BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
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Fiber Technologies Networks, L.L.C. Petition for Preemption Pursuant to Section 253	)	WC Docket No. 03-37
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COMMENTS OF TIME WARNER TELECOM

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Time Warner Telecom Corporation ("TWTC"), by its attorneys, hereby submits these comments in response to the Public Notice[1] in the above-referenced proceeding seeking comment on the petition for preemption of Fiber Technologies, L.L.C. ("Petition").

I. INTRODUCTION AND SUMMARY

The Petition filed by Fibertech Technologies Network, L.L.C. ("Fibertech") for preemption of the Borough of Blawnox Ordinance No. 529 ("Ordinance") offers the Commission an important opportunity to finally begin to address in earnest the critical issue of local rights-of-way management. Seven years of Commission caution in this area have left the industry and localities with a morass of inconsistent court precedents and a general uncertainty that has contributed to the reluctance of carriers to make significant investments in new and upgraded facilities. A decisive grant of the instant petition accompanied by the adoption of federal presumptions and rules as to the rights-of-way management permitted under Section 253

[1] *See Pleading Cycle Established for Comments on Fiber Technologies Networks, L.L.C. Petition for Preemption Pursuant to Section 253*, Public Notice, DA 03-376 (rel. Feb. 13, 2003).

are necessary steps toward the establishment of a clear and consistent national policy for rights-of-way management and the establishment of the preconditions necessary for significant facilities investment going-forward.

The Commission has made the elimination of barriers to such investment, especially to investment in broadband facilities, its most important goal in the area of common carrier regulation. The Commission has also recognized that local rights-of-way management policies that result in discriminatory treatment of competitors, the imposition of fees that exceed the localities' costs of managing the rights-of-way and other unreasonable costs constitute a major barrier to investment. In at least two past proceedings the Commission has accumulated a voluminous record documenting real world examples of these problems and the effects they have on carrier investments. Despite the Commission's stated hope that localities would, over time, voluntarily discontinue harmful rights-of-way management policies, this has not occurred. To be sure, many localities have established policies that comply with the spirit and even the letter of Section 253(c). But many have not. Indeed, Fibertech's petition describes local rights-of-way management practices that, although they affect a small portion of Fibertech's Pittsburgh network, are exactly the kinds that, applied broadly, chill investment incentives. Moreover, TWTC's experience demonstrates that many localities have adopted similarly harmful practices.

Notwithstanding the importance of rights-of-way management to the elimination of barriers to facilities investment, the Commission has approached this issue very cautiously. It has offered some general guidance as to the possible meaning of subsection 253(c). But those statements have had relatively little effect, because the Commission has avoided the threshold question of whether it has the jurisdiction to rule on controversies implicating subsection (c). This caution is striking, because there is little downside to the FCC asserting jurisdiction in this area. On the merits, the Commission likely would prevail if its jurisdiction were challenged, as the Second Circuit implicitly recognized in the *TCG New York v. City of White Plains* case. But even if the Commission were ultimately to lose on this issue, such a result would not make the *status quo* any worse. After all, the Commission has essentially operated up to this point as if it lacks jurisdiction. In the absence of any detailed guidance from the Commission, courts have addressed the meaning of subsection (c) on their own, and differences among the circuits have emerged on some of the most fundamental issues associated with rights-of-way management.

Moreover, the Commission's caution in this area is the all the more striking in light of the aggressive initiatives it has pursued elsewhere to spur investment in facilities. For example, its proposals to reclassify the transmission underlying ILEC broadband Internet access and its apparent decision to eliminate unbundling on a national basis for upgraded broadband loops are extremely risky as a matter of both law and policy. The elimination of barriers created by rights-of-way management is far less risky and may well be equally important to carrier investment decisions.

The Commission should therefore take the opportunity offered by the Fibertech Petition to assert jurisdiction over matters implicating subsection (c) and to immediately establish national presumptions and rules for rights-of-way management. The presumptions and rules should incorporate past precedent as to the meaning of subsection (a), which prohibits any state or local statute, regulation or legal requirement that "materially inhibits or limits the ability of a competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." The Commission should clarify that rules that allow a locality to prevent a carrier from providing service, that result in significant delay or that result in discriminatory treatment are all inconsistent with this standard.

In addition, the following specific presumptions and rules regarding the meaning of the subsection (c) safe harbor should be adopted:

- A presumption that any difference in the manner in which fees are imposed on carriers using rights-of-way is inconsistent with the "competitively neutral and nondiscriminating" requirements of subsection (c); moreover, only carriers' current contribution obligations should be presumed to be relevant to the inquiry, and past contributions made by incumbents (especially as part of the monopoly regulation applicable prior to 1996) should be deemed presumptively irrelevant;

- A presumption that, in order to comply with the "fair and reasonable compensation" requirement of subsection (c), any local compensation requirement imposed on "telecommunications providers" must reflect only the actual and direct costs incurred in managing the public rights-of-way and the amount of public rights-of-way actually used by the provider;

- A presumption that local rules that are not related to compensation paid to a locality and that are imposed only on the operations of new entrants and competitors (not on existing operations of incumbents) are inconsistent with the "competitively neutral and non-discriminatory" requirements of subsection (c); and

- A rule that any "third tier" of local regulation that does not relate to the management of rights-of-way is inconsistent with the requirement in subsection (c) that local rules be limited to localities need to "manage the public rights of way."

Applying these principles to the instant Petition, it is clear that it should be granted. The Blawnox Ordinance is inconsistent with subsection (a), because it gives the Borough the ability to prevent Fibertech from providing service (in fact, the Borough has threatened to remove Fibertech's facilities traversing the public rights-of-way if the carrier does not pay the disputed franchise fee). The Ordinance is also inconsistent with subsection (a) and the Commission's interpretation of that provision to require that competitors be able to "compete in a fair and balanced legal and regulatory environment," because it apparently applies to competitors but not Verizon.

Nor is the Ordinance consistent with subsection (c). As Fibertech explains, the Ordinance fails to meet the requirement that fees be imposed on a "competitively neutral and nondiscriminatory basis," because the franchise fees apparently only apply to competitors. The fees imposed by Blawnox also fail to meet the requirement that they be "fair and reasonable," because there is no evidence that the $2.50 per foot fee charged under the Ordinance is based on the Borough's actual and direct costs incurred in managing the public rights-of-way. In addition, the Ordinance and associated Certification Application impose reporting obligations that are unrelated to the locality's responsibility to "manage public rights-of-way." For all of these reasons, therefore, the Petition should be granted.

II. THE ELIMINATION OF BARRIERS TO ENTRY CAUSED BY LOCAL RIGHTS-OF-WAY MANAGEMENT IS ESSENTIAL TO THE GROWTH OF FACILITIES-BASED COMPETITION

Over the past several years, the Commission has concluded that encouraging investment in facilities both by competitors and incumbents is its highest priority in the area of common carrier regulation. As the Commission explained with regard to competitive LEC investment, "[t]hrough its experience over the last five years in implementing the 1996 Act, the Commission has learned that only by encouraging competitive LECs to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local markets."[2] Similarly, the Commission has emphasized the importance of giving the ILECs strong investment incentives for the deployment of broadband service.[3]

The Commission has recognized that eliminating entry barriers associated with access to rights-of-way is a critically important part of advancing the goal of spurring investment in facilities, including the need to deliver broadband. For example, in the Third Report to Congress on broadband deployment, the Commission observed that, "some service providers provided the Commission with specific examples of rights-of-way disputes and argued that costs and other requirements imposed on carriers for use of the public rights-of-way are burdensome to the point where they are a barrier to deployment."[4] The Commission stated that it "share[d] commenters' concern about the difficulty some companies have faced in securing access to the rights-of-way necessary to deploy advanced telecommunications infrastructure in a timely manner." *See id.* at ¶ 166. Moreover, in response to the Notice of Inquiry concerning access to rights-of-way in the

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2 *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket No. 98-147, 16 FCC Rcd 15435, ¶ 4 (2001).

3 *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, 17 FCC Rcd 3019, ¶¶ 3-6 (2002).

4 *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Third Report, CC Docket No. 98-146, 17 FCC Rcd 2844, ¶ 167 (2002) ("*Broadband Report*").

Competitive Networks proceeding, the Commission again received extensive filings documenting these problems.[5]

Responding to this input from carriers, individual Commissioners have specifically cited access to rights-of-way as a major roadblock to investment in facilities. For example, Chairman Powell has recognized that "local restrictions [on, among other things, access to rights-of-way] are some of the most vexing problems in bringing new services to consumers."[6] Similarly, Commissioner Martin has observed that, "[n]ew entrants to the broadband market face federal, state, and local rights-of-way management fees and franchise fees, which are sometimes intended to generate revenue rather than recover legitimate costs." *See Broadband Report* at 2960 (Separate Statement of Commissioner Martin). Commissioner Martin correctly observed that "these financial burdens discourage deployment." *See id.*

The problems created by rights-of-management are evident in Fibertech's petition. Fibertech is precisely the kind of facilities-based competitor whose entry advances the goals of this Commission. Fibertech explains that it deploys "broadband, fiber optic, local networks in

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5 *See e.g.* Comments of AT&T Corp., *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98 at 8-14 (filed October 12, 1999) ("Competitive Networks NOI") (discussing barriers to entry created by cities engaging in substantive telecommunications regulation); Comments of Level 3, WT Docket No. 99-217, CC Docket No. 96-98 ("Competitive Networks NOI") at 4-8 (filed October 12, 1999) (discussing specific examples of unreasonable requirements and fees that make it difficult and/or impossible to gain access to rights-of-ways); Comments of McLeod USA, WT Docket No. 99-217, CC Docket No. 96-98 ("Competitive Networks NOI") at 2-3 (filed October 12, 1999) (discussing specific examples of unreasonable requirements and fees that make it difficult and/or impossible to gain access to rights-of-ways).

6 *See* Remarks of Chairman Michael Powell at the National Summit on Broadband Deployment, Washington, D.C., at 11, October 25, 2001 (As prepared for delivery).

under-served markets" in Indiana, Connecticut, Massachusetts, New York, Ohio, Pennsylvania, and Rhode Island. Petition at 1. The Fibertech network in Pittsburgh (at issue in this proceeding) will apparently run through the downtown central business district as well as numerous nearby towns in which there are probably few or no non-ILEC sources of transport. *Id*. at 2. The construction of such facilities will eventually let "real and long-lasting competition take root in the local market." It will also eventually permit the Commission to diminish or eliminate the extensive duties to deal (e.g., unbundling) imposed on the ILECs under the 1996 Act.

Yet as Fibertech explains, the Borough of Blawnox has attempted to impose access policies under the Ordinance that, if applied more broadly by local governments, would likely make such investment difficult or impossible to sustain. Specifically, Fibertech asserts that Blawnox has sought to impose an annual fee of $2.50 per foot for obtaining access to State rights-of-way to run aerial cable through the Borough of Blawnox. *Id*. at 3-4. The absolute amount of this charge is small, because Fibertech has only installed approximately 2/3 of a mile of aerial cable through the county. *See id.* at 2. Nevertheless, Fibertech asserts that the recurring charge "approaches one hundred percent (100%) of the cost of constructing aerial facilities on pre-existing poles through the borough [which is apparently the manner in which Fibertech has used the state rights-of-way in this case]." *Id.* at 6-7. As Fibertech point out, if applied more broadly, it is not hard to see how fees of this magnitude would stifle facilities-based deployment. *See id.* at 11. Even more worrisome is Fibertech's assertion that the Blawnox fees do not apply to Verizon. *See id.* at 12-13. Discriminatory treatment of this sort diminishes or prevents investment by competitors and reduces the need for incumbents to respond with their own investments in new or upgraded facilities.

Moreover, problems such as these face most facilities-based competitors, as TWTC's own experience demonstrates. Like Fibertech, TWTC deploys its own network facilities, including in many cases its own loop facilities. TWTC's network now serves 44 markets across the country, and in all of those areas TWTC must obtain access to public rights-of-way. TWTC has been forced to comply with many local franchise requirements that diminish its incentive and ability to upgrade and expand its network. Most harmful are regulatory regimes under which substantial costs are imposed on competitors but not on incumbents.

For example, TWTC provides service in Phoenix and Tucson, Arizona. Both of those cities (as described briefly below) impose substantial contribution obligations on carriers using the public rights-of-way. But the Arizona statute governing franchise fees states that any carrier that provided service in the state as of November 1, 1997 pursuant to an authorization granted to it or its lawful predecessors prior to the effective date of the Arizona Constitution shall continue to provide service pursuant to the terms and conditions established under local franchises, licenses or permits effective on November 1, 1997. *See* Ariz. Rev. Stat. § 9-582.E,F. This means that Qwest, the only carrier that apparently meets these criteria, continues to provide service in Phoenix and Tucson pursuant to franchise, license and permit requirements established prior to the 1996 Act.[7] Those requirements do not include franchise fees, although Qwest is subject to some local tax obligations that also apply to TWTC. Thus, the problem is that TWTC must pay local franchise fees and make in-kind contributions to both Phoenix and Tucson in addition to the generally applicable taxes that both TWTC and Qwest pay (although TWTC can generally deduct its tax payments from its franchise payment obligations). While TWTC has not been able to quantify precisely the difference in costs imposed on TWTC and Qwest pursuant to these regimes, it seems likely that TWTC is required to make larger contributions (especially since the in-kind contributions apparently apply only to TWTC) than Qwest to both Phoenix and Tucson.

Such discriminatory treatment forces TWTC into a Hobson's choice: it must either absorb the extra costs and lower its profit margins or pass the extra costs through to customers and accept a reduced market share. Either way, TWTC's competitive position is harmed due to factors that bear no relation to whether it is more or less efficient than the incumbent. TWTC's ability and incentive to expand its facilities-based network is accordingly diminished. But the situation is in fact even worse than this as a matter of public policy, because such discriminatory application of franchise fees only penalizes competitors that deploy their own facilities in public rights-of-way. Competitors that rely on resale and UNE-P generally do not experience the

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[7] *See US West Communications, Inc. v. City of Tucson*, 11 P.3d 1054, 1057 (Ariz. Ct. App. 2000) ("US West Communications, Inc. ("US West") and its predecessors in interest have provided telecommunications service in the City of Tucson and throughout the state of Arizona since before statehood under legislative franchise. Other providers of telecommunications services in the City of Tucson must enter into franchise agreements with the City and pay agreed fees for the exercise of their franchise rights.").

effects of this discrimination. The effect is therefore to stand the Commission's public policy goal of encouraging facilities-based competition on its head.

But of course discrimination is not the only problem. TWTC operates in many jurisdictions in which it is currently forced to pay fees and make in-kind contributions that have no apparent basis in the costs local governments incur to manage the public rights-of-way. Examples of such requirements are as follows:

- In Phoenix, AZ, TWTC must pay the city an annual fee of $5,000 or 5% of its gross revenues from its Phoenix operations,[8] whichever is greater; it must provide the city with four optical fibers in its main backbone and it must furnish to the city connecting points at up to 40 locations to the four optical fibers provided to the city;
- In Tucson, AZ, TWTC must pay 5% of its total gross revenue associated with its Tucson operations; it must provide the city with an IRU for 6 dark fiber strands on every route in TWTC's network as of 12/6/2000 as well as certain other in-kind payments, and it must offer to the City the lowest rate offered to any similarly situated customer;
- In Atlanta, GA, TWTC must pay 3% of its gross revenues associated with its Atlanta operations;
- In Memphis, TN, TWTC must pay 5% of its gross revenues associated with its Memphis operations;
- In Albuquerque, NM, TWTC must pay 3% of its gross revenues associated with its Albuquerque operations, and it must make in-kind payments in the form of network capacity, conduit, equipment or other infrastructure or services identified by the city;
- In New York City, NY, TWTC must pay 5% of its gross revenues associated with its New York City operations

[8] For sake of simplicity, TWTC has referred in this list to percentage of gross revenue charges generally without describing the differences among the localities in the manner in which "gross revenues" are defined.

This list is purely illustrative, and it could be much longer, since many cities and counties force TWTC to pay fees and make in-kind contributions that are not based on the costs the locality incurs in managing the rights-of-way and that are (as explained below) inconsistent with Section 253. Even when they apply to all carriers, non-cost based fees have harmful effects on TWTC by either reducing profit margins where costs cannot be passed through to customers or by forcing price increases that can reduce demand and therefore reduce profitability and efficiency. Non-cost based fees therefore directly undermine the Commission's policy goal of encouraging facilities-based investment. In addition, TWTC is often required to comply with performance bond and letter of credit requirements that are not reasonably related to the risks to a locality associated with TWTC's access to rights-of-way.

There are also specific inefficiencies created by carrier obligations to make in-kind contributions to cities. For example, in Portland, Oregon, TWTC is required to (among other things) install duct capacity for the city every time it uses the public rights-of-way to install its own duct capacity, and it is required, upon a request by the city, to provide conduit and/or lit optical fiber connections to the city.[9] The City of Portland has subsequently used the conduit provided by carriers pursuant to this kind of franchise requirement to construct an extensive fiber network. The communications layer of that network is called the Integrated Regional Network Enterprise ("IRNE"). The IRNE network will reportedly serve the city itself as well as a wide

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[9] These obligations are imposed pursuant to the local franchise granted to GST Telecom Oregon, Inc. to which TWTC became a party after acquiring the assets of GST Telecom. The franchise can be found at www.cable.ci.portland.or.us/ufm/gstfran.htm. The in-kind contributions are set for in Section 9 of the franchise.

range of public entities, such as state universities, as well as county and city governments other than Portland.[10] As the Portland city official that oversees the IRNE project has explained, the logic behind the project was twofold. First, the network could be built with the cooperation of the city franchising authorities, thus giving IRNE a significant advantage over private carriers. This is because government franchising authorities "control the streets. For a telecommunications company, the hardest thing to do is get licenses and permits for the right-of-way. We have them." *See Jesuale Interview* at 3. Second, since the city has "been requiring any telecommunications carrier who wants to place conduit in our [Portland] streets for their network to build additional conduit for the city as a condition of receiving a franchise and permit," the city could deploy fiber "essentially for free." *See id.* at 2, 4. But the problem with Portland's approach (and in-kind contribution obligations more generally) is that such artificial cost advantages can give a local government the incentive to deploy networks that provide services in competition with TWTC and other carriers even if, absent the artificial advantages, such carriers can provide service more efficiently than the locality. Indeed the Portland official overseeing IRNE has admitted that, even with the artificial cost advantages created by the in-kind contributions, it is not clear that IRNE will deliver cost savings for the city. *See id.* at 4.

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10 *See* "Leveraging Its Assets for the 'Big Picture,' A Discussion With Nancy Jesuale, Director Communication & Networking Services Division ("ComNet") of the City of Portland," Newsletter of the ITS Cooperative Deployment Network (at p.6) available at www.nawgits.com/icdn/portland_net.html ("Jesuale Interview").

Finally, while these problems often fall disproportionately on competitors (where local policies are either facially or, more commonly, effectively discriminatory), they have critically important implications for incumbent LEC investment decisions as well. The ILECs have themselves explained to this Commission that their operations are materially harmed by the non-cost-based fees and in-kind payments foisted upon them by local governments.[11] For example, where state or federal rate regulation limits an ILEC's ability to pass through to customers the full amount of the costs it incurs as a result of rights-of-way management policies or where such increases are permissible but result in reduced consumer demand, the ILEC's profitability is impaired. This of course leaves less money for investment in broadband, and the Commission's policy goals further from realization.

III. THE COMMISSION HAS FAILED TO IMPLEMENT SECTION 253(c)

Despite the importance of rights-of-way management to the elimination of barriers to facilities investment, the Commission has approached this issue very cautiously. Its failure to promote a national approach rights-of-way management is inconsistent with the letter and spirit of Section 253 and the 1996 Act as well as sound policy.

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11 *See* Comments of BellSouth Corp., WT Docket No. 99-217, CC Docket No. 96-98 ("Competitive Networks NOI") at 3-4 (filed October 12, 1999) (asserting that discriminatory and unlawful ordinances materially affect the ability of BellSouth and other carriers to compete. BellSouth also provides a list of examples of unlawful provisions found in various local ordinances at Appendix A); Comments of SBC Communications Inc., WT Docket No. 99-217, CC Docket No. 96-98 ("Competitive Networks NOI") at 2-8 (filed October 12, 1999) (discussing discriminatory regulations and fees. SBC notes that ILECs and other facilities-based providers incur significant costs which are not being assessed on their competitors, and this results in higher and less competitive customer rates).

The purpose of the 1996 Act was to establish "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 by opening *all* markets to competition."[12] As the Commission has explained, "through this provision, Congress sought to ensure that its *national* competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states." *Texas Order* ¶ 4 (emphasis added). Congress understood that such "isolated actions" would likely chill competitive entry in the specific local areas affected and also nationally.

Indeed, the national implications are especially important to carriers such as TWTC that serve medium and large business customers. Such customers often demand that their carriers serve each one of their locations across a region or across the entire country. Entry barriers in one city can therefore pose a threat to competition in other cities. Subsection (c) of Section 253 was designed to address exactly this problem (among others), since it reflects "Congress' view that an array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition."[13] In fact,

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[12] S Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (emphasis added). *See also In the Matter of The Public Utility of Texas Petition for Declaratory Ruling an/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995,* Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 3 (1997), *aff'd City of Abilene v. FCC,* 164 F.3d 49 (D.C. Cir. 1999) ("*Texas Order*").

[13] *See TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e) and 253,* Memorandum Opinion and Order, 12 FCC Rcd 21396, ¶ 106 (1997) ("*Troy Order*").

"[s]uch a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies." *See id.*

In decisions by the Commission and the courts, a general understanding as to the structure of Section 253 has developed. The cases generally agree that Section 253(a) grants the Commission broad authority to preempt any state or local statute, regulation or legal requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[14] The courts have generally (though not uniformly) held that subsections (b) and (c) are safe harbors that preclude preemption of rules and regulations adopted by states and localities that would otherwise run afoul of subsection (a).[15] Thus, when state and local rules and regulations are reviewed for purposes of determining whether they are preempted under Section 253, the initial inquiry is whether they are prohibited by subsection (a). As the Commission has explained, subsection (a) prohibits any governmental action that (1) legally bars "an entity or class of entities from providing a particular service," *Troy Order* ¶ 97, or (2) that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment," *Id.* ¶ 98 (quoting *Huntington Park Order*, 12 FCC Rcd 14191, ¶ 31 (1997)). If it

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14 *See, e.g., Cablevision of Boston v. Public Improvement Commission of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) ("*Cablevision of Boston*"); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001), *cert. denied sub nom. City of Takoma v. Qwest Corp.*, 534 U.S. 1079 (2002) ("*City of Auburn*").

15 *See, e.g., New Jersey Payphone Ass'n. v. Town of West New York*, 299 F.3d 235, 240 (3rd Cir. 2002); *Cablevision of Boston*, 184 F.3d at 98.

is determined that a statute, regulation or legal requirement violates these requirements, the cases generally ask whether the governmental action should be allowed because it falls within either the safe harbor established by subsection (b) (which addresses state requirements designed to promote universal service, protect public safety and welfare, ensure continued quality of telecommunications services, and safeguard consumer rights) or subsection (c) (which addresses state and local management of rights-of-way).[16]

Unfortunately, while the Commission has taken helpful steps toward defining and enforcing the mandates of subsection (a) in general as well as subsection (b), it has avoided addressing the threshold question of whether it has the jurisdiction to rule on cases implicating subsection (c). To be sure, this question is complicated by the fact that subsection (d) requires that the Commission preempt governmental action that is inconsistent with subsections (a) and

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[16] In describing this interpretation of Section 253, TWTC does not mean to imply that it agrees with the view that subsection (c) is a savings clause only rather than an independent limitation on local rights-of-way management policies. On the contrary, while subsection (c) is phrased as a savings clause, there are important reasons why it should be understood as a limitation on local rights-of-way policies that applies regardless of whether those policies are inconsistent with subsection (a) and over which the Commission at least shares jurisdiction with federal courts. First, subsection (c) should be viewed as an independent limitation on localities because it applies to "telecommunications providers," while subsection (a) applies only to those that provide or seek to provide a "telecommunications service." Telecommunications services are a subset of telecommunications. *Compare* 47 U.S.C. § 153(46) *with* 47 U.S.C. § 153(43). It is hard to see how the provision that covers the broader category of activities can be a savings clause to the provision that covers a subset of those activities. Indeed, subsection (d) states that the Commission "shall" preempt a rule that "violates" subsection (b) which, like subsection (c), is phrased like a savings clause. Yet one cannot violate a savings clause, leading one to conclude the subsections phrased like savings clauses in Section 253 were in fact intended as independent limits on state and local regulation. Finally, Section 253 should be read to give the Commission jurisdiction to hear claims that a locality has violated subsection (c). While it is true that the mandatory preemption in subsection (d) does not address subsection (c), this does not mean that the Commission lacks the authority to choose to preempt violations of subsection (c). *See White Plains* at 75. This is especially so since, the Supreme Court has held that the Section 201(b) gives the Commission jurisdiction over all provisions of Title II, unless the provision explicitly states otherwise. *See AT&T v. Iowa Utilities Board,* 525 U.S. 366, 380-381 (1999). Notwithstanding these reasons for viewing subsection (c) as an independent restriction, those comments assume arguments that it is merely a savings clause.

(b), but it is silent as to whether the Commission must or may preempt government action that implicates subsection (c). While, as explained below, there is a strong argument to be made that the Commission does indeed have the authority to preempt in such cases, the Commission has chosen to avoid this issue.

For example, in cases where localities have raised a subsection (c) defense, the Commission has been able to sidestep the jurisdictional question by ruling that the locality had failed to raise a *bona fide* claim that the local rule or legal requirement was actually an exercise of public rights-of-way management or the imposition of compensation for the use of such rights-of-way.[17] In this way, the Commission could preempt the local rule or legal requirement without needing to determine whether it has the jurisdiction to apply subsection (c). In other cases, the Commission felt free to make general statements regarding the manner in which it would view various types of local regulations or legal requirements *if* such consideration were necessary to the resolution of a particular proceeding. *See, e.g., Minnesota Petition Order*, 14 FCC Rcd 21697, 21730, ¶ 63 (1997); *Troy Order* at ¶¶ 102-110. In every case, however, the Commission has either implicitly or explicitly declined to address the question of its jurisdiction under subsection (c). *See Troy Order* at n.268 (expressly declining to address the jurisdictional question).[18]

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[17] *See, e.g., In the Matter of Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082, at ¶¶ 40-42 (1996) ("*Classic Telephone Order*").

[18] As mentioned, the Commission did release a Notice of Inquiry concerning rights-of-way issues in the Competitive Network Proceeding. *See In the Matter of Promotion of Competitive Networks in Local*

Its failure to assert jurisdiction over matters concerning subsection (c) has meant that the Commission has never taken a firm position on the important interpretative issues raised by that provision. Most importantly from TWTC's perspective, the Commission has not ruled on (among other things) (1) how exactly the "competitively neutral and nondiscriminatory" requirement should apply to fees charged to carriers (e.g., whether past compensation made by the incumbent for access to rights-of-way is relevant or whether only compensation made going-forward is relevant) and whether localities must account for the effect of state laws -- especially those prohibiting application of fees to incumbents -- that might cause otherwise nondiscriminatory local fees to be discriminatory; (2) whether "fair and reasonable" compensation for rights-of-way management must be based on the costs incurred by a locality in performing these functions or is subject to some other standard; or (3) whether, and if so under what circumstances, "in kind" payments (such as access to conduit or most-favored customer treatment) are protected by the subsection (c) safe harbor.

The Commission's inaction has caused carriers to try to seek redress in federal court, since the courts have generally ruled that they at least share jurisdiction with the Commission to

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Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98, 14 FCC Rcd 12673 (1999) ("Competitive Networks NOI"). In the Notice of Inquiry, the Commission sought general comments from carriers as to the problems they have encountered in obtaining access to public rights-of-way and successful solutions to these problems. *Id*. at ¶ 79. It went on to state that it was particularly interested in participation in the proceeding from the Local and State Government Advisory Committee. *Id*. at ¶ 80. The Commission stated that "through the participation of the Advisory Committee as well as industry representatives, one outcome of this inquiry could be a greater agreement on principles that could be broadly accepted both by carriers and by State and local governments." *Id*. Strikingly, the Commission did not even seek input regarding the jurisdictional question in the Competitive Networks NOI.

rule on matters related to subsection (c). But piecemeal rulings by federal courts are extremely inefficient means of enforcing the national mandate of Section 253. The Commission is free to issue advisory rulings and to establish rules of general applicability, but courts may only decide legal issues necessary to resolve the matter before them. Courts are therefore limited to making incremental advances in the construction of Section 253. Moreover, the courts are not well-placed to make these decisions since, unlike the Commission, they are not experts in the complexities of the Communications Act or the place and purpose of subsection (c) in that broader framework. In addition, in part because of the absence of guidance from the expert agency with responsibility for administering the statute,[19] different district courts and later different circuits have reached different conclusions. There are now differences among the circuits on some of the most critical issues associated with subsections (c), including whether non-cost based fees for rights-of-way management are "fair and reasonable"[20] and whether the nondiscrimination requirement requires consideration of local requirements only or in combination with any state laws that have the effect of prohibiting local fees for incumbent use

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[19] Indeed, to the extent that the Commission has jurisdiction to address subsection (c) matters, its interpretations of that provision are due some measure of deference by the courts. *See City of Auburn* at 1177 (relying on FCC for "interpretative assistance" regarding subsection (c) and citing district courts that have done the same); *White Plains* at 76 (concluding that "the FCC decisions interpreting the scope of § 253(c) merit some deference).

[20] *Compare City of Auburn*, 260 F.3d at 1180 (describing non-cost based fees as "objectionable" under Section 253) *with TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) ("*City of Dearborn*") (upholding DCH's determination that the fee of 4% of gross revenues is "fair and reasonable").

of rights-of-way.[21] There is also no indication that the Supreme Court will provide guidance on these issues in the near future, since the Court just recently refused to hear an appeal of the White Plains decision.

Nor should any weight be given to the Commission's apparent concern that that it could in fact attempt to assert jurisdiction over matters concerning subsection (c) only to be ultimately overturned in the courts. As explained below, the merits of this matter weigh in favor of Commission jurisdiction. But even if the Commission were ultimately deemed somehow to lack the authority to address subsection (c), this would at least provide clear guidance to the industry as to where to bring complaints, to courts as to whether FCC statements are relevant interpretive guides, and to Congress as to whether there is a need to adopt legislation clarifying that the Commission has jurisdiction. In fact, it is hard to see how a court ruling that the Commission lacks jurisdiction would make matters worse since the Commission has essentially approached subsection (c) cases as if such a ruling had already been made.

The Commission's caution in this area is the all the more striking in light of the aggressive initiatives it has pursued to try to remove other regulations that it perceives to be barriers to investment. For example, the Commission's proposals to reclassify the transmission underlying ILEC broadband Internet access as a Title I service and its apparent decision to eliminate unbundling on a national basis for upgraded broadband loops are extremely risky as a

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[21] *Compare TCG New York v. City of White Plains*, 305 F.3d 67, 80 (2nd Cir. 2002), cert denied, No. 02-1062, 2003 US LEXIS 2215 (U.S. Mar. 24, 2003) ("White Plains") (holding that the effect of state law must be considered) *with City of Dearborn*, 206 F.3d at 625 (holding that effect of state law is generally irrelevant).

matter of both law and policy.[22] The elimination of barriers created by rights-of-way management is far less risky and could well be just as important to investment decisions.

IV. THE COMMISSION SHOULD ASSERT ITS AUTHORITY TO RULE ON MATTERS THAT IMPLICATE SUBSECTION (c) AND ESTABLISH RULES INTERPRETING AND IMPLEMENTING SUBSECTION 251(c)

The Commission must first clarify that it has concurrent jurisdiction with federal courts to address petitions for preemption under Section 253 of local regulation or legal requirements under which the municipality claims protection under subsection (c). In this regard, it should follow the reasoning of the Second Circuit in *White Plains*. In holding that the FCC's interpretations (limited as they have been) of subsection (c) are due deference as a guide to the courts, the Second Circuit relied on its underlying conclusion that the FCC has concurrent jurisdiction with the courts to interpret and apply subsection (c). In reaching this conclusion the court rejected the argument that subsection (d), by omitting reference to subsection (c), removed disputes involving subsection (c) from the Commission's jurisdiction entirely. *See White Plains*, 305 F.3d at 75.

In addressing the Commission's jurisdiction, the court acknowledged that there is some support in the legislative history for the view that Congress intended that the Commission would

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[22] *See* Reply Comments of TWTC *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 at 2-3 (filed July 1, 2002). In addition, in the Triennial Review, the Commission has adopted a national rule for the elimination of ILEC unbundling obligations without regard to differences among product and geographic markets. In so doing, it appears to have ignored the requirement that its unbundling decisions reflect such differences. *See United States Telecom Ass'n. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom v. United States Telecom Ass'n., No 02-58 2003 U.S. Lexis 245 (U.S. Mar. 24, 2003).*

not have the jurisdiction to rule on cases implicating subsection (c). *See id.* Indeed several courts have been persuaded by floor statements by Senators Gorton and Feinstein, whose proposals formed the basis for subsection (c) as adopted (the Gorton compromise amendment was in fact adopted as subsection (c)), that the FCC has no jurisdiction to address cases involving subsection (c). Senator Feinstein in particular stated that the purpose of removing a reference to (c) in subsection (d) was that it would obviate the need for municipal representatives to travel to Washington, D.C. to defend regulations challenged before the FCC and would allow them instead to address these matters in local district courts. *See* 141 Cong. Rec. S8172 (1995) (statement of Senator Feinstein).

But it is well established that floor statements by members of Congress are not dispositive interpretive guides.[23] This is especially so where the view taken in the floor statements runs contrary to the purpose, logic and structure of the statute. First, as mentioned, Congress adopted the 1996 Act in order to establish national policy for telecommunications competition. Even though the courts have the right to interpret and apply subsection (c),

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[23] *See Allen v. Attorney General of Maine*, 80 F.3d 569, 575 (1st Cir. 1996) ("As a general matter, courts must be chary of overvaluing isolated comments by individual solons.") (citations omitted); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991) ("To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent .... Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted for the bill.") (citations omitted). Indeed, it is notable that the view articulated by Senator Feinstein was omitted from the Joint Committee Report describing the purposes of the statute as adopted. *See, e.g.*, S. CONF. REP. NO. 230, 104th Cong., 2d Sess. 1, at 126 ("Joint Explanatory Statement") and S. REP No. 23, 104th Cong., 1st Sess. at 35-36.

allowing the FCC to do the same will lead to greater consistency across jurisdictions, less market uncertainty and more competition.

As the Second Circuit observed, it is contrary to the logic and structure of Section 253 to conclude that the FCC lacks the authority to rule on cases concerning subsection (c). *First*, the court observed that the Commission clearly has the authority to preempt laws and legal requirements that are inconsistent with subsection (a). This "strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption." *See White Plains*, 305 F.3d at 75.

Second, as the Second Circuit explained, the fact that subsection (c) was not included in the mandatory preemption requirement of subsection (d) does not at all indicate that the Commission is *precluded* from preempting local laws and requirements that concern rights-of-way but that are not saved by subsection (c). *See id*. Indeed, as mentioned, the Supreme Court has held that Section 201(b) gives the Commission the power to implement all of the provisions of Title II, including those provisions of the 1996 Act that concern matters historically under state (or local) jurisdiction, unless a provision specifies otherwise. *See AT&T v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999); *see also id*. at 382, n.9 (explaining that the existence of provisions mandating that the FCC exercise jurisdiction does not imply that the FCC lacks permissive jurisdiction to implement provisions that lack such mandatory language).

Third, the Second Circuit also observed that interpreting Section 253 as precluding FCC consideration of matters concerning Section 253(c) would create a "procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint." *See*

White Plains, 305 F.3d at 75-76. This is because, again, subsection (c) has been interpreted to provide nothing more than a defense to a preemption claim under subsection (a). While the court observed that such a procedural oddity is not unconstitutional, it would not assume that Congress adopted such a scheme "without stronger evidence." *See id.* at 76.

While it has avoided addressing the matter in a final agency order, the Commission has nevertheless expressed its general support for the analysis adopted by the Second Circuit. Most importantly, in an amicus brief filed in the *White Plains* case, the Commission stated that "to the extent that the FCC has jurisdiction under section 253(d) to adjudicate whether the state or local government action violates section 251(a), it would appear as a matter of statutory structure and logic that the FCC also has the jurisdiction to adjudicate defenses, including the section 253(c) defense." Supplemental Brief of Amici Curiae Federal Communications Commission filed in *White Plains* at 4.

But it is not enough simply to assert that the Commission has the jurisdiction to rule on cases implicating subsection (c). In order to provide courts, municipalities, and carriers with needed guidance, the Commission must establish bright line national presumptions and rules implementing the terms of the subsections (a) and (c) as they apply to rights-of-way management. By defining the permissible parameters for action, the Commission can help to limit the number of costly disputes and hopefully prompt local governments to reform their policies on their own initiative.

While this proceeding is not the place to address every detail associated with such an endeavor, TWTC provides below the principles that should guide the Commission in this regard and that should be adopted in this proceeding. First, in giving meaning to subsection (a), the Commission can draw upon its prior decisions and court decisions. As the courts and the Commission have held, a barrier to entry created by governmental action need not be "insurmountable" or complete to be prohibited under Section 253(a). *See RT Communications v FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). Instead, the FCC has said that the question is whether the state or local provision "materially inhibits or limits the ability of a competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Troy Order* at ¶ 98.

Applying this standard to rights-of-way management, the Commission should establish a presumption that any local regulatory regime that gives the locality the right to prohibit a carrier from providing service unless and until it complies with the franchise or other similar local requirements "may" have "the effect of prohibiting" a carrier from providing service in violation of subsection (a). *See White Plains* 305 F.3d at 76. Similarly, any regulatory regime that results in "extensive delays" must also be deemed to violate subsection (a). *See id.* at 76-77. Delays that could be deemed "extensive" are those in excess of one month from the time a carrier submits a complete and accurate application to provide service.

Furthermore, the Commission should establish a presumption that any local requirements that result in discrimination among carriers (either in the manner in which rights-of-way are managed or in which fees and other required contributions are applied) violate subsection (a). Any such rules "materially inhibit[ ] or limit[ ] that ability of a competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." This is the case regardless of whether the requirement explicitly discriminates against certain classes of carriers (e.g., by imposing fees or other obligations only on non-incumbents) or the requirement is in practice applied in a discriminatory manner (e.g., where state law prohibits the application of an otherwise facially nondiscriminatory local requirement to incumbents). *See id*. at 80-81.

Where a locality's legal requirement is inconsistent with subsection (a), the next question is whether it falls within the safe harbor of subsection (c). The Commission should address at least four kinds of local legal requirements under subsection (c), most of which track those that are prohibited under subsection (a). *First*, fees and other required contributions must be applied on a "competitively neutral and nondiscriminatory basis." This means that the Commission should establish a presumption that any differential in the manner in which fees are imposed on carriers using rights-of-way removes the provision from the scope of the subsection (c) safe harbor. The same methodology for imposing fees for access to public rights-of-way must apply to all carriers. Moreover, only carriers' current contribution obligations are relevant to the inquiry; past contributions made by incumbents (especially as part of the monopoly regulation applicable prior to 1996) should be deemed irrelevant. *See id*. at 78. This does not mean that all carriers pay the same fees, since some carriers may cause the locality to incur more expenses than others. But as mentioned above, it does mean that the terms of a compensation regime must be examined as well as the manner in which it applies in practice.

Second, fees and other required contributions must be "fair and reasonable," and they must be related to "use of public rights-of-way." The Commission should establish a presumption that any local compensation requirement may reflect only the actual and direct costs incurred in managing the public rights-of-way and the amount of public rights-of-way actually used by the carrier. This approach is reasonable, because it will advance efficient investment decisions by carriers. If fees are above cost, carriers will systematically reduce the extent to which they would otherwise purchase access to a locality's rights-of-way below efficient levels. Indeed, the Commission has hinted that it views the "fair and reasonable" and "use of public rights-of-way" requirements in subsection (c) as requiring that a locality impose only cost-based fees on carriers. *See* Brief of Amici Curiae Federal Communications Commission filed in *White Plains* at 14 n. 7 (stating that a "percentage of gross revenues-based fee, even if uniformly applied, might well have no relationship to either the extent of each carrier's use of the rights-of-way or the costs it imposed on the municipality" and thus could be deemed not to fall within subsection (c) safe harbor).

Thus, the Commission should presume that fees based on a percentage of a carrier's revenues are neither "fair and reasonable" nor reasonably reflect a carrier's "use of public rights-of-way." It is only by chance that a percentage of revenues approach would accurately reflect a locality's costs or the extent to which a carrier uses the rights-of-way. For example, a new entrant that has constructed a large network relying on extensive access to public rights-of-way (including trenching, traffic disruption, etc.) may impose significant costs on a locality and may make use of a significant amount of rights-of-way without generating much revenue. Under a percentage of revenues methodology, such a carrier would pay less than an established provider that generates substantial revenue by relying on minimal use of public rights-of-way. Such an outcome would fail to send accurate signals to competitors and would skew market outcomes.

In addition, any "in-kind" contribution requirements (e.g., requirements that the carrier provide the locality free or discounted access to conduit deployed in the public rights-of-way) or "most favored nation" requirements should be presumed unlawful under subsection (c). This is because the value of any such requirements is highly unlikely to be targeted to reflect the actual and direct costs incurred in managing the rights-of-way.

Third, local requirements unrelated to fees or compensation must be administered on a "nondiscriminatory and competitively neutral basis." For example the Commission should establish a presumption that "local requirements imposed only on the operations of new entrants and not on existing operations of incumbents" are not covered by the subsection (c) safe harbor. *See Troy Order* at ¶ 108. Furthermore, the Commission should presume that any requirements that result in significant and unnecessary delays (e.g., more than 30 days from the submission of a full and complete application for entry) fail the competitively neutral/nondiscrimination requirement. By delaying a firm's ability to enter the market or to expand its entry for reasons unrelated to compliance with appropriate local rights-of-way regulations, the locality would be unduly discriminating against the firm seeking approval to provide service.

Fourth, local requirements unrelated to fees or compensation must be necessary for the locality to "manage the public rights-of-way." *Id.* at ¶ 105. The Commission should establish a bright line standard that rules establishing a "third tier" of regulation that does not relate to the management of rights-of-way are not protected by the subsection (c) safe harbor. Specific examples of requirements that the FCC should presume not to fall within the safe harbor of subsection (c) include (1) reporting requirements as to the carrier's ownership structure, the type of services that it will provide (*City of Auburn*, 260 F.3d at 1166), or the carrier's qualifications to provide the services in question (*id*. at 1178); (2) any regulation of service offerings (*id*. at 1178-79; *Troy Order* at ¶ 105); (3) any requirement that the carrier obtain the locality's prior approval for the transfer of control of a municipal franchise (*City of Auburn*, 260 F.3d at 1178); and (4) any requirement that the carrier waive its right to challenge the lawfulness of the locality's rules (*White Plains*, 305 F.3d at 81-82). Rules such as these bear no relation to rights-of-way management and, in any event, are generally redundant to state regulations.

Finally, In order to provide the localities with certainty, the Commission should also reiterate its earlier statements as to regulations it would presume to be adequately related to the management of rights-of-way, such as regulations associated (i) coordination of construction schedules, (ii) determination of insurance bonding and indemnity requirements, (iii) establishment and enforcement of building codes and (iv) keeping track of the various systems using the rights-of-way to prevent interference between them. *Troy Order* at ¶ 103 (*see also Classic Telephone Order* at ¶ 39).

V. THESE PRINCIPLES DEMONSTRATE THAT THE FIBERTECH PETITION SHOULD BE GRANTED

The instant Petition offers the Commission an important opportunity to apply these principles. To begin with, the Fibertech Petition places before the Commission a local regulatory regime that is inconsistent with subsection (a). For example, Section 2.1 of the Ordinance allows the Borough to deny a franchise to those carriers that fail to comply with its requirements, including the franchise fee requirements. *See* Borough of Blawnox Ordinance No. 529 "Borough of Blawnox Rights of Way Ordinance" (Adopted February 12, 2001). Similarly, Section 3.20 of the Ordinance gives the Borough the right to remove a franchisee's equipment from public rights-of-way if the franchisee at any time fails to comply with the requirements of the Ordinance, including the franchise fee requirements. *See id*. Indeed, in a letter, attached to the Petition as Exhibit I, from the Solicitor for the Borough of Blawnox to Fibertech, the Borough threatens "the removal of any equipment of your organization from its public rights of way" if Fibertech fails to comply with the franchise fees required under the Ordinance. *See* Petition, Exh. I. Thus, Sections 2.1 and 3.20 "may" have the effect of prohibiting a carrier from providing a telecommunications service, and they are therefore inconsistent with subsection (a).

In addition, Fibertech asserts that either as a practical or a legal matter the Borough does not apply the Ordinance, including the associated franchise fees, to Verizon. Assuming this is the case, the Ordinance "materially inhibits or limits that ability of a competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." It is therefore inconsistent with subsection (a) for this reason as well.

Nor is there any part of the Blawnox Ordinance that is saved under subsection (c). *First*, and most importantly, the Ordinance is not "competitively neutral and nondiscriminatory," because, again, it apparently only applies to competitors. This fact alone should render the Ordinance subject to mandatory preemption under subsection (d). As the Commission has stated, "[o]ne 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 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." *Troy Order* ¶ 108. As discussed, this is so, even where the differential application of the local legal requirement is the result of the interaction of state and local law, as may be the case here. *See White Plains*, 305 F.3d at 80.

Second, the fee imposed by the County is not "fair and reasonable compensation" for the "use" of public rights of way. As Fibertech explains, there is no evidence that the $2.50 per foot franchise fee bears any rational relationship to the actual and direct costs incurred in managing the public rights-of-way. Petition at 11. In the absence of such evidence, the Commission should conclude that the franchise fee fails to meet the "fair and reasonable" requirement of subsection (c).

Third, while not addressed by Fibertech, the reporting requirements imposed by Blawnox also fall outside the safe harbor of subsection (c). The Ordinance and associated Certification Application require that CLECs provide a wide range of information that bears no relation to the County's management of the public rights-of-way. For example, the Certification application requires that the carrier describe its corporate structure, the business activities of its corporate affiliates, the types of services currently provided by the carrier and those that the carrier plans to provide. The courts have repeatedly held that requiring this kind of information bears no relationship to the management of rights-of-way and is therefore not protected by subsection (c). *See e.g. White Plains*, 305 F.3d at 81; see also *City of Auburn*, 260 F.3d at 1177-1178.

For all of these reasons, the Commission should determine that the Blawnox Ordinance must be preempted under subsections (a) and (d). But the Commission should also take from this proceeding the broader message that Fibertech might well have been spared the time and expense of disputing the lawfulness of the Ordinance if the Commission had taken a more proactive approach to the enforcement of Section 253. If the Commission had established clear rules establishing bright line presumptions, Blawnox might well have never established or attempted to enforce the Ordinance at issue here. Even if the County had attempted to do so, Fibertech would have had a clearer basis for seeking expedited relief from the Commission or from a federal court. Moreover, as explained, there are many other municipalities with equally onerous and discriminatory local rules that are preventing facilities-based competitors from competing on an equal footing with the ILEC and that are preventing the realization of full-scale telecommunications competition as envisioned by Congress and the Commission. The Commission must therefore no longer wait to establish national rules regarding local rights-of-way management as described herein.

VI. CONCLUSION

For the reasons described herein, the Commission should exercise its jurisdiction in this proceeding to grant the Fibertech Petition and preempt the Borough of Blawnox Ordinance under Section 253(d).

Respectfully submitted,

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