

**Before the  
Federal Communications Commission  
Washington, D.C. 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 VERIZON<sup>1</sup>**

The ordinance Fiber Technologies Networks, L.L.C. challenges in the petition, promulgated by the Borough of Blawnox (“Ordinance”), imposes an annual recurring franchise fee of \$2.50 per foot or \$13,200 per mile for aerial facilities placed on utility poles. As Blawnox acknowledges in its comments, this fee is not based on the costs it incurs to manage its rights-of-way. Nor is it related to carriers’ use of the rights-of-way. Comments of Borough of Blawnox at 12-13. Instead, the fee is a mechanism designed to raise revenue from telecommunications carriers.

Blawnox’s \$2.50 per linear foot franchise fee violates Section 253(c) because it exceeds the municipality’s authority to manage the public rights-of-way and is not “fair and reasonable compensation” as required by the Act. Verizon agrees with the majority of commenters on this issue and respectfully suggests that the Commission grant the petition and preempt the Blawnox ordinance on these grounds.

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<sup>1</sup>The Verizon telephone companies (“Verizon”) are the local exchange carriers affiliated with Verizon Communications Inc., and are listed in Attachment A.

**I. SECTION 253 DOES NOT PERMIT A STATE OR LOCAL GOVERNMENT TO IMPOSE FEES UNRELATED TO THE COSTS OF MAINTAINING THE PUBLIC RIGHTS-OF-WAY.**

The 1996 Act reserves “a very limited and proscribed role in the regulation of telecommunications” by municipalities. *AT&T Comm. of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998). Section 253 expressly preempts state or local regulations that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. §§ 253(a), (d). As many courts have observed, the statutory language is clear and absolute – “certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena.” *City of Auburn v. Qwest Corp*, 260 F.3d 1160, 1175 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002).

Despite this broad prohibition, Section 253(c) permits states and local governments to regulate the public rights-of-way in certain limited respects. Section 253(c)’s safe harbor provision allows state or local governments to enact regulations that “manage the public rights-of-way” or “require fair and reasonable compensation” for “use of public rights-of-way.” 47 U.S.C. § 253(c).

The Commission has spoken to the first exception – management of the rights-of-way – and has outlined what types of activities are appropriate. *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, ¶ 103 (1997) (these include “coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them”).

The plain language of Section 253(c) makes clear that municipalities are entitled to “compensation,” a word that clearly connotes payment tied to a particular expense or outlay, *not* an ability to charge fees based some other criterion. Black’s Law Dictionary 283 (6th Ed. 1990) (defining “compensation” as the “[e]quivalent in money for a loss sustained”). And, although the Commission has not directly ruled on what constitutes “fair and reasonable compensation,” the majority of courts addressing the question have squarely held that Section 253(c) preempts state or local laws that impose non-cost based fees. In a recent decision with similar facts, a federal district court in Missouri explicitly held that “to meet the definition of ‘fair and reasonable compensation’ a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way.” *XO Missouri Inc. et al. v. City of Maryland Heights*, No. 99-1052, slip op. at 10 (E.D. Mo. Feb. 5, 2003) (invalidating ordinance which required annual license fee equal to either a per lineal foot fee or 5 percent of gross revenue); *see also City of Auburn v. Qwest*, 260 F.3d at 1176 (“Some non-tax fees charged under the franchise agreements, are not based on the cost of maintaining the right of way as required under the Telecom Act”); *New Jersey Payphone Ass’n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D. N.J. 2001) (“fair and reasonable compensation” limited to “recoupment of costs directly incurred through the use of the public right-of-way”); *Bell Atlantic-Maryland, Inc. v. Prince George’s County, Md.*, 49 F. Supp. 2d 805, 817 (D. Md. 1999), (any “fees that local governments impose[d] on telecommunications companies must be directly related to the companies’ use of the local rights-of-way”), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000). These cases properly recognize that Section 253(c) dictates that “a fee that does more than make a municipality whole is not compensatory in the literal sense.” *New Jersey Payphone Ass’n*, 130 F. Supp. 2d at 638.

The legislative history of Section 253(c) confirms that Congress's intent was to allow municipalities to recover only the actual costs of administering the public rights-of-way, not "rent." *See, e.g.*, 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein). During the floor debate on Section 253(c), Senator Feinstein gave examples of public rights-of-way management activities that Congress intended to reserve to municipalities, namely "requir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation. . . ." *Id.* Thus, the plain language of Section 253(c), its legislative history, and judicial and Commission precedent establish that municipalities are limited by the 1996 Act to imposing fees based solely on the actual costs of managing the public rights-of-way.

Blawnox's Ordinance fails to meet either of Section 253(c)'s tests. First, the Ordinance is not an exercise of any of the "management" functions the Commission endorsed in the *TCI Cablevision* decision: it does not specify when or where a carrier uses the rights-of-way, address public health or safety, or enforce zoning laws. The per foot lineal fee has nothing whatsoever to do with Blawnox's management tasks, but applies year after year, regardless of how the carrier disturbs (or does not disturb) the public right-of-way. Qwest Comments at 4. In fact, Blawnox explicitly acknowledges that the Ordinance is designed not to manage the rights-of-way, but to "regulate service providers" allegedly outside of the jurisdiction of the Pennsylvania Commission. Blawnox Comments at 12. This violates the Act. "Section 253 permits municipalities to manage rights-of-way; not regulate telecommunications." *City of Rome v. Verizon*, 240 F. Supp. 2d 176, 179 (N.D. N.Y. 2003). Rights-of-way regulations that "regulate the telecommunications companies themselves, not merely the rights-of-way" exceed the limited

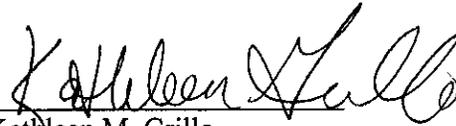
power Section 253(c) confers and must be preempted. *City of Auburn v. Qwest*, 260 F.3d at 1178.

For much the same reasons, the fee does not constitute “fair and reasonable compensation” for “use” of the rights-of-way. The \$2.50 per lineal foot fee bears no relationship to Blawnox’s actual costs. FiberTech alleges in its petition that the fee applies to placement of its aerial cables on utility poles within the *state’s* Highway Department’s jurisdiction. Blawnox does not claim that it incurs any costs, let alone substantial ones, that would justify the amount of the fee. In fact the opposite is true. Blawnox readily admits that the fee is a rent-based charge designed to take advantage of the “desirable” location of the municipality and to extract the “price a telecommunications provider is willing to pay.” Blawnox Comments at 13-14. This is exactly what federal law forbids – using the fact that a telecommunications carrier must have access to rights-of-way as leverage to extract payments unconnected with the actual costs of management or administration. Blawnox’s approach simply cannot be squared with the plain language and intent of Section 253(c).

CONCLUSION

The Commission should find that the Blawnox Ordinance, and the per linear foot franchise fee it imposes, do not constitute “management of the public rights of way” or “fair and reasonable compensation.” To the extent the Ordinance fails to satisfy Section 253(c)’s “safe harbor” provisions, the Commission should grant FiberTech’s petition for preemption.

Respectfully submitted,



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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States  
GTE Midwest Incorporated d/b/a Verizon Midwest  
GTE Southwest Incorporated d/b/a Verizon Southwest  
The Micronesian Telecommunications Corporation  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Hawaii Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of April, 2003, copies of the foregoing "Reply Comments of Verizon" were sent by first class mail, postage prepaid, to the parties listed below.



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