

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
FIBER TECHNOLOGIES)	
NETWORKS, L.L.C.)	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 SPRINT CORPORATION

Sprint Corporation, on behalf of its incumbent local exchange (“ILEC”), competitive LEC (“CLEC”)/long distance, and wireless divisions, respectfully submits its reply to comments filed in the above captioned proceeding on March 31, 2003.

I. BLAWNOX’S ARGUMENTS ARE NOT PERSUASIVE

1. Blawnox claims the ordinance does not violate Section 253(a) of the Communications Act, 47 U.S.C. § 253(a) because it does not facially inhibit or have the effect of prohibiting any entity from providing telecommunications; the ordinance “simply provides a process by which an entity must comply in order to use public rights of way ... to provide telecommunications services.”¹

Blawnox misconstrues the prohibition in Section 253(a). As Time Warner correctly points out:²

¹ Comments of Borough of Blawnox (“Blawnox”) at p. 6.

² Comments of Time Warner Telecom at p. 26. See also, Comments of AT&T at p. 2 (“The Commission has also held that section 253(a) forbids entry barriers regardless of whether they are “absolute” or “conditional.” *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).

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). [Citation omitted.] 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.” [Citation omitted.]

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) [Citation omitted.]

Blawnox’s ROW ordinance clearly has the “effect of prohibiting” a carrier from providing service. Section 2.1 of the Ordinance³ makes it unlawful for any Person to construct Telecommunications Systems within public rights-of-way without first complying with the ROW ordinance. Further, Section 7.1 of the ordinance empowers Blawnox to forfeit Franchises, and consequently the ability to provide service, in the event of repeated violations of the ordinance.

Blawnox’s ordinance violates Section 253(a) and must be preempted unless saved by the safe harbor available to local government laws in Section 253(c).

2. Blawnox claims that even if the ordinance violates Section 253(a), the ordinance is saved by the safe harbor provisions in Section 253(c) of the Communications Act, 47 U.S.C. § 253(c) because the compensation required by the ordinance is for the purpose of managing the public ROW and is fair and reasonable.⁴

The fee established in the Blawnox ordinance has absolutely nothing to do with managing the public ROW. Blawnox’s comments are conspicuously missing any claim of any management functions preformed by Blawnox or management cost incurred.

³ A copy of the ordinance was attached to Fibertech’s Petition as Exhibit “B”.

⁴ Blawnox at p. 11.

Even assuming that Blawnox has the right under Pennsylvania law to manage ROW that is under the authority of the State Highway Department, the record makes clear that Blawnox is not engaging in management activities.

As Qwest points out, the very nature of the fee proves that it has nothing to do with management activities or cost:

The Borough's fee is simply based on linear footage which, by definition, does not and cannot tie back to any direct and actual costs caused by a local government's "management" or rights-of-way. The Borough's recurring fee applies regardless of whether there is some impact, or no impact, on the public rights-of-way. A company that installs facilities in one year will continue to pay the per linear foot charge in years two, three, four and into the future, even absent any new impact on or use of the public rights-of-way.⁵

Nor can Blawnox's fee be said to meet the "fair and reasonable" standard.

Blawnox claims the fee is "fair and reasonable" based on the "totality-of-the-circumstances" standard.⁶ However, as Sprint pointed out in its comments in this proceeding, this Commission and an increasing number of Courts utilize an actual cost standard in determining the fairness and reasonableness of ROW fees.⁷

AT&T shares Sprint's view that the ROW fee in Blawnox's ordinance is not fair and reasonable.

As the Commission has observed, in order to be consistent with section 253(c), a right-of-way fee must be related "to either the extent of each carrier's use of the rights-of-way or the costs it imposes[s] on the municipality." [Citation omitted.] Thus, "a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry." [Citations omitted.] Accordingly, even if the Borough could properly charge a fee for Fibertech's use of State Highway rights-of-way, any such fees must be

⁵ Comments of Qwest Communications International Inc. at p. 4.

⁶ Blawnox at p. 13

⁷ Comments of Sprint Corporation at pp. 2-3.

directly related to the costs incurred *by the Borough* in managing those rights-of-way.⁸

3. Blawnox claims that the Commission's authority to preempt enforcement articulated in Section 253(d) simply does not extend to consideration of the Section 253(c) issues reserved to state and local government authority.⁹

Blawnox claims that because the preemption authority in Section 253(d) only references Sections 253(a) and (b), the Commission cannot preempt an ordinance that fails to meet the test of Section 253(c). Sprint believes that Blawnox's argument ignores the fact, as demonstrated above and in the comments filed in this proceeding, that Blawnox's ROW ordinance violates Section 253(a) and thus must be preempted unless saved by the safe harbor provision in Section 253(c) for local government laws. As demonstrated, Blawnox's ordinance does not meet the safe harbor standard.

Even if that is not the case, Sprint agrees with Time Warner that the Commission has the jurisdiction to address cases involving Section 253(c). Time Warner argues, relying on the Second Circuit's *White Plains* decision,¹⁰ that

..., 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." [Citation omitted.]

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). [Citation omitted.] Indeed, as

⁸ Comments of AT&T at p. 7.

⁹ Blawnox at p. 4.

¹⁰ *TCG New York v. City of White Plains*, 305 F.3d 67 (2nd Cir. 2002).

mentioned, the Supreme Court has held that Section 201(b) gives the Commission the power to implement all of the provisions of Title II,

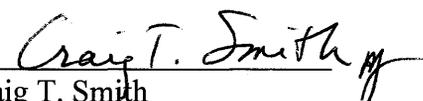
Third, the Second Circuit also observed that interpreting Section 253 as precluding FCC consideration of matters concerning Section 253(c) would create a “procedural oddity where the appropriate forum would be determined by the defendant’s answer, not the complaint.”¹¹

II. CONCLUSION

The Blawnox ROW ordinance has the effect of prohibiting carriers from telecommunications services. The ordinance imposes fees that are not related to management of public rights-of-way and are not fair and reasonable. The Commission has the authority and should exercise it to preempt pursuant to Sections 253(a) and (c).

Respectfully submitted,

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¹¹ Comments of Time Warner Telecom at p. 24.

CERTIFICATE OF SERVICE

I, Joyce Y. Walker, hereby certify that I have on this 29th day of April 2003, served via hand delivery and U.S. mail, a copy of the foregoing letter "In the Matter of Fiber Technologies Networks, WC Docket No. 03-37", filed this date with the Secretary, Federal Communications Commission, to the persons listed below.


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