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

In re City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Cleveland Heights, Ohio	)))	CS Docket No. 00-253
In re City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Wickliffe, Ohio	)))	CS Docket No. 00-254
In re City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Pepper Pike, Ohio	)))	CS Docket No. 00-255

COMMENTS OF CONCERNED MUNICIPALITIES

AL: City of Auburn
AZ: City of Mesa
CA: City of Cerritos, City of Concord, Imperial County
CO: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of most municipalities in the greater Denver area.
FL: City of Coral Gables, City of Tallahassee
IL: City of Batavia, City of Chicago, City of Marshall
MI: City of Detroit, Ada Township, Alpine Township, City of Belding, City of Cadillac, City of Coopersville, Genesee Charter Township, Grand Rapids Charter Township, Holland Charter Township, City of Kentwood, Laketown Township, City of Livonia, City of Marquette, City of Monroe, City of Plainwell, City of Portland, PROTEC (Michigan Coalition to Protect Rights of Way), City of Southfield, Tallmadge Charter Township, City of Walker, City of Wyoming, Zeeland Charter Township
MO: City of St. Joseph
NM: City of Sante Fe, Town of Taos
NV: City of Henderson, City of Winnemucca
OH: Ohio Municipal League
TX: City of Fort Worth, Town of Addison, City of Carrollton, City of Grand Prairie, City of Huntsville, City of McAllen, City of Paris, City of Plano, City of Victoria and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues)
WI: City of Waukesha

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January 29, 2001

SUMMARY

City Signal has requested that the Commission preempt telecommunications line undergrounding requirements in Cleveland Heights, Wickliffe and Pepper Pike, Ohio. The gravamen of its complaint is that it believes being required to put its lines underground in certain portions of the cities (where the incumbent provider has aerial lines) would increase the cost of its telecommunications facilities and constitute an "effective prohibition on entry" under Section 253 of the Federal Telecommunications Act. It asks this Commission to "order that a permit be granted to construct fiber optic aerial facilities" in each of the three Cities.

City Signal's complaint must be dismissed for several reasons.

First, right of way matters – relating as they do to local control of property – are not within the scope of Federal power under the Commerce Clause of the U.S. Constitution and are reserved to the states under the 10th Amendment. The U.S. Supreme Court has made this clear in its recent decision involving the Federal Clean Water Act. The decision represents the Court's growing curtailment of the Commerce Clause and corresponding expansion of the 10th Amendment. Among other things, City Signal's request that this Commission order the three cities to allow aerial lines, unconstitutionally seeks to commandeer state and local authority and blur lines of political accountability.

Second, as a matter of statute, the Communications Act expressly bars Commission preemption authority under Section 253 on matters relating to right of way management. Instead such matters are left solely to the jurisdiction of the Federal courts. City Signal's sole complaint is one of right of way management – in this case where a telecommunications line is to be placed in the right of way (aerial or underground). Congress has expressly placed jurisdiction for such matters with the Federal District courts. This Commission lacks jurisdiction over the subject matter of the Petitions.

Third, City Signal has failed utterly to make any showing that requiring fiber lines to be placed underground in certain areas of the cities, in fact, is an "effective prohibition on entry" under Section 253(a) of the Act. It has shown nothing with respect to the routes involved; the cost for aerial versus undergrounding construction on each; alternative routings which might be available which would not involve aerial construction; or how any purported cost increase compares against either the overall capital costs of the City Signal system or the revenues which City Signal expects to derive from it.

In this regard, City Signal's fiber optic network appears to be extensive – it states that it is building a fiber optic network throughout "various municipalities in Northeast Ohio," which is an area of over 3.5 million people. Both the amount of any purported cost increase and a comparison to the capital cost and revenues of the project in question are necessary to resolve whether there is any "effective prohibition" under Section 253(a).

Finally, the policies being challenged are within the "safe harbor" of Section 253(c): They are competitively neutral and nondiscriminatory because they apply to all new providers. City Signal's argument, in effect, is that no obligation can be imposed on a new provider that was not imposed on the incumbent when it built its facilities. To state this argument is to show it is incorrect.

For the preceding reasons City Signal's Petitions must be denied.

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COMMENTS OF
CONCERNED MUNICIPALITIES

I. INTRODUCTION

Concerned Municipalities ("Concerned Municipalities")[1], by their attorneys, hereby file

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[1]Concerned Municipalities consist of the following municipalities and municipal organizations:

Alabama: City of Auburn
Arizona: City of Mesa
California: City of Cerritos, City of Concord, Imperial County
Colorado: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium consisting of Adams County, Arapahoe County, City of Arvada, City of Aurora, City of Brighton, City of Broomfield, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, City and County of Denver, Douglas County, City of Edgewater, City of Englewood, Town of Erie, City of Glendale, City of Golden, City of Greenwood Village, City of Idaho Springs, Jefferson County, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, Town of Parker, City of Sheridan, City of Thornton, City of Westminster, City of Wheat Ridge
Florida: City of Coral Gables, City of Tallahassee
Illinois: City of Batavia, City of Chicago, City of Marshall
Michigan: City of Detroit, Ada Township, Alpine Township, City of Belding, City of Cadillac, City of Coopersville, Genesee Charter Township, Grand Rapids Charter Township, Holland Charter Township, City of Kentwood, Laketown Township, City of Livonia, City of Marquette, City of Monroe, City of Plainwell, City of Portland, PROTEC (Michigan Coalition to Protect Rights of Way), City of Southfield, Tallmadge

comments in the three above-captioned proceedings pursuant to the Commission's notices for each proceeding. Concerned Municipalities represent directly or indirectly literally hundreds of municipalities nationwide with a population of over 21 million people located in 13 states. This broad range of municipalities makes this filing due to the fundamental importance of three issues.

- Municipalities being able to manage their rights of way, specifically, requiring telecommunications lines to be placed underground in appropriate circumstances.
- The Congressional and Constitutional denial of Commission jurisdiction over the right of way management issues involved in these cases.
- Municipalities being able to adopt new laws and policies on right of way management different from those applicable when existing providers installed their lines during the past century and a quarter.

Specifics on the preceding are set forth in detail below.

These comments are filed jointly in the three proceedings relating to Cleveland Heights, Ohio (CS Docket 00-253), Wickliffe, Ohio (CS Docket 00-254) and Pepper Pike, Ohio (CS Docket 00-255) because the same or much the same issues are presented by each, all of which involve

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	Charter Township, City of Walker, City of Wyoming, Zeeland Charter Township
Missouri:	City of St. Joseph
New Mexico:	City of Sante Fe, Town of Taos
Nevada:	City of Henderson, City of Winnemucca
Ohio:	Ohio Municipal League which is a voluntary association which represents the interests of its membership of more than 600 cities and villages in the State of Ohio.
Texas:	City of Fort Worth, Town of Addison, City of Carrollton, City of Grand Prairie, City of Huntsville, City of McAllen, City of Paris, City of Plano, City of Victoria and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues)
Wisconsin:	City of Waukesha

essentially identical Petitions filed by the same telecommunications provider. These comments will focus principally on the Petition filed against the City of Cleveland Heights because it was the first to be filed, contains somewhat more information (principally due to an opposition to Petition for Declaratory Ruling having been filed by the City of Cleveland Heights) and is representative of all three cities.

The gravamen of City Signal's complaint is that it believes being required to put its proposed fiber underground in certain portions of the City of Cleveland Heights (where the existing provider has aerial fiber) "increases the cost of its telecommunications facilities, which would make City Signal's service noncompetitive"[2] in violation of Section 253 of the Communications Act of 1934 ("the Act"). Thus, City Signal's specific request for relief in all three Petitions is that the Commission "order that a permit be granted to construct fiber optic aerial facilities in the City . . .".[3] (emphasis supplied)

The Opposition to Petition for Declaratory Ruling filed by the City of Cleveland Heights ("Cleveland Heights Opposition") and attached affidavit emphasize that the City is only requesting City Signal to place its lines underground in certain of its five older major business districts which date from before 1950[4]. The City states that the only aerial telecommunications type lines in the city

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[2]Petition for Declaratory Ruling against City of Cleveland Heights ("Cleveland Heights Petition") at Paragraph 7.

[3]Concluding paragraph of all three Petitions.

[4]See Affidavit of City Law Director, John Gibbon (attached to Cleveland Heights Opposition) ("Gibbon Affidavit") at Paragraphs 3, 6, 16 and 17; Cleveland Heights Opposition at 2-3.

are those of the local phone company (presumably Ameritech) and cable company;[5] that these phone and cable company lines have been in place for over twenty years[6]; that all new telecommunications providers are being asked to place their lines underground in these areas; and that the City is in the process of adopting an ordinance which would require all new telecommunications (and perhaps other) lines in such older business districts to be placed underground[7]. The City states that one new telecommunications provider agreed several years ago to put its lines underground in one such business district; that there are at least four new providers, including Petitioner, seeking to place wires in the City's rights of way; that the City is close to an agreement with one company (apparently one of the preceding four providers) to place conduits underground in these older business districts; and that the City has (or thought it had) a verbal agreement with City Signal to use these conduits once they were in place.[8] City Signal's affidavit attached to its Petition comports with the preceding. The sheet summarizing contacts with the City states that the City "may require UG [undergrounding] on some streets" (July 31 entry) and a detailed entry for August 22 describes conduit or conduit leasing along Lee, Mayfield (Mayfield being identified in the Gibbon Affidavit as a location where another new telecommunications provider placed fiber underground several years ago)[9] and Taylor Streets.

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[5]Gibbon Affidavit at 11; Cleveland Heights Opposition at 2.

[6]Id.

[7]Gibbon Affidavit at Pages 2-3; Cleveland Heights Opposition at Pages 2-4.

[8]Id.

[9]Gibbon Affidavit at Paragraph 12.

City Signal's Petition states that it is a telecommunications provider "in the process of installing its fiber optic network through various municipalities in Northeast Ohio"[10] and that aerial construction "increases the cost of its telecommunications facilities, which would make City Signal's service noncompetitive." City Signal states that "other telecommunications providers have fiber on utility poles throughout the City of Cleveland Heights"[11] and complains of the delay in receiving required approvals from the City to construct its fiber optic lines. The delay is due to a failure of the parties to agree on the City's request that City Signal lines be placed underground in the City's older business districts.[12] Thus, as stated above, City Signal's request for relief is that this Commission "order that a permit may be granted to construct fiber optic aerial facilities in the City of Cleveland Heights."[13]

As authority for the Commission to act, City Signal cites Section 253(a) of the Act banning state or local prohibitions on entities providing telecommunications service, the Commission's 1999 Notice of Inquiry on access to public rights of way and franchise fees and the Commission's 1997 Order in TCI Cablevision of Oakland County. City Signal makes no reference to Section 253(c) of the Act, which generally preserves local right of way management authority, nor does it cite or address Section 253(d) of the Act, which expressly denies Commission jurisdiction as to matters within the scope of Section 253(c).

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[10]Cleveland Heights Petition at Paragraph 2.

[11]Cleveland Heights Petition at Paragraph 6.

[12]See Cleveland Heights Petition at 16.

[13]Cleveland Heights Petition at 4.

City Signal provided no information on the additional cost, if any, to place its lines underground in the areas of question other than the conclusiory statements quoted above that it "increases City Signal's cost and makes its services noncompetitive."[14]

The City in its Opposition and Affidavit stresses how requiring new lines to be placed underground in the five older business districts is important to preserve the vitality of the districts in the face of competition from suburban shopping areas. The City states that this is part of an overall effort to maintain property values in the City, maintain its commercial vitality, retain and attract businesses and residents, and that abating the visual blight caused by numerous telephone lines and poles is a part of this comprehensive effort. The City states that these are "vital concerns" to it.

The City also states in addition that its actions on undergrounding are competitively neutral and nondiscriminatory because all new telecommunications providers requesting authorization to use the rights of way are treated in the same way, i.e. required to put in underground lines in the five areas in question.[15] It requests a hearing before the Commission and asks that the Petition be denied.[16]

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[14]Cleveland Heights Petition at Paragraph 16.

[15]Cleveland Heights Opposition at Pages 1, 4 and passim.

[16]Cleveland Heights Opposition at Paragraph 17.

II. THE COMMISSION LACKS JURISDICTION OVER THESE MATTERS

A. Right of Way Matters Are Not Within the Scope of Federal Power Under the Commerce Clause, and are Reserved to the States Under the 10th Amendment

On January 9, 2001, the U.S. Supreme Court issued an opinion that once again demonstrated the limited scope of the federal government's preemptive powers under the Commerce Clause. In Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 2000 U.S.LEXIS 640; 148 L. Ed. 2d 576 (2001), the Court addressed the question of whether the federal Clean Water Act empowered the U.S. Army Corps of Engineers to regulate intrastate waters and wetlands. A consortium of local communities had sought to construct a landfill of about 500 acres located in the Chicago area. The property included approximately 17 acres of wetlands. Although the Corps of Engineers initially refused jurisdiction, it reversed itself when it learned that various species of waterfowl used the site as part of their migratory habitat. It refused to grant a permit required under the Clean Water Act for landfills that affect the "waters of the United States." The consortium challenged the decision, contending that the Corps of Engineers was acting beyond the reach of its federal jurisdiction. The federal district court nevertheless ruled in favor of the government. The Seventh Circuit Court of Appeals affirmed.

The United States Supreme Court, however, rejected that expansive interpretation. The Court feared that any other ruling would have extended the Corps of Engineers' jurisdiction far beyond navigable waters to include such things as farmyard ponds and other isolated pools that were not adjacent to open water. Thus, while the Court technically ruled against the government on the basis of rules of statutory construction, it clearly intimated that, were compelled to do so, it would have significant constitutional concerns about the Corps' efforts to "push the limit of Congressional

authority." 2001 U.S. LEXIS *24. Its concern, said the Court, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." Id., citing United States v. Bass, 404 U.S. 336, 349; 30 L Ed. 2d 488; 92 S. Ct.515 (1971) ("Unless Congress conveys its purposes clearly, it will not be deemed to significantly change the federal-state balance"). The Court concluded that there was "nothing approaching a clear sign from Congress" that it intended federal power to reach so invasively into the area of land use regulation. To rule in favor of the Corps, said the Court, "would result in a significant impingement of the states' traditional and primary control over land and water use." Id. At *25.

In so ruling, the Supreme Court reinvigorated the principal articulated in the Tenth Amendment to the U.S. Constitution, i.e., that "powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States . . . ." The decision also reflected the Court's gradual erosion of federal power over the states. It marked another example of the Court's recent trend – begun approximately five years ago – toward applying a much more restrictive construction to the Commerce Clause. In U.S. v. Lopez, 514 U.S. 549; 115 S. Ct. 1624 (1995), for example, the Court invalidated the recently enacted federal Gun Free School Zones Act on the grounds that it exceeded federal power under the Commerce Clause. Similarly, in U.S. v. Morrison, 120 S. Ct. 1740 (2000), Congress attempted to regulate in the area of gender-motivated violence, and was again rebuffed when the Court ruled the statute to be unconstitutional. Although it is not clear where the final line will be drawn, there is no doubt as to the general direction of the Court and its increasingly strong inclination to limit the reach of federal power over the states.

The requested declaratory relief in the current Petitions falls within that same category. It attempts to preclude municipal regulation of local land use – here in the public rights of way – thus infringing upon a basic, core police power that, for reasons described at length elsewhere in these comments, has been traditionally and prudently reserved exclusively to the states. As in the Northern Cook County matter, the federal interference in this case would go too far. It would significantly circumscribe the ability of communities to control their own rights of way, a quintessentially local function. Such efforts will not withstand Constitutional scrutiny.

B. The Commission Does Not Have the Authority to "Commandeer" State and Local Authorities.

The Petitions also face a second Constitutional challenge. They improperly seek to compel the Commission to not merely invalidate a local regulation, but to *order* the cities to issue the requested aerial permit. Such action would clearly be beyond the scope of the Commission's authority. In New York v. United States, 505 U.S. 144, 166 (1992), Justice O'Connor flatly stated:

> [T]he allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

The Court goes on to discuss how Congress may attempt to encourage certain behavior, primarily through the qualified availability of federal funds, but expressly rejected any claim that the federal government can "commandeer" local action. Five years later, the Supreme Court reaffirmed this principle in Printz v. U.S., 117 S. Ct. 2365 (1997). In Printz, the Supreme Court overturned provisions of the Brady Handgun Violence Prevention Act, which would have required stated and local enforcement officers to conduct mandatory background checks on prospective handgun

purchasers and to perform certain related tasks. In overturning portions of that statute, the Court stated:

> The Federal Government may neither issue directives requiring the states to address particular problems, nor command the states's officers, or those of their political subdivisions, to administer and enforce a federal regulatory program. It matters not whether public policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our Constitutional system of dual sovereignty.

117 S. Ct. at 2384 (emphasis added).

The rationale for this public policy rests on the concept of political accountability. See generally New York v. U.S., 505 U.S. 144, 168; 112 S. Ct. 2408, 2424 (1992).[17] The courts recognize that local governments are often in the best position to address land use type of problems and issues, and that local citizenry look to local officials to be responsive to those types of matters. Rarely is there one, uniform, national response that can adequately address the tremendous variety of land use type issues that occur at the local level. It is for this reason that the courts have cautioned against the dangers of divorcing the power to regulate for the public health, safety and welfare from the political accountability for the consequences of that regulation. This principle, moreover, is stronger in the area of local land use and zoning type issues, such as those challenged by the three Petitions. As the Third Circuit Court of Appeals recognized, "land use policy customarily has been considered a feature of local government in an area in which tenets of federalism are particularly

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[17]The Supreme Court there stated: "Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devise the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance of the views of the local electorate in mattes not pre-empted by federal regulation." 505 U.S. at 169 (other supporting citations omitted).

strong." Evans v. Board of County Commissions of the City of Boulder, Colorado, 994 F.2d. 755 (10th Cir. 1993), citing Izzo v. Borough of River Edge, 843 F.2d 765, 769 (3rd Cir. 1988).

C. By Statute the Commission Does Not Have Jurisdiction of Right of Way Management Matters

Congress has removed any Commission jurisdiction over telecommunications right of way management and compensation matters. City Signal is simply in error on this fundamental point in each of its Petitions when it asks the Commission "to order that a permit be granted to construct aerial fiber optic facilities in the City." City Signal acts as if the Communications Act of 1934 was worded in relevant part to read that "the rights of way and compensation practices of states and local units of government shall be as from time to time prescribed by the Commission." This is not the case. In fact, Congress has done the opposite by depriving the Commission of substantive jurisdiction on right of way management and compensation matters.

Specifically, as set forth in more detail below, Section 253 applies only if, as an initial matter, there is a state or local legal requirement that "may prohibit or have the effect of prohibiting" an entity from providing telecommunications services. 47 USC Section 253(a). Only if there is such a "prohibition" on entry is the Commission given certain preemption jurisdiction under Section 253(d). But even under those circumstances, Congress created a safe harbor and expressly removed from Commission jurisdiction all right of way management and compensation practices set forth in Section 253(c). As set forth below, Congress specified that disputes on such matters should go to the local Federal District Court, not to this Commission. The Commission has recognized this restriction on its jurisdiction – most recently in its 1999 Notice of Proposed Rulemaking and Notice

of Inquiry on certain wireless, rights of way and tax related matters.[18] In the "Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees" portion of the preceding Order, the Commission expressly stated that:

> Section 253(d) does not, however, on its face grant the Commission any direct authority over Section 253(c).[19]

The Commission then went on to discuss at some length the several court decisions to date brought against municipalities by telecommunications providers under Section 253(c)[20], and instituted a Notice of Inquiry "to compile a record regarding local rights of way management as it affects telecommunications service providers."[21]

D. Section 253 Prohibits Commission Jurisdiction

Section 253 of the Act states in relevant part as follows:

> SEC. 253. REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL. – 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.
>
> (b) STATE REGULATORY AUTHORITY. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

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[18] Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket 96-98, FCC 99-141, adopted June 10, 1999, released July 7, 1999 ("Wireless/Right of Way Order").

[19] Wireless/Right of Way Order at Paragraph 73.

[20] Id. Paragraphs 75-77.

[21] Id. Paragraph 79.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. – Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to 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 government.

(d) PREEMPTION. – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency (emphasis supplied).

Section 253 provides that state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service is preempted. Section 253(d), however, only allows the Commission to preempt the enforcement of regulations found to violate or be inconsistent with Sections 253(a) or (b) and then only to the extent necessary to correct the violation or inconsistency. Right-of-way management and compensation matters described in Section 253(c) are excluded from the Commission's preemption authority under Section 253(d).

In this regard, the legislative history of Section 253(d) confirms that Congress did not grant this Commission jurisdiction to address right-of-way management and compensation related requirements.[22] As presented to the Senate in June, 1995, Section 253 (then referred to as Section 254) contained a preemption clause which provided:

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[22]The issue of where a telecommunications line is to be placed in the right of way (here, aerial or underground) is an obvious component of right of way management. This is discussed at greater length later in these Comments.

> (d) PREEMPTION. -- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

On June 12, 1995, Senator Feinstein proposed an amendment to the Senate bill which would have eliminated the preemption clause in its entirety. In support of the amendment, Senator Feinstein stated:

> "On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; with the other hand, this bill, as it presently stands, takes these protections away.
>
> "The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority. The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC.
>
> "That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist (sic) at the FCC, on what may be very broad questions of State or local government rights.
>
> * * *
>
> "[P]reemption would severely undermine local governments' ability to apply locally tailored requirements on a uniform basis.
>
> * * *
>
> "The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator is going to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have

> control over their streets. Counties should have control over their highways.
>
> "The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $86 billion in 1993 alone. Of the $86 billion, more than $22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on State and local governments for the use of public right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.
>
> * * *
>
> "By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review whether the city or State acted reasonably under the circumstances." 141 Cong. Rec. S8170-S8171 (June 12, 1995) (statement of Sen. Feinstein).

The purpose of Senator Feinstein's amendment, therefore, was to completely deny this Commission jurisdiction to hear any claims regarding local regulations.

On June 13, 1995, Senator Gorton offered an amendment to the Feinstein amendment designed to limit the scope of the FCC's preemption jurisdiction so that the FCC would have no jurisdiction over disputes regarding regulation of public rights-of-way and compensation due for the use of public rights-of-way. In support of his amendment, Senator Gorton stated:

> "Now, the Senator from California I think very properly tells us what the impact of [preemption] will be. It does not impact the substance of the first three subsections of this section at all, but it does shift the forum in which a question about those three subsections is decided. Instead of being the Federal Communications Commission with an appeal to a Federal court here in the District of Columbia, those controversies will be decided by the various district courts of the

> United States from one part of this country across to every other single one.
>
> * * *
>
> "So in order to try to balance the general authority of a single Federal Communications Commission against the specific authority of local communities, I have offered a second-degree amendment to the Feinstein-Kempthorne amendment.
>
> * * *
>
> "So this amendment does two things, both significant. The first is that it narrows the preemption by striking the phrase "is inconsistent with" so that it now allows for a preemption only for a requirement that violates the section. And second, it changes it by limiting the preemption section to the first two subsections of new section 254; that is, the general statement and the State control over utilities.
>
> "There is no preemption, even if my second-degree amendment is adopted, Mr. President, for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition from those two Senators that these local powers should be retained locally, that any challenge to them take place in the federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions." 141 Cong. Rec. S8212-S8213 (June 13, 1995) (statement of Sen. Gorton, emphasis supplied).

The Gorton amendment was adopted, resulting in the Section 253(d) preemption language quoted above.

The plain language of Section 253(d) and this legislative history establish that Congress intended to and did deprive this Commission of jurisdiction over right of way management and compensation matters. Municipal decisions and policies which relate to the control of the public rights-of-way (such as those City Signal complains of) are simply not subject to Commission review.

Challenges to such decisions and policies must be brought in the local Federal courts, not before the Commission.

In short, City Signal's three Petitions – which request this Commission to order the cities to allow the construction of aerial fiber optic facilities – are beyond the jurisdiction of this Commission, and must be dismissed.

III. THE SUBSTANTIVE REQUIREMENTS FOR RELIEF UNDER SECTION 253 ARE NOT MET.

A. Introduction

Regardless of the issue of the appropriate forum, City Signal's Petition does not meet the requirements of Section 253 for two reasons:

(1) It has failed to show that the undergrounding requirement is, in fact, an effective prohibition of entry under Section 253(a); and

(2) In any event, the Cities' undergrounding policy falls within the safe harbor of Section 253(c).

These points are set forth in more detail below.[23]

B. No Prohibition on Entry Under Section 253(a).

In the first instance Petitioner, City Signal, must show that the local matters complained of "prohibit or have the effect of prohibiting" it from providing an interstate or intrastate telecommunications service, i.e. that there is a violation of Section 253(a). If there had been an

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[23] This analysis follows the same analysis applied by the Commission in matters relating to Section 253. It first determines whether the item in question violates the terms of Section 253(a) standing alone, and only then determines whether it is permissible under Section 253(c).

express or outright prohibition, this might be fairly easy to demonstrate. Such is not the present case, however, where the only issue is whether a telecommunications provider can be required to place its lines underground. City Signal has contended that this constitutes an indirect regulation that has "the *effect* of prohibiting" it from providing that service. With respect to this latter category of alleged indirect prohibitions, the Commission itself has stated that the relevant inquiry is whether the restrictions "materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." See In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 516 NS of the City of Huntington Park, California, 12 FCC Rcd 14, 191, 14,206; 1997 FCC LEXIS 3773 (July 17, 1997), at ¶ 31; In the Matter of the Public Utility Commission of Texas, et al., CCBP 96-13, at ¶ 22. This may set the relevant standard too low. At least one Court has noted that the statute speaks of "prohibiting" entry, not merely making it more burdensome." U.S. West Communications, Inc. v. The Arizona Corporation Commission, et al., 8 P.3d 396, 405 (Ariz Ct App 2000), n9.[24] In any event, the point is that the standard is a rigorous one. It is, moreover, one on which the burden of proof rests on the

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[24]The court there states:

> The parties use the word 'barrier' which is not found in the text of 47 U.S.C. section 253(a). The title of section 253, 'Removal of barriers to entry,' invites a false analogy to federal anti-trust statutes, which prohibit regulatory costs and delays that are so burdensome as to amount to unlawful barriers to entry. See Southern Pac. Communications Co. v. American Tel. & Tel. Co., 238 U.S. App. D.C. 309, 740 F.2d. 980, 1001 (D.C. Cir. 1984). Prohibiting entry into a market is distinct from, and more severe than, merely making entry more burdensome.

U.S. West Communications, supra, 8 P.2d. at 405, n.9 (emphasis added).

party challenging the regulation (here, City Signal). It is a standard that, in this case, City Signal has not met.

All City Signal has stated is that being required to put its fiber underground in certain locations "increases the cost of its telecommunications facilities, which would make City Signal's service noncompetitive."[25] Such conclusiory allegations are wholly insufficient, particularly since it is acknowledged that another new provider, which has also asked to construct lines in the restricted areas, has already agreed to the City's requirements that the lines be placed underground.[26] Beyond that, City Signal has failed to demonstrate any of the factual predicates to "prohibition" or "effective prohibition" i.e., (a) whether there is any increase in cost, (b) if so, how much the increase is, and (c) whether any cost increase actually acts as an effective prohibition of service.

For example, although placing telecommunications lines underground often costs more than aerial construction, whether in any specific instance this is true depends upon the specific locations and facts in question: Is there conduit readily available into which lines can be pulled (usually for a modest cost)? Can lines can be plowed in underground (using a specialized plow used to bury utility lines), in which case the cost is often roughly the same as aerial construction? Can or must a directional bore be used (in essence using a large drill to drill a hole for a sideways underground), in which case costs may be higher than using existing conduit? Cutting the surface of the street to excavate a trench and then bury a line or conduit is generally more expensive than the preceding

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[25]Cleveland Heights Petition at Paragraphs 7 and 16.

[26]See Cleveland Heights Opposition, at Paragraph 2 and Gibbon Affidavit, at Paragraph 12.

alternatives. City Signal, however, has provided no information as to which of the preceding four alternatives it has considered, much less their cost or feasibility.

At the same time, aerial construction is not always easy or inexpensive, as City Signal's Petition inferentially suggests. This is because the new provider wishing to place its poles is typically required to pay for "make ready" work, that is, the work necessary to make the poles ready to accommodate the installation of a new line. The amount of "make ready" work depends on the specific poles in question, their height, condition, available free space, appliances placed on the poles by other providers, necessary guying, separation requirements, code requirements and engineering standards, among other things. The amount and cost of make ready work can vary from very little (for a pole which can readily accommodate a new line) to the increasingly frequent situation where there is insufficient space on the pole in question for a new line and the utility company has to install a new, taller pole (and existing providers then have to one by one switch their lines and equipment to the new pole, after which the old pole is removed). In the latter case the cost can easily be many thousands of dollar per pole to make the change.

Such requirements to "change out" an old, shorter pole for a new, taller one are increasingly frequent as more lines are placed on poles. They are particularly frequent at intersections where an array of north-south utility lines encounters and crosses a comparable array of east-west lines, with the result that much more (roughly double) usable space on the pole located at the intersection is required, hence increasing the likelihood that the pole will have to be replaced to accommodate a new provider.

The preceding make ready and change out requirements are complicated. Costs increase significantly to the extent that there are street lights, utility transformers, cable television power supplies, fiber optic notes or other equipment (other than just lines) attached to the poles in question. City Signal has not even attached a map showing the areas of the three cities where undergrounding has been requested and the number of feet of line affected. It has, in short, provided none of the information necessary to conduct a comparative evaluation of the cost of installing aerial versus underground lines in the areas in question.

Finally, City Signal has not provided any information on what options it has considered to mitigate or reduce any undergrounding costs, such as routing its lines around the periphery of areas where underground lines are required. The Commission should be aware that telecommunications companies and utility providers generally look for the "least cost" routing from point A to point B as opposed to the route that is the "shortest distance" between point A and point B. Often a route that is longer in terms of number of feet of line is lower in cost due to such factors as conduit being readily available, lines being able to be plowed in rather than excavated (if undergrounding is required), a smaller amount of make ready work being necessary for aerial or underground construction, and the like. City Signal has simply failed to meet its burden of proof because it has provided none of the factually specific information needed to compare the cost of aerial versus underground construction (or other alternatives) for the areas of the three cities in question.

Even if City Signal produced that information, it would still have to show that its costs were so substantial as to "effectively prohibit" or (under the Commission's standard) "materially inhibit" its ability to compete. In making that showing, it seems only fair to consider those costs in light of

City Signal's entire investment in the proposed project. City Signal's business plan, it should be noted, calls for it to provide telecommunications services "through various municipalities in Northeast Ohio."[27] Assuming there is a cost increase for City Signal to put its lines underground in portions of the three cities in question, the appropriate analysis (in determining whether there is an effective prohibition to providing service) would be to compare those increased costs to City Signal's anticipated costs involved in implementing its *overall* business plan for Northeast Ohio.[28] If (for example) City Signal's plan is to install thirty million dollars of new facilities in Northeast Ohio, a $20,000 increase in costs is clearly not a "prohibition on entry."[29] City Signal, of course, has provided no information on what its business plan is in terms of municipalities to be served, numbers of miles of line involved or (most importantly) projected revenues, expenses and how a cost increase relates to such figures.

City Signal has simply failed to provide sufficient information on which the Commission can make an informed decision as to whether there is a substantial cost increase and, if so, whether it is or is not an effective prohibition on entry.

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[27]Cleveland Heights Petition at Paragraph 2. Concerned Municipalities have attached as Exhibit A a map of much (not all) of Northeast Ohio which extends (roughly) 100 miles east to west and a comparable distance north to south. It encompasses all of the Cleveland, Akron and Youngstown Metropolitan Areas which have a combined population of approximately 3.5 million.

[28]Alternatively, if City Signal is, in fact, operating predominantly as a reseller or is installing very few capital facilities, a more appropriate comparison for any increased cost may be against City Signal's projected revenue stream.

[29]Assuming (as is often the case) that such companies borrow money at a certain number of points above a prime rate, any significant change in the prime rate is likely to lead to economic consequences far greater than the cost of undergrounding versus aerial construction.

C. The Petitions Come Within the Section 253(c) Right of Way Management Safe Harbor.

Section 253(c) provides a "safe harbor" for matters otherwise falling within the scope of Section 253(a). Thus, Section 253(c) states that "nothing in this Section affects the authority of a State or local government to manage the public rights-of-way . . .", subject to certain restrictions (discussed below).[30]

"Managing the public rights of way" includes the determination of where in the public rights of way a line goes: On the north side of the highway or the south? If underground, how far underground and where laterally within the rights of way?[31] As the Commission may appreciate, many items affect the location decision, including the presence and location of existing lines and facilities, engineering standards, code requirements, separation distances from other utilities and the like. Other factors include public safety (large numbers of wires on poles sometimes being a hazard in urban areas), aesthetic considerations (is the area a historic area or eligible for inclusion in a

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[30]It should be noted that the statute leaves no room for an "implied" power of preemption. Section 601(c) of the Federal Telecommunications Act of 1996, which added Section 253, expressly states:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

See Federal Telecommunications Act of 1996, Pub. L. 104-104, Title VI, § 601(c) (Feb. 8, 1996), 110 Stat. 143.

[31]For example, if a line is placed underground, does it go more or less in the middle of the street under the paved portion of the right of way, under the sidewalk, or on a grassy strip beside the sidewalks. The last is often more preferable as it least disturbs the traveled portion of the right of way and is readily accessible.

National Register of Historic Places), business development and the like. Managing the rights of way thus includes a determination of where in the right of way a line may go.

This conclusion is reinforced by the legislative history of Section 253. In the Senate floor debates on what is now Section 253(c), Senator Feinstein (one of the "authors" of Section 253, as described above) stated that it included "requir[ing] a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies."[32]

The plain language of Section 253 *and* its legislative history thus confirms that undergrounding of utility lines is one of the matters expressly included within Section 253(c), and is therefore reserved to the local communities.

D. The Undergrounding Policy is Competitively Neutral and Nondiscriminatory.

The undergrounding policy being implemented by the cities is competitively neutral and nondiscriminatory because it applies to all new lines. As the City of Cleveland Heights pointed out, the only aerial telecommunications type lines in the City are those of the local phone and cable company which have been in place for over twenty years.[33] The only other new provider which has asked to construct lines in the areas in question has agreed to conform to the City's requirement and place its lines underground.[34] The City's "treatment of City Signal's request to use the City's right-of-way has been non-discriminatory and competitively neutral because all telecommunications

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[32]141 Congressional Record S8172 (Daily Edition, June 12, 1995)(Statement of Senator Feinstein, quoting a letter from the Office of the City Attorney, City and County of San Francisco).

[33]Gibbon Affidavit at 11; Cleveland Heights Opposition at 2.

[34]Cleveland Heights Opposition at Paragraph 2; Gibbon Affidavit at Paragraph 12.

providers requesting authorization to use the City's rights-of-way are treated in a similar manner with the same requirements."[35]

The fundamental point which the City is making – and which is important to Concerned Municipalities – is that states and municipalities must have the ability over time to change the laws applicable to telecommunications providers. Stated otherwise, City Signal's argument is another way of making the telecommunications provider's argument that no obligation can be imposed on a new provider that was not imposed on the incumbent when it built its facilities. In other words, if certain legal requirements applied to the local Bell company when it built its system a century ago, then no greater requirements can be imposed on a new provider in the 21st century.

To state this proposition is to show how untenable City Signal's argument is. Our telephone companies date from the latter quarter of the nineteenth century. Much of our current telecommunications systems were built (although later rejuvenated and upgraded) between the time of the Spanish American War and the First World War. The logical conclusion of City Signal's argument is that state and local laws applicable to telephone companies must be frozen at the time the incumbent system was installed, and that no greater requirements can be imposed on the provider.[36] Such a conclusion is obviously nonsense.

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[35]Cleveland Heights Opposition at Page 1.

[36]This attempt to "freeze" state and local regulation at the time the incumbent provider installed its lines is an argument that has been made to this Commission by various providers. For example, in CC Docket 97-219, Chibardun Telephone Cooperative Inc. and CTC Telecom Inc.("Chibardun") filed a Petition for Preemption under Section 253 relating to ordinances, fees and right of way practices of the City of Rice Lake, Wisconsin. At issue, among other things, were a new telecommunications ordinance and license agreement which would be applicable to Chibardun if it provided telecommunications service in Rice Lake. Among many other points, Chibardun objected to the City's new telecommunications ordinance applying

The key word in this analysis is "discrimination." Its meaning has been the subject of a number of cases brought under Section 253. One court, for example, noted that Black's Law Dictionary had defined the term as "a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, et. al., 38 F. Supp. 2d. 46, 59 (D. Mass. 1999) aff'd, 184 F.2d 88 (1st Cir. 1999) (citing Black's Law Dictionary 420 (5th ed. 1979)). Another court emphasized that the term "discrimination" does not require the telecommunications providers be necessarily treated "identically." ECG New York, Inc. et. al. v. City of White Plains, New York, 2000 U.S. Dist. LEXIS 18465 (S.D.N.Y. 2000), at *50. The term permits cities to make distinctions based on valid considerations. Id., citing Cablevision of Boston, supra, 184 F. 3d. at 103. It does not require strict equality. TCG Detroit v. City of Dearborn, 16 F. Supp. 2d. 785, 792 (E.D. Mich. 1998), Aff'd 206 F.3d 618 (6th Cir 2000). Nor does it require cities to ignore significant distinctions between providers. AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. 3d 582,

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to it because it has "not been imposed upon GTE, Marcus Cable or other utilities when they entered the Rice Lake market," May 23 Letter to City of Rice Lake (Exhibit D to Petition for Preemption), at 2 (emphasis supplied).

Chibardun repeatedly criticized the license agreement and new ordinance conditions and costs on the grounds that they "are not" (and have never been) imposed upon the existing Rice Lake Utilities," Petition at 3. And Chibardun in its request for relief asked the Commission to preempt the City from enforcing "future right of way ordinance placing larger fees and more onerous conditions and restrictions upon entities seeking to furnish competitive telecommunications in Rice Lake [that have been imposed on existing providers]." Petition at 24-25. Various industry commenters supported Chibardun's claim. Thus, MCI Telecommunications Corporation asserted that the license agreement at issue was invalid "because it imposes far more onerous and expensive obligations upon new entrants than the existing Rice Lake Code imposes upon either GTE or Marcus." Comments of Marcus, MCI Telecommunications Corporation, at 2. Unfortunately, no order was ever entered in that case, the parties having reached a settlement on the matter.

593 (N.D. Tex 1998). In fact, Congress considered, but eventually rejected, a proposed "parity" provision to Section 253 that would have made it illegal for cities to impose different fees on different telecommunications providers. During the Congressional hearings on amendments to the Act, Representative Stupak criticized the proposed provision, stating:

> Local governments must be able to distinguish between different telecommunication providers. The way the (parity) amendment is now, they cannot make that distinction. For example, if a company plans to run 100 miles of trenching in our streets and wire to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings. The [parity] amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.

TCG New York, Inc., supra, at *51, citing 141 Cong. Rec. H8427 (August 4, 1995). The present version of Section 253(c) represents an express rejection by Congress of the proposed "parity" concept.

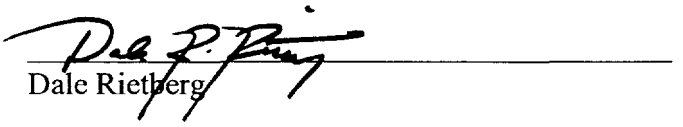
It is clear that the concepts of "competitive neutrality" (used in both Section 253(b) and (c)) and "nondiscrimination" (used only in Section 253(c)) must, of necessity, include the ability to make reasonable classifications. Here, the classification that is fundamental is based on time: Going forward, new requirements apply.

As the preceding examples indicate, if the courts or Commission adopt any other standard, they will have played into the provider's hands. They will have frozen state and local laws applicable to telecommunications companies to those in effect decades or a century ago. Any such result is untenable, is contrary to the Act, and would be constitutionally suspect under the Supreme Court's increasingly expansive reading of the 10th Amendment and narrowed reading of the Commerce Clause, described above.

IV. CONCLUSION

For the reasons set forth above, the three Petitions for Declaratory Ruling in CS Dockets 00-253, 00-254 and 00-255 should be dismissed without further action by the Commission.

January 29, 2001



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CERTIFICATE OF SERVICE

I, Kim Van Dyke, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 29th day of January, 2001, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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EXHIBIT A-MAP OF NORTHEAST OHIO

(attached)

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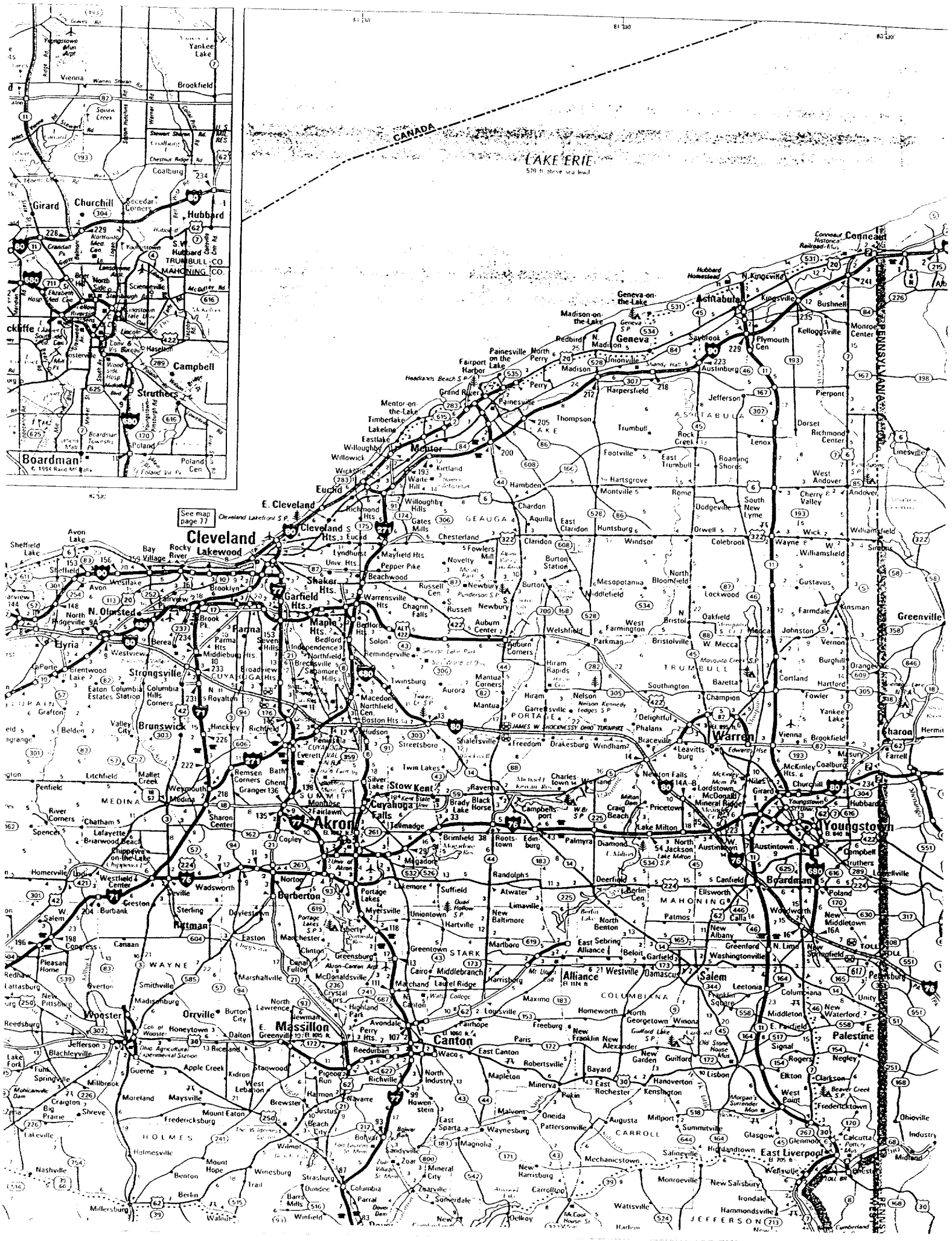
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Barberton
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