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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

**RE: Notice of Inquiry, Promotion of Competitive Networks In Local Telecommunications Markets WT Docket No. 99-217**

Dear Ms. Salas:

Please have the attached documents entered into the record in the above-referenced proceeding as *ex parte* filings from Qwest Communications Corporation that were shared with Commission staff at or in connection with meetings held during the month of March, 2001. Because this is an exempt proceeding, we have not filed separate notices with respect to those meetings.

Please call me with any questions.

Sincerely,

Lynn R. Charytan

Lynn R. Charytan

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 26, 2001

# PREEMPTION OF GENERALLY APPLICABLE LOCAL ORDINANCES UNDER SECTION 253 OF THE COMMUNICATIONS ACT

**Submitted by**
**Qwest Communications Corporation**

Many of the petitions filed with the Commission seeking preemption under section 253 of the Communications Act[1] have challenged ordinances that impose discriminatory burdens on one class of carriers (*e.g.*, new entrants). As we describe in this memorandum, however, a violation of section 253(a) may be found even in the absence of discriminatory regulatory burdens. Several federal district court decisions have preempted rights-of-way ordinances for violating section 253(a) — and have determined that such ordinances fall outside of section 253(c)'s safe harbor — notwithstanding the absence of any allegation of preferential treatment. We describe those cases below.

## Discussion

Section 253(a) prohibits state or local laws or ordinances that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[2] Section 253(c) protects local ordinances that might otherwise be found to violate section 253(a) — to the extent such ordinances are designed to "manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis."[3]

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1 47 U.S.C. § 253.

2 47 U.S.C. § 253(a).

3 47 U.S.C. § 253(c).

In several decisions, the courts have construed the language of section 253(a) broadly, finding that a variety of local ordinances "prohibit or have the effect of prohibiting" the provision of service. In several cases, the action was brought by an ILEC, and the challenge to the local ordinance was based not on disparate treatment of different carriers, but on the allegation that a generally applicable ordinance was so burdensome or restrictive that the provision of service by any carrier in that locality would be affected. The courts similarly have found that even generally applicable rights-of-way ordinances that are "competitively neutral" and nondiscriminatory may nonetheless fall outside the protection of section 253(c), either because they impose requirements unrelated to rights-of-way management or because they demand compensation that is not fair and reasonable. We discuss these two separate, but related, issues, below.

## I. SECTION 253(a) AND GENERALLY APPLICABLE BURDENS ON THE PROVISION OF SERVICE

Although section 253 is entitled "Removal of Barriers to Entry," section 253(a) applies to legal requirements that prohibit or have the effect of prohibiting the *provision of any service by any entity*, not merely new entry. And the statute proscribes not only those laws that directly prohibit the provision of services, but also laws that "have the effect of prohibiting" services. Thus, ILECs and CLECs both have brought claims under section 253, alleging that local ordinances interfere with their provision of either a new or an *existing* service.

Neither the FCC nor any court has suggested that a violation of section 253(a) requires a showing that one carrier is being treated unfairly in comparison to another. While such an ordinance might very well constitute a section 253(a) violation as to the disadvantaged carrier, the decisions demonstrate that a restrictive local ordinance that affects all carriers equally — and burdens the provision of service by any and all of them — likewise would violate section 253(a).

The purpose of the Telecommunications Act of 1996 is not just to ensure the development of competition, but to deregulate the telecommunications marketplace generally and facilitate the introduction and expansion of services by all carriers.[4] Accordingly, where an ordinance limits the availability of, unreasonably delays, or unreasonably increases the cost of the provision of a particular service, it does not escape the prohibition of section 253(a) simply by virtue of applying across the board to all carriers equally. Courts have focused on several characteristics of ordinances of general application in determining that they have the effect of prohibiting the provision of telecommunications services: (1) unfettered **discretion** to grant or deny telecommunications companies access to the public rights-of-way, for reasons not reasonably related to management of the right-of-way;[5] (2) unreasonable **delay** in the application or approval process;[6] and (3) unnecessary requirements for companies to disclose **information**,

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4 The Telecommunications Act of 1996 is intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans." H. R. Conf. Rep. No. 104-458, at 1 (1996).

5 *See e.g., Bell Atlantic-Maryland, Inc. v. Prince George's County,* 49 F. Supp. 2d 805, 817 (D. Md. 1999) ("[m]ost objectionable is the fact that the ordinance vests the County with complete discretion to grant or deny a franchise application based on a wide–ranging set of factors" that "go well beyond the bounds of legitimate local governmental regulation"), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000); *Board of County Comm'rs of Grant County v. U S West Communications, Inc.*, No. Civ 98-1354, slip op. at 11 (D.N.M. June 26, 2000) ("*Grant County*") (discretionary provisions unlawfully leave "a franchise applicant [] at the mercy of the [City], ignorant of the actual criteria used in 'determining the suitability of an applicant'"); *PECO Energy Co. v. Township of Haverford*, CIV.A.99-4766, 1999 U.S. Dist. LEXIS 19409, at *20 (E.D. Pa. Dec. 20, 1999) (ordinance unlawfully gives township manager total discretion to grant or deny a franchise); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 592 (N.D. Tex. 1998) (city cannot grant or deny a franchise "based on its own discretion"); *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 92-93 (S.D.N.Y. 2000).

6 *See TCG New York*, 125 F. Supp. 2d at 89 ("while the City's requirements admittedly do not impose an explicit prohibition on TCG, the regulations coupled with the City's long delay in moving forward with the approval process [7 years] have effectively prohibited TCG from providing telecommunications services in White Plains"); *In the Matter of Classic Telephone,*

which is often competitively sensitive, and to grant local governments favorable concessions that are not reasonably related to right-of-way management.[7] Section 253 is designed precisely to prevent municipalities from improperly burdening the provision of service within their borders by any means.

A few examples illustrate the point that courts focus on the prohibitory effect of the ordinances' restrictions generally rather than the status of the competitor (i.e. incumbent versus new entrant):

- In *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, the court found that "any process for entry that imposes burdensome requirements on telecommunications companies and vests significant discretion in local government decisionmakers to grant or deny permission to use the rights-of-way 'may . . . have the effect of prohibiting' the provision of telecommunications services."[8] The court found the ordinance had the effect of prohibiting service because it required a telecommunications carrier to submit a lengthy and detailed franchise application form, along with a $5,000 application fee; gave local authorities complete discretion over whether to grant or deny permission to use the rights-of-way; required franchisees to file regular financial reports and pay a right-of-way charge of 3% of gross revenues; and

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*Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 15619-20 ¶ 1 (1997) ("unreasonable delays in acting on franchise applications can thwart local exchange competition in contravention of the Telecommunications Act. . .").

7 *See, e.g.*, *Grant County*, No. CIV 98-1354, slip op. at 11; *City of Dallas*, 8 F.Supp.2d at 593; *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, Case No. 98-8232-CIV-DIMITROULEAS, 1999 U.S. Dist. LEXIS 16904, at *17 (S.D. Fla. Sept. 28, 1999); *BellSouth Telecommunications, Inc., v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1309-10 (S.D. Fla. 1999).

8 49 F. Supp. 2d 805, 814 (D. Md. 1999).

prohibited the sale of shares of stock in a franchisee without the county's prior approval.[9] The ordinance applied to all telecommunications carriers, and the challenge was brought by the incumbent provider, Bell Atlantic.

- Similarly, in *Board of County Commissioners of Grant County, New Mexico v. US West Communications, Inc. ("Grant County")*, the court found the county ordinances had the effect of prohibiting service where they prohibited use of the rights-of-way without a franchise; required companies to submit a lengthy and detailed franchise application form, along with a $2500 application fee; authorized sanctions of up to $50,000 per day for violations; failed to impose procedural guidelines, leaving local authorities with significant discretion in evaluating applications; and obligated franchisees to file regular financial reports and any other information requested by the county, as well as a franchise fee of 5% of its gross revenues.[10] Again, the ordinances did not distinguish between incumbents and new entrants. All carriers were subject to the ordinances, and the challenge was brought by the incumbent provider.

- In *TCG New York, Inc. v. City of White Plains*,[11] the court held that an ordinance violated the threshold prohibition of section 253(a) because it required a carrier seeking to use the rights-of-way to obtain a franchise "contain[ing] certain broad terms and conditions, such as the compensation to be paid to the City, the City's right to inspect facilities and records of the franchisee, a restriction on the assignment or other transfer of the facility without prior written consent by the City, and such other provisions the City determine[d]

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9 *Id.*

10 No. CIV. 98-1354, slip op. at 9.

11 125 F. Supp. 2d 81 (S.D.N.Y. 2000).

[we]re necessary or appropriate 'in furtherance of the public interest.'"[12] The court noted that these "regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains."[13] The court's conclusion that the ordinance had the effect of prohibiting service was based solely on the burdensome provisions of the ordinance and not on the fact that the challenge was brought by a new entrant and included charges of disparate treatment.

## II. ORDINANCES MAY FALL OUTSIDE SECTION 253(c)'s PROTECTIONS, EVEN IF THEY ARE "COMPETITIVELY NEUTRAL"

Notwithstanding a preliminary finding that an ordinance violates section 253(a) by burdening or prohibiting the provision of service, a local ordinance may not be preempted under section 253 if it meets the requirements of section 253(c)'s safe harbor. The courts have determined, however, that even an ordinance that is "competitively neutral" may fail to satisfy section 253(c)'s other requirements — and thus be subject to preemption. Specifically, the courts have preempted rights-of-way ordinances as outside of section 253(c)'s protections where the municipality cannot demonstrate a true nexus between the ordinance's provisions and "manage[ment]" of the rights of way, or where the fee imposed is not "fair and reasonable." Although the meaning of "fair and reasonable compensation" has been the subject of some judicial disagreement, the important point for present purposes is that the courts have preempted ordinances that fail to meet section 253(c)'s requirements even where they apply to both incumbents and new entrants alike.

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12 *Id.* at 88-89.

13 *Id.* at 89.

*A. Absence of Nexus with Management of the Rights-of-Way*

The FCC itself has found that an ordinance may not be protected under section 253(c) where it is not genuinely related to rights-of-way management. The Commission has determined that the legislative history of section 253(c) makes clear that management of the rights-of-way is limited to activities such as regulating the time or location of excavation; requiring a company to place its facilities underground; requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs; enforcing local zoning excavations; and requiring a company to indemnify the City against any claims of injury arising from the company's excavation.[14] Similarly, the Commission has noted that the "types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[15]

Explicitly relying on these orders, courts have preempted several local regulations on the ground that they are not related to rights-of-way management. For example, courts have preempted provisions of local ordinances that require

- a description of services to be provided;
- information concerning the applicant's proposed financing and a description of the applicant's legal, financial, and technical qualifications;

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[14] *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103 ¶ 39 (1996) (citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)).

- most-favored nations clauses (i.e., requirements that carriers offer the government service on favorable rates);
- waivers of carriers' rights to challenge terms or conditions of the agreement; and overly broad inspection rights.[16]

In addition, as noted above, a number of courts have struck down provisions that grant local authorities broad discretion to grant or deny franchise applications.[17] For example, courts have rejected provisions that direct authorities to consider whether applications to use the rights-of-way are in "the public interest," reasoning that such provisions impermissibly allow authorities to grant or deny applications based on factors unrelated to management of the rights-of-ways.[18] In determining that section 253(c) is inapplicable, these decisions typically do not even address the question of whether the ordinance is "competitively neutral."

*B. Absence of Fair and Reasonable Compensation*

Courts have found that a rights-of-way fee — even though generally applicable — may still fail to qualify as "fair and reasonable compensation" for use of the rights-of-way and thus fall outside the ambit of section 253(c). In some instances, the courts have found that a fee qualifies as "fair and reasonable" only where it is limited to the amount necessary to recover the

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15 *TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441 ¶ 103 (1997).

16 *See TCG New York*, 125 F. Supp. 2d at 91-95; *Bell Atlantic-Maryland*, 49 F. Supp. 2d at 816-17; *Grant County*, slip op. at 10-11; *City of Coral Springs*, 42 F. Supp. 2d at 1309-10.

17 *See* cases cited *supra*, note 5.

18 *See TCG New York*, 125 F. Supp. 2d at 92-93; *Bell Atlantic-Maryland*, 49 F. Supp. 2d at 817.

government's costs of processing applications and managing the rights-of-way.[19] Thus, a fee based on a percentage of gross revenue or profits or on the "market value" of the rights-of-way would not be "fair and reasonable compensation," even if imposed on all carriers equally.

Other courts have taken a different approach in construing "fair and reasonable compensation," an approach that we view as inconsistent with the legislative history and underlying purposes of the Act,[20] but that approach too is consistent with our basic point here. To determine whether right-of-way fees are "fair and reasonable," these courts have typically looked to four factors: "(1) the extent of use of the public rights-of-way; (2) whether other carriers have agreed to comparable compensation (for comparable uses of public rights-of-way); (3) the course of dealings among the parties; and (4) whether the compensation sought is 'so excessive that it is likely to render doing business unprofitable.'"[21] These courts do not, however, require a carrier to show discrimination in order to establish that a fee is not "fair and reasonable."

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19 *See Grant County*, slip op. at 12 (invalidating 5 percent gross revenue fee because it was not "directly relate[d] . . . to [the county's] expenses in managing the rights-of-way"); *Bell Atlantic-Maryland*, 49 F. Supp. 2d at 817-19 ("[T]he proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that Bell Atlantic actually uses.").

20 *See Bell Atlantic-Maryland*, 49 F. Supp. 2d at 818 n. 27 (noting that *TCG Detroit* court failed to "address the various reasons intrinsic to the [Telecommunications Act of 1996] that this court finds persuasive for limiting the franchise fees imposed by local governments to the costs of maintaining and improving the local public rights-of-way").

21 *Omnipoint Communications, Inc. v. Port Authority of New York and New Jersey*, No. 99 Civ. 0060, 1999 WL 494120, at *7 (S.D.N.Y. July 13, 1999) (citing *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 790-91 (E.D. Mich. 1998)).

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March 26, 2001

# SCOPE OF FCC PREEMPTION AUTHORITY WITH RESPECT TO LOCAL RIGHTS-OF-WAY ORDINANCES UNDER 47 U.S.C. § 253

**Submitted by**
**Qwest Communications Corporation**

Municipal governments have raised questions regarding the scope of the FCC's preemption authority with respect to local franchise and rights-of-way ordinances under section 253 of the Communications Act. The question we address in this submission is *not* whether the FCC may preempt local rights-of-way ordinances that violate section 253(a) but nonetheless fall *within* the savings clause of section 253(c). Instead, we address whether the FCC may preempt local rights-of-way ordinances that violate section 253(a) and fall *outside* the scope of the relevant savings clause. The answer is straightforward: section 253(d) squarely compels the Commission to preempt such ordinances whether or not they concern (or are said to concern) "rights-of-way." The contrary position is irreconcilable with both the statutory language and common sense; indeed, carried to its logical conclusion, it would strip the Commission of much of its general preemption authority under section 253.

## Discussion

In various proceedings, state and local governments have suggested that the mere invocation of section 253(c)'s safe harbor for state and local rights-of-way regulations divests the FCC of jurisdiction over preemption petitions alleging violations of section 253(a). For example, municipalities have asserted that "Congress has removed *any* Commission jurisdiction over telecommunications right of way management and compensation matters." *Comments of Concerned Municipalities*, CS Docket No. 00-253, 11 (filed Jan. 20, 2001) (emphasis added).

The municipalities attempt to support this assertion by citing section 253(d)'s silence with respect to section 253(c), and the legislative history of section 253(d).

In fact, however, section 253 could not be clearer on the only question we address here: it straightforwardly requires the FCC to preempt local rights-of-way ordinances that violate section 253(a) and fall outside the savings clause of section 253(c). If there is any ambiguity in section 253 or its legislative history, it concerns a wholly separate question: whether the savings clauses of section 253(b) and section 253(c) create substantive prohibitions *independent of* the primary prohibition of section 253(a), such that a local ordinance could be subject to preemption under one of those savings clauses even if it did not also violate section 253(a). *See, e.g., TCG Detroit v. City of Dearborn*, 206 F.3d 618, 623-24 (6th Cir. 2000). Even if the answer were yes, the only arguable consequence for the FCC would be that the Commission (as distinguished from a federal court) might lack authority to preempt an ordinance that violates section 253(c) but does *not* violate section 253(a). And resolution of *that* ambiguity could not logically cast doubt on the Commission's authority to preempt ordinances that *do* violate section 253(a).

## I. ON ITS FACE, SECTION 253(d) PROVIDES THE FCC WITH UNLIMITED AUTHORITY TO PREEMPT ANY LOCAL LAW OR REGULATION THAT VIOLATES SECTION 253(a).

As the FCC and courts have consistently recognized, subsection (a) of section 253 is the linchpin of that statutory provision, setting forth its express and unqualified prohibition. Subsection (a) provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

However, Congress excepted from the reach of section 253(a)'s prohibition two categories of "State or local statute or regulation or other . . . legal requirement" that might "prohibit or have the effect of prohibiting" the provision of a telecommunications service. *First,* in subsection (b), Congress carved out a safe harbor for state universal service requirements that are "impose[d] . . . on a competitively neutral basis and consistent with section 254 of this section." 47 U.S.C. § 253(b). *Second,* in subsection (c), Congress created a safe harbor for rights-of-way regulations that meet certain requirements:

> 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.

47 U.S.C. § 253(c).

The FCC has consistently recognized that the language and structure of section 253 permit only one interpretation: subsection (a) sets forth the substantive prohibition on state and local regulations that bar or burden the provision of telecommunications service, while subsections (b) and (c) carve out exceptions or safe harbors to subsection (a)'s prohibition. *See, e.g., In the Matter of the Public Utility Commission of Texas et. al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd. 3460, 3481 ¶ 44 (1997) ("*Texas Order*") ("Subsection (a) is the only portion of section 253 that broadly limits the ability of states to regulate. All of the remaining subsections . . . carve out defined areas in which states may regulate or continue to regulate, subject to certain conditions."); *In the Matter of Promotion of Competitive Networks in Local Communications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, 14 FCC Rcd. 12,673, 12,713 ¶ 73 (1999) ("*Notice of Inquiry*") ("Section 253(a), considered alone, generally proscribes State and local governments from imposing legal requirements that either directly prohibit the ability of any entity to provide any interstate or intrastate telecommunications service or have the effect of prohibiting any entity's ability to provide such service. Section 253(b) and 253(c), however, permit State and local governments to take certain actions that meet the requirements of those subsections notwithstanding section 253(a).").

Subsection (d) of section 253 plainly authorizes and requires the FCC to determine whether a state or local regulation violates subsection (a), and to preempt a regulation that does:

> If . . . 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) of this section, the Commission *shall preempt* the enforcement of such statute, regulation, or legal requirement . . . .

47 U.S.C. § 253(d) (emphasis added). The FCC has confirmed that the plain language of subsection (d) *requires* it to preempt ("shall preempt") any regulation that it finds in violation of subsection (a). *See Texas Order* at ¶ 22 ("[S]ection 253 expressly empowers -- indeed, *obligates* -- the Commission to remove any state or local legal mandate that 'prohibit[s] or has the effect of prohibiting' a firm from providing any interstate or intrastate telecommunications service." (emphasis added)).

The only limits that the statute places on the FCC's authority and obligation to preempt a local law or regulation that violates section 253(a) are found in the section 253 safe harbors. Subsections (b) and (c) provide that even *if* section 253(a) would otherwise be violated by a state or local regulation, that regulation is exempted from the prohibitions of section 253 if the requirements of either safe harbor are met. Thus, the FCC's authority under subsection (d) to determine whether a state or local law violates subsection (a) necessarily includes the authority to determine whether either of section 253's safe harbors permits the challenged regulation to avoid preemption. Without the latter authority, there would be no point to the FCC's exercise of the former. This result is mandated by the plain language of the statute, and may not be disturbed by the snippets of legislative history cited by the municipalities. *See* n.1, *infra*.

The FCC has recognized that determining whether a regulation violates subsection (a) also requires determining the validity of any defense under subsection (c). *See In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21,697, 21,730 ¶ 63 (1999) ("*Minnesota Order*") ("[W]e *must* consider whether the [regulation] is protected from preemption by section 253(c)." (emphasis added)); *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief*, Memorandum Opinion and Order, 12 FCC Rcd. 21,396, 21,440 ¶ 101 (1997) ("*TCI Order*") ("Parties seeking preemption . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a), without meeting the requirements of section 253(b) or (c)."); *see also Suggested Guidelines for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 F.C.C. Rcd. 22,970, at B.5 (November 17, 1998) ("Responding parties . . . may also rely on section 253(b) or (c), which identify certain State and local government actions that are permissible even though they may be the basis for the alleged violation of section 253(a)."). Indeed, the FCC has decided whether the invocation of subsection (c) provided a defense to a violation of subsection (a). *See Notice of Inquiry* at 12,714-15 ¶ 76 ("[W]here the record was 'inadequate to establish that the Cities' actions reflect[ed] an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way,' we have held that the cities' actions did 'not trigger section 253(c).'" (quoting *In the Matter of Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 13,082, 13,104 ¶ 42 (1996)) ("*Classic Telephone Order*")).

The federal courts have similarly recognized that ordinances having the effect proscribed by (a) cannot be preempted until the applicability of subsections (b) and (c) has been ruled out. *See, e.g., Cablevision of Boston, Inc. v. Public Improvement Comm'n of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) ("[S]ubsections [(b) and (c)] take the form of savings clauses, preserving certain state or local laws that might otherwise be preempted under § 253(a)."); *Bell Atlantic-Maryland, Inc. v. Prince Georges Cty.*, 49 F. Supp. 2d 805, 814 (D. Md. 1999) ("Section 253 preempts all state and local regulations that 'prohibit or have the effect of prohibiting' any company's ability to provide telecommunications services, unless such statutes fall within either of the statute's two 'safe harbor' provisions.").

## II. ANY EFFORT TO LIMIT THE FCC'S AUTHORITY UNDER SECTION 253(d) WITH RESPECT TO DETERMINING THE APPLICABILITY OF SECTION 253(c) LEADS TO ABSURD RESULTS.

As noted above, some municipalities have asserted that the FCC lacks any authority to consider rights-of-way management and compensation matters; indeed, some have suggested that the mere invocation of subsection (c)'s safe harbor divests the FCC of its expressly granted authority to determine whether an ordinance violates subsection (a). *See, e.g., Comments of Concerned Municipalities* at 16 ("Municipal decisions and policies which relate to the control of the public rights-of-way . . . are simply not subject to Commission review."). The municipalities attempt to support these assertions by pointing out that section 253(d) does not expressly grant the FCC the authority to consider whether section 253(c) provides a defense for a violation of section 253(a).

But these assertions make no sense, and if accepted would create an obvious conflict in section 253's review structure. Subsection (d) expressly requires ("shall") the FCC to preempt regulations that it determines to be in violation of subsection (a); but, according to the interpretation proposed by some municipalities, as soon as a municipality claimed that subsection (c) applied, the FCC's authority to preempt a violation of subsection (a) would terminate.

As both the FCC and the courts have concluded, however, the mere fact that a challenged ordinance is labeled a "rights-of-way" ordinance is not determinative of whether it is protected by section 253(c)'s safe harbor. Rather, section 253(c)'s safe harbor applies only if *each* of section 253(c)'s requirements is met. Thus, even if a regulation satisfies the threshold requirement by constituting rights-of-way management, "[s]ection 253 requires that both management of public rights-of-way and the requirement for compensation be competitively neutral and nondiscriminatory in order for a state or local legal requirement to be protected under section 253(c)," and that the compensation also be "fair and reasonable." *Minnesota Order* at 21,729 ¶ 61; *see also Classic Telephone Order* at 13,103 ¶ 39 (same); *TCI Order* at 21,443 ¶ 108 (same). Indeed, the FCC has made plain that the applicability of one of section 253's safe harbors must be proven like any other issue. *See Minnesota Order* at 21,704, n.26 ("Although the party seeking preemption bears the burden of proving that there is a violation of section 253(a), *the burden of proving that a statute, regulation, or legal requirement comes within the exemptions found in section 253(b) and (c) falls on the party claiming that the exception applies*." (emphasis added)).

Thus, to determine whether a regulation can be preempted because it violates section 253(a), the FCC *must* possess the authority to rule on the question of whether subsection (c) applies. If the FCC did not possess such authority, *all* of the FCC's authority under section 253(d) would be undermined. Any state or locality could avoid the FCC's authority to enforce the requirements of subsection (a) simply by asserting that any challenged ordinance or regulation related, in some manner, to "manage[ment] of the rights of way." The possibilities for abuse are obvious, and the FCC's ability -- not to mention its *obligation* -- to enforce the requirements of section 253(a) would be vitiated.

## III. THE LEGISLATIVE HISTORY IS IRRELEVANT TO THE QUESTION ADDRESSED HERE AND WOULD BE, IN ANY EVENT, INSUFFICIENT TO OVERCOME THE PLAIN LANGUAGE OF SECTION 253.

Municipalities also seek to bolster their assertions by reference to section 253's legislative history, which, they argue, demonstrates a congressional intent to shield them from having to defend their rights-of-way ordinances before the FCC. But that legislative history is analytically irrelevant to the question addressed here.

On the question we address in this submission -- whether the FCC has the authority to preempt a local ordinance that violates section 253(a) and to determine the applicability of section 253(c)'s safe harbor in so doing -- the statute is plain and contains no ambiguity. To be sure, some courts have read section 253 to contain an ambiguity on a *different* point -- whether subsections (b) and (c) of section 253 have preemptive force in their own right. In particular, observing that section 253(d) directs the FCC to preempt any regulation that "*violates* subsection (a) *or (b)*," 47 U.S.C. 253(d) (emphasis added), some courts have concluded that the savings clauses contained in sections 253(b) and 253(c) can be read to create stand-alone prohibitions *independent* of the primary prohibition of section 253(a). *See, e.g., TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (holding that section 253(c) creates a private right of action to enforce its requirements); *Cablevision*, 184 F.3d at 99 (noting that section 253(b) could be interpreted to create a private right of action to enforce its requirements). For example, the Sixth Circuit has suggested that "[a] violation of § 253(c) might well not involve violating § 253(a); unfair or unreasonable fees need not rise to the level of erecting a barrier to entry." *TCG Detroit*, 206 F.3d at 624.

If that interpretation were correct -- if subsections (b) and (c) were freestanding prohibitions that preempted some local requirements that subsection (a) does not reach -- the only possible consequence for the FCC's authority would be this: the Commission (as opposed to a federal court) might lack authority to preempt local requirements that "violate" subsection (c) but do *not* violate the primary prohibition of subsection (a). But reading the statute this way would not, of course, cast doubt on the Commission's unambiguous statutory obligation to preempt local requirements that *do* violate subsection (a) and fall outside the savings clause of subsection (c).

That conclusion is consistent with the portions of the legislative history cited by various municipalities, *see Comments of Concerned Municipalities* at 11-15, which indicate that some members of Congress sought to select a judicial forum for challenges to regulations based on the requirements of subsection (c), *see* 141 Cong. Rec. S8212-13 (daily ed. June 13, 1995) (statement of Sen. Gorton) ("Instead of being [decided by] 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."). And reading the legislative history this way -- as evidence of an intention to preclude FCC preemption only of local requirements that violate subsection (c) without violating subsection (a) -- at least permits a result that is consistent with the statute's express grant of unlimited authority to the FCC with respect to violations of section 253(a). It is thus far more reasonable than the municipalities' suggestion that the statute should be contorted so as to *deprive* the FCC of authority with respect to all municipal ordinances, whether they accord with the requirements of section 253(c) or not.[1]

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[1] Nor, in any event, would it be appropriate to ignore the plain language of section 253 by relying on the ambiguous comments in the legislative history cited by the municipalities. Courts "do not permit [statutes] to be expanded or contracted by the statements of individual legislators

In sum, even if sections 253(b) and (c) were viewed as independent prohibitions that can be violated even when section 253(a) is not, that interpretation could not logically draw into question the FCC's authority to preempt where an ordinance *does* violate section 253(a) and is not saved by section 253(c). On that issue, the statute contains no ambiguity at all: the Commission *must* preempt, for the reasons discussed above.

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or committees during the course of the enactment process." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Such statements are ordinarily addressed to an almost empty chamber, and thus usually have no bearing on what a majority of both Houses of Congress intended when they voted for a statute. *See, e.g., Sundstrand Corp. v. C.I.R.*, 17 F.3d 965, 967 (7th Cir. 1994) ("[T]he statement of a single legislator, on a day when the chamber may have been empty," is a "peculiarly unreliable 'historical' guide[] to meaning."). And, more generally, legislative history cannot overcome the plain language enacted by Congress and signed into law by the President, particularly where, as here, the legislative history in question is ambiguous. *See United States v. Singleton*, 182 F.3d 7, 15 (D.C. Cir. 1999); *see also United States v. Ron Pair Entrs., Inc.*, 489 U.S. 235, 240 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.").

# QWEST COMMUNICATIONS CORPORATION

**FCC Presentation Regarding**
**Access to Public Rights-of-Way and Franchise Issues**
**Washington, DC March 9, 2001**



**Presenters:**
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## I. QWEST, IN ITS SEVERAL TELECOMMUNICATIONS PROVIDER ROLES, IS AFFECTED NATIONWIDE BY THE RIGHT-OF-WAY ACCESS PROBLEM

A. Qwest as a "New Entrant"
B. Qwest as an Incumbent Provider
C. Qwest as a Wireless Provider

## II. WHAT IS THE PROBLEM?

A. Municipalities Increasingly Abuse Their Right-of-Way Authority to Veil Overreaching Revenue-Raising or Regulatory Initiatives

B. Specific Examples

1. Using Public Rights-of-Way for Revenue Generation
2. Imposing Third-Tier Regulation Unrelated to Rights-of-Way Management
3. Discriminatory Regulation of Rights-of-Way Operations (*e.g.,* relocation)
4. Technology Discrimination in Connection with Rights-of-Way Access (wireless & data)
5. Onerous Application Requirements
6. Use of Right-of-Way Access to Require In-Kind Services

## III. THE "IMPACT" OF THE PROBLEM

A. Customer Service
B. Customer Cost
C. Customer Choice

## IV. WHAT IS THE SOLUTION?

### A. The Current Situation

1. Expensive, Time-Consuming, and Unpredictable Litigation In Cities Across the Country, Which Has Not Been Effective in Curtailing New Unlawful Ordinances
2. State Legislative Efforts

### B. What Can Be Done By The FCC

1. PREFERRED: Binding Rules Interpreting § 253 And Use Of The Right-Of-Way
2. NEXT BEST: Strong Policy Statement Interpreting § 253 And Use of the Rights-of-Way, Providing Guidance For Municipalities

## I. AN OVERVIEW OF QWEST

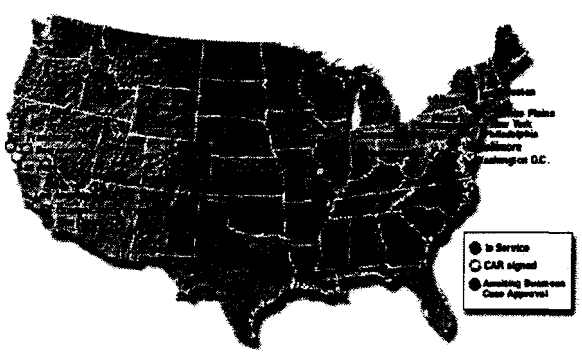
Qwest Communications International Inc. is an industry leader in providing reliable, scalable and secure broadband Internet-based data, voice and image communications for businesses and consumers. In addition to being an incumbent local telephone service provider in the 14-state Western United States, Qwest's Macro Capacity® Fiber Network, designed with the newest optical networking equipment for speed and efficiency, spans more than 104,000 miles globally. This network provides local telephone service, long distance, video, high speed Internet Access and other Broadband services.

Qwest began in 1995 when SP Telecom, a subsidiary of Southern Pacific Railroad, combined with Qwest Corporation, a small Dallas-based digital microwave firm. Realizing early on that the Internet would create unseen demands that existing networks couldn't possibly meet, Qwest set out to build a whole new kind of network -- faster, more flexible and more robust than any network on earth. Qwest's plan was to build not just a new-generation network, but also a full array of Internet-based applications, services and management that would help customers use the new broadband technologies to maximum advantage.

In 2000, Qwest acquired U S WEST. The acquisition added the size and scale today's market demands of any top competitor, and a slate of advanced technologies -- such as Digital Subscriber Line (DSL) services, advanced frame relay, the country's largest Web-based yellow pages, PCS wireless and a network that features more than 99 percent digital switching.

### A. Qwest as a "New Entrant"

Outside of its 14-state ILEC region, Qwest is a long distance provider as well as a facilities based CLEC. QwestLink, the arm of Qwest that is offering CLEC, DLEC and BLEC service, is building metropolitan area networks in 25 out-of-region cities across the country as an extension of the Qwest long distance backbone. Using these networks, QwestLink will build fiber directly to customer premises. The map below illustrates the national scope of Qwest's service.



The services provided by Qwestlink as a "new entrant" can be broken down into two categories of products:

**Bundled Local Access** - An on-net connection from the customer premise to the nearest Qwest POP/Hub to support traditional & new long distance services

**Metro Services** - Products or services that are designed to connect multiple locations within a metropolitan area

Qwest allows its customers to access an array of advanced services using either one of these categories of products,

**QwestLink Rollout**

| 2000 Cities | 2001 Cities |
|---|---|
| Washington, DC* | San Diego, CA |
| Sacramento, CA | Philadelphia, PA |
| Houston, TX* | San Antonio, TX |
| Chicago, IL* | Kansas City* |
| New York, NY* | St. Louis, MO* |
| San Francisco, CA* | White Plains, NY* |
| San Jose, CA | Cleveland, OH* |
| Dallas / Ft. Worth, TX* | Indianapolis, IN |
| Los Angeles, Orange County CA* | Newark, NJ |
| Boston, MA | Baltimore, MD* |
| | Albany, NY |
| | Austin, TX* |
| | Detroit, MI* |
| | Pittsburgh, PA |

In the above list, the * denotes cities where Qwest faces overreaching regulatory schemes from the Cities regarding access to public rights-of-way.

As the rings are deployed and expanded, the network touches the municipalities surrounding the major metropolitan areas. As a result, Qwest's right-of-way issue grows increasingly national in scope.

**B. Qwest as an "Incumbent Provider"**

As the successor to U S WEST, Qwest provides residential local telephone services, high speed Internet access services through its DSL product, high-speed connectivity, home office solutions and even video programming service within its 14 western states. Similar to its experience outside the 14-state region, Qwest has dealt with hundreds of cities who impose unnecessary, and often unlawful layers of regulation affecting Qwest's access to the public right-of-way.

This has adversely affected the timeliness and the quality of Qwest's services as well as its ability to deploy facilities for the provision of advanced services.

### C. Qwest as a Wireless Provider

Qwest offers comprehensive PCS wireless service in the region where the company operates as an incumbent wireline provider. The advanced digital wireless services include state-of-the-art Internet access services.

## II. WHAT IS THE PROBLEM?

### A. GENERALLY

Municipalities have attempted to exploit the Telecommunications Act's objective of creating facilities-based competition by leveraging their monopoly control over the public rights-of-way. While the Act does not preempt a local government's ability to manage the right-of-way, it does define the limits of what local governments can do under the guise of right-of-way management. Pursuant to Section 253(c), local governments may "manage" the right-of-way and, within limits, require "fair and reasonable" compensation for its use. Despite the limitations found in Section 253(c), municipalities assert that the Act creates "new rights" regarding the public right-of-way, or they impose regulations and fees unrelated to use of the rights-of-way under the guise of their protected right-of-way authority. Qwest is now faced with the prospect of obtaining or being subject to thousands of franchises, licenses and ordinances across the country, many of which contain terms and conditions unrelated to right-of-way management. Many of these examples are set forth below.

Section 253(a) of the Act also provides that "[n]o state or local statute or regulation ... may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Qwest acknowledges the legitimate interests of local governments in the development and application of non-discriminatory and competitively neutral right-of-way management policies. But these management policies must be harmonized with the goals of the Act to ensure the deployment of advanced and competitive services and to promote consumer choice and competition.

### B. SPECIFIC EXAMPLES

Qwest's experience across the country is that many municipalities attempt to regulate the actual provision of the service, to allow the municipality to act in the place of the state public utilities commission, to request that carriers provide services or facilities to the cities free of charge, to require that the operator using the rights-of-way submit information with its registration or application that is unrelated to the city's lawful management of the rights-of-way, and to generate substantial amounts of revenue for the cities in connection with the use of the