

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

In the Matter of )  
 )  
**Fiber Technologies Networks, Inc..** ) **WC Docket No. 03-37**  
 )  
Petition for Preemption Pursuant to Section 253 )  
of the Communications Act of Discriminatory )  
Ordinance, Fees and Right-of-Way Practices of )  
the Borough of Blawnox, Pennsylvania )

**REPLY COMMENTS OF AT&T**

AT&T Corp. ("AT&T") hereby submits these reply comments regarding the petition by Fiber Technologies Networks, Inc. ("Fibertech") for preemption of local entry barriers pursuant to Section 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253(d).<sup>1</sup> The comments demonstrate that the rights-of-way ordinance (the "Ordinance") that the Borough of Blawnox (the "Borough") seeks to enforce creates a barrier to entry in violation of section 253(a) that is not saved from preemption by section 253(c).

**I. THE ORDINANCE VIOLATES SECTION 253(a).**

In its petition, Fibertech alleges that the incumbent LEC, Verizon, is exempt from the franchise fee requirement the Ordinance imposes on new entrants. The Borough does not expressly deny this allegation. Although the Borough asserts that the ordinance applies equally to Verizon and new entrants,<sup>2</sup> it does not deny that only ILECs meet the requirements for exemption from the Ordinance. Instead, the Borough apparently agrees

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<sup>1</sup> By order released April 15, 2003, the Chief, Competitive Policy Division, extended the time for filing of reply comments to April 29, 2003.

<sup>2</sup> Blawnox Comments at 7 ("The Ordinance applies to all entities, including ILECs").

with Fibertech’s contention that “the Ordinance is applicable only to those entities who do not meet the qualifications [for the exemption],” and that Fibertech – as a CLEC – does not meet those requirements.<sup>3</sup> The Borough nevertheless argues that the Ordinance does not create an unlawful barrier to entry because “[t]he fee imposed by the Ordinance is equal for any entity to which the Ordinance is applicable.”<sup>4</sup> The critical point, however, is that the Ordinance does not apply to Verizon. Because the Ordinance “apparently applies only to competitors,” “[t]his fact alone should render the Ordinance subject to mandatory preemption.” Time Warner Telecom Comments at 31. Such discriminatory application by definition “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,” and thus violates section 253(a).<sup>5</sup>

The Borough also argues (at 4) that the Commission may not consider any issues that are in any way related to rights-of-way management in discharging its statutory obligations under section 253(a). But, the adoption of such a bright line test – which has no support in the language of the Act – would lead to absurd results that Congress clearly did not intend. Under the Borough’s proposed approach to preemption, a municipality – under the guise of rights-of-way management – could erect a flat-out prohibition against placement of competitive facilities in the public rights-of-way, and the Commission would be powerless to preempt such a “local legal requirement” “prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

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<sup>3</sup> Blawnox Comments at 8.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> AT&T Comments at 3, quoting the Commission’s decision in *Petition of Pittencrieff*

Fortunately, the plain language of section 253(a) precludes such a result, and, in its *Classic Telephone* decision, the Commission specifically rejected such an approach.

In *Classic Telephone*, the two Kansas cities involved justified their bar of a competing telephone provider in part on their authority to manage public rights-of-way. *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 F.C.C.R. 13082, FCC 96-397 (1996) at ¶ 29. Under the Borough’s reasoning, the Commission would have been precluded from finding a violation of section 253(a) and preempting under section 253(d). The Commission, however, had no problem finding that the cities had not presented a legitimate section 253(c) defense and granting the petition for preemption. *Id.*, ¶¶ 42, 50.<sup>6</sup>

NATOA argues that the Commission cannot preempt any barrier to entry – no matter how blatant – unless the affected competitor provides evidence such as audited financial statements, current business plans, the costs of doing business, expected revenues, projected profit margins, the amount of dividends declared, bonuses paid to officers, the entities and apparently locations from which materials were purchased,

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*Communications, Inc.*, 13 F.C.C.R. 1735 ¶ 32 (1997).

<sup>6</sup> NATOA makes a related argument, *i.e.*, that even where a barrier to entry violating section 253(a) exists, the Commission cannot preempt if the barrier arguably relates in any way to use of the public rights-of-way. NATOA Comments at 5. But, as the Commission noted in its Supplemental Amicus Brief in *White Plains*, “[t]o the extent that the FCC has jurisdiction under section 253(d) to adjudicate whether the state or local government action violates section 253(a), it would appear as a matter of statutory structure and logic that the FCC also has jurisdiction to adjudicate claimed defenses, including the section 253(c) defense.” Supplemental Brief of the Federal Communications Commission and the United States as Amici Curiae (Mar. 11, 2002), submitted in *TCG New York, et al. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *cert. denied*, *City of White Plains v. TCG New York*, 2003 WL 162557 (US Mar. 24, 2003) (“*White Plains*”), at 4. *See also White Plains*, 305 F.2d at 75-76.

whether “a better deal” could have been negotiated, and whether it could have saved money on its agreements with contractors.<sup>7</sup> Under NATOA’s view of the Act, such a discriminated-against competitor can obtain absolutely no relief unless it provides evidence regarding “*all other financial costs of doing business*,”<sup>8</sup> including apparently, what it pays its janitorial staff, whether it provides health insurance to its employees, whether it is unionized, or even whether its customers pay their bills on time. Fortunately, the law does not compel such an absurd result. As the Commission and the courts have made clear, an entry barrier need not be absolute or insurmountable to violate section 253(a).<sup>9</sup> Instead, the test established by the Commission is whether the requirement at issue “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>10</sup> The discriminatory, permanently recurring fee imposed by the Borough clearly meets this test.

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<sup>7</sup> NATOA also strongly implies (pp. 2-4) that the ordinance is unlawful under Pennsylvania law. But the fact that the ordinance may also violate state law does not mean the Commission should shy away from preempting a violation of federal law. As Time Warner Telecom makes clear in its comments (at 5-8), access to public rights-of-way is absolutely essential to the development of facilities-based competition. The type of rights-of-way abuses identified by Fibertech “are exactly the kinds that, applied broadly, chill investment incentives,” and should be preempted by the Commission. Time Warner Telecom Comments at 2.

<sup>8</sup> NATOA Comments at 10 (emphasis in original).

<sup>9</sup> See AT&T Comments at 2, citing *Silver Star Telephone Co.*, 13 F.C.C.R. 16356 ¶ 8 (1998), *aff’d*, *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir.2000); see also *TCG New York, et al. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *cert. denied*, *City of White Plains v. TCG New York*, 2003 WL 162557 (US Mar. 24, 2003) (“*White Plains*”) (“a prohibition does not need to be complete or ‘insurmountable’ to run afoul of § 253(a)”).

<sup>10</sup> *Petition of Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735 ¶ 32 (1997), *aff’d*, *Cellular Telecommunications Indus. Ass’n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999).

**II. THE ORDINANCE DOES NOT MEET THE REQUIREMENTS OF SECTION 253(c).**

As AT&T demonstrated in its comments (at 7), any permissible right-of-way fee must be directly related to the carrier's use of the rights-of-way or the costs it imposes on the municipality. The filed comments establish that the Borough's fee is not related at all to the Borough's management of its rights-of-way. According to the Borough, Fibertech's facilities "merely traverse[] the Borough" on State Highway ROW, and do "not serve anyone or anything in the Borough." Blawnox Comments at 9. Fibertech merely uses state highway ROW "to carry its network traffic from one location outside the Borough to another location outside the Borough." *Id.* There thus are no extensions from Fibertech's facilities in the State Highway right-of-way crossing the Borough's streets or other rights-of-way to serve entities within the Borough. As Sprint notes, "it is difficult to see how Blawnox has any incremental management cost, let alone cost equal to \$2.50 per foot," caused by Fibertech's installation of aerial cable "on utility owned and managed poles in State highway ROW that runs through Blawnox." Sprint Comments at 1-2. Moreover, none of the examples of ROW management that the Commission cited in its *Classic Telephone* decision "are activities that Blawnox would engage in to manage aerial cable located on existing public utility poles in State highway ROW." Sprint at 3.

Qwest demonstrates that the \$2.50 per foot fee "is neither related to 'management' of the rights-of-way nor is it based on costs imposed by the carrier." Qwest Comments at 4. Instead, it "is an annual 'rental' fee for occupying the public rights-of-way." *Id.* Because the fee "is simply based on linear footage," it, "by definition, does not and cannot tie back to any direct and actual costs caused by a local government's 'management' of the rights-of-way." *Id.* Moreover, the plain language of

section 253(c) and clear congressional intent “require a cost-based approach to management of the public rights-of-way.” *Id.* at 5. And, the majority of the courts have endorsed a cost recovery standard. *Id.* at 7. Thus, as the Commission has noted, “a fee that does more than make a municipality whole is not compensatory in the literal sense.”<sup>11</sup>

Because the Borough’s recurring and discriminatory \$2.50 per foot fee is not directly related to the Borough’s management of its right-of-way and is not based on the Borough’s costs of managing that right-of-way, it does not meet the safe harbor requirements of section 253(c).

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<sup>11</sup> Brief of the Federal Communications Commission and the United States as Amici Curiae (June 12, 2001), submitted in *White Plains*, , at 14 n.7, quoting *New Jersey Payphone Assn. v. Town of West New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001); accord, *XO Missouri, Inc., et al. v. City of Maryland Heights*, \_\_\_ F. Supp. \_\_\_ (E.D. Mo. Feb. 5, 2003), slip op. at 10.

## CONCLUSION

Based on the facts alleged in Fibertech's petition, and for the reasons set forth herein and in AT&T's prior comments, the Commission should preempt enforcement of the Borough's franchise fee requirement.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Theresa Donatiello Neidich, do hereby certify that on this 23<sup>rd</sup> day of April, 2003, a copy of the foregoing "Reply Comments of AT&T Corp." was mailed by U.S. first class mail, postage prepaid, to the parties listed below:

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