

Dated: December 16, 1999

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CERTIFICATE OF SERVICE

I, Pamela S. Neff, hereby certify that on this 16th day of December 1999 copies of the foregoing Reply Comments of Williams Communications, Inc., filed today with the Federal Communications Commission in WT Docket No. 99-217/CC Docket No. 96-98, were served on the persons on the attached list by placing the document in postage prepaid envelopes addressed to them at their respective addresses and depositing the envelopes in the United States mail.

/s/ Pamela S. Neff

Pamela S. Neff, Paralegal

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