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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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Dated: February 14, 2001

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REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association For Local Telecommunications Services ("ALTS") submits these reply comments regarding the captioned petitions of City Signal Communications, Inc. for declaratory ruling under Section 253 of the Communications Act, as amended.

I. *INTRODUCTION AND SUMMARY*

ALTS is the primary trade association for facilities-based competitive providers of local telecommunications services, with over 80 network members throughout the country. ALTS'

members are principally responsible for having introduced competition in local telecommunications markets since enactment of the Telecommunications Act of 1996.[1]

The 1996 Act was groundbreaking legislation. Congress' intent, in enacting the law, was to open previously monopoly controlled local telecommunications markets to competition, to allow new companies to introduce competitive pressures that would spur the development of new service offerings and lower prices, and thereby to benefit consumers nationwide.

The Act has had mixed results. On the one hand, it has spawned a new industry comprised of competitive local exchange carriers ("CLECs"), an industry that barely existed in 1996. Indeed, many of ALTS' members are the progeny of Congress' monumental legislation. As ALTS' recent study, *An ALTS Analysis: Local Competition Policy & The New Economy*,[2] discusses, the Act has produced *some* impressive results. Six to eight percent of the local market is now served by CLECs.[3] Between 1997 and 2000, CLECs spent in excess of $55 billion on capital investments, and as of 2000, employed 94,000 workers in high-paying, high-skill jobs.[4] Indeed, the introduction of investment and jobs by CLECs have fueled the explosive economic growth of the last decade, with Federal Reserve Chairman Alan Greenspan noting, "it is the growing use of information technology throughout the economy that makes the current period unique. . . ."[5]

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[1] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 91996).

[2] David A. Wolcott, *An ALTS Analysis: Local Competition Policy & The New Economy*, February 2. 2001 ("*ALTS Analysis*") (A copy is attached hereto as Attachment 1).

[3] *ALTS Analysis* at 1.

[4] *ALTS Analysis* at 4-5.

[5] *ALTS Analysis* at 4 (quoting Remarks by Chairman Alan Greenspan, *Technology Innovation and its Economic Impact*, before the National Technology Forum, St. Louis, Missouri, Apr. 7, 2000).

On the other hand, to dwell on these accomplishments would be to overlook the loss in the past five years of tremendous opportunities for CLECs and consumers alike due to the intransigence of incumbent local exchange carriers ("ILECs") and, perhaps more insidiously, municipally erected barriers to entry. As the *ALTS Analysis* and the initial comments in these proceedings demonstrate, municipal impediments, such as unreasonable delay and discriminatory preferences for incumbents, "delay the deployment of equipment and facilities, introduc[ing] uncertainty into company business plans and investor confidence and act[ing] as an overall barrier to competition."[6] Accordingly, it is critical that the Commission act at this time to protect the goals of the 1996 Act from further impairment.

As facilities-based carriers, ALTS' members face issues regarding access to, and municipal regulation of, local rights-of-way each and every day. Many communities have recognized the benefits of competition, and have acted to manage their rights-of-way in a reasonable and responsible manner. However, as City's Signal's petition and the initial comments in these dockets demonstrate, too many other municipalities are abusing their position as gatekeepers to delay competitive entry, and are "managing" the rights-of-way in a discriminatory and competitively biased manner. ALTS and its members respect the legitimate interests of municipalities in adopting reasonable and appropriate right-of-way management measures. Moreover, ALTS does not seek to freeze right-of-way management at the levels imposed when ILECs first constructed their local telephone networks nearly 100 years ago, as some commenters would have the Commission believe. ALTS and its members seek only the level competitive playing field that Congress envisioned.

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[6] *ALTS Analysis* at 9.

It is of critical importance that the Commission take this opportunity to reiterate that it will not tolerate municipal erection of barriers to entry – whether in the form of delay of CLECs' market entry, or imposition of discriminatory requirements that will frustrate the achievement of Congress' goals in enacting the Telecommunications Act of 1996. It is also essential that the Commission act ***expeditiously*** in these dockets to provide the requested relief, in order to avoid this agency's consideration of the case from compounding the anticompetitive effect of the Respondent Cities'[7] long delay in acting upon City Signal's applications. Finally, ALTS respectfully requests that the Commission consider establishing expedited procedures to be employed hereafter in cases alleging violations of Section 253(a).

II. MUNICIPAL DELAY IS AN UNJUSTIFIABLE AND UNLAWFUL BARRIER TO ENTRY

As even the Commission's Public Notices[8] recognized, the primary issue raised by City Signal's petitions is the Section 253(a) violation resulting from the Respondent Cities' delay in granting City Signal access to the public rights-of-way. In each of its petitions, City Signal alleges that the respondent community has ignored City Signal's construction application and has engaged in delaying tactics leading to many months (and in some cases more than a year's) delay.[9] The issue of whether City Signal's construction would be overhead or underground,

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[7] The cities of Cleveland Heights, Wickliffe, and Pepper Pike are collectively referred to as the "Respondent Cities."

[8] *Comments Sought On City Signal Communications, Inc. Petition For Declaratory Ruling Concerning Use Of Public Rights-of-way For Access to Poles In Cleveland Heights, Ohio Pursuant to Section 253*, DA 00-2870 (released Dec. 22, 2000); *Comments Sought On City Signal Communications, Inc. Petition For Declaratory Ruling Concerning Use Of Public Rights-of-way For Access to Poles In Wickliffe, Ohio Pursuant to Section 253*, DA 00-2871 (released Dec. 22, 2000); *Comments Sought On City Signal Communications, Inc. Petition For Declaratory Ruling Concerning Use Of Public Rights-of-way For Access to Poles In Pepper Pike, Ohio Pursuant to Section 253*, DA 00-2872 (released Dec. 22, 2000).

[9] *City Signal Request For Declaratory Ruling*, Docket No. 00-253 (hereinafter "Cleveland Heights Petition"), at ¶¶8, 12; *City Signal Request For Declaratory Ruling*, Docket No. 00-255

while important, is only the secondary issue raised by the petitions. Yet, the municipal commenters that filed in support of the Respondent Cities do not address the issue of delay, and act as if the sole issue before the Commission is one of aerial versus underground construction. The Commission should not lose sight of the key claim in these cases. Municipal delay is a critical problem because it creates an impenetrable barrier to entry by competitive local exchange carriers. The Commission should address that issue and, in granting City Signal's petitions, send a strong message that delay is unacceptable and will not be tolerated.

A. Municipal Delay Is A Serious Problem

The initial comments of several ALTS members, including Adelphia Business Solutions ("ABS") and Metromedia Fiber Network Services ("MFNS"), explained in considerable detail, with numerous illustrative examples, how municipal delay in granting access to public rights-of-way has adversely impacted the ability of CLECs to construct and operate competitive telecommunications networks.[10] Just as the unlawful intransigence of ILECs has severely hampered CLECs' introduction of competition, so too has municipal delay and overreaching. Unless CLECs can cross and occupy public rights-of-way, they cannot construct the competitive local telecommunications networks needed to provide facilities-based alternatives to ILEC networks; there simply is no alternative for CLECs but to cross public rights-of-way. Thus, because municipalities have absolute control over access to such rights-of-way, they hold the critical key to opening the local exchange to competition. And given the importance of time-to-market to a CLEC seeking to enter a local telecommunications marketplace, even where access

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(hereinafter "Pepper Pike Petition"), at ¶¶ 8, 12; *City Signal Request For Declaratory Ruling*, Docket No. 00-254 (hereinafter "Wickliffe Petition"), at ¶¶ 8, 12.

[10] Comments of Adelphia Business Solutions at 11-17 ("ABS Comments"); Comments of Metromedia Fiber Network Services at 19-21, 26-29 ("MFNS Comments"); *see also* Comments of American Fiber Systems, Inc. at 8-10 ("AFS Comments).

to public rights-of-way is not ultimately denied, but only delayed, such delay can mortally wound a CLEC in its attempt to compete with an entrenched, and typically far stronger, ILEC.

Unfortunately, far too many municipalities have shown an unwillingness to administer the rights-of-way in a reasonable and expeditious manner to promote competition. Rather, as the comments of CLECs demonstrate, too many municipalities either have sought to exercise their control for pecuniary gain, or have been affirmatively uninterested in accommodating new entrants.[11]

The substantial delays that have become all too commonplace (from six months to a year or more) have had a significant negative impact on the achievement of the goals of the 1996 Act. As ABS and AFS explained, municipal delay has a negative impact on a CLEC's ability to obtain financing and investment, and ultimately can undermine its ability to enter a particular market.[12] MFNS similarly provided detailed discussion of some of the ways in which municipal delays have thwarted its ability to provide service.[13] Although City Signal's petitions deal with three communities in the same section of Northeastern Ohio that have delayed its entry, by over a year in some cases,[14] the submissions of CLEC commenters demonstrate that the delays suffered by City Signal clearly are not isolated incidents.

B. Municipal Commenters Fail To Address, Much Less Defend, The Barrier To Entry Created By The Respondent Cities' Unreasonable Delays

Despite the fact that City Signal's petitions clearly allege that the Respondent Cities have "ignored" its applications, and have engaged in unlawful delaying tactics, none of the municipal

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[11] ABS Comments at 11-18; MFNS Comments at 8-29; *see also ALTS Analysis* at 9-11.

[12] ABS Comments at 9-11; AFS Comments at 9.

[13] MFNS Comments at 8-29.

[14] The attachment to City Signals' Cleveland Heights Petition, for example, shows that City Signal first approached the City in **July of 1999**.

commenters addressed the issue of delay. Rather, they focused solely on the issue of overhead versus underground construction. The commenters' approach is both calculated and telling.

First, the municipal commenters' approach is calculated to draw the Commission's focus away from the clear barrier to entry that the Respondent Cities' delay has erected in violation of Section 253(a), and into a potentially murkier discussion of right-of-way "management" issues. They do this, no doubt, because they believe that any action that they can characterize as being right-of-way "management" is sacrosanct under Section 253(c) and untouchable by the Commission. Of course, the municipalities' reading of Section 253(c) is overreaching, and, as discussed below, the discriminatory application of an underground construction requirement, in the context of municipalities' duty to treat CLECs and ILECs in a competitively neutral manner, is not a legitimate exercise of right-of-way management authority.[15]

Second, the municipal commenters' failure to address the delay issue is extremely revealing. At this point, there can be no question that municipal delay has the effect of prohibiting a company from providing telecommunications service in violation of Section 253(a). As several of the CLEC commenters explained, the Commission, the courts and state legislatures have recognized this point.[16] For example in *AT&T Communications of the Southwest, Inc. v. City of Austin*, the court recognized that the present telecommunications marketplace is highly competitive and constantly changing and that, as a result, even the slightest delay can cause a provider to lose significant opportunities as compared to those already operating in the market – particularly well-entrenched ILECs.[17] Likewise, in *PECO Energy*

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[15] *See infra* Part III.

[16] ABS Comments at 5-8; AFS Comments at 8-9.

[17] 975 F. Supp. 928, 938 (W.D. Tex. 1997), *vacated as moot*, 2000 US App. LEXIS 33524 (5th Cir. 2000).

Co. v. Township of Haverford, the court held that the challenged ordinance violated Section 253 because, among other reasons, there was no guarantee that a franchise application "once submitted, will be processed ***expeditiously***."[18]

The Commission itself has stated that "***a failure by a local government to process a franchise application in due course may 'have the effect of prohibiting' the ability of the applicant to provide telecommunications service, in contravention of section 253***."[19]

Legislators in at least two states have recognized that municipal delay is a barrier to entry. The Ohio legislature has enacted a statutory requirement that municipalities must ***grant*** a telecommunications provider's application to occupy the public rights-of-way within ***thirty days***.[20] Similarly, the Michigan legislature has adopted a statutory deadline of ***ninety days*** in which municipalities must ***grant*** a telecommunications provider's application to occupy the public rights-of-way.[21] The Michigan legislature viewed delay as so serious an offense that it even provided for substantial fines of $1000 to $20,000 per day for failure to grant such an application.[22] In *Coast To Coast I*, the Michigan PSC stated that this provision reflects the Michigan legislature's view of "the [local] permitting process as a potential bottleneck to facilities development. . . ."[23] The Commission's holdings, coupled with the determinations of

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[18] 1999 U.S. Dist. LEXIS 19409, *26 (E.D. Pa. 1999) (emphasis added).

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

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

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

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

[23] *Coast To Coast I,* at 8.

courts, state commissions, and state legislatures, indisputably establish that municipal delay has the effect of prohibiting the provision of telecommunications services.

The Public Service Commission of Michigan ("PSC") has recently fined two cities for failure to comply with the State's statutory 90-day deadline for the issuance of telecommunications franchises,[24] stating that "[d]elay can impede competition, which requires streamlined regulatory processes so that providers can respond quickly to market-based incentives."[25] The PSC stated further that "[o]bviously, lengthy delays of an indefinite duration can have the same deterrent effect on market-driven activities as an outright denial. . . ."[26]

C. The Respondent Cities Do Not Deny That It Has Been Nearly A Year Since City Signal First Sought Authorization

The Respondent Cities do not dispute the inordinate and inexcusable time period that City Signal has had to wait.[27] For example, the City of Pepper Pike does not deny the allegations of City Signal's petition, which demonstrate that City Signal first applied to the City in May, 2000 (nine months ago at this point).[28] Indeed, Pepper Pike's Opposition demonstrates that the City not only failed to grant City Signal's application within the statutorily mandated 30-days, but did not even retain a consultant to respond to City Signal until approximately three months after City Signal applied.[29] Yet, the City is unapologetic, stating dismissively that "negotiations

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[24] *Coast To Coast Telecommunications, Inc. v. City of Birmingham, MI*, Case No. U-12354, at 8 (M.P.S.C. Oct. 24, 2000) ("*Coast To Coast I*"); *Coast To Coast Telecommunications, Inc. v. City of Rochester, MI*, Case No. U-12462 (M.P.S.C. Dec. 20, 2000) ("*Coast To Coast II*").

[25] *Coast To Coast I*, at 8.

[26] *Id.*

[27] Indeed, the City of Wickliffe does not appear to have filed comments or even an opposition of any kind.

[28] City Signal Pepper Pike Petition at ¶ 8.

[29] Pepper Pike Opposition, Attachment 1 (Affidavit of Mike Mouser).

with City Signal may not have progressed as quickly as City Signal would like. . . ."[30] Indeed, the City does not even claim that delay has been City Signal's fault for refusing to construct underground. The City seems content to believe that "discussions" that are still "on-going" nine months after City Signal first applied are somehow sufficient. They clearly are not. The City's delay in processing, let alone granting, City Signal's application undeniably violates the statutory mandate of Ohio law, and has had the effect of prohibiting City Signal from providing telecommunications services in violation of Section 253(a).

The City of Cleveland Heights is similarly unresponsive on the issue of delay. Indeed, the City's Opposition is in large part identical to the City of Pepper Pike's, including the same statement that "negotiations with City Signal may not have progressed as quickly as City Signal had anticipated . . . ."[31] But the City of Cleveland Heights goes even further, and admits that it has intentionally delayed City Signal from using the City's rights-of-way.[32] Yet, as demonstrated by the initial comments of parties such as ABS, MFNS, and AFS, there is no legitimate reason for Cleveland Heights to have engaged in such intentional delay. The fact that the City is "considering" a new ordinance does not justify its indefinitely stalling City Signal's access to the public rights-of-way. The City is free to consider a new ordinance for as long as it wants, but in the meantime, Section 253 and Ohio law mandate that it permit City Signal to construct pursuant to existing guidelines (*i.e.*, aerially, like the ILEC) until such time as the City adopts a lawful regulatory scheme applicable in a nondiscriminatory fashion to ***all*** occupants of the rights-of-way.

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[30] Pepper Pike Opposition at 3.

[31] Cleveland Heights Opposition at 3.

[32] Cleveland Heights Opposition, Affidavit of John Gibbon ¶ 16.

Contrary to the assertions of the municipal commenters, this position is not tantamount to freezing right-of-way regulation at a level set nearly one-hundred years ago.[33] ALTS does not advocate such a freeze in right-of-way regulation. Municipalities are free to adopt new, ***legitimate*** right-of-way management regulations that would apply to all occupants of the public rights-of-way in a competitively neutral and nondiscriminatory manner. The critical point is simply that cities cannot hold CLECs hostage while they "consider" or "study" the issue, and they may not impose competitively biased obligations on CLECs versus those imposed on ILECs at any time, including times when they are considering new right-of-way ordinances.[34]

Ultimately, delay is a concern not only in individual markets, such as those on which these petitions focus, but cumulatively, nationwide, for all CLECs, because of the overall impact of delay on the attainment of Congress' objective to "accelerate deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition."[35] The cumulative effect of municipalities' delay is important to all CLECs for another reason, as well: the impact that such delay has had on the CLEC industry's ability to raise the capital necessary to fund the costly construction of their competitive telecommunications facilities.[36] Accordingly, the Commission should not only grant City Signal's petitions as to the Respondent Cities, but more broadly declare that unreasonable delays

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[33] Concerned Municipalities Comments at 25.

[34] Similarly, while the facts are ambiguous, it appears that the City of Cleveland Heights may only be requiring, or considering requiring, underground construction in certain sections of the City. There certainly can be no justification for denying City Signal the ability to construct in the meantime in other sections of the City where undergrounding is not required of anyone Yet, that appears to be the case.

[35] S. Conf. Rep. No. 104-230 at 1 (1996); *see also ALTS Analysis* at 10.

[36] *ALTS Analysis* at 9; ABS Comments at 9-10.

by municipalities have the effect of prohibiting the provision of telecommunications services and, therefore, violate Section 253(a).

III. ALLOWING ILECs TO REMAIN OVERHEAD IN THE SAME LOCATION WHERE CLECs ARE REQUIRED TO CONSTRUCT UNDERGROUND IS NOT A COMPETITIVELY NEUTRAL, NONDISCRIMINATORY EXERCISE OF LEGITIMATE RIGHT-OF-WAY MANAGEMENT POWER

The defense of the Respondent Cities and the position of their defenders is that City Signal's petitions should be denied because the cities merely have been exercising their right-of-way management authority, and thus have a defense to claims under Section 253(a). They argue that cities must retain the authority to manage the public rights-of-way, and hyperbolically assert that City Signal's petitions seek to freeze right-of-way management at the level exercised when the Bell System was first constructed.[37]

ALTS respects the fact that municipalities retain the authority to exercise *legitimate* right-of-way management functions. And clearly, no party is asserting that right-of-way management be frozen in time. However, as the opening comments of ABS, MFNS, American Fiber Systems, and others, demonstrated, requiring new entrants to go underground while allowing the ILEC in the same location to continue aerially is not a legitimate, competitively neutral and nondiscriminatory exercise of that authority.

A. Congressional Rejection Of Exact "Parity" Does Not Give Cities Free Reign

In their comments, both the City of Richmond and Concerned Municipalities discuss at length the fact that Congress did not adopt a provision that would have required exact parity in the regulation of ILECs and new entrants.[38] While it is true that Congress declined that

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[37] *See, e.g.*, Comments of Concerned Municipalities at 2.

[38] Comments of City of Richmond at 6; Concerned Municipalities Comments at 27. Interestingly, neither Cleveland Heights nor Pepper Pike advances this argument in its Opposition.

provision, the conclusion drawn by the commenting municipalities ignores the plain language that Congress did adopt.

Section 253(c) provides that any right-of-way management measure adopted by municipalities must be "competitively neutral and nondiscriminatory."[39] Accordingly, for the undergrounding policy of a city to be lawful, it must be neutral in its treatment of competitors. If a city requires a CLEC to construct underground, which the evidence quite clearly shows is substantially more expensive than aerial construction,[40] but spares an ILEC – the CLEC's arch competitor – from incurring comparable costs by allowing it to keep its facilities on aerial attachments, that city is not being neutral in its treatment of those competitors.[41] In such circumstances, the city's actions, while perhaps constituting lawful, legitimate exercise of its right-of-way management power for some other purpose, do not pass muster under Section 253.

The Commission's precedent, which is cited by CLEC commenters in support of City Signal's petitions, clearly compels this conclusion. For example, in *Silver Star Telephone Co., Inc.*, the Commission addressed a state law that favored ILECs and burdened new entrants, and

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[39] 47 U.S.C. § 253(c).

[40] *See, e.g.*, ABS Comments at 23; AFS Comments at 11. Concerned Municipalities assert that City Signal has not carried its burden of proof on the issue of "cost", *i.e.*, whether the Respondent Cities' requirement that City Signal construct underground really will cost City Signal more than if it, like the ILEC, were allowed to construct and maintain its facilities aerially. The evidence submitted by CLEC commenters, as well as other data of which the Commission may take judicial notice, more than amply demonstrate that the cost of underground construction, in an urban or suburban setting such as Cleveland Heights, Pepper Pike and Wickliffe, Ohio, will far exceed the cost of aerial construction. *See, e.g.*, AFS Comments at 11 ($4,500 per mile aerial versus $185,000 to $525,000 per mile underground); ABS Comments at 23 (on average six times more expensive to construct underground); *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (underground construction impracticable alternative). The Commission should make short shrift of Concerned Municipalities contention.

[41] Remarkably, some municipalities have actually argued that ILECs and CLECs are not competitors. The Commission should clarify that for purposes of Section 253, CLECs and ILECs are competitors.

held that "disparity in the treatment of ***classes of providers*** violates the requirement of competitive neutrality. . . ."[42] On appeal, the Tenth Circuit confirmed the Commission's "competitive neutrality" analysis.[43] The court of appeals noted that the Commission previously had addressed a competitive neutrality requirement in the context of Section 251 of the 1996 Act, and that "the FCC has ruled that a mechanism assigning costs based on each exchange carrier's active local numbers is 'competitively neutral' [under § 251(e)(2)] ***but a mechanism requiring new entrants to bear all the costs of number portability is not***."[44] The court thus affirmed the Commission's *Silver Star* decision, rejecting the state's argument that the regulation was "competitively neutral" because it treated all ***new*** entrants the same.[45] In the earlier *TCI Cablevision of Oakland County* case, the Commission similarly found such discrimination "especially troubling," and noted:

> One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. ***Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory***.[46]

Municipal commenters completely ignore the Commission and Tenth Circuit precedent, relying instead on several distinguishable cases. For example, in *TCG New York, Inc. v. City of*

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[42] 12 FCC Rcd. 15,639, 15658 (1997), *recon. denied*, 13 FCC Rcd. 16,356 (1998) (emphasis added).

[43] *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

[44] *Id.* at 1269 (quoting *US West v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999))(emphasis added).

[45] *Id.*

[46] *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21443, ¶ 108 (1997), *aff'd*, 13 FCC Rcd. 16400 (1998) (emphasis added).

White Plains, the court held that the city's treatment of Bell Atlantic was not discriminatory because, while the city did not impose the same franchise fee on Bell Atlantic that it sought to impose on TCG, it had required Bell Atlantic and its predecessors to construct for the city an extensive underground conduit system.[47] Thus, the court determined, based on the specific facts of that case, that the city's fee was not discriminatory.[48] In *TCG Detroit v. City of Dearborn*, the court concluded that the city's failure to impose the same fee on Ameritech as it did on TCG was not discriminatory, but reached that conclusion because state law prohibited the city from imposing the fee on Ameritech.[49] Moreover, the court acknowledged that such a state-granted exemption to Ameritech from franchise fees "might be a barrier to entry by newcomers" in violation of Section 253(a), but declined to address the question as not raised in the appeal.[50]

Cablevision of Boston, cited by the municipal commenters, actually supports City Signal's position. There, the U.S. Court of Appeals for the First Circuit ruled that local regulations must be "competitively neutral and nondiscriminatory," but concluded that Section 253(c) does not impose "an affirmative obligation on local authorities to promulgate regulations to ensure a level playing field among telecommunications providers."[51] The court also held that a city's rights-of-way management (*e.g.,* to minimize disruption of traffic patterns) must not create "unnecessary competitive inequities among telecommunications providers."[52] Thus, while

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[47] 2000 U.S. Dist. LEXIS 18465, at *52-53, 125 F. Supp. 2d 81 (S.D.N.Y. 2000).

[48] ALTS ultimately disagrees with the conclusion of the court, and believes that the City's fee was not competitively neutral or nondiscriminatory. TCG is filing a Notice Of Appeal in the case.

[49] 206 F.3d 618, 625 (6th Cir. 2000).

[50] *Id.*

[51] *Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 104 (1st Cir. 1999).

[52] *Id.* at 105.

under the specific facts of that case no Section 253(c) violation was found, applying the court's analysis here leads to the conclusion that imposition of an underground construction requirement on new entrants only would create unnecessary competitive inequities among telecommunications providers and thus would violate Section 253.

The City of Richmond's quote from the Commission's *Classic Telephone* decision also makes the point. In *Classic*, as Richmond points out, the Commission quoted statements by Senator Feinstein regarding right-of-way management functions. Included in those functions was the ability to "require a company to place its facilities underground, rather than overhead, ***consistent with the requirements imposed on other utility companies***."[53] Yet, in relying on the quoted language, the City of Richmond completely ignores the critical, bolded portion of the statement, which makes clear that Senator Feinstein, and the municipalities that she was representing (her statements were from a letter from the Office of City Attorney, City and County of San Francisco), understood that undergrounding requirements would have to be imposed consistently among all "utility companies." Indeed, the Senator and the cities intended that all "utilities" would be treated consistently. There was certainly no intent to allow discriminatory differentiation between competing telecommunications providers based on the mere timing of construction, let alone upon one carrier's favored status as the incumbent.

B. Respondent Cities' Stated Reasons For Their Discriminatory Treatment Of City Signal Do Not Justify Such Actions

Respondent Cities and the commenting municipalities posit several arguments that allegedly support policies that allow incumbents to remain aerial while forcing all new entrants

[53] Comments of City of Richmond at 4 (quoting *In re Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 13,083, ¶ 39 (1996)(quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995)) (internal quotations omitted) (emphasis added).

underground. Primarily, they point to concerns about aesthetics and public safety.[54] Those reasons, however, are not legitimate bases for, and do not justify such discriminatory regulation.

First, as CLEC commenters discussed in their opening comments, "aesthetics" is not a legitimate basis for the discriminatory application of municipal right-of-way regulations.[55] Whether or when a particular wire rises to the level of "visual blight" is a standardless, wholly subjective issue that would vest in cities unfettered discretion over who is permitted to construct in the rights-of-way, and when such construction will be permitted.[56]

Second, the cities' arguments about aesthetics and public safety do not support a policy that permits the ILEC and the electric company to remain aerial while forcing CLECs underground. As CLEC commenters pointed out, if a city has already permitted the ILEC and electric utility to construct aerial facilities, the supposed visual blight has been created.[57] If a city were legitimately interested in eliminating the aesthetic blight of aerial wires and utility poles in certain portions of the city, then it would order ***all*** utilities, including the ILEC and the electric company, to move their facilities underground, not just the CLEC.

The "public safety" argument is a similar red herring. For example, the City of Richmond makes much of the fact that ice storms "threatened the health, safety and welfare of several hundreds of thousands of people" because "vital" services, like electricity and phone services, were knocked out.[58] Yet, these proceedings are about cities that want to allow the existing utility facilities (*i.e.*, electric and ILEC) to remain above ground while requiring CLEC's

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[54] *See, e.g.*, City of Richmond Comments at 4-5.

[55] *See* ABS Comments at 27-29; AFS Comments at 15.

[56] *See PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, at *20-23 (E.D. Pa. Dec. 20, 1999) (unfettered discretion in city violates Section 253).

[57] *See, e.g.*, ABS Comments at 27; AFS Comments at 15.

[58] City of Richmond Comments at 4-5.

to construct underground. If the cities were truly concerned with public safety and the uninterrupted provision of vital services, they would order the electric company and the ILEC, which serve the overwhelming majority of residences and businesses, to move their facilities underground. Requiring new CLECs, which have single digit market shares, likely will serve fewer residential areas, and will install comparatively limited amounts of plant, to construct underground will do virtually nothing to protect the "health, safety and welfare" of the majority of a community's residents. This argument merely emphasizes the illegitimacy and irrationality of the reasons that the cities have presented to justify their discrimination against CLECs and in favor of the ILECs.

The irrationality of the cities' argument in this case is further emphasized by the fact that municipalities generally desire to limit street cuts. With fewer and fewer exceptions, municipalities are seeking to limit the number of cuts made in their streets to install underground facilities. It makes no sense, therefore, that in these proceedings the cities advocate having a CLEC dig up the right-of-way directly under existing pole lines, yet they do not seek to have the ILEC and the electric company move their facilities underground while that trench is open. Undergrounding of ***all*** facilities in any location where a city is requiring undergrounding of any new facility is seemingly what would be in the municipalities' legitimate right-of-way management interest. The arguments advanced in these proceedings, however, are not about legitimate interests; they are about bottleneck control by municipalities.

C. Timing Of Construction Is Not A Legitimate Basis For "Classification" Because It Ignores Recent Upgrades And Construction By ILECs

Perhaps the most specious argument advanced by municipal commenters is that "timing" of construction is a legitimate basis for classifying telecommunications providers differently and that, therefore, requirements that differentiate based on when construction occurred are not

discriminatory.[59] There is no basis in the 1996 Act for such an argument. Indeed, if the argument were adopted, it would gut Section 253.

Section 253(c) requires that a regulation be not only "nondiscriminatory" but also that it be "competitively neutral." Yet, the arguments and actions of municipalities ignore that critical element. Rather, they focus solely on the "discrimination" language, and then, they focus on creating "classifications" that will allow them to justify competitively biased regulations. Classifications are inherently suspect because they are then used to justify disparate treatment. Accordingly, whenever a municipality argues that a challenged regulation is based on a reasonable classification of providers, there must be a heavy burden on the municipality to demonstrate that its regulation is both competitively neutral and nondiscriminatory. In this case, the municipalities cannot and have not met that burden. Indeed, the classes that municipal commenters seek to define – carriers that are constructing "new" facilities, and carriers that built their facilities at some time in the past – would preserve exactly the monopoly market structure that Congress, in enacting the 1996 Act, intended to eliminate.

The point of Section 253(c) was that neither an ILEC nor a CLEC should be given a competitive advantage by a municipality's right-of-way management, but rather that the regulatory environment should be "neutral." As the municipalities point out, this does not require that the regulation of the two be "identical" in every instance. In fact, requiring an ILEC to move its existing facilities underground at the same time that a CLEC is required to construct anew underground is not identical treatment (the ILEC was given years to operate with the lower

[59] City of Richmond Comments at 7-8; Concerned Municipalities Comments at 24-25.

construction and maintenance costs associated with aerial facilities), but it is competitively neutral.[60]

ILECs and CLECs are competitors. Their facilities are, for right-of-way management purposes, essentially identical (*i.e.*, both are wired facilities; if anything, the ILECs' are larger and impose a greater burden). Accordingly, there is no legitimate basis for distinguishing between them for construction purposes, and they must be treated neutrally.

The argument that construction timing is a legitimate basis for discrimination would completely gut Section 253, as would the City of Richmond's argument that ILECs and CLECs are not "similarly situated" and thus need not be treated equally. Section 253, along with the rest of the 1996 Act, was intended to eliminate the historic regulatory discrimination in favor of ILECs that had, over many decades, erected barriers to competition.[61] If timing of construction were a legitimate basis for discrimination, however, the historic preference for ILECs would never be eliminated, and municipalities would be permitted to continue to burden CLECs with unreasonable and discriminatory requirements that would thwart the development of level playing field competition.

The timing argument also completely ignores the fact that ILECs are constantly upgrading their facilities and installing new facilities. The ILECs' networks have not laid untouched for the last twenty years, as Respondent Cities and municipal commenters suggest. ILECs, such as Ameritech in Ohio, have been upgrading their networks with fiber optics, which were unheard of twenty years ago, and upgrading their copper facilities to provide new technologies, such as DSL. Yet, the inherent premise of Respondent Cities' oppositions is that

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[60] Identical regulation would allow the CLEC to construct aerially, then operate for nearly 100 years before having to go underground.

[61] *See, e.g.*, H.R. Rep No. 104-204 at 75 (July 24, 1995).

the ILEC's facilities have been static.[62] By disregarding such new construction, the cities reveal that the real "classification" that they are making is based on the company's identity, and its entrenched political position. Such disparate treatment of ILECs and CLECs is discriminatory and not competitively neutral, and is therefore unlawful.

D. The Discriminatory Effect Of Respondent Cities' Actions Should Be Scrutinized On A Community-By-Community Basis

Concerned Municipalities assert that a Section 253(a) violation must be based on a comparison of the cost of the challenged regulation in the particular community to the overall cost of implementing the provider's regional, or even national, business plan.[63] That argument is without any statutory or legal support. Section 253(a) prohibits a municipality from adopting any regulation or requirement that has the effect of prohibiting the provision of telecommunications services. The statute does not provide that whether a regulation or requirement violates Section 253(a) should be measured based on the overall plans of the company. The statute is quite clearly municipality-specific.

The irrationality and speciousness of the Concerned Municipalities' theory is illustrated by the example of a company that is engaged in a nationwide rollout. Under the Concerned Municipalities' theory, such a company would never face a barrier to entry in any individual community because the cost of the burden imposed by any particular community would never be significant in comparison to the company's overall nationwide rollout plans. The same is true even on a regional level. The Concerned Municipalities make the argument because they know that the cost of even a modest regional roll out is very substantial. Clearly, Congress intended to prohibit acts by individual municipalities that create barriers to entry. Congress did not intend to

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[62] *See* Cleveland Heights Opposition at 3; Pepper Pike Opposition at 2, 4.

[63] Comments of Concerned Municipalities at 22.

allow municipalities to create such barriers to entry, but be sheltered by the fact that the provider's plans extended beyond that municipality.

IV. THE COMMISSION HAS JURISDICTION TO DECLARE THAT THE RESPONDENT CITIES HAVE CREATED A BARRIER TO ENTRY IN VIOLATION OF SECTION 253(a)

The Concerned Municipalities argue that the Commission does not have jurisdiction to consider City Signal's petitions.[64] Notably, however, none of the Respondent Cities has challenged the Commission's jurisdiction. The jurisdictional arguments of the municipal commenters are inconsistent with the statute and legislative history, and should be rejected.

A. The Plain Language Of Section 253 Provides The Commission With Jurisdiction To Adjudicate City Signal's Petitions

Section 253(d) of the 1996 Act provides the Commission an explicit grant of authority to preempt ***any*** statute, regulation or legal requirement that constitutes a barrier to entry under Section 253(a).[65] Indeed, the Commission has no choice; it ***must*** preempt ***any*** local or State action that the Commission finds to constitute a barrier to entry.[66] Yet, the municipal commenters attempt to distort the clear language and legislative history of Section 253 to divest the Commission of jurisdiction over any local regulation.[67] They create a circular argument,

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[64] Concerned Municipalities Comments at 12-16.

[65] 47 U.S.C. § 253(d).

[66] 47 U.S.C. § 253(d) ("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. . . . ") (emphasis added).

[67] The Concerned Municipalities also assert that the Tenth Amendment prohibits the Commission from acting on City Signal's petitions. That argument is remarkable in that it is not so much an attack on the Commission's jurisdiction as a challenge to the constitutionality of Section 253. There has been no such challenge made in any other case involving Section 253, and for good reason. The cases cited by the Concerned Municipalities are inapt. *Solid Waste Agency of Northern Cook County v. United States*, 121 S. Ct. 675, 2001 U.S. LEXIS 640 (2001), upon which they rely heavily, does not support their argument. The Court decided in that case

whereby they assert that all local regulation of telecommunications providers is based on their use of the rights-of-way; that Section 253(c) recognized local authorities' power to manage the rights-of-way; that Section 253(d) excludes subsection (c) from the Commission's explicit preemption power; and, therefore, that ***all*** local regulation of the rights-of-way is beyond the Commission's jurisdiction. The clear language of Section 253, and the legislative history accompanying it, however, demonstrates that municipal commenters' interpretation is untenable.

In removing the Commission's jurisdiction to preempt actions that violate subsection (c), Congress did not deprive the Commission of jurisdiction over all local right-of-way regulations, whether or not imposed under the guise of so-called right-of-way "management" powers. Rather, Congress eliminated only the Commission's power to adjudicate claims involving certain municipal right-of-way actions that were not alleged to constitute a violation of Section 253(a). Thus, the Commission remains fully empowered to adjudicate under Section 253(a) whether ***any*** local rule, regulation, or action – including one that imposes undue delay under the guise of right-of-way "management" -- constitutes a barrier to entry. City Signal's petitions demonstrate that the Respondent Cities have acted discriminatorily, and with unjustifiable delay, to create just such a barrier to entry and, accordingly, its petitions are within the Commission's jurisdiction.

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that the federal agency involved did not have jurisdiction based on the language of the statute, not the Commerce Clause. *Id.* at *14. The Court's brief discussion of the Commerce Clause was purely dicta, and the Court did not even state that the statute at issue would have been unconstitutional under the Commerce Clause. *Id.* at *23-25. Rather, it discussed the analysis it would have had to undertake had it not decided based on the statute itself. *Id.* The municipalities' reliance on *United States v. Morrison*, 120 S. Ct. 1740 (2000), is likewise misplaced. There, the Court held that gender-motivated crimes of violence were not economic activity, and thus were not within Congress' Commerce Clause power. 120 S. Ct. at 1749-51. In comparison, congressional authority to regulate interstate telecommunications through the Communications Act is clear. There can be no question that Congress has authority to limit municipal actions that impact companies engaged in interstate telecommunications.