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

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

To: The Commission

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

Cox Communications, Inc. ("Cox") urges the Commission to take this opportunity to reaffirm that federal policy has as its preeminent goal the deployment of long term, sustainable facilities-based competition in the telecommunications industry. This goal is reflected throughout the provisions of the Telecommunications Act of 1996 and, in particular, in Section 253, which reflects Congress' clear intent to remove state and local barriers that inhibit the deployment of new telecommunications facilities. Local public rights-of-way management authority must be exercised consistent with this overriding federal policy goal, and must not unreasonably impede the ability of service providers to build their networks and offer services to all Americans.

One of the country's largest cable operators, Cox is upgrading its systems to provide consumers a variety of discrete basic and advanced telecommunications, video and data services. Because Cox operates its own infrastructure and manages its own databases, it is far less dependent on incumbent telephone company resources than other competitive local exchange carriers ("CLECs"). However, Cox faces obstacles that non-facilities-based CLECs do not precisely because it owns the physical network over which it provides services. Although many local franchising authorities ("LFAs") are fully supportive of Cox's competitive entry into local telephony, a number of others have engaged in unwarranted attempts to micromanage Cox's facility upgrades and expansion into new lines of business. These problems typically fall into three categories: (1) the LFA imposes arbitrary or discriminatory restrictions on Cox's placement in the rights-of-way of back-up power supplies necessary to the provision of lifeline local phone service; (2) the LFA imposes redundant franchise obligations, inflated telecommunications franchise fees and/or adopts discriminatory regulatory provisions; or (3) the LFA attempts to prevent Cox from making its facilities available to CLECs.

While Cox welcomes the opportunity to describe its experiences with local governments in the rights-of-way area, it urges the Commission to do more than simply collect information. To ensure that local overreaching does not delay or prevent facilities-based telecommunications competition from developing — and to spare CLECs the expense and delay inherent in repetitive and costly rights-of-way litigation — the Commission should issue a policy statement that expressly precludes local authorities from impeding the deployment of competitive telecommunications facilities under the guise of rights-of-way regulation.

This policy statement should affirm five basic principles:

(1) local governments may not impose telecommunications regulation unrelated to rights-of-way management except where expressly authorized by state law, and may exercise their rights-of-way management authority only to the extent that a communications service provider physically impacts the public rights-of-way;

(2) local governments may collect rights-of-way usage fees solely related to the actual incremental costs incurred in managing the public rights-of-way for telecommunications services;

(3) local governments may not impose more burdensome requirements on new entrants using public rights-of-way than on incumbent telecommunications providers;

(4) local governments may not require communications service providers to obtain redundant authorizations to construct facilities in the public rights-of-way; and

(5) local governments may not unreasonably delay the issuance of construction permits to facilities-based service providers using the public rights-of-way.

These principles are built upon the Commission's earlier pronouncements, as well as the work of several federal courts that have themselves built upon the Commission's lead in cases such as *Troy* and *Classic*. Restating and clarifying these basic principles will benefit localities, their residents and competitive telecommunications providers by preventing disputes before they devolve into costly and divisive litigation. Consistent with the basic principles listed above, the Commission should also clarify that federal policy prohibits localities from imposing arbitrary

limitations on a cable operator's ability to install the power-supply technology needed to build reliable telecommunications networks.

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To: The Commission

COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its comments in response to the *Public Rights-of-Way Inquiry* in the above-referenced proceeding.[1] Cox offers

[1] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services, Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the*

continued...

these comments to help the Commission compile a record about the complex rights-of-way issues that multi-service providers such as Cox face when rolling out an array of discrete voice, video and data services over the same physical plant. Cox urges the Commission to take this opportunity to reaffirm that federal policy has as its preeminent goal the deployment of long term, sustainable facilities-based competition in the communications industry. Local public rights-of-way management authority must be exercised consistent with this overriding federal policy goal, and must not unreasonably impede the ability of service providers to build their networks and offer services to all Americans.

I. INTRODUCTION AND BACKGROUND

Cox, one of the country's largest cable operators, provides video programming services to roughly 5 million customers across the country. Most Cox customers are served by large, urban, highly clustered and technologically sophisticated cable systems.[2] Over the past four years, Cox has invested roughly $4 billion to upgrade its cable networks to support new, advanced services including voice, digital video and high-speed data and Internet services. As of

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Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking, CC Docket No. 96-98, WT Docket No. 99-217, CC Docket No. 96-98, FCC 99-141, 64 Fed. Reg. 41883, 41884, 41887 (rel., July 7, 1999) ("*Public Rights-of-Way Inquiry*" or "*PROW Inquiry*").

[2] Cox's customers are located in some of the highest-growth areas of the country, including Orange County and San Diego, California, Phoenix, Arizona, Las Vegas, Nevada, and Hampton Roads, Virginia.

June, 1999, Cox provided local telephone service to more than 59,000 residential customers with more than 92,000 lines, making it far and away the leading provider of cable telephony services in the nation. Cox's contemporaneous deployment of data and digital video services has been equally successful: as of June 30, 1999, Cox served more than 112,000 high-speed cable data customers and more than 144,000 digital video customers. Cox will continue to launch these new services aggressively throughout its clustered cable systems over the next few years.

Cox has long advocated before the Commission that new entrants who deploy their own facilities will best promote telecommunications competition. In its *Public Rights-of-Way Inquiry*, the Commission agrees with this assessment. "[O]nly facilities-based competitors can break down the incumbent LECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings. Moreover, only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing."[3]

Cox is a facilities-based telecommunications provider. Because it operates its own network and manages its own databases, it is far less dependent on incumbent telephone company resources than other competitive local exchange carriers ("CLECs"). Cox accordingly has been able to avoid some of the delays experienced by non-facilities-based CLECs that attempt to secure access to, and interconnection with, ILEC facilities.[4]

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[3] *Public Rights-of-Way Inquiry* at ¶ 4.

[4] Cox provides telecommunications services to its customers through a state-certificated telecommunications subsidiary in each of its markets.

Cox, however, has faced obstacles that non-facilities-based CLECs do not precisely because it owns the physical network over which it provides advanced services. Specifically, Cox has encountered stumbling blocks that a number of local franchising authorities ("LFAs") have erected in an unwarranted attempt to micromanage Cox's expansion into new lines of business. To be sure, many LFAs have enthusiastically embraced Cox's efforts to bring advanced services to their constituents. These LFAs have adopted reasonable and expeditious procedures for overseeing the upgrades of Cox's systems that are needed to support these services. Other local governments, however, have proved far less cooperative and have followed franchising procedures that unnecessarily increase Cox's costs and slow construction of upgraded facilities. Whether intentionally or not, these LFAs have significantly delayed Cox's roll-out of telecommunications and other services in several of its key clusters.

Cox welcomes the opportunity to describe its experiences with some local governments in the rights-of-way area. However, it urges the Commission to do more than simply collect information. To ensure that local overreaching does not delay or prevent facilities-based telecommunications competition from developing — and to spare CLECs the expense and delay inherent in repetitive and costly rights-of-way litigation — the Commission should issue a policy statement that expressly precludes local authorities from impeding the deployment of competitive telecommunications facilities under the guise of rights-of-way regulation. As discussed further below, this policy statement should affirm five basic principles:

(1) local governments may not impose telecommunications regulation unrelated to rights-of-way management except where expressly authorized by state law, and may exercise their rights-of-way management authority only to the extent that a telecommunications service provider physically impacts the public rights-of-way;

(2) local governments may collect rights-of-way usage fees solely related to the actual incremental costs incurred in managing the public rights-of-way for the provision of telecommunications services;

(3) local governments may not impose more burdensome requirements on new entrants using public rights-of-way than on incumbent telecommunications providers;

(4) local governments may not require communications service providers to obtain redundant authorizations to construct facilities in the public rights-of-way; and

(5) local governments may not unreasonably delay the issuance of construction permits to facilities-based service providers using the public rights-of-way.

Restating and clarifying these basic principles will benefit localities, their residents and competitive telecommunications providers by preventing disputes before they devolve into costly and divisive litigation. Consistent with the basic principles listed above, the Commission should also clarify that federal policy prohibits arbitrary, unreasonable or discriminatory limitations on a cable operator's ability to install in public rights-of-way the power-supply technology needed to deploy reliable, emergency-resistant telecommunications networks.

II. COX'S UPGRADING OF ITS CABLE FACILITIES TO PROVIDE ADVANCED SERVICES HAS BEEN UNREASONABLY DELAYED OR BURDENED BY SEVERAL LOCAL JURISDICTIONS

In its *Public Right-of-Way Inquiry*, the Commission notes that federal and state courts have "consistently recognize[d]" that local rules seeking to impose requirements on telecommunications carriers beyond those necessary for rights-of-way management "are inimical to competition and are not consistent with section 253" of the Telecommunications Act of 1996

("1996 Act").[5] The Commission then expresses its own concern about "requirements imposed on carriers that use the public rights-of-way that are unrelated to their rights-of-way usage."[6] This concern echoes earlier Commission statements "that local regulation should not reach[] beyond traditional rights-of-way matters and seek[] to impose a redundant 'third tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public."[7]

Many of the LFAs overseeing the upgrade of Cox's cable systems and its launch of telecommunications services have readily accepted that their role properly is limited to actions directly related to Cox's use of public rights-of-way. These LFAs have actively encouraged Cox to introduce telecommunications and other advanced services in their communities and have followed appropriate and reasonable procedures. At the same time, other LFAs continue to ignore the warnings from the courts and the Commission that their ability to regulate in the

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[5] *Id.* at ¶75 (*citing TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441 (1997) ("*Troy Preemption Decision*"), *partial recon. denied,* Order on Reconsideration, 13 FCC Rcd 16400 (1998) ("*Troy Reconsideration Order*"); *see also, e.g.*, *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13104 (1996) ("*Classic*") (*citing* 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)), *petition for emergency relief, sanction and investigation denied,* 12 FCC Rcd 16577 (1997); *Bell Atlantic-Maryland v. Prince George's County*, __ F. Supp.2d __, 1999 WL 343646 at *9 (D.Md. May 24, 1999) ("*Prince George's County*")).

[6] *Public Rights-of-*Way *Inquiry* at ¶76.

[7] *Troy Preemption*, 12 FCC Rcd at 21441-42.

telecommunications arena is quite limited. In these communities, Cox has experienced significant problems upgrading cable plant and deploying telecommunications services.

Cox's problems typically fall into three categories: (1) the LFA imposes arbitrary or discriminatory restrictions on Cox's placement of back-up power supplies in the rights-of-way; (2) the LFA imposes redundant franchise obligations, inflated telecommunications franchise fees and/or adopts discriminatory regulatory provisions; or (3) the LFA attempts to prevent Cox from making its facilities available to CLECs. As a result, these localities have significantly delayed Cox's roll-out of competitive telecommunications services to business and residential customers.

A. Arbitrary Local Restrictions on the Placement of Back-Up Power Supply Facilities Have Prevented Cox From Rolling Out New and Competitive Services

Unlike copper, electricity cannot be sent over fiber, which has been extended deep into Cox's hybrid fiber-coax ("HFC") cable networks. As a result, to provide emergency-resistant plant, Cox must install remote power supplies throughout its upgraded cable systems. Cox's market research makes clear that its existing and new services will fail to be competitive if the reliability of those services cannot be guaranteed. It accordingly has begun to install the necessary back-up power supply cabinets in public rights-of-way.

Cox has sought to place power supply cabinets in the public rights-of-way pursuant to the authorizations contained in its various cable franchises, which permit Cox to use the public rights-of-way for the installation of cable system facilities. The power-supply pedestals are installed as part of the upgrading of Cox's cable facilities. The addition of back-up power not only ensures that Cox complies with its responsibilities under its franchise agreements to operate

reliable cable systems, but also ensures that advanced voice, video and data services will continue to operate in the event of an emergency power outage. This capability is particularly important for Cox's local telephone customers, who must be able to make 911 and other important calls even when their electricity fails.

Cox's remote power supply facilities use gas generators that can provide immediate and unlimited stand-by back-up capacity in the event the supply of commercial power is interrupted. Where access to an existing natural gas line is available, Cox runs an extension line to its power supply units. In other cases, Cox uses propane canisters. In each case, Cox takes extra precautions to ensure safe operation of these units, including installing switches to shut the gas line in the event of an impact and concrete posts to protect the canister units. Where possible, Cox locates the gas units in less travelled areas.

Recognizing that the power supply units may raise aesthetic issues, Cox makes every effort to work with local communities to minimize the visual impact and to screen units where possible. Nonetheless, it has encountered considerable resistance from local government officials to the placement of its power supply cabinets in public rights-of-way. In some cases, LFAs have adopted arbitrary height and size limitations on the cabinets that effectively prevent Cox from expeditiously and economically upgrading its system. One community, for example, has arbitrarily imposed a height limitation that is more than one foot shorter than the smallest,

state-of-the-art power-supply cabinets available on the market. This height restriction effectively bars Cox from upgrading its existing facilities.[8]

In other communities, LFAs have contested Cox's proposed location of power supplies for unsupported reasons, and have delayed or refused entirely to issue the necessary construction permits. For example, one LFA objected to Cox's proposed plan for placement of power supply facilities on the basis of alleged safety and aesthetic concerns. The locality then proposed alternative siting for the facilities that failed to take into account Cox's system architecture or its service-reliability needs. Another locality simply told Cox to use a different brand of power supply unit than the brand that Cox had selected, and forced Cox to agree to a special permitting procedure for power supplies to avoid further delays. In yet another locality, Cox has struggled for more than six months to upgrade its system with new power supply units in the face of citizen protests over the aesthetics of the units. Cox has scaled back its original deployment plans in a good-faith effort to address local concerns, but it cannot currently proceed with any installations because the matter remains pending before local planning officials. Another locality in which Cox sought to install its gas-powered power supply units raised unspecified "safety" concerns, and simply barred the use of those units without any supporting evidence that demonstrated that the system was, in fact, unsafe. Cox was forced to re-engineer its system to use other, less

[8] *See* Linda Haugsted, *Power-Box Backlash Slows Cox Rollouts*, Multichannel News 14 (Aug. 23, 1999) (describing the problems and lengthy delay that Cox has faced in deploying backup power-supply units and noting some of the local ordinances and regulatory concerns about the size and placement of the power-supply units).

reliable power supplies. This forced re-engineering added unnecessary costs and delays to Cox's system upgrade.

Many of these situations are all the more frustrating because local authorities do not apply the same rules to other utilities that place power-supply cabinets in the public rights-of-way. All too often, Cox discovers that other utility providers — electric and telephone — have been allowed to install pedestals of comparable dimensions in the same or similar locations. Such discriminatory behavior only makes it more difficult for Cox to guarantee the reliability of its services and launch lifeline basic telephone service in competition with the incumbent LECs.

Delay in securing permission from local authorities to upgrade its systems and provide greater service reliability imposes heavy costs upon Cox. Costs are greatest in those cases where either the LFA has set a deadline for upgrades, or Cox's contractual commitments with local telephone customers require it to begin service by a date specific. In one case, Cox not only suffered millions of dollars in lost revenue, but also lost contractors who moved on rather than wait idly and indefinitely for local approval to proceed. In these circumstances, an operator has few, if any, options for legal redress through the court system, because for a new entrant, time to market is of the essence. In short, unreasonable processing delays impose significant costs upon facilities-based CLECs which must be eliminated if facilities-based competition for telecommunications services is to flourish.

B. Overreaching Local Telecommunications Fees and Discriminatory Regulatory Provisions Have Delayed Cox's Roll-Out of Competitive Local Telecommunications Services to Both Businesses and to Residences

In one major U.S. city, Cox is faced with a comprehensive local telecommunications ordinance that imposes a variety of openly discriminatory provisions on new entrants. The ordinance, which predates the passage of the Telecommunications Act of 1996, contains several express and implicit preferences for the incumbent LEC. For example, the ordinance levies a 5% right-of-way fee on CLECs, but the ILEC is required to pay only a 3% fee. Incredibly, the higher, CLEC-only fee applies to *all* of the CLECs' gross telecommunications revenues, including revenues earned from the provision of local, long-distance and enhanced services revenues, but the lower, ILEC fee applies to only those revenues that the ILEC earns from the provision of recurring local services. The local ordinance also requires CLECs to install six dark fibers for the City's benefit and permits the municipality to have free use of conduit. The local ordinance does not impose these additional burdens on the ILEC.

For more than two years, Cox has negotiated with this municipality over the most onerous provisions of its ordinance. Cox has cited in detail the Commission's various exhortations to state and local governments to avoid enacting any regulations "that, either explicitly or in practical effect, favor incumbent LECs over competing carriers."[9] Cox has explained to the municipal officials that, under Section 253(c) of the 1996 Act, localities may only impose rights-of-way compensation requirements "on a competitively neutral and

[9] *See, e.g., Public Rights-of-Way Inquiry* at ¶ 75.

nondiscriminatory basis."[10] Cox also has recounted the federal court decisions that have held that Section 253(c) limits local rights-of-way payments by telecommunications service providers to only those fees necessary to recoup the costs of "managing" the provider's actual physical use of the public rights-of-way.

Despite more than two years of negotiations, however, the municipal officials continue to disagree with Cox over the proper scope of their authority under the 1996 Act. The municipality has all but invited Cox to file suit to obtain access to the local market. Cox's principled opposition to this openly discriminatory and anti-competitive ordinance has come at a price. In the absence of a single, clear, pro-competitive pronouncement from the Commission concerning Section 253, Cox will be forced to continue to spend considerable time, money and talent to convince this and other local governments that their authority must necessarily be narrow to speed the roll-out of new services to consumers and to promote the Telecommunications Act's goal of a creating a competitive telecommunications marketplace.

C. Some Local Governments Withhold or Delay Construction Authority When Cox Makes its Facilities Available to CLECs

Some localities have halted Cox's efforts to make its cable system available to CLECs for their use in providing telecommunications services. Cities have withheld or delayed permits for system construction where Cox sought to lease dark fiber to other carriers. Localities justify the delay by claiming that Cox must apply for and receive separate authority from the LFA before Cox can make its facilities available to other CLECs. These localities argue that a cable

[10] *See* 47 U.S.C. § 253(c).

franchisee can only provide rudimentary cable service unless separate and additional authority is obtained from the LFA to provide other services — even though the cable operator is not itself providing telecommunications service in the locality and the CLEC in question has obtained its own certificate to provide telecommunications from the state public service commission. Although Cox believes that it is not required to obtain additional local authorizations before it leases capacity to certified CLECs, it has been forced to stall system upgrades while it negotiates with LFAs over this issue. The attendant construction delays have harmed both Cox and its contractual partners in meeting their obligations to serve customers.

Because costly and lengthy litigation constitutes Cox's only recourse to enforce its rights under federal and state law, Cox unfortunately has had no choice but to agree to the demands of some LFAs in order to obtain the necessary permits to enter the market for telecommunications services. Until the FCC affirms that the LFAs' ability to regulate is extremely limited, LFAs will continue to use the permit process to extract anti-competitive concessions from Cox and other new entrants.

III. THE COMMISSION SHOULD ADOPT A PRO-COMPETITIVE, COMPREHENSIVE APPROACH TO LOCAL RIGHTS-OF-WAY MANAGEMENT AUTHORITY

In the three years since enactment of the 1996 Act, the Commission has developed several important policy precepts under Section 253 in proceedings involving specific challenges to local franchising authority actions. Cox urges the Commission to take this opportunity to establish a comprehensive approach to the proper scope of local rights-of-way management authority under the 1996 Act. This comprehensive policy statement would build upon the