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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, DC**

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| In the Matter of<br><br>Request by City Signal Communications, Inc. for Declaratory Ruling Concerning the Use of Public Rights of Way for Access to Poles in Cleveland Heights, Ohio Pursuant to Section 253 | CS Docket No. 00-253 |
| In the Matter of<br><br>Request by City Signal Communications, Inc. for Declaratory Ruling Concerning the Use of Public Rights of Way for Access to Poles in Wickliffe, Ohio Pursuant to Section 253 | CS Docket No. 00-254 |
| In the Matter of<br><br>Request by City Signal Communications, Inc. for Declaratory Ruling Concerning the Use of Public Rights of Way for Access to Poles in Pepper Pike, Ohio Pursuant to Section 253 | CS Docket No. 00-255 |

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## COMMENTS OF ADELPHIA BUSINESS SOLUTIONS, INC.

Pursuant to the Public Notices released by the Commission on December 22, 2000, Adelphia Business Solutions, Inc. ("ABS") submits the following comments regarding the captioned petitions of City Signal Communications, Inc. for declaratory ruling under Section 253 of the Communications Act, as amended.[1]

## I. INTRODUCTION AND SUMMARY

Five years ago, Congress enacted sweeping, revolutionary legislation designed to "accelerate deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition."[2] Particularly important to Congress was the development of facilities-based competition. The Commission has repeatedly recognized the goals of the 1996 Act, and has taken many important steps toward bringing about prompt introduction of facilities-based competition, as envisioned by Congress. And it has committed itself to taking additional steps, if necessary.[3]

Yet competition in the local telecommunications market, particularly facilities-based competition, has been slow to develop. While the focus on foot-dragging and barrier-building by incumbent local exchange carriers ("ILECs"), and the Commission's rules designed to remedy such actions, are important, the three petitions filed by City Signal present the Commission with

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[1] These Comments are supported by the declaration of John Glicksman, Vice President and General Counsel of ABS.

[2] S. Conf. Rep. No. 104-230 at 1 (1996).

[3] *See Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC

an opportunity to remedy a problem that is just as prevalent and just as harmful as anything done by the ILECs: municipal delay and discrimination.

Like the ILECs standing as gatekeepers to the monopoly local loop, municipalities stand as gatekeepers to the public rights-of-way, access to which is equally as essential to facilities-based competition as access to the local loop, if not more. Without the ability to cross or access public rights-of-way, competitive local exchange carriers ("CLECs"), such as ABS, cannot deploy advanced telecommunications infrastructure in competition to the ILECs. Without facilities based competitors, the nation's businesses, and ultimately residents, will simply be more and more at the mercy of the ILECs. No meaningful competition for prices, services and support will develop. Only minor price competition at the margins will be permitted, as resellers and capacity lessees seek to use wholesale discounts, but are unable to offer real choice based on service or reliability stemming from establishment of their own networks.

Municipalities, therefore, are the critical third player in the movement to achieve the promise of local competition. Many municipalities have astutely recognized that prompt introduction of infrastructure investment and competition will provide short and long-term benefits for their citizens and the nation, and have conscientiously discharged their duties under the 1966 Act. ABS has worked cooperatively with many such communities, and appreciates their efforts.

Unfortunately, too many other communities have ignored the will of Congress, and the benefits that will inure to their citizens from the introduction and development of competition. Exerting the leverage that they possess through their bottleneck control over the public rights-of-way, these municipalities have sought to coerce the payment of both monetary and in-kind

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Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC

tribute, wholly unrelated in spirit or magnitude to their actual costs of regulating CLECs' use of the rights-of-way. Even more insidiously, some municipalities have discriminated against CLECs and new entrants in favor of locally entrenched ILECs or municipally owned utility companies looking to enter the telecommunications market themselves. As City Signal's petitions demonstrate, and these comments will amplify, in a world where time-to-market is crucial, too many municipalities have created substantial delays, and imposed discriminatory requirements, that have effectively prevented CLECs, such as ABS, from offering telecommunications services in the local market.

The Commission should grant City Signal's petitions, and in so doing, send the most powerful message possible that such delays and discriminatory actions must be stopped. In addition, the Commission should take this opportunity to create an expedited procedure for the resolution of complaints regarding municipal delay under Section 253.

## II. MUNICIPAL DELAY IS A BARRIER TO ENTRY IN VIOLATION OF SECTION 253(a) OF THE COMMUNICATIONS ACT

At the core of the 1996 Act's pro-competitive provisions is Section 253(a), Removal of Barriers to Entry, which states:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). At the same time, in Section 253(c), Congress carefully and narrowly defined the limited role that may be played by municipalities.

In Section 253(c), Congress reserved for municipalities "a very limited and proscribed role in the regulation of telecommunications." *AT&T Communications of the Southwest, Inc. v.*

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Docket No. 88-57, 2000 FCC LEXIS 5672, *6-7 (FCC Oct. 25, 2000).

*City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998) ("*Dallas I*").[4] Section 253(c) clarifies that, to the extent authorized by State law, a State or local government may

> manage the public rights-of-way [and] ...require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such [municipality].

47 U.S.C. § 253(c). Of course, such "management" power cannot be exercised so as to create a barrier to entry in violation of Section 253(a). *See* Joint Explanatory Statement of the Committee of Conference, 142 Cong. Rec. H1111 (daily ed. 1/31/1996). Several state and federal courts, as well as the Commission, have held that Section 253(c) limits municipal regulation to those issues that are directly related to the physical occupation of the rights-of-way. As the Commission first explained, under Section 253(c) local governments may engage in

> tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. . . [Other] matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of various systems using the rights-of-way to prevent interference between them.

*TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, 21441 ¶ 103 (1997) (citations and subsequent history omitted). Numerous courts have adopted the Commission's delineation of permissible "management" functions under Section 253(c). *See, e.g., Dallas I*, 8 F. Supp. 2d at 591; *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1308

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[4] The *City of Dallas* court subsequently granted a second injunction in favor of a wireless telecommunications provider, 52 F. Supp. 2d 756 (N.D. Tex. 1999) ("*Dallas II*"), and finally

(S.D. Fla. 1999)(following *TCI Cablevision* and *Dallas I*); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 813-14 (D. Md. 1999) (following *Dallas I* and *Coral Springs*), *vacated on procedural grounds*, 212 F.3d 863 (4th Cir. 2000); *Town of Palm Beach*, 1999 U.S. Dist. LEXIS 16904, at *6-7 (following *TCI Cablevision* and *Dallas I*); *see also AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 940 (W.D. Tex. 1997) (citing legislative history relied upon by FCC), *vacated as moot,* 2000 U.S. App. LEXIS 33524 (5th Cir. 2000).

### A. Municipal Delay Violates Section 253(a)

It is now well accepted that municipal delay has the effect of prohibiting the provision of telecommunications services in violation of Section 253(a). Case law has established that municipal delay is a barrier to entry. State legislatures have enacted statutes recognizing that even brief delay creates a barrier to entry. And the harsh realities of the competitive marketplace have driven home the lesson that municipal delays prevent competitive telecommunications companies from entering the market.

#### 1. Caselaw Recognizes That Delay Is An Unlawful Barrier To Entry

Several decisions have recognized the barrier to entry created when municipalities fail to grant access to the public rights-of-way in a timely and expeditious manner. In *City of Austin*, the court recognized that the present telecommunications marketplace is highly competitive and constantly changing and that, as a result, even the slightest delay can cause a provider to lose significant opportunities as compared to those already operating in the market – particularly against well-entrenched ILECs. 975 F. Supp. at 938. In *PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, *22 (E.D. Pa. 1999), the court held that the challenged

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granted summary judgment and a permanent injunction against Dallas' imposition of various

ordinance violated Section 253 because, among other reasons, there was no guarantee that a franchise application "once submitted, will be processed ***expeditiously***." 1999 U.S. Dist. LEXIS 19409 at *26 (emphasis added).

The Commission itself has stated that it has

> serious concerns about the potential adverse effect on the development of local exchange competition caused by unreasonable delay by local governments in processing franchise applications and other permits. If a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority. . . . More specifically, in certain circumstances ***a failure by a local government to process a franchise application in due course may "have the effect of prohibiting" the ability of the applicant to provide telecommunications service, in contravention of section 253.***

*Classic Tel. Co., Pet. for Emergency Relief*, 12 FCC Rcd. 15619, 15634 (1997) (emphasis added); *see also TCI Cablevision,* 12 FCC Rcd. at 21441 (FCC concerned with "unnecessary delays" caused by local governments).

Recently, the Public Service Commission of Michigan ("PSC") fined two cities for failure to comply with the State's statutory 90-day deadline on the issuance of telecommunications franchises. On October 24, 2000, the PSC issued an order fining the City of Birmingham, Michigan $10,000 for failing to grant a CLEC, Coast To Coast Telecommunications, Inc., permission to construct in the public rights-of-way within 90 days, as required by Michigan law. Under the Michigan Telecommunications Act, municipalities are required to grant telecommunications providers permission to construct in the rights-of-way within 90 days of a request. In that case, the City had ignored the 90-day deadline, responding to the CLEC's application only after the 90 days had run, and even then only by requiring a lengthy, burdensome, and likely unlawful franchise agreement.

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service requirements and fees, 52 F. Supp. 2d 763 (N.D. Tex. 1999)("*Dallas III*").

While the PSC's holding is specifically based on the Michigan 90-day time limit, its analysis and discussion are critical to the Commission's analysis under Section 253(a). The PSC recognized that "[d]elay can impede competition, which requires streamlined regulatory processes so that providers can respond quickly to market-based incentives."[5] Moreover, it stated that "[o]bviously, lengthy delays of an indefinite duration can have the same deterrent effect on market-driven activities as an outright denial. . . ."[6] The PSC also found that the Michigan legislature had appeared to "regard[] the [local] permitting process as a potential bottleneck to facilities development. . . ."[7] In *Coast To Coast Telecommunications, Inc. v. City of Rochester, MI*,[8] the PSC reinforced its previous holding and rationale by fining the City of Rochester $20,000 for failing to grant the CLEC's application within 90 days.

### 2. State Legislatures Have Recognized That Delay Is An Unlawful Barrier To Entry

While the Commission need look no further than the previously discussed precedent to resolve this issue, it can also gain assurance from the recognition by state legislatures that municipal delay is a serious barrier to entry. For example, as City Signal points out in its petitions, legislators in Ohio have adopted a statutory requirement that municipalities *grant* a telecommunications provider's application to occupy the public rights-of-way within ***thirty days***.[9]

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[5] *Coast To Coast Telecommunications, Inc. v. City of Birmingham, MI*, Case No. U-12354 at 8 (M.P.S.C. Oct. 24, 2000).

[6] *Id.* at 8.

[7] *Id.*

[8] Case No. U-12462 (M.P.S.C. Dec. 20, 2000).

[9] OHIO REV. CODE ANN. § 4939.02(f) (2000).

Similarly, the Michigan legislature has adopted a statutory deadline of ***90 days*** in which municipalities must *grant* a telecommunications provider's application to occupy the public rights-of-way.[10] The statute further provides for substantial fines of $1000 to $20,000 per day for failure to grant such an application.[11] As discussed above, the Michigan PSC has determined that this provision reflects the Michigan legislature's view of "the [local] permitting process as a potential bottleneck to facilities development. . . ."[12]

While factual and policy determinations of the Michigan and Ohio legislatures are strong testament to the fact that this Commission should hold that municipal delay is an unlawful barrier to entry under Section 253, such state legislation—even in the few states where it has been enacted to date—is inadequate to ensure that Congress' goal in enacting the 1996 Act will be effectuated. Thus, the Commission must recognize that action under Section 253 is still necessary. As City Signal's petition demonstrates, the existence of state statutory deadlines has not been fully effective. Indeed, the Ohio statute is currently being attacked in the courts by Ohio municipalities that are loathe to lose their power over competitive telecom providers that must cross the public rights-of-way.[13] A strong statement from the Commission is needed to clarify that, state statute or not, municipalities may not thwart the development of competition.

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[10] MICH. COMP. LAWS § 484.2251(3) (2000).

[11] MICH. COMP. LAWS § 484.2601(a) (2000).

[12] *Coast To Coast Telecommunications, Inc. v. City of Birmingham, MI*, Case No. U-12354 at 8 (M.P.S.C. Oct. 24, 2000).

[13] *City of Dublin v. State of Ohio*, Case No. 99CVH-08-7007 (Ct. Com. Pl. of Franklin County filed Aug. 25, 1999).

### 3. Economic Reality Demonstrates That Delay Is An Unlawful Barrier To Entry

The decisions of the Commission, the courts, state regulators and state legislators all recognize that the economics of facilities-based entry into the telecommunications marketplace make delay a powerful barrier to competition.

Construction of modern fiber optic telecommunications networks deep into the local loop (ABS constructs fiber to the subscriber's premises in many instances) requires substantial capital investment in equipment infra-structure and construction expense. Construction costs alone can run $150,000 per mile to construct facilities underground in an urban business district. The necessary capital and financial backing typically comes in the form of debt or equity financing. Indeed, it is common knowledge that competitive telecommunications providers carry very high levels of debt.[14] Competing with entrenched monopolists that have had a 100-year head start, however, is very risky, even under the best of circumstances. Accordingly, CLECs' investors and lenders, including ABS', insist on a return on their investment that is commensurate with the level of risk they have undertaken.

One key checkpoint for investors and lenders in the CLEC industry is a CLEC's speed-to-market. The longer it takes for a CLEC, such as ABS, to begin providing service in a market, the longer it will be before an investor will see a return, if any, on its investment and the greater

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[14] *See* Beth Healy, *Junk Fund Gets Lift Avoiding Highfliers*, BOSTON GLOBE, Dec. 29, 2000, at C1 ("A whopping 20 percent of all junk debt is issued by telecom companies, which need mountains of money to expand.");Yuki Noguchi, *Nettel's woes Bode Ill for Industry; Carrier's Bankruptcy Reflects Fierce Telecom Competition*, WASH. POST, Oct. 3, 2000, at E2 ("'It is a tough time for the CLEC industry,' said John D. Windhausen Jr., president of the Association of Local Telecommunications Services (ALTS) based in Washington, which represents about 100 such carriers. "The downturn in the stock market made it difficult to raise capital to continue to build their networks.'"); Keith Darce, *American Metrocomm File for Chapter 11; Customers Won't Suffer Firm Says*, THE TIMES-PICAYUNE, Aug. 19, 2000, at 1 ("The most aggressive CLECs went deep into debt to build costly fiber-optic networks and switches connecting to regional Baby Bell phone networks).

the risk that a lender will not obtain prompt repayment of its debt financing. To lenders and investors, therefore, delay in a CLEC's time-to-market is profoundly significant. Indeed, the financial markets' frustration with delays in the roll-out of CLEC networks nationwide has played a major role in causing the dramatic decline in stock prices of competitive telecommunications providers over the past six months.[15]

Municipal delays also have an important impact at the local competitive level. If a municipality delays ABS for even a few months, ABS may suffer numerous short and long-term negative effects. First, ABS may not be able to provide service to customers that have already signed-up with an expectation of receiving the benefits of service on ABS' network. Second, any such failure to fulfill existing demand could have a significant negative impact on ABS' reputation and goodwill; for, if ABS were to be saddled with a reputation as a company that cannot deliver in a timely fashion, or at all, that reputation could severely damage its ability to market and serve new customers in the future.[16] Third, inability to provide facilities-based service would mean that ABS would not receive the revenue necessary to support further construction and marketing, and as explained above, could hamper ABS' ability to obtain future financing and investment.

Finally, at the most fundamental level, municipal delays prevent ABS from competing with ILECs in local telecommunications markets. Every month that passes while ABS has to

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[15] Alan Goldstein, *Tech Fortunes Rise and Fall Together, Bur Firms Not Equal*, DALLAS MORNING NEWS, Dec. 20, 2000 at 1D ("Installation delays are affecting the fortunes of service providers and equipment makers alike").

[16] It is well established that damage to a company's goodwill, particularly from barriers to installing networks and providing service, is irreparable. *See e.g., Cable TV Fund 14-A, Ltd. V. Property Owners Association Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422, 432-33 (D. MD 1989) (finding that immeasurable harm to plaintiff's reputation and goodwill would result if potential customers learned that plaintiff was not permitted to provide service); *Centel Cable Television Co. v. Burg & DiVosta Corp.*, 712 F. Supp. 176, 178 (S.D. Fla. 1988).

prod a municipality for long overdue action is one more month in which an ILEC can further entrench itself. When it sees competition coming to town for the first time, an ILEC will seek to lock-up existing, lucrative customers with long-term deals. A multi-month delay by the municipality simply gives the ILEC more time to entrench.

An even more pernicious scenario is when the delay is imposed by a municipality in order to benefit its own utility. ABS has encountered instances where a municipal utility has been working to enter the local telecommunications market and, in the meantime, municipal officials have delayed ABS' entry in a way that gave the local municipal utility extra time to get its operations underway free from competition.[17] When such actions are unintentional, they are problematic. But when they are clearly intentional, they are highly improper and the worst abuse of governmental power.

### B. ABS Has Faced Delays Of Six Months To A Year, And More

Like City Signal, ABS has faced delays of six months to a year, and more. As the following discussion highlights, ABS' experiences have run the gamut, from municipalities that have said either "we're thinking about the issue", "we don't want new entrants", or "unless you acquiesce to our demands, you will be delayed", to others that have delayed ABS in order to assist a municipal utility or have simply expressed complete unwillingness to act promptly.

#### 1. "We're Thinking About The Issue"

***Oldsmar, Florida***

Oldsmar, Florida represents a typical example of a city delaying the market entry of a competitive telecommunications provider while the City considers adopting a new ordinance. Oldsmar is a suburb of Tampa, which is situated in the most densely populated county in Florida.

[17] *See infra* Section II(B)(4).

Although ABS originally contacted the City in a letter dated March 8, 2000, as of today the City still has not processed ABS' request to use the public rights-of-way. After originally requesting that ABS modify a *cable* franchise agreement, the City then informed ABS that it was in the midst of adopting a telecommunications ordinance. Each time ABS contacted the City, the City claimed that it was just weeks away from finalizing an agreement. After repeatedly contacting the City on this issue, and seven months after its initial request, ABS was informed that it could enter into an interim agreement while the City worked on an ordinance. Despite this assurance, the City changed its mind two months later and refused to permit ABS to use the rights-of-way absent a final agreement. In November 2000, the City assured ABS that a franchise ordinance would be forthcoming. However, despite repeated requests by ABS since then, the City still—*nearly eleven months after ABS' initial contact*—has failed to provide any further information on the ordinance or to authorize ABS' use of the rights-of-way.

***California, Pennsylvania***

ABS is the grantee of a contract from the Commonwealth of Pennsylvania that requires ABS to extend telecom facilities to small and mid-sized communities throughout the state ("the COPA Contract") in order to connect Commonwealth buildings. The contract is valued at more than $250 million. California, Pennsylvania is one of the communities through which ABS must run its network facilities in order to satisfy its obligations to the State under the COPA Contract. ABS first requested permission to use the public rights-of-way in California, Pennsylvania in March, 2000. ABS provided the Borough with a description of ABS' plans and proof of certification by the Pennsylvania Public Utility Commission. ABS offered to provide a route map, but the Borough failed to specify what information it required on a map. Even with this information, the Borough Secretary informed ABS that the Borough Council still had concerns

about ABS' plans. Although ABS has offered on a number of occasions to meet with Council members to discuss their concerns, the Council still has not responded to ABS' last request for a meeting, and *more than ten months* have now elapsed since ABS' first request for permission to use the rights-of-way.

***Culver City, California***

Culver City initiated development of a multi-tiered right-of-way ordinance in June 2000. The ordinance was to be adopted in stages, beginning with a right-of-way "management plan." In the interim, the City refused to grant any construction permits until the ordinance was finalized and applications were granted pursuant to its new requirements. As of now, almost eight months after it began, the City has yet to complete work on the ordinance.

ABS' history with the City goes back even farther. ABS first contacted the City by letter dated February 18, 2000, in which ABS introduced itself as a facilities-based carrier interested in providing business communications services within the City. ABS made a follow-up call on April 11, 2000, and the City informed ABS that the City Attorney was working on a response to the letter. Shortly thereafter, ABS was invited by the City's Telecommunications Task Force to discuss the Company's plans for the City. The meeting took place on May 31, 2000, at which the City told ABS that a telecommunications ordinance was under development and that it was unlikely that ABS would be able to obtain a construction permit before the ordinance was completed. The proposed time frame for the ordinance at that time was allegedly "end of the summer."

In July, ABS received an invitation to participate in an industry roundtable on the ordinance. ABS reviewed and submitted comments on the proposed ordinance, which turned out to be a lengthy right-of-way management plan—despite being just the first component of the

ordinance. ABS also participated in the roundtable discussion. The plan was adopted in August. In September, the City invited ABS back for comment on the second phase of the ordinance, an umbrella Telecommunications Regulatory Requirements Ordinance. The umbrella ordinance incorporated the right-of-way management plan and *required five subsequent ordinances* delineating varying regulatory schemes for telephone companies, data companies, pass through carriers (*e.g.*, dark fiber providers), OVS providers, and cable operators. In October, the City passed the umbrella ordinance and held-over the telephone ordinance after opposition from industry.

To date, none of the subsequent ordinances have been adopted and the City still maintains its de facto moratorium on new construction. *After nearly 12 months*, ABS still has no means for accessing the City's rights-of-way.

### 2. "We're Not Interested In New Entrants"

***Ben Avon, Pennsylvania***

ABS first contacted the Borough of Ben Avon, a suburb of Pittsburgh, in May 2000. In June, ABS was informed that its request to use the public rights-of-way had been forwarded to the Borough Solicitor. Despite 13 phone messages and three letters, ABS has received only one call back from the Borough Solicitor. ABS was told at that time that its request would not be placed on the Council's agenda without a recommendation from the Borough Solicitor. In October 2000, the Borough Council President informed ABS that the Borough had other priorities than ABS' request and that the Solicitor was seeking an outside consultant for assistance in evaluating ABS' request. ABS has had no response from the Borough in the last three months, and today – *more than eight months* after its initial contact to the Borough of Ben

Avon – ABS still has been unable to obtain permission to place its facilities in the public rights-of-way.

### 3. "Unless You Acquiesce, Your Application Will Be Delayed"

***Shreveport, Louisiana***

On or about March 28, 2000, representatives of ABS met with the City Attorney of Shreveport, Louisiana. At that time, ABS was informed that it could move forward quickly if it agreed to the same franchise agreement as a previous provider (KMC Telecom), but if it wished to negotiate any of the terms it would be a long, drawn out process. ABS attempted to contact the City four times over the next month, but received no response. ABS reluctantly decided to accept the agreement "as is" and submitted an application on April 26, 2000. ABS again attempted to contact the City, leaving approximately eight telephone messages and sending two letters over a period of eleven weeks.

The second letter, dated July 11, 2000, threatened litigation and received an immediate response from the City. The City promised a status report on the status of ABS' application within one week. When ABS failed to receive the status report on time, it attempted once again to contact the City, leaving several telephone messages. On July 26, 2000, ABS received a fax from the City, stating that its application was in order and that the City would contact ABS by July 28, 2000. ABS received a similar fax on July 28, with a promise of another communication the following week. On August 2, 2000, the City telephoned ABS and promised to fax the KMC ordinance for ABS to review. On September 19, 2000, after several more telephone calls to the City by ABS, ABS received the KMC ordinance in the mail.

In January 2001, *ten months after initial contact*, and after several more calls by ABS to the City and still further delaying information requests by the City, ABS decided to abandon its

plans for Shreveport. The length of time and administrative delay contributed to ABS' decision to concentrate its efforts elsewhere.

### 4. Delay To Assist The Municipal Utility

***Bristol, Tennessee***

ABS' experience with Bristol, Tennessee is also extremely troublesome. In November, 2000, after many months of communications, ABS agreed to enter into a right-of-way access agreement with the City of Bristol, Tennessee that was essentially identical to an agreement entered into by the City with another CLEC. ABS was shocked, therefore, when it was informed just prior to the beginning of the City Council meeting at which the copy-cat agreement should have been considered, and adopted, that the Council would not consider the agreement. Rather, ABS was informed that there were potential issues involving the City's electric utility. ABS' attorney at the meeting offered to amend the agreement to resolve any concerns, on the spot, but the City refused to consider that offer. ABS subsequently learned that the attorney for the municipal utility is "reviewing" the proposed agreement between ABS and the City. ABS has been negotiating with the Bristol Utility regarding an arrangement whereby ABS would lease fiber from the Utility to satisfy parts of ABS' long-haul needs. In a subsequent conference call intended to clarify the issues, it was made clear to an. attorney for ABS that the Utility intended to hold up ABS' agreement with the City until the Utility gained satisfaction in its negotiations with ABS over the fiber deal.

Accordingly, nearly one-year after ABS first contacted the City of Bristol, Tennessee and despite its willingness to enter into an agreement that is substantially identical to one previously entered into by the City, ABS' ability to construct and operate in the City are being used as leverage by the municipal utility in. unrelated business negotiations.

### 5. Unwillingness To Act Promptly

***Emeryville, California***

The City of Emeryville passed its "Excavations and Encroachments in the Right-of-Way" Ordinance on June 20, 2000. This ordinance requires that the City Attorney draft an encroachment agreement for telecommunications providers to sign prior to receiving an encroachment permit. From July through October, this provision of the ordinance was waived and providers were still able to obtain permits. Providers, including ABS, were told repeatedly that they would have an opportunity to review and comment on the City Attorney's draft encroachment agreement. This invitation to review was made at each of the City's monthly utilities coordination meetings from July through October. Starting in November, however, the City stated that no further permits would be issued until providers, including ABS, signed the City's encroachment agreement. To date, the City has yet to finalize the draft agreement and distribute it to telecommunications providers.

***Redwood City, California***

The crux of the Redwood City delay has been the failure of the City to respond to ABS. On first contact, the City did not have an ordinance in place but requested that a "franchise" agreement be executed and approved by City Council. ABS obtained a copy of an executed encroachment agreement by Williams Communications. The agreement was provided by the City three months after ABS' initial request. An electronic copy of the agreement was sent to ABS to redline on July 10, 2000. A redlined version of the agreement was returned to the City Attorney the same day. Following the submission, ABS made repeated attempts to reach the City by telephone over a span of 60-days in which messages were left by ABS but no return calls from the City were received. ABS sent the redlined version of the agreement by email twice

during this same time. On September 7, 2000, the City Attorney agreed to a meeting with ABS and several City staff by telephone to discuss the redlined version. The meeting was held on September 12, 2000, and was attended by ABS and one member of the City's engineering department; however, the City Attorney failed to attend or even to instruct the staff member how to proceed. Subsequently, the City has failed to provide any further information regarding the process for the approval of the agreement or a schedule for Council review.

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While the particular facts and circumstances of each of the situations described above may vary, the consistent feature of all of these examples is the inordinate delay to which ABS has been subjected in attempting to secure municipal authorization for access to public rights-of-way. These delays have been motivated by a variety of factors, ranging from municipal disinterest in the introduction of competitive telecommunications services by ABS, to the keenest interest in delaying ABS so as to provide an advantage to a municipal utility that was seeking to enter the telecommunications marketplace in competition with ABS. No matter what the motive may have been, each of these instances of delay has served to create a barrier to ABS' entry into these local telecommunications markets and has undermined the advancement of Congress' purpose in enacting Section 253.

### C. Alleged Right-Of-Way "Management" Cannot Excuse Municipal Delay

Some municipalities, such as the City of Cleveland Heights in its opposition to City Signal's petition, argue that delay is due to their "management" of the rights-of-way, and thus is "saved" from being an unlawful barrier to entry under Section 253(c). Such assertions are flawed as a matter of fact and law.

First, Section 253(c) does not create a "safe harbor" that permits regulations that would otherwise violate Section 253(a). *See* Joint Explanatory Statement of the Committee of Conference, 142 Cong. Rec. H1111 (daily ed. 1/31/1996). An analysis of Section 253(b) provides clear proof that Congress did not intend that the savings clause of Section 253(b) and (c) ("[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way") would obliterate Section 253(a)'s prohibition on barriers to entry. Section 253(b) permits states to regulate to protect universal service. Prior to the 1996 Act, however, under the guise of ensuring universal service, states used to prohibit competitive entry. Yet, such restrictions were clearly meant to be prohibited by 253(a). Thus, Congress could not have intended for the supposed savings language of sections (b) and (c) ("[n]othing in this section...") to override the general rule of Section 253(a), or else under the rubric of protecting universal service, states could prohibit competitive entry and, in so doing, obliterate the purpose of the 1996 Act.[18]

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[18] *See TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21441-2 (1997); *The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697, 21724, ¶ 51 (Dec. 23, 1999) (finding that a narrow interpretation of 253(b) concerning competitive nuetrality is not "appropriate because it would undermine the primary purpose of section 253 -- ensuring that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of opening all telecommunications markets to competition").

Second, the municipalities' interpretation of the exception would completely destroy the rule. If a municipality could effectively prohibit companies from providing telecommunications services simply by refusing to grant access to the public rights-of-way until the municipality had worked out its "management," it would be forever immune from Section 253(a). Yet, that indisputably is not what Congress intended. As the Commission and the courts have repeatedly recognized, Section 253(c) was intended to reserve for municipalities very limited authority over very specific right-of-way functions.[19] By invoking the mantra of "management," municipalities may not empower themselves to thwart the clear will of Congress and the policies enunciated by this Commission.

Third, delay in the name of "management" is not competitively neutral or nondiscriminatory. While a municipality is delaying ABS from constructing and operating, under the guise of "management" issues, it is at the same time allowing the ILEC to operate, maintain, and in some instances upgrade its facilities without delay. As discussed below, such preferential treatment of the ILEC is discriminatory and provides a competitive advantage that is inconsistent with Section 253(c).[20]

When Congress enacted Section 253(c), it intended only to reserve pre-existing authority over construction in the rights-of-way. It did not intend to prompt municipalities to undertake massive new regulatory schemes that take months or years to "consider."[21] Moreover, with

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[19] *See PECO Energy Co. v. Township of Haverford,* 1999 U.S. Dist. LEXIS 19409, *18-19 (E.D. Pa. 1999); *TCI Cablevision of Oakland County, Inc.* at 21441; *Classic Telephone, Inc. Petition for preemption, Declaratory Ruling and Injunctive Relief,* Memorandum Opinion and Order, 11 FCC Rcd. 13082, 13103 (1996).

[20] *Silver Star Telephone Company, Inc., Petition for Preemption and Declaratory Ruling,* 12 FCC Rcd. 15639 (1997), *recon. denied,* 13 F.C.C.R. 16356 (1998); *infra* Section III(B).

[21] 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from San Francisco City Attorney).

Section 253(c), Congress did not intend to allow municipalities to claim, five years after the Act, that they now must put new entry on hold while they "consider" their management of the rights-of-way. The introduction of competitive facilities is not a new issue. Indeed, cities have had five years to consider the issue, if there was anything to be considered. If a municipality has failed to timely exercise its right-of-way management authority, it cannot now thwart new entrants while it belatedly "considers" or "studies" the issue.

The reality of the situation is that many of the municipalities that are delaying CLEC entry are doing so while they consider massive and largely unlawful ordinances promoted by municipal consultants. Delaying the entry of ABS or any other CLEC for a year or more while a city "considers" adoption of a model ordinance, much of which has been held unlawful in a half dozen or more cases, is not "managing" the rights-of-way; rather, it is indifference to the mandate of Congress that competition be allowed and encouraged. The Commission must not allow congressional policy, and the introduction of competitive local telecommunications services, to be held hostage to unreasonable and discriminatory municipal practices and demands.

## III. REQUIRING NEW ENTRANTS TO BUILD UNDERGROUND WHILE ILECS ARE PERMITTED TO CONSTRUCT AND MAINTAIN AERIAL FACILITIES IS AN UNLAWFUL BARRIER TO ENTRY

City Signal's petitions point out that, in each instance, the municipalities with which it was dealing sought to require the new entrant, City Signal, to construct underground while allowing the ILEC to maintain and upgrade its facilities aerially on utility poles. City Signal is correct in its assertion that such differential requirements are barriers to entry in violation of Section 253(a), and are competitively biased and discriminatory under Section 253(c).

### A. Preferential Construction Regulations Have The Effect Of Prohibiting The Offering Of Telecommunications Services

To violate Section 253(a), local regulations do not have to explicitly prohibit a particular entity from providing telecommunications services. Indeed, the majority of challenged provisions have not been explicit prohibitions on the challenging entity's entry. The Commission and courts have held numerous provisions to be barriers to entry even in the absence of explicit prohibiting language. A key factor for determining that a regulation has the effect of prohibiting the provision of telecommunications service is whether the regulation makes it harder for certain providers to enter the market.

For example, the Commission held that the state of Minnesota's agreement granting a single provider the exclusive right to construct fiber optic facilities in the state freeway rights-of-way was a barrier to entry in violation of Section 253(a).[22] In so doing, the Commission rejected the State's argument that because other providers would be permitted to lease capacity on a nondiscriminatory basis, the agreement did not have the effect of prohibiting entry. The Commission emphasized that Section 253(a) bars any state or local action that makes any of the possible market entry methods (*e.g.*, facilities-based, resale, etc.) unavailable to competitors.[23] The Commission further rejected the State's arguments that other providers had alternative rights-of-way and routes available, stating that "Minnesota fails to convince us that the existence of alternative rights-of-way means that the Agreement does not have ***the potential to prevent*** certain carriers from providing facilities-based services."[24] The Commission's focus in that case

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[22] *State of Minnesota*, Memorandum Opinion And Order, 14 FCC Rcd. at 21697, 21725 (1999).

[23] *Id.* at ¶ 38.

[24] *Id.* at ¶ 23 (emphasis added).

was on the fact that alternative routes appeared to be more expensive, and thus would impose a competitive disadvantage on those forced to use those routes.[25]

Undergrounding requirements on new entrants have the same effect as the unlawful regulations struck down in the *Minnesota* decision. On average, underground construction costs three to six times more than aerial construction, and takes considerably longer to complete. The reasons for that substantial disparity are quite obvious. To construct underground requires street cuts, digging, trench reinforcement, conduits (possibly encased in concrete), manholes, hand holes, and vaults, among other things. Aerial construction, by comparison, requires a smaller crew and only a bucket truck, strand, and a lashing machine. Aerial construction is substantially faster, and is less subject to weather delays (particularly in northern areas where ice and snow play a role). Aerial construction also has substantial advantages over underground construction in the long term, as maintenance of aerial attachments is less expensive and easier, and upgrades are also more easily accomplished.

For those reasons, requiring new entrants to construct underground while the ILEC is allowed to maintain, and in some cases upgrade, its facilities aerially, has the effect of prohibiting competitive entry. It imposes greater burdens, in terms of cost and time, and has the potential to prevent certain carriers from providing facilities-based service.

### B. Allowing An ILEC To Remain Aerial Is Not Competitively Neutral Or Nondiscriminatory

Undergrounding requirements, such as those identified by City Signal, that apply only to new entrants are not competitively neutral and nondiscriminatory, as required by Section 253(c). Section 253(c) of the Communications Act explicitly provides that, to the extent a municipality has the limited authority to manage the physical occupation of the public rights-of-way by

[25] *See, e.g., id.* at ¶ 28-29.