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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
City Signal Communications, Inc.	)	
	)	CS Docket No. 00-253
Petitioner	)	
v.	)	
	)	
City of Cleveland Heights	)	
	)	
Defendant	)	

In the Matter of	)	
	)	
City Signal Communications, Inc.	)	
	)	CS Docket No. 00-254
Petitioner	)	
v.	)	
	)	
City of Wickliffe	)	
	)	
Defendant	)	

In the Matter of	)	
	)	
City Signal Communications, Inc.	)	
	)	CS Docket No. 00-255
Petitioner	)	
v.	)	
	)	
City of Pepper Pike	)	
	)	
Defendant	)	

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Comments of
Metromedia Fiber Network Services, Inc.

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January 30, 2001

SUMMARY

Metromedia Fiber Network Services, Inc. ("MFNS") submits its comments on the Petitions for Declaratory Ruling filed by City Signal Communications, Inc. ("City Signal"). City Signal asks the Federal Communications Commission ("Commission") to preempt any pronouncement, rule, regulation, or ordinance by the Ohio cities of Pepper Pike, Cleveland Heights, and Wickliffe (collectively "Defendant Cities") that prohibits, or may have the effect of prohibiting, the ability of City Signal from providing interstate or intrastate telecommunications service and order that permits be issued to City Signal to construct fiber optic aerial facilities in the defendant Cities. The Commission issued a Public Notice on December 22, 2000 seeking comments on City Signal's petitions.

As a telecommunications provider,[1] carriers' carrier, and facilities provider, MFNS has the critical need to have nondiscriminatory access to the public rights-of-way in order to build it high-bandwidth, fiber optic communications infrastructure and offer competitive telecommunications services to its customers. Like City Signal, MFNS has had difficulty obtaining access to public rights-of-way in a non-discriminatory manner, and at just and reasonable rates.

MFNS urges the Commission to grant City Signal's petitions to the fullest extent permitted and make it clear to all state and local governments that they must follow the letter of the Telecommunications Act of 1996 codified at 47 U.S.C. § 151, *et seq.* ("Act") and state laws, including responding in a timely manner to carrier requests for permits,

[1] MFNS is a certified telecommunications service provider in 42 states and the District of Columbia.

meeting statutory deadlines, treating carriers in a fair and non-discriminatory manner, and charging only legally permitted fees.

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	)	
Defendant	)	

Comments of
Metromedia Fiber Network Services, Inc.

I. INTRODUCTION

MFNS is a leader in providing dedicated fiber optical infrastructure and high-bandwidth advanced services for communications intensive customers throughout the United States and in several European cities. MFNS is leading the country's transition from a legacy copper telecommunications infrastructure to a fiber infrastructure. To date, MFNS has installed over 1.2 million fiber miles of fiber optic cable.

MFNS or its affiliates currently provide high-bandwidth fiber optic communications facilities and services to carriers and end use customers in New York, Philadelphia, Washington, D.C., Chicago, Dallas, San Francisco, Seattle, Baltimore, Houston and Boston. MFNS is currently constructing networks in additional markets and intends to complete expansion into 50 U.S. markets within the next several years.

The Commission has given all telecommunications service providers a welcome opportunity by issuing the Public Notice and inviting comments on the difficulties they are having in obtaining lawful and reasonable access to public rights-of-way. The Commission must make it clear that states, counties and particularly local governments ("Municipalities") must stop all activities that clearly and continuously violate section 253 of the Act.

MFNS is sympathetic to City Signal's problems and applauds it for its courage in seeking Commission intervention. Too often, carriers are reluctant to take public action against Municipalities for fear of retribution, including further permitting delays. As will be demonstrated in these comments, the issues raised in City Signal's petitions are symptomatic of a very large problem that carriers face nationwide in deploying their

networks. In fact, it is with some trepidation that MFNS brings its Municipal problems to the attention of the Commission. However, the barriers to providing service presented by Municipalities are so pervasive and real that MFNS is taking this risk in the hope that the Commission will begin to take action of a general nature on this issue. Consequently, although City Signal's petitions are confined to the Defendant Cities, MFNS strongly urges the Commission to take this opportunity to clarify and strengthen carriers' rights to occupy the public right-of-way in all Municipalities.[2]

In the area of pole attachments, the Commission has recognized the utility's superior bargaining power over cable and competitive telecommunications companies seeking attachment to the utility's facilities.[3] The public rights-of-way controlled by municipalities constitute a bottleneck similar to pole attachments. Consequently, the Commission should make similar findings in the context of access to the public rights-of-way. The Act's promises of greater innovation and lower prices will not be realized until all bottlenecks, including right-of-way access, are eliminated.[4]

The types of difficulties that MFNS has experienced in obtaining access to public rights-of-way fall generally into the following four categories:[5]

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[2] In July 1999, the Commission issued a Notice of Inquiry on Access to Public Right-of-Way and Franchise Fees. *See* WT Docket No. 99-217, released July 7, 1999. MFNS urges the Commission to take the comments provided in that Notice of Inquiry and the comments received in these proceedings and initiate a rulemaking that will address the numerous and troublesome issues that a providers face for access to the public right-of-way.

[3] *Texas Cable and Telecommunications Assoc., et. al. v. Entergy Services, Inc., et. al.*, PA 97-005, 14 FCC Rcd 9138, para. 12 (1999) quoting *Second Proceeding.*

[4] The Act was enacted "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996).

[5] The Commission should be aware that many issues span categories. MFNS has attempted to place issues in the category that seems to fit the issue best.

- ✓ **Rights-of-way access conditioned on extortionate demands** for money and in-kind compensation that clearly violate the Act and/or state law.
- ✓ **Formal and informal permitting moratoriums** lasting over a year, pending the city's study of the issue and possible adoption of new ordinances to manage the rights-of-way. In addition to preventing the provision of telecommunications services, these moratoriums are often discriminatory in that they commonly do not apply to other utilities, including the incumbent telephone company.
- ✓ **Excessive regulatory burdens**, whether formally imposed through an ordinance, or informally imposed in an ad hoc manner at the permit counter.
- ✓ **Routine permitting delays** of up to eight months, often including violation of statutory deadlines.

As a facilities provider and competitive carrier, MFNS is in a unique position to promote telecommunications competition by providing state-of-the-art facilities to telecommunications providers anxious to serve end-user customers but unable to build a complete network in a time responsive and cost effective manner. MFNS also provides technically advanced services to bandwidth-hungry customers.

Unfortunately, MFNS has been constantly delayed in constructing its network because Municipalities purposely delay or demand unreasonable compensation in exchange for access to the public right-of-way. In fact, but for the delays imposed by Municipalities,

MFNS' networks would be operational in several of the markets where it is currently constructing, including the metropolitan areas of Los Angeles and Kansas City.[6]

Finally, although these comments will provide the Commission with a significant number of examples of abuse from Municipalities other than the Defendant Cities, in some instances MFNS has chosen not to name the specific Municipality for fear of retribution in future dealings with them.[7] However, in these instances, the examples of abuse seemed so egregious that MFNS believed it was worth bringing to the Commission's attention, even without reference to the responsible municipality. Additionally, MFNS is willing to provide the Commission with additional information and supporting documentation, including declarations, on any of the situations described herein.

II. CALIFORNIA MUNICIPALITIES DESERVE SPECIAL MENTION

MFNS has encountered a troubling and growing number of problems in California Municipalities that it cannot specifically discuss in these comments because of ongoing settlement discussions with a number of the offending jurisdictions. However, MFNS believes that the general problem is worth special mention here. Increasingly, California municipalities are erecting barriers to entry and intentionally discriminating against competitive local carriers under the guise of rights-of-way management programs and ordinances. Given California's status as the largest telecommunications market in the country, MFNS hopes that the Commission will take special note of what is likely to be a serious continuing threat to telecommunications competition in that state. MFNS

[6] While MFNS is operational in the Kansas City central business district and has point to point connections to some Kansas City towns, these comments will show that MFNS has been unable to complete its ring and provide redundant service throughout the Kansas City metropolitan area due to unreasonable demands imposed by a number of Kansas City municipalities.

welcomes Commission efforts to educate Municipalities and provide speedy mechanisms to resolve issues of the type raised in California.

The primary reasons for carrier difficulties in California stem from the impacts wrought by the infamous "Proposition 13,"[8] which limits a Municipality's ability to increase existing taxes or implement new ones. Proposition 13 has forced cash-starved cities to look for other sources of revenue. Creative Municipalities with little concern for their obligation to uphold state and federal law have turned to telecommunications carriers as a source of new revenue.

State law clearly provides all telephone companies a state-wide franchise to use the public rights-of-way and California Supreme Court cases construing this law have consistently ruled that Municipalities are forbidden from requiring separate franchises from telephone companies seeking to use their public rights-of-way. (*See* California Public Utilities Code Section 7901); Pacific Tel. & Tel. Co. v. City & County of San Francisco, 51 Cal.2d 766, 771 (1959) (telephone corporations receive a franchise from the state, "to use the public highways ... without the necessity for any grant by a subordinate legislative body"); and Pacific Tel. & Tel. Co. v. City of Los Angeles, 44 Cal.2d 272, 279-282 (1955) (telephone corporations may use their telephone lines to transmit telegraph messages, teletypewriter messages, telephotographs, program services such as radio and television broadcasts, and any other communication service by means of the transmission of electrical impulses).

[7] MFNS has sought to serve the City Attorney or other responsible public official in each of the jurisdictions specifically named in these comments.
[8] California Const. Art. XIII A, Sec. 4.

Notwithstanding these restrictions, many Municipalities routinely withhold permits from MFNS and other competitive telephone companies until they agree to pay unlawful compensation for use of the public rights-of-way, or litigate the issue. Municipalities view the advent of telecommunications competition as their chance to take a fifth or sixth swing at the fairly sturdy legal piñata that California Public Utilities Code Section 7901 represents.

Thus far, the majority of competitive carriers faced with this Hobson's choice elect to pay for access to the rights-of-way because of concerns regarding speed to market. While carriers like MFNS are certain that they could ultimately prevail in court, no carrier has any certainty that the courts will provide a speedy remedy. A delay of two or three years to enforce MFNS' rights is simply not an option.

Even worse than the immediate demands for money encountered in some California Municipalities, is the extortion combined with *unending delays* faced in others. In the worst cases the Municipalities impose moratoria to "study" the issue five years after the Act was signed, delaying construction for nine months to a year, and *then* demand even *higher payments or in-kind compensation* than those being demanded by their quicker moving counterparts.

It is clear from discussions with California Municipalities that this problem is only going to get worse – and that competition and California consumers will suffer. Even now, where network engineering will permit, carriers routinely route around troublesome cities, such as Los Alamitos and Culver City in southern California. MFNS has contractors standing by to complete its northern California loop as soon as MFNS is able to overcome the delays and demands presented by jurisdictions like Berkeley. Further delays will force

MFNS to consider expensive re-routing options bypassing Berkley customers that deserve the benefits of the Act like all citizens. Clearly, these are exactly the kinds of delays intended to be prohibited under Section 253 of the Act, and which occur in the absence of speedy and conclusive enforcement options.

III. RIGHTS-OF-WAY ACCESS IS OFTEN CONDITIONED ON EXTORTIONATE DEMANDS

Access to public rights-of-way is almost routinely conditioned on MFNS' provision of monetary or in-kind compensation that clearly violates the Act and/or state law. In most cases, the Municipality is clearly prohibited under state law from requiring compensation for use of the rights-of-way, but the Municipality makes the argument that the law is no longer valid in light of the Act, changing technology, or an absurd interpretation of the law.[9] Consequently, MFNS is left to either route around the Municipality, litigate the issue (which will take several years, further delay MFNS' access to rights-of-way in the interim, and impact customer choice), or pay the requested, but illegal, compensation for access to the rights-of-way. In almost all of these instances, the request is discriminatory because the incumbent local exchange carrier is not required to make the same payments. In many of these cases, MFNS enters into the agreements and pays the unlawful, demanded compensation because the delay involved in litigation is simply unacceptable to remain competitive. To add insult to injury, MFNS is often required by the Municipality to waive its rights to later challenge the validity of the agreement.[10] These Municipalities understand and abuse the need of telecommunications providers to obtain immediate access

[9] In some instances the Municipality simply refuses to provide any legal rationale for its position.
[10] Compare with "any attempt to require an attacher to waive its rights and remedies under § 224 would be a per se violation of § 224." *Cavalier Telephone LLC v. Virginia Electric and Power Co.*, Docket No. DA 00-1250, para.5. (2000). The Commission should make a similar holding in the area of § 253.

to their rights-of-way and to which the carriers are legally entitled. The demanded waiver of rights is further evidence of this duplicity. These Municipalities simply have no incentive to comply with the law when they know it will take years for a carrier to obtain "justice" from the legal system.

Some Municipalities require MFNS to pay unlawful fees or provide in-kind compensation claiming that MFNS' services do not qualify under the state's definition of telecommunications services and thus entitled to access to the public right-of-way without a franchise or fees. This is often the case with MFNS' dark fiber offerings. Since dark fiber will eventually be lit to provide a telecommunications service, this distinction is meaningless and creates a clear barrier to entry prohibited by section 253 of the Act. MFNS urges the Commission to make clear that the installation of dark fiber is entitled to access to the public right-of-way pursuant to section 253(c). This conclusion is no different than the holding made by the Commission in *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*[11] and upheld by the Eleventh Circuit in *Gulf Power 2*[12] permitting the placement of dark fiber on Pole Attachments pursuant to section 224 of the Act. The language of sections 224(f) and 253(c) are very similar and, thus, supports making such a conclusion regarding access of the public right-of-way and installation of dark fiber.

The following are examples of such extortionate practices:

- The cities of **Walnut Creek and Richmond, California** insisted that the state's law giving all telephone companies a statewide franchise without direct compensation did

[11] 13 FCC Rcd 6777 (1998)
[12] *Gulf Power Co. et. al. v. Fed. Communications Comm., et. al.*, 208 F.3d 1263 (2000).

not apply to MFNS, despite the fact that MFNS is a certificated provider in California. These cities made the implausible assertion that only voice telephony is telephone service and that any other service, such as data transport, is not a telephone service. They presented this position to MFNS, despite a California Supreme Court case that is directly on point affirming that a telephone corporation may use its lines for telegraph messages, teletypewriter messages, telephotographs, program services such as radio and television broadcasts, and any other communication service by means of the transmission of electrical impulses. Pac. Tel. & Tel. Co. v. City of Los Angeles (1955) 44 Cal.2d 272, 281-2. Notwithstanding this position, the ILEC, who is currently installing DSL facilities for data transmission is allowed to pull permits in these cities with abandon.

These cities refused to grant MFNS permits to construct in the public rights-of-way, or even to simply pull fiber through existing ILEC conduit. MFNS was forced to sign settlement agreements with them waiving MFNS' rights to challenge the unlawful compensation, agreeing to pay them annual linear foot fees in order to obtain access to the rights-of-way. MFNS' payments to these cities over the term of the agreements will likely total over $100,000.

- MFNS sought a permit from the City of **Dearborn, Michigan** in March of 2000. In May the City advised MFNS that it would have to sign the City's "Franchise Agreement", requiring MFNS to pay a percentage of its gross revenues to the City and to agree to many unlawful extensions of municipal authority over telecommunications providers like MFNS. *Dearborn made this demand despite the fact that its gross*

revenue fee had already been struck down by a state court, finding it violated the state telecommunications law limiting fees to actual costs of issuing a permit and maintaining rights of way used by the provider. *See* TCG Detroit v City of Dearborn, Case No. 98-803937 CK, Opinion and Order issued June 11, 1999. To date, nearly a year after MFNS submitted its permit application, and nearly nine months after the running of the state's 90-day statutory deadline (M.C.L. 484.251(3)), the City still has not issued MFNS a permit. MFNS is taking formal action against the City at this time.

- The City of **Chandler, Arizona** has claimed that certain services provided by MFNS do not qualify under the state's definition of "telecommunications services," which mirrors the federal definition. Although state law prohibits a city from charging right-of-way access fees to providers of "telecommunications services," and although MFNS is certificated in Arizona as a telecommunications provider, MFNS must pay a fee of $1.47 per linear foot to access Chandler's rights-of-way. MFNS must also act as the City's "contractor," installing additional conduit and manholes for the City's use, with Chandler's compensation to MFNS limited to the incremental construction costs incurred by MFNS. These fees and requirements are not imposed on the ILEC, Qwest Corporation.
- The city of **Phoenix, Arizona** has required MFNS to install a complete conduit and manhole system for the City in exchange for access to the City's rights-of-way. The City has continued to require these in kind contributions even though state law provides that intrastate providers of "telecommunications services" are not required to pay for access to public rights-of-way. Thus far, this system has cost MFNS over $3 million. Additionally, the City has demanded that MFNS pay an annual access fee of $.76 per

linear foot. To date, the City has not imposed access requirements of this magnitude on other providers of telecommunications services, including the ILEC, Qwest Corporation.

- The city of **Raleigh, North Carolina** has also rejected state law that prohibits it from charging for access to its public rights-of-way. The most recent agreement provided for MFNS' review by the City requests that MFNS make quarterly payments to the City of 2% of its gross revenues for use of city streets. MFNS already compensates cities for use of their rights-of-way through a state tax scheme whereby a portion of the proceeds are remitted to the cities by the State. The agreement is attached as Exhibit A.
- **Jefferson Parish, Louisiana** is permitted to charge for access to rights-of-way under state law. It currently collects the greater of $2.60 per linear foot or 5% of gross revenue annually for use of city streets. Notwithstanding that this is one of the highest fees in the country, the Parish also insists on collecting a one time charge of $1.50 per linear foot allegedly for compensation for costs incurred in managing its rights-of-way. However, the fee is simply another opportunity to extract money from anxious carriers, as evidenced by the fact that the Parish imposes this fee on *state* rights-of-way for which the Parish has no ownership, management, or control. MFNS' formal protest of this fee is attached as Exhibit B.
- MFNS has encountered extraordinary delays and obstacles in constructing its network in **Boston, Massachusetts**. This is particularly surprising given the fact that the City had previously developed a policy governing the construction of new telecommunications conduit as a result of the competitive access provider boom of the 1980s. At that time, Boston adopted a "shadow conduit" policy requiring

telecommunications utilities building new telecommunications conduit to implement joint builds to accommodate other carriers and to install excess conduit as a condition of excavating in public rights-of-way. This excess or "shadow conduit" had to be given to the City and the City obtained the ability to lease the "shadow conduit" to future market entrants. Consequently, the City now has an abundant supply of empty conduit available to lease to telecommunications providers. Nevertheless, the City refused to process MFNS' "shadow conduit" application (filed originally on October 30, 1998), while allowing the ILEC to construct new conduit and allowing the affiliate of an electric utility to install fiber in existing electric conduit. If MFNS's original application had been granted, it would have been required to make an upfront installation payment to the City of between $2.5-3.0 million, for 33,568 total duct feet (4 one and one quarter inch ducts), in addition to an annual rent fee of $5.00 per linear foot (subject to increase in the future). In December 1998, MFNS pared down its prior application, but would still have had to pay the City over $1.4 million upfront for a reduced amount of construction.

MFNS counsel was advised by the City Law Department that its application would not be considered until after the City promulgated a new fees policy covering all conduit in Boston. However, at the same time, the City held hearings on new conduit construction applied for by another carrier in some of the same locations MFNS had applied to use "shadow conduit." Despite repeated requests for rights-of-way access and an opportunity to comment on any proposed policy, the City refused to process MFNS's application and failed to share any information about the new policy with MFNS and other CLECs. The City did share information regarding the new policy

with both the ILEC and the electric companies (see December 23, 1998 *Wall Street Journal* at NE1, NE4.).

The City eventually adopted a new telecommunications policy in June of 1999. It requires that all carriers become "certified" by the City and provide documentation similar to the state certification process, essentially reproducing on a smaller scale work already performed by the state utility commission.

Most significantly, between approximately October 1998 and August 1999 the City prevented a number of CLECs, including MFNS from entering the telecommunications market, violating Section 253 of the Act and substantially delaying market plans, all to the benefit of the ILEC.

Additionally, the "shadow conduit" policy raises troubling issues. Setting aside the legal issue of whether the City can demand "shadow conduit" from new conduit builders and then charge for its use, both the cost of providing "shadow conduit" to the City in the event of a new build, and the "shadow conduit" rental formula constitute economic barriers to entry. In MFNS' case, an application to construct new conduit would burden MFNS with either expensive joint build or "shadow conduit" installation requirements. Under the rental formula, a carrier only gets to use **one** conduit, but is required to pay the City an upfront fee computed as the CPI-adjusted equivalent of the "certified" construction costs of **four** conduits. The carrier must then pay an annual rental fee of approximately $5.00 a linear foot for **one** conduit – a conduit that the carrier has already paid four times the construction costs for!!

- In the Town of **Arlington, Massachusetts**, MFNS sought to place fiber in existing conduit in the public rights-of-way, construct a segment of its own conduit, and cross a

portion of the public rights-of-way that intersected a railroad crossing, permitting MFNS to access a state-controlled bike path that ran through the municipality. MFNS contacted the Town Manager on April 23, 1999 to discuss its plans and filed its initial permit application on August 13,1999. MFNS proposed that the Town issue it the same order that the Town had routinely issued to the ILEC.

In response to MFNS permit application, the Town Manager demanded ***$2 million*** as a condition of issuing MFNS the order, and referenced the need for new ballfields in the community. The Town Manager also asserted authority over the state-controlled bike path and refused to allow any public hearings on MFNS' application. After extensive delays by the Town and intervention by the state agency that owns the bike path, the Town Manager allowed MFNS to move forward pursuant to an "agreement" that required MFNS to make a $200,000 payment to the Town and waive its right to contest the legality of this payment requirement. Again, the ILEC is not subject to these types of delays and demands when it applies to install new conduit or make additional use of existing conduit. MFNS did not reach "agreement" with the Town until nearly a year after its initial application.

- MFNS filed its first application in **Newton, Massachusetts** on July 6, 1999, and has experienced extensive delays since then. At its initial meeting with City officials on April 28, 1999, MFNS agreed to accept the same conditions imposed upon the ILEC. This proposal was unacceptable to the City and several problems arose as a result. First, the City demanded that MFNS answer a number of questions posed by the Law Department. MFNS did so. MFNS was then delayed while the City tried to determine what requirements it wanted to impose on MFNS, despite the fact that the City

ordinance did not provide for economic compensation. Ultimately, the City required MFNS to make a lump sum ***$100,000*** "voluntary" payment to the City. This fee was not included in the public conditions accompanying the grant of location order. The City also required MFNS to install, at no cost to the City, conduit for municipal use. In addition, it imposed street excavation and restoration standards that exceeded those mandated by the Massachusetts Department of Telecommunications and Energy, further increasing MFNS' construction costs and delaying its project. Finally, the City required MFNS to waive its legal right to challenge the conditions imposed, as well as the $100,000 payment to the City. MFNS did not obtain approval of its first application until March 14, 2000.

- **DuPage County, IL** proposed charging MFNS a fee of over $1 million dollars to install fiber in approximately seven miles of existing ILEC conduit. This fee is clearly illegal under several provisions of the Act and state law. First, the fee is discriminatory because it has not been imposed on the ILEC, Ameritech. Second, if the County had insisted on immediate payment, it would have had the effect of preventing MFNS from providing telecommunications service in violation of section 253(a) of the Act because of its breathtaking amount. Finally, over $1 million (or approximately $27.00 per foot) for the right to occupy less than 7 miles of existing conduit is clearly not "fair and reasonable compensation" consistent with section 253(c). In order to proceed with its fiber installation, MFNS was able to post a bond for the bulk of the fee, pending litigation on the issue. However, the fee remains, and MFNS will be forced to incur substantial legal costs, or pay the fee shortly

- Despite a recent change to Washington state law preventing **Washington Municipalities** from requiring free conduit from providers,[13] many still make the demand. In some cases, the cities are willing to waive permit fees for the conduit. Others, with utter disregard to state law, continue to demand conduit in addition to the required permit fees.
- MFNS has encountered demands for illegal fees **throughout New Jersey,** despite a 1997 legislative enactment limiting fees to cost-based recovery. The law bars any "fees, taxes, levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against ... telecommunications companies," and further limits permit fees to "reasonable fees for actual services made by any municipal, regional or county governmental agency." N.J.S.A. 54:30A-124. Specific examples of "bad actor" cities in New Jersey include the following:
    - For more than a year MFNS attempted to obtain permission from **Trenton, N.J.** to build a network of rings in the downtown area, that would have entailed occupying about 40,000 feet of municipal right-of-way. Trenton insisted on street opening permits equivalent to $25.00 per foot, which would have required a permit fee in excess of $1 million. As a result, MFNS was forced to defer its plans to build in Trenton.
    - MFNS approached another New Jersey city about a proposed build of approximately 5 miles in June 2000. Newark informed MFNS that it would require a fee of $70,000 ***per year*** for this build, despite state law limiting fees to cost recovery. The City also stated that it would require MFNS to install 8

[13] R.C.W 35.99.070.

additional ducts to be granted to the City, at no cost. As of this writing, there has still been no agreement achieved between the City and MFNS.

- Despite state law limiting fees to actual services rendered, **both Monmouth County and several municipalities within Monmouth County**, after consultation among themselves, have concluded that an appropriate fee is $1.50 per foot per year. This fee is producing tens of thousands of dollars in recurring revenue to each of these jurisdictions, despite the fact that after the year in which construction occurs, the only cost to the County or any of these municipalities is the file space to store "as built" drawings.

- One **New York municipality** charges as much as $4 per foot per year for use of the public right-of-way claiming that is the estimated fee to administer and maintain the road after facilities are installed even though MFNS is required to fully restore the streets. As stated in the Introduction, MFNS is working to complete networks in 50 US markets in the next several years. These networks traverse hundreds of Municipalities. In all of the other markets that MFNS is building and with all of its experience in this area, MFNS has never found that cost recovery even comes close to $4 per foot per year. This fee is not fair and reasonable.

- The cities of **Burbank** and **Glendale, California** both require competitive carriers to sign agreements agreeing to pay fees for use of the rights of way. Burbank's fees are over $3.00 per linear foot annually. Glendale claims its fee is "cost-based" to avoid the state law prohibition on franchise fees. However, the City reserves the right to charge carriers up to $1.80 per linear foot annually. Clearly, the City does not incur annual fees of this magnitude once facilities are installed and it is only left to "administer" an

agreement. Even more troubling, MFNS has signed the *exact same* agreement executed by another CLEC, and both cities have thus far dragged their feet on processing approval of the agreement.

IV. MUNICIPALITIES ROUTINELY PREVENT THE PROVISION OF TELECOMMUNICATIONS SERVICES THROUGH PERMITTING MORATORIA

It is no exaggeration to say that nearly five years after the Act, Municipalities routinely impose both official and unofficial permitting moratoriums that prevent installation of new telecommunications facilities for over a year, pending adoption of new telecommunications ordinances or to appease perceived citizen outrage. In addition to preventing the provision of telecommunications services and the resulting customer benefits, these moratoriums are often discriminatory in that they are rarely applied to other utilities, including the incumbent telephone company.

- On April 19, 2000, the city of **Berkeley, California** rejected MFNS' permit requests, claiming that, contrary to state law that prohibits a Municipality from franchising telephone companies, MFNS was required to obtain a franchise from the city. See Berkeley's permit rejection letter, attached as Exhibit C. To add insult to injury, Berkeley also refused to negotiate a settlement agreement of this issue, instead deciding to institute an informal moratorium on all telephone company permits.[14] Nine months after originally rejecting MFNS' permit requests, Berkeley is now in the final stages of adopting an overreaching and illegal telecommunications ordinance that literally amounts to a third tier of regulation. It is attached as Exhibit D. Most discouraging,

[14] It is likely that this moratorium does not apply to the ILEC, but MFNS has not yet conducted public records searches to verify this.

the ordinance requires carriers to "register" with the city and participate in an extensive process for determining whether the carrier is "exempt" from a franchise. As MFNS has had experience with a similar ordinance written by the same attorney for another California, it is clear that this "registration" and "exemption" process can take months unless a carrier simply agrees to pay fees to keep the process moving. Among other things, the ordinance imposes illegal rental fees to access the rights-of-way (the amount of the fees is not yet determined) (Section 16.10.040, *et seq.*); requires a carrier to submit to a technical audit of its system in the event of a system transfer (Section 16.10.120(E)); and requires carriers to provide information about their "technical qualifications, experience and expertise regarding the Telecommunications System and Telecommunications Facilities." (See Sections 16.10.040 and 16.10.060(10) of the Berkeley Ordinance that is attached). The last two requirements unquestionably extend far beyond the city's jurisdiction and have the effect of creating unnecessary additional "hurdles" to installation of facilities. Among other things, a carrier's fitness to construct and operate a telecommunications system is determined by the state regulatory commission and Municipalities are preempted from making their own determinations on this subject.[15] Most significantly, after more than nine months of discussions with the City, at this writing, MFNS is still unable to access Berkeley's public rights-of-way.

- **Culver City, California** has had an "informal" moratorium on issuing telecommunications carrier permits since at least July 1999. In essence, the City

[15] "These factors [managerial, technical, financial and legal qualifications] relate to regulatory issues that go well beyond the bounds of legitimate local governmental regulation discussed in *TCI Cablevision* and *Classic*

refuses to process any permit applications until it has adopted a comprehensive telecommunications and franchising ordinance. The City's refusal to process permits has forced MFNS and other carriers to route around this city for the time being.

- Notwithstanding the fact that as recently as 1995 the Kansas Supreme Court affirmed that a Kansas Municipality could not require a franchise from a telephone company "passing through" a jurisdiction (United Tel. Co. v. City of Hill City, 258 Kan. 208, 899 P.2d 489 (1995)), a number of **Kansas Municipalities** have decided to reexamine their franchise ordinances in an attempt to challenge this law. In the interim, they have imposed unofficial permitting moratoria and denied permits to MFNS for failure to have a franchise. They have taken this position despite the fact that many of these same Kansas Municipalities previously refused to respond to MFNS' requests in June, July and August of 2000 to obtain a franchise. The Kansas Municipalities' newly asserted franchise requirement is especially ludicrous in light of one Municipality's articulated position that the Act, or alternatively this Commission's decision in Classic Telephone, has "overruled" the Kansas Supreme Court's determination in the Hill City case. Perhaps the Commission can appreciate the irony of a Municipality arguing that clearly articulated state law is preempted by federal law or a federal agency determination when Section 253 of the Act specifically retains states' rights to manage public right-of-way. While it might be satisfying to MFNS litigators to put such amusing claims to the test, there is nothing amusing about the delays that the Kansas Municipalities have caused for MFNS. MFNS is in the process of completing

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Telephone, supra." *Bell Atlantic – Maryland, Inc. v. Prince George's County, Maryland,* 49 F. Supp. 2d 805, 817 (1999).

installation of a fiber optic ring in the Kansas City metropolitan area. This ring would be complete and MFNS would be providing service over the ring today if not for Municipal delays, and now, extortion. There is simply no time to test these issues with the Commission or the courts – too much is at stake. Consequently, customer commitments will likely force MFNS to enter franchises and pay fees to "pass through" Municipalities that would otherwise have no right to a franchise, or fees, from MFNS.

V. MUNICIPALITIES DELAY PERMITTING AND DISCRIMINATE AGAINST COMPETITIVE CARRIERS BY IMPOSING EXCESSIVE REGULATORY BURDENS

Regulatory burdens generally take one of two forms. They are either designed to keep carriers out of the rights-of-way for as long as possible, or they are designed to extract as many public works benefits as possible. Some Municipalities require carriers to coordinate joint trenching among competitors that unreasonably delay projects. Others routinely use carrier construction plans to obtain street and sidewalk improvements, generally through restoration standards that require carriers to improve the street or sidewalk to a *better* condition than found. Clayton, Missouri provides an especially egregious example of this tactic.

Some examples provided throughout these comments describe demands for excessive in-kind compensation. Demands for in-kind compensation represent both an excessive regulatory burden and often unlawful compensation. In-kind compensation, as in the case of Phoenix, Arizona, can amount to a huge expense to the company, and should be evaluated by applying the fair and reasonable compensation standards of section 253 of the Act. MFNS requests that the Commission make such a finding in the proceeding.

- The city of **Clayton, Missouri** presents a textbook example of the imposition of unreasonable regulatory burdens on carriers seeking access to the rights-of-way. The City clearly views the advent of telecommunications competition as the opportunity to complete a number of public works projects, including upgrading of certain city sidewalks and accompanying streetscapes. Instead of allowing carriers to construct in the street along Maryland Avenue, the City is requiring a number of carriers to joint trench together in the adjoining sidewalk. Under normal circumstances, this would not be objectionable. However, as a condition of excavating the Maryland Avenue sidewalks, the carriers must meet excessive restoration requirements that include replacing a concrete sidewalk with brickwork, and installing trees and other public improvements. In summary, the city has adopted the attached architectural specifications (Exhibit E) as its restoration standards for that street, raising linear foot construction costs by more than $40.00 per participant in the joint trench.
- The city of **Federal Way, Washington** requires carriers to pave 500 feet of road on either side of a new manhole. There is simply no structural justification for such a large amount of overlay.
- The city of **Brier, Washington** required MFNS to not only install new street curbs and gutters, but to install sidewalks where previously there had been no infrastructure.
- MFNS recently sought an easement over publicly owned park property in **Medina, Washington.**[16] The City's outrageous demands would be laughable, were they not so indicative of the manner in which Municipalities view carriers – as large companies

[16] MFNS recognizes that it does not have the same rights to publicly-owned property that is not public rights-of-way, but presents its experience in Medina, WA for the proposition that, among other things,

with unlimited resources that the Municipality can extract because of the value of the property they control. Medina's first set of demands included 16 items, among them:

- 8 fibers dedicated for City use;
- Free long distance;
- Free high-speed internet service to all Medina citizens;
- A "best price" guarantee for all Medina citizens;
- An annual easement fee of $250,000;and
- An institutional network connecting City Hall to all current and future City facilities.

The list of demands presented to MFNS is attached as Exhibit F. At this time, while the City has substantially reduced its demands, MFNS and its construction partner have determined that it is more feasible to obtain the easement from a private property owner. Thus far, the City has refused to provide MFNS with even a sample franchise agreement. Consequently MFNS is concerned that its decision to bypass the City park property will result in retribution in the form of franchise delays.

- Some Municipalities reserve space for planned projects, even if they are unfounded and far into the future. One **Washington Municipality** forced MFNS to construct on the sidewalk claiming the streets are reserved for city utility use.[17] In addition to instituting discriminatory policies prohibited by 253(c) in favor of the municipality owned utilities, the municipality used MFNS as a public works subcontractor requiring it to install a new sidewalk at additional expense to MFNS.

Municipalities have unreasonable expectations of carriers resources and don't hesitate to attempt to extract all manner of things. The unique thing about Medina is that the city actually put its requests in writing.

[17] Compare with *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Service Providers,* CC Docket No. 96-98 and 95-185, para. 9 (1999) that states utilities are not permitted to reserve space for pole attachments to the detriment of a would-be entrant. As a bottleneck facility, Municipalities should not be permitted to reserve public right-of-way space for future projects especially if they are unfunded.

- **Joint trenching/build requirements** – Increasingly, Municipalities are requiring carriers to coordinate their construction with all other carriers who may seek to install facilities along the same route within a 2-5 year period. Although MFNS understands the desire to minimize construction and generally supports joint builds, many joint builds are burdensome on smaller companies such as MFNS. Joint build regulations require MFNS to canvass all *possible* companies that *might* want to occupy a particular route. This canvassing takes months. Some municipalities require an affirmative response from all *possible* companies (compared to requiring response by a date certain). In many cases it is difficult, if not impossible, to obtain affirmative responses, but the Municipality will not issue permits until MFNS provides such affirmative responses. MFNS suggests that such a position by a Municipality is unfair, costly and violates sections 253(a) and(c) of the Act.
- One **Washington Municipality** requires MFNS to notify all utilities that have aerial plant of our construction plans so they can move their facilities underground. The notification period is 60 days. Of course additional time is then required to negotiate a joint build agreement. Time to market is crucial for competitive providers such as MFNS. If moving facilities underground is important to cities, they should set a deadline for such a change and work with the utilities to implement the change. The Municipalities should not wait until a provider has an immediate need to access the public right-of-way and then place conditions on the provider that significantly delay construction.

VI. MANY MUNICIPALITIES UNREASONABLY DELAY OR IGNORE STATUTORY DEADLINES

As stated in the City Signal petitions, the Defendant Cities failed to meet the statutory deadline of responding to permit applications within 30 days along with other violations of section 253. City Signal continues by stating that this failure to respond "is tantamount to a denial of the application."[18] MFNS agrees with City Signal that blatant disregard for the statutory obligations of the Defendant Cities', as demonstrated in City Signal's petitions, is tantamount to a denial and an abuse of the Defendant Cities' authority.

To make matter worse, Exhibit A of the Wickliffe petition indicates that the city's Chuck Webster told City Signal that if they wanted a "30 day" answer, the city could simply reject the application.[19] This example of a "my way or no way" attitude is an unfortunate reality in dealing with many Municipalities as reflected in the other examples provided by MFNS in these comments. Imagine the response in the majority of Municipalities, where no statutory deadlines exist. As described in the examples contained herein, delays last months, and even years.

The City Signal situation is clear-cut. Governments set statutory deadlines for good reason. If the Defendant Cities feel that 30 days is too short in order to respond to permit applications, the proper course of action is to ask the state Legislature to change the law so that a longer time is permitted. The proper course of action is NOT to ignore the statutory

[18] Contrast with "a pole owner 'must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted." *Cavalier Telephone, LLC v. Virginia Electric and Power Company,* DA 00-1250, para. 15, (1999) quoting *In the Matter of Application of Bellsouth Corporation,* FCC 98-271 13 FCC Rcd 20599 (1998).

[19] See Exhibit A of Wickliffe petition, July 25 entry. A rejection such as suggested by Mr. Webster would also be a violation of section 253(c).

deadline and threaten rejection to those that seek a response in the legally mandated timeframe.

The Commission must make it clear to all Municipalities, including the Defendant Cities, that they are expected to work cooperatively with carriers to enable access to the public right-of-way in an appropriate amount of time and that, like pole attachments, "time is of the essence and dilatory cooperation is as effective as denial."[20]

To demonstrate how many Municipalities abuse their position to delay access to the public right-of-way, MFNS offers the following additional examples:

- MFNS applied for a statutory permit under the Michigan Telecommunications Act ("MTA") from the City of **Centerline, Michigan** on March 30, 2000. The statute, enacted in 1995, requires local units of government to act on such requests within 90 days. M.C.L. 484.251(3). However, the City refused to issue MFNS a permit until it had drafted and passed an entirely new telecommunications regulatory ordinance. The new ordinance, consisting of over 40 pages, conflicted with and violated the state telecommunications law in many respects. Although the 90-day statutory period expired in June, 2000, the City did not pass its ordinance until August and did not issue MFNS a final permit until October, 2000, nearly four months after the statutory deadline, and only after MFNS was forced to engage in protracted and lengthy negotiations costing MFNS thousands of dollars in unnecessary costs and delays.
- MFNS first applied for a grant of location to construct new conduit in the Town of **Winchester, Massachusetts** on May 21, 1999, after MFNS had extensive pre-

[20] Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Company, Docket No. DA 99-1376, para. 16 (1999).

application discussions with municipal officials about its construction plans and proposed routes. MFNS proposed to use the same form of grant of location order used by the Town in granting conduit construction applications to the ILEC. The Board of Selectmen refused to treat MFNS the same as the ILEC and delayed issuance of MFNS orders. The Board of Selectmen instructed the Town Conservation Commission not to allow any MFNS filing to proceed to hearing pending its "discussions" with MFNS. Delays caused by the Board of Selectmen forced MFNS to miss an entire construction season. MFNS had timed its application to enable it to complete its construction during those months when local schools were not in session. The Town ultimately required MFNS to make monetary payments not authorized under state law and provide in-kind contributions, including laterals to several municipal buildings and fiber optic cable for municipal use, in addition to installation of a single duct reserved for municipal use, all at no cost to the Town. The ILEC is only required to provide duct for municipal use. The Town also imposed a bond amount that exceeded its standard requirements applied to the ILEC. No written by-law supported the imposition of these conditions, which were not part of any publicly known or applied requirements. MFNS did not receive an affirmative vote on its permit application until August 7, 2000 – more than 1 year and 2 months after its initial application.

- MFNS has encountered significant delays to market entry **throughout New Jersey**. Delays are especially troubling in New Jersey because the State has hundreds of small municipalities, so even a relatively modest project will require approval from many jurisdictions, any one of which can effectively block the project through delay.

- In June 2000, MFNS approached the city of **Bayonne, N.J.** to discuss a small construction project traversing approximately thirty city blocks. In August, having received no response to the June application, MFNS' counsel reiterated the request. In response, in September, the City attorney requested a copy of the June request, which had been misplaced. MFNS responded four days after the request was made. In January 2001, approximately four months after the replacement application was provided, and more than seven months after the first request was made, the City attorney requested copies of resolutions issued by other jurisdictions. While these were provided promptly, it is evident that this will provide an excuse for yet further delay, as the "new information" is reviewed.
- MFNS approached **Rochelle Park, N.J.** to discuss a small build in June 2000. The Borough attorney requested additional information, which was provided in July 2000. Just recently, more than 4 months after MFNS' initial submission, and after repeated inquiries by MFNS, the Borough attorney requested fresh copies of the material previously provided in July 2000.
- One state DOT takes up to 8 months to process a permit. Although this is a significant and unreasonable delay, this is not isolated to one particular DOT or Public Works Department. The DOT has one person that reviews permit applications and calculates fees for the entire state. If he is on vacation or out sick the permits just pile up until he gets back.

VII. WHERE THINGS ARE WORKING

A. Texas

An example of where right-of-way access is beginning to show promise is Texas. In 1999, Texas passed unique legislation dispensing with municipal franchise requirements for certificated telecommunications providers ("HB1777"). Fees for use of public rights-of-way located within a municipality are calculated pursuant to a legislative formula and implemented by the Texas Public Utility Commission ("TPUC"). Providers in Texas are expressly authorized to pass the fees through to end-use customers on customer bills.[21] Texas municipalities retain police power to manage the public right-of-way. Specifically, municipalities are authorized to require a telecommunications provider to obtain a construction permit before it is authorized to install facilities in the public rights-of-way. Some implementation issues have arisen such as permit application forms, insurance and bonding requirements, time to issue a permit, and fees for providers that do not terminate access lines in the municipality.

To demonstrate further the PUCT's commitment to providing access to the public rights-of-way, the PUCT has two staff members dedicated to the administration of HB1777 and the propagated regulations. These staff members answer questions regarding requirements of carriers and Municipalities and make telephone calls in an attempt to move parties off positions that are not lawful under HB1777 so that construction can move forward.

[21] Such a method begins to reveal to customers the real cost of service which is often masked or subsidized. It also requires tax authorities to stop hiding behind the utilities that traditionally have been heavily taxed and included the taxes into service costs thereby hiding a customer's true tax burden.

The situation in Texas is not perfect – yet. But given the underlying legislation and the TPUC's willingness to continue to fine-tune the process as issues arise, and to dedicate staff to explain the law to the Municipalities, Texas proves to be a model for all states in its right-of-way management.

B. Illinois

Another example of where things are working is Illinois. Effective January 1, 1998, Illinois enacted the Telecommunications Municipal Infrastructure Maintenance Fee Act (35 ILCS 635) ("TIMF"). The Illinois General Assembly imposed a tax on invested capital of utilities to partially replace the personal property tax that was abolished by the Illinois Constitution of 1970. The TIMF abolished the invested capital tax on telecommunications retailers and franchise fees with respect to telecommunications retailers to create a uniform system for the collection and distribution of fees associated with the privilege of use of the public right of way for telecommunications activity, and provide municipalities with a comprehensive method of compensation for telecommunications activity including the recovery of reasonable costs of regulating the use of the public rights-of-way for telecommunications activity.[22] The fee is charged to end user customers. The state TIMF rate is 0.5 percent of gross charges. The municipal TIMF cannot exceed 2% in the City of Chicago and 1% in all other municipalities.

Except for the problems outlined above in DuPage County, the TIMF has produced simplified processes that generally permit MFNS to obtain permits in a timely and cost-effective fashion and complete construction to satisfy customer requirements.

[22] 35 ILCS 635/5.

Because the state legislature had the foresight to develop a simple and straightforward scheme, Illinois customers have benefited from the promises of the Act.

VIII. ACTION THE FCC CAN TAKE TO HELP THE BALANCE THE NEEDS OF CARRIERS AND MUNICIPALITIES

In these proceedings, MFNS urges the Commission to set forth the sphere of local authority to regulate access to the public right-of-way, including what constitutes appropriate time, place and manner of right-of-way management. The Commission should make it very clear to all Municipalities that actions of the Defendant Cities and the other Municipalities contained in these comments will not be tolerated. The Commission should also make clear that forcing carriers to turnover customer lists and technical information is completely outside the scope of necessary right-of-way management.

As suggested in footnote 2, and to the extent the record requires further development, the Commission should initiate a formal rulemaking proceeding to establish right-of-way access standards. To the extent the Commission determines that such issues are outside the scope of this proceeding, the rulemaking should spell out for such things as time to respond to permits, what constitutes a fair and reasonable fee, establish accelerated dispute resolution for violations of 253, and declare a mandatory waiver of rights under Section 253 of the Act a per se violation of the Act.

The Commission should clarify that the Enforcement Bureau has jurisdiction over section 253 issues and make the escalated dispute resolution process, "Rocket Docket", available for this matters as well as informal mediation by the Enforcement Bureau staff. The Commission should also consider dedicating staff to resolving right-of-access access issues as has been done by the PUCT.

IX. CONCLUSION

MFNS is sensitive to the fact that the Commission takes its preemption authority seriously under section 253 (d) and uses it only when necessary. MFNS agrees that preemption of a Municipal law or regulation is a serious action that should be used only in extreme circumstances. The circumstances presented to the Commission in these petitions warrant such action.

MFNS also acknowledges the Commission's efforts to eliminate the "digital divide" in the United States. Although much of that effort is directed to rural areas, the Commission must continue to monitor deployment of high-tech infrastructure in major cities or some Municipalities may slip behind the digital divide because their right-of-way policies discourage investment in the community. Although some consider Cleveland Heights an affluent community, it will not remain such if it continues to be a barrier to entry to such competitive carriers as City Signal and MFNS. The Commission must be diligent in its attempts to remove the digital divide from *all* American neighborhoods by ensuring that no Municipality may prevent a carrier from providing facilities and service in their Municipality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of Metromedia Fiber Network Services, Inc. were served via overnight delivery on this 30th day of January, 2001 of the following:

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