

February 22, 2002

**VIA ELECTRONIC FILING AND U.S. MAIL**

Marjorie Reed Greene  
Associate Bureau Chief  
Cable Services Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re:    **City Signal Communications, Inc.; CS Docket No. 00-253**

Dear Ms. Greene:

I am writing on behalf of the City of Cleveland Heights, Ohio (“City”) to respond to the update letter provided to you by the attorneys for City Signal Communications, Inc. (“City Signal”) on February 14, 2002 (hereinafter the “Update Letter”). I have substantial concerns about some of the characterizations made in the letter, and I also believe that wholly new assertions made in the Update Letter need to be addressed.

**Status of Negotiations**

First of all, and to be as succinct as possible, the negotiations between the City and City Signal were successful, not unsuccessful. An agreement in principle between the parties was reached in early August, 2001, and a draft contract authorizing City Signal’s use of the City’s right-of-way (hereinafter the “Proposed Agreement,” copy attached) was forwarded to City Signal at its request on August 20, 2001. Thereafter, City Signal made its own determination, apparently based on business factors, not to proceed with the project. This much is reflected in my letter to City Signal’s counsel dated August 30, 2001 (copy attached), which was prepared and sent after City Signal verbally notified me of its decision not to proceed with the project.

The Update Letter provided by City Signal unfairly characterizes the transaction between the parties as a series of “demands.” (Update Letter, p.3) The City’s “demands” were nothing more than an attempt to *partially* implement the City’s interim policy with respect to use of its public right-of-way by competitive non-utility telecommunications providers, a policy which has been in effect and successfully applied since passage of the Telecommunications Act of 1996 (the “Act”). At the time the City was approached by City

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Signal, the City had not yet adopted a permanent right-of-way management policy. City Signal was given the opportunity to either negotiate an agreement under the interim policy, or wait for adoption of the permanent policy. City Signal chose to negotiate with the City under the interim policy. In that negotiation, the City waived substantial portions of its interim policy in reaching the agreement in principle with City Signal, reflected in the Proposed Agreement.

The City's interim policy requires that the facilities of competitive non-utility telecommunications providers be undergrounded in commercial districts of the City. If new underground construction is required, underground conduit facilities must be overbuilt at the provider's cost and dedicated to the City. Overbuilt conduits may be leased by the City to other providers, but most of the proceeds of such leases must be paid to the first provider in compensation for building the overbuilt portion of the conduit system. For all underground construction, there is no limit on the number of conduits or fiber optic cables which can be installed, or on the resale of services or dark fiber. These opportunities are limited only by the capacity of the infrastructure installed, which is determined by the provider itself.

The City has five commercial districts, three of which ( "Cedar," "Mayfield" and "Lee") were impacted by City Signal's project. In the Mayfield district, the City owned its own vacant conduit and offered it for use by City Signal *completely free of charge*. In the Cedar district, the City agreed to *waive the undergrounding policy in its entirety*, and permit overhead construction. In the Lee district, the policy was applied in order to coordinate with a major street construction project. Had the Agreement been implemented, the City would have constructed two 4" conduits in the Lee District. City Signal would have been required to reimburse the City \$360,950 for the cost of construction. City Signal would have been eligible to use 50% of the capacity of one of the conduits without charge, and would have been eligible for substantial reimbursement of its payment as stated above. All of these provisions were part of the agreement in principle which was reduced to writing in the August 20<sup>th</sup> Proposed Agreement.

In light of the Update Letter's reliance on the recent U.S. Court of Appeals decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9<sup>th</sup> Cir. 2001), it should be helpful to point out what was *not* "demanded" by the City in this negotiation:

- 1) The City did not require City Signal to submit any written application or any application fee (even though the City has incurred thousands of dollars in out-of-pocket expenses associated with the City Signal transaction).
- 2) The Proposed Agreement does not require that City Signal pay a franchise fee or any other non-tax fee for the right to occupy the public right-of-way.
- 3) The City did not require City Signal to identify, describe or list the types of services it will offer or the customers it will serve, and the Proposed Agreement contains virtually no reporting requirements.

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- 4) The Proposed Agreement imposes no duty to serve Cleveland Heights residents or businesses on a nondiscriminatory or universal access basis. The Proposed Agreement contains no duty to serve customers at all.
- 5) The Proposed Agreement does not require that City Signal offer any free services to the City or to any other entity. Indeed, as part of the Proposed Agreement, the City has offered free conduit space to City Signal.
- 6) The Proposed Agreement does not purport to regulate rates or terms of service, and does not require that City Signal offer the best available rates or “most favored community” status to the City or any other entity.
- 7) The Proposed Agreement is freely transferrable without review or approval by the City.
- 8) The Proposed Agreement is not subject to revocation or self-help remedies.
- 9) The City did not demand to conduct a review of City Signal’s finances or fitness to provide services as a condition of entering into the Proposed Agreement. The Proposed Agreement itself contains no conditions relative to the legal, technical, or financial qualifications of City Signal or any successor.
- 10) Finally, the City required no formal franchise. The City’s 3-page right-of-way use agreement is modest by any standard.

While the Proposed Agreement does require City Signal to build extra conduit, this type of requirement is indisputably related to management of the public right-of-way, and is clearly designed to further the City’s legitimate interest in minimizing future street excavations and protecting the public’s investment in infrastructure. It is also distinguishable from the requirement for “free or excess capacity” discussed in *Auburn*. *Id.* at 1179. Although some of the ordinances cavalierly dismissed by the *Auburn* court did require extra conduit, the Proposed Agreement in this case specifies that the extra conduit capacity cannot be used by any third party without compensation to City Signal. City Signal is not being required to provide free services or subsidize its competition. It is being required to use the public right-of-way in a responsible manner. Inasmuch as it is receiving this privilege without any fee for use of the right-of-way, the City’s posture in this case appears reasonably calculated to arrive at a “win-win” solution.

More importantly, the court in *Auburn* was construing overall franchise regulatory structures that had been adopted by the cities involved in that case. No single ordinance provision out of the list of provisions found questionable by the *Auburn* court amounted, by itself, to a violation of 47 USC §253(a). The court stated: “Taken together, these requirements ‘have the effect of prohibiting’ Qwest and other companies from providing telecommunications services, ...” *Id.* at 1176. (internal quotations in original). The court in fact amended its earlier opinion (reported at 247 F.3d 966) to emphasize that the franchise

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requirements were found to “*in combination*, have the effect of prohibiting the provision of telecommunications services.” *Id.* at 1165. (emphasis added to reflect amended wording). In other words, Cleveland Heights’ conduit overbuild requirement cannot be considered in a vacuum. It must be considered in light of the City’s waiver of its undergrounding requirement in other locations, its offer of free use of existing conduit, and its forbearance on right-of-way use fees and a host of other issues.

The *Auburn* court recognized that cities must be allowed to perform the vital tasks necessary to preserve the physical integrity of streets and highways, and to manage utilities that use the public right-of-way. *Id.* at 1177. The court also recognized that the City was intended by Congress to have the authority to recover costs associated with multiple excavations. *Id.* Overbuilding conduit to avoid multiple excavations obviates the need to charge City Signal for these costs and goes to the essence of the City’s vital and legitimate public right-of-way management authority. It is inconceivable that a regulation that eliminates damage to streets and the need to assess costs therefor would not be preferable to one that allows, and requires, both. This, perhaps more than any other aspect of the *Auburn* decision, demonstrates the court’s profound misunderstanding of the role of local government.

Section 253 of the Act authorizes the Federal Communications Commission (“FCC”) to preempt a local regulation that prohibits, or has the effect of prohibiting the ability of any entity to provide telecommunications service. The fact that the City prohibits access to its right-of-way except under certain conditions does not by that fact make the conditions preemptable, even when the entity subject to the conditions is a telecommunications provider. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6<sup>th</sup> Cir. 2000). The key inquiry is whether the conditions attempt to regulate telecommunications providers *as telecommunications providers*, or are legitimate regulations concerned with management of the public right-of-way. *Auburn, supra* at 1178.

Telecommunications providers are not excused from compliance with legitimate right-of-way regulations simply because it costs money to comply. Among other factors, Congress specifically contemplated that local governments would recover value for the use of right-of-way, recover the cost of multiple excavations, and require undergrounding. 47 USC §253(c); *Auburn, supra* at 1177. All of these things cost money. Thus, Congress did not intend that the cost of complying with legitimate right-of-way regulations would *ipso facto* transform right-of-way regulations into preemptable telecommunications regulations, and City Signal’s abandonment of the Cleveland Heights agreement is not by itself evidence that the City’s regulations rise to the level of a “prohibition” under 47 U.S.C. §253(a). But this is precisely what City Signal argues in the Update Letter. City Signal claims that the City’s policies are “unreasonable and economically prohibitive” and “economically infeasible and cost prohibitive for a new entrant such as City Signal.” (Update Letter, p.3.). Without any basis in the record, City Signal argues that because *it alone* finds the City’s policies to be economically infeasible, these policies should be preempted. Under this theory, anything from a building permit to a driver’s license could be preempted if a telecommunications provider decides, in its sole discretion, that the costs of regulation are too high. By basing its claim solely upon its own opinion of the costs, City Signal ignores the key inquiry and abandons any claim that the City’s regulation is of one character or another.

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Cities are generally understood to be best positioned to determine the suitability of local regulations. This is why the concept of “home rule” is enshrined in most state constitutions. Different cities with different needs enact different regulations with, yes, different costs. Some cities are “high cost” and some are “low cost.” Every day, businesses deal with the costs of doing business in a particular location. Sometimes the costs of local regulations enter into a business’s selection from various alternatives. City Signal appears to have made such a selection. This is a normal fact of economic life, even in the case of City Signal. If City Signal has truly made its decision, then this case is moot and should be dismissed. If not, we believe it would be inappropriate and dangerous for the FCC to allow itself to be importuned simply to improve the alternatives available to City Signal.

### **New Allegations Contained in the Update Letter**

Finally, City Signal claims it “has been foreclosed from providing its telecommunications services to the residents of Cleveland Heights...” (Update letter, p. 3) This claim is entirely new, inasmuch as it suggests that City Signal *ever had* an intent to provide services to the residents of Cleveland Heights. Rather, this not-so-subtle ploy reveals that City Signal lacks standing to maintain this action. City Signal has never intended to provide telecommunications services to anyone, certainly not to the residents of Cleveland Heights. Indeed, by its own admission, City Signal is not a telecommunications provider at all. City Signal’s March 8, 2000 letter to the City states:

City Signal Communications specializes in the installation and management of fiber-optic networks for the purpose of providing bandwidth capacity to competitive local exchange carriers (C-LEC), long haul telecommunications companies, businesses and municipalities throughout your community. Rather than providing specific telecommunications services, we construct the infrastructure that can be shared and used by future and competing telecommunications companies that are providing services to residential, business and institutional customers.

To have the status of a telecommunications carrier, City Signal must provide services “directly to the public, or to such classes of users as to be effectively available directly to the public,....” 47 USC §153(51). Based on its own representations, City Signal is what is known in the industry as a “carrier’s carrier,” i.e., a dark fiber provider or, at best, a bandwidth provider that provides no services to any end users. Unless City Signal is now radically changing its proposal to the City, City Signal is merely requesting to use the City’s right-of-way for its own private business purposes. City Signal is not a telecommunications carrier within the meaning of the Act. City Signal has no intent to provide, and is not attempting to provide telecommunications services within the meaning of the Act. As such, City Signal lacks proper standing to maintain this preemption action and should not be permitted to abusively exploit the FCC’s preemption authority.

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The City's conditions for use of the public right-of-way are plainly within its authority to manage the public right-of-way. The City has not attempted to regulate telecommunications providers or to prevent any telecommunications provider from providing service. Even if the City had done so, City Signal is not a telecommunications provider and lacks standing to maintain this action. Nevertheless, the City successfully negotiated in good faith with City Signal and came to an agreement. City Signal has made its own decision not to proceed with the project. City Signal's decision may or may not be because of the costs of the City's policies, but assuming it is, the City's lawful policies are not thereby rendered unlawful. The petition should be denied.

Sincerely,

/s/ John H. Gibbon

John H. Gibbon  
Director of Law  
City of Cleveland Heights

Enclosures

cc: Jeffrey M. Karp, Esq., Swidler Berlin Shereff Friedman, LLP  
Kathy L. Cooper, Esq., Swidler Berlin Shereff Friedman, LLP