

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

REPLY COMMENTS OF TIME WARNER TELECOM

WILLKIE FARR & GALLAGHER
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR
TIME WARNER TELECOM

April 29, 2003

Reply Comments of Time Warner Telecom
WC Docket No. 03-37
April 29, 2003

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION AND SUMMARY	1
II. THE COMMISSION SHOULD RESOLVE THE PETITION UNDER SECTION 253; THERE IS NO BASIS FOR REFERRING THE MATTER TO STATE COURT.....	4
III. THE COMMISSION HAS THE AUTHORITY TO RULE ON DISPUTES IMPLICATING SUBSECTION (c).....	6
IV. THE EVIDENCE PROFFERED BY FIBERTECH IS SUFFICIENT TO MEET THE BURDENS OF PRODUCTION AND PROOF UNDER APPROPRIATE INTERPRETIVE PRESUMPTIONS AND RULES.....	10
V. THE COMMISSION MAY ESTABLISH GENERAL PRESUMPTIONS AND RULES FOR ADDRESSING LOCAL REGULATIONS IMPLICATING SUBSECTION (c) IN THIS PROCEEDING.....	15
VI. CONCLUSION.....	19

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Corporation ("TWTC"), by its attorneys, hereby submits these reply comments in response to the Public Notice¹ in the above-referenced proceeding regarding the petition for preemption of Fiber Technologies, L.L.C. ("Petition").

I. INTRODUCTION AND SUMMARY

As TWTC explained its comments, the Commission's unwillingness since the passage of the Telecommunications Act of 1996 to assert jurisdiction over Section 253 petitions implicating local rights-of-way management issues has undermined facilities-based investment in broadband. The vacuum created by the Commission's inaction has been filled by the courts, whose piecemeal and often inconsistent rulings have created a great deal of uncertainty. Since the Supreme Court recently denied petitions for certiorari of the Second Circuit's *TCG New York v. White Plains* decision, there is now little chance this situation will improve.

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).

Fibertech's Petition presents the Commission with an opportunity to provide national guidance as to the manner in which Section 253 applies to local public rights-of-way management. In particular, as TWTC explained in its comments, the Commission should adopt appropriate presumptions and interpretative rules designed to clarify the local requirements that are unlikely to meet the requirements of subsection (a) and that would not fall within the safe harbor in subsection (c). Such presumptions and rules would constitute an important first step toward a consistent and predictable national legal framework for local public rights-of-way policies. Greater clarity would reduce the risks and uncertainties associated with facilities-based investment in broadband and would therefore advance the Commission's policy goals and the goals of Congress in enacting the 1996 Act.

The cities, represented by the National Association of Telecommunications Officers and Advisors ("NATOA") and other organizations with which it filed joint comments, and the Borough of Blawnox ("Borough" or "Blawnox") raise several arguments in opposition to the Fibertech Petition. None of these arguments has merit.

First, NATOA raises a fairly bazaar comity argument in which it asserts that the Commission should refer the instant proceeding to state court for prior resolution of any relevant state law issues. This argument is easily rejected, since the Commission has the authority to preempt state laws even while related state court proceedings remain pending. The Commission has already done so at least twice under to Section 253. Moreover, any other approach would unnecessarily delay preemption proceedings and would be inconsistent with the need for national uniformity in the administration of the 1996 Act.

Second, both NATOA and the Borough assert that the Commission does not have jurisdiction to preempt local public rights-of-way management rules. But this is not the case. As the Supreme Court held in *Iowa Utilities Board v. FCC*, Section 201(b) gives the Commission the authority to implement the provisions of the Act. This authority existed prior to the enactment of Section 253. As the Commission recently confirmed in *Core Communications et al. v. SBC*, Section 601(c)(1) requires that the Commission's preexisting authority extends to the 1996 amendments unless those amendments "expressly" state otherwise. Section 253 includes no such express language. On the contrary, subsection (d) states only that the Commission "shall" exercise its otherwise discretionary authority to preempt state or local requirements that violate subsections (a) and (b). It in no way limits the Commission's underlying discretionary authority to implement all other subsections of Section 253, including subsection (c). Moreover, the structure and logic of Section 253 rule out even the implication that the Commission lacks jurisdiction over matters implicating subsection (c). The Commission therefore has the authority to rule on Fibertech's Petition.

Third, NATOA argues that Fibertech has failed to proffer adequate factual information in support of its Petition. NATOA asserts that Fibertech should be required to provide a detailed analysis of why the fees charged by Blawnox prevent Fibertech from providing specific telecommunications services. But there is no need for such burdensome factual analysis. The Commission can determine from the face of the Blawnox Ordinance whether it gives the Borough the authority to prevent Fibertech from providing telecommunications service (and it certainly does grant such authority). The Commission also can assess whether the fees imposed

on Fibertech, and apparently not on Verizon, “materially inhibit[] or limit[] the ability of [Fibertech] to compete in a fair and balanced legal and regulatory environment.” Such an analysis should be based on a comparison of the manner in which the regulations apply to competitors rather than a detailed examination of Fibertech’s finances.

Finally, NATOA argues that the Commission cannot give meaning to subsection (c) until it complies with the Administrative Procedure Act’s (“APA”) notice requirements for rulemakings. This is simply wrong, because presumptions and interpretative rules would merely clarify the scope of a preexisting statutory requirement. As such, they fall squarely within the category of “interpretative rules” that are exempt from APA’s notice requirements for rulemakings.

II. THE COMMISSION CAN AND SHOULD RESOLVE THE PETITION UNDER SECTION 253 WITHOUT FIRST REFERRING STATE LAW ISSUES TO STATE COURT.

NATOA argues that the state law issues Fibertech raises can and should be decided by state courts before preemption under federal law is considered. NATOA Comments at 2-4. NATOA essentially supports the adoption of a requirement that carriers exhaust their remedies under state law - no doubt including multiple levels of appeal possibilities - prior to seeking preemption under Section 253. But there is no basis in law or policy for this approach.

To begin with, the Commission is under no legal obligation to defer ruling on a Section 253 petition until state law claims arising out of the same controversy are resolved in state court. To the extent the Commission has the authority to preempt local requirements that do not comport with the requirements of Section 253 (as explained below, the Commission does have

that power), it must also have the authority to preempt an offending local requirement at any time. The resolution of any state law issues is essentially irrelevant, since federal law applies regardless of the outcome of any state proceeding. Not surprisingly, the Commission has approached Section 253 preemption in exactly this way in the past. In at least two situations the Commission has preempted state laws under Section 253 while claims arising out the same controversy and brought under state law remained pending before state courts.²

Nor would it make any sense for the Commission, as a matter of comity, to voluntarily defer consideration of preemption petitions until state courts can address any related state law claims. Requiring aggrieved parties to first resolve any related state law matters in state court would result in lengthy and unnecessary delay prior to resolution of the relevant preemption matter. This would obviously undermine Congress' goal of accelerating "rapidly private sector deployment of advanced telecommunications and information technologies." S Conf. Rep. No. 104-230, at 1 (1996). Such delay would also undermine the purpose of Section 253, namely to prevent national telecommunications policy from being "frustrated by the isolated actions of individual municipal authorities or states."³ In addition, NATOA's proposed approach would

² See *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, n.11 (1999) ("*Minnesota Order*"); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, ¶ 14 (1997).

³ *Public Utility Commission of Texas Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 4 (1997) *aff'd City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) ("*Texas Order*").

offer parties opportunities to delay any preemption proceeding simply by dreaming up state law issues that somehow pertain to the controversy. Based on all of these considerations, NATOA's comity argument must be rejected.

III. THE COMMISSION HAS THE AUTHORITY TO RULE ON DISPUTES IMPLICATING SUBSECTION (c).

Both NATOA and the Borough of Blawnox argue that the Commission does not have the jurisdiction to hear any matter concerning the management of rights-of-way and thus implicating subsection (c). This is obviously an important issue that the Commission has studiously avoided addressing thus far. But as TWTC explained in its comments, the Commission almost certainly does have the jurisdiction to rule on matters implicating subsection (c).

The Supreme Court has held that Section 201(b) gives the Commission the authority to implement the provisions of the Communications Act. *Iowa Utilities Board v. FCC*, 525 U.S. 366, 377-78 (1999). Congress expressly directed that the 1996 Act be inserted as amendments to the 1934 Act. *See id.* at 377. As the Court held, this means that the authority to implement the provisions of the Communications Act applies to the 1996 Act amendments, including Section 253. *See id.* at 378.

Moreover, as part of the 1996 Act amendments, Congress adopted Section 601(c)(1), which states that nothing in the 1996 Act should be understood to “modify, impair, or supercede *Federal*, State or local law unless expressly so provided.” 47 U.S.C. § 152 (emphasis added). The Commission's jurisdictional authority under Section 201(b) is federal law that existed at the time the 1996 Act amendments were added. Thus, the 1996 Amendments cannot modify, impair, or supercede the Commission's jurisdiction to implement Section 253 generally and

subsection (c) in particular unless they do so “expressly.” Section 253 cannot implicitly limit the Commission’s jurisdiction.

The Commission recently confirmed that this is the appropriate interpretation of Section 601(c)(1) in *Core Communications et al. v. SBC*.⁴ In that case, SBC argued that the requirement in Section 252 that interconnection agreement disputes be arbitrated by the states and appealed to federal district court implicitly means that the Commission cannot hear such disputes in a Section 208 complaint. *See Core v. SBC* ¶ 13. The Commission rejected this argument, finding that the language of Section 208 “grants the Commission jurisdiction to resolve complaints alleging any violation of the Act,” including violations of Section 251(c). *See id.* ¶ 14. As the Commission explained, Section 601(c)(1) mandates that the Commission retain such jurisdiction unless it is expressly superceded in the 1996 Act, and Section 252 could only be read to “implicitly” override the Commission’s Section 208 jurisdiction. *See id.* ¶ 15. In the absence of express superceding language in Section 252, the Commission held that it shares jurisdiction with the states and federal district courts to rule on disputes concerning what should be contained in an interconnection agreement. *See id.* Similarly, in the instant case, the Commission could only be deprived of its jurisdiction under the preexisting grant in Section 201(b) to implement all

⁴ *See Core Communications, Inc., and Z-Tel Communications, Inc., v. SBC Communications, Inc. et al*, File No. EB-01-MD-017, Memorandum Opinion and Order (*rel.* Apr. 17, 2003) (“*Core v. FCC*”).

provisions of the Act, including Section 253(c), if Section 253 expressly limited that jurisdiction.⁵

There is no basis for concluding that Section 253 expressly (or even implicitly) limits the Commission's authority under Section 201(b).⁶ While NATOA and the Borough make only a cursory effort to interpret the language of Section 253, their basic point appears to be that subsection (d) denies the Commission jurisdiction over matters implicating subsection (c). See NATOA Comments at 5; Borough of Blawnox Comments at 3-4. But subsection (d) merely states that the Commission "shall" preempt violations of subsections (a) and (b). As the Second Circuit has held, this merely means the Commission is required to exercise its preemptive jurisdiction where a state law implicating subsection (b) violates Section 253. See *White Plains*, 305 F.3d 67, 75 (2d Cir. 2002) ("*White Plains*"). That mandate does not deprive the Commission of the discretion to exercise its preexisting authority to preempt in cases implicating subsection (c). In fact, the Supreme Court made exactly this holding in *Iowa Utilities Board v.*

⁵ NATOA attempts to turn Section 601(c)(1) on its head by arguing that it precludes Commission jurisdiction over matters previously within the purview of local governments (*i.e.*, states) absent express superceding language. See NATOA Comments at 7. But *Core v. FCC* demonstrates that the preexisting law that may not be implicitly modified, impaired, or superceded is the Commission's authority under the 1934 Act. There, as here, that preexisting authority extends to local competition matters unless the 1996 Act expressly states otherwise.

⁶ In its comments, NATOA states that "[s]ubsection (d) creates authority for the Commission to determine whether regulations violate subsection (a), or fall within subsection (b)'s safe harbor." NATOA at 5. This statement reflects a misunderstanding of the Commission's jurisdiction. The Commission's authority to make such a determination arises from Section 201(b) (as well as Section 152(a)). There is therefore no need to create a new grant of jurisdiction in Section 253, and none exists. The only questions under Section 253 are the extent to which the terms of that provision (1) in some cases require that the Commission exercise its normally discretionary jurisdictional powers, and (2) may limit the Commission's Section 201(b) jurisdiction by granting exclusive jurisdiction to the federal district courts.

FCC, in which it held that the inclusion of Section 251(e), which states that the Commission “shall” exercise its jurisdiction to create or designate entities to administer numbers, does not mean that the Commission lacks the discretionary authority under Section 201(b) to implement the other provisions of the 1996 Act. *See Iowa Utilities Board v. FCC*, 525 U.S. at 383 n.9. Both of these decisions demonstrate that the terms of subsection (d) cannot be understood to be an express limitation on the Commission’s authority to address matters implicating subsection (c).

It is also instructive in this regard to note that Congress was fully capable of “expressly” granting jurisdiction to federal courts *in lieu* of the Commission in the 1996 Act provisions. Most obviously, the Commission did so with regard to appeals from state arbitration decisions (although, as mentioned, interconnection disputes can be brought initially to the FCC and appealed to federal courts of appeals). *See* 47 U.S.C. § 252(e)(6) (establishing federal district court review of state decisions made pursuant to Section 252).

Even if the “implicit” meaning of subsections (a), (c), and (d) were relevant, the most logical conclusion is that those provisions imply Commission jurisdiction over matters implicating subsection (c). To begin with, NATOA concedes that the Commission has the authority to preempt a violation of subsection (a) and views subsection (c) as a safe harbor protecting certain local regulations from preemption. NATOA Comments at 5. But as the Second Circuit held and as the Commission observed in an *amicus* brief, this interpretation of Section 253 strongly implies that the Commission has the ability to interpret subsection (c) to determine whether it must preempt under subsection (a). *See White Plains*, 305 F.3d at 75;

Supplemental Brief of Amici Curiae Federal Communications Commission filed in *White Plains* at 4. In addition, as the Second Circuit also held, interpreting Section 253 as precluding FCC consideration of matters concerning subsection (c) would create a “procedural oddity where the appropriate forum would be determined by the defendant’s answer, not the complaint.” *White Plains*, 305 F.3d at 75-76. The Second Circuit ruled that it would not assume that Congress adopted such an awkward scheme “without stronger evidence.” *See id.* at 76.

Apparently recognizing the absence of any basis for its interpretation in the language of the statute, NATOA relies almost exclusively on the statements of the legislative sponsors of subsection (d). *See* NATOA Comments at 5-7. As the Supreme Court has held, the remarks of a single legislator, even a sponsor, are not controlling in determining the meaning of a statute. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). The actual language of the Act is the most important basis for statutory construction, and the interpretation mandated by that language obviates the need for any reference to legislative history. *Cf. White Plains*, 305 F.3d at 75-76. This is clearly the case with regard to subsections (a), (c), and (d) of Section 253.

IV. FIBERTECH HAS PROFFERED ENOUGH EVIDENCE TO JUSTIFY PREEMPTION OF THE BLAWNOX LOCAL REQUIREMENTS.

NATOA argues that Fibertech has failed to provide adequate evidence in support of its Petition. NATOA Comments at 8-11. This argument is without merit.

NATOA argues that, in order to establish a violation of subsection (a), Fibertech must produce a detailed financial analysis explaining why the Blawnox fees have the effect of preventing it from providing a specific telecommunications service. *See* NATOA Comments at 8-10. But this approach is contrary to the logic of subsection (a) and the established standards

for determining whether a state or local legal requirement violates that provision. As the Second Circuit held, a local ordinance that gives a locality “the right to reject any application” to provide service “clearly [has] the effect of prohibiting [a CLEC] from providing telecommunications service.” *See White Plains*, 305 F.3d at 76. This is so, even where the locality has the right to waive the requirement. *See id.* Where a local regulation includes the power to prevent a firm from providing any service, there is no reason to undertake the kind of detailed and costly analysis urged by NATOA. It is sufficient to provide the legal basis for the locality’s right to prevent a carrier from providing service. As TWTC has explained, Fibertech has done so here by supplying a copy of the Ordinance that gives the Borough the power to prevent a carrier from providing service as well as the correspondence in which it threatened to exercise that power. *See TWTC Comments at 30-31.*

Similarly, no detailed financial analysis should be required to determine that discriminatory application of fees for obtaining access to public rights-of-way violates subsection (a). It is well established that a prohibition need not be “insurmountable” to run afoul of subsection (a). *See White Plains*, 305 F.3d at 76; *RT Communs., Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). In other words, it is not necessary to prove that a carrier was unable to provide the service to any customer. A state or local requirement violates subsection (a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” *See White Plains*, 305 F.3d at 76. For example, a state or local requirement violates this standard if it systematically limits competitors’ opportunities to pursue the mode of entry of their choice -- in this case facilities-based entry that

requires access to public rights-of-way. *See Minnesota Order* ¶¶ 22-49. *Cf. Texas Order* ¶¶ 74-80. Similarly, a state or local requirement violates this standard if it systematically imposes materially greater costs on new entrants than on incumbents.⁷ In either case, a “material” difference in treatment should be presumed to have the effect of preventing the disadvantaged carrier(s) from providing service to the customers it is likely to lose as a result of the discrimination.

The detailed financial analysis called for by NATOA is neither necessary nor sufficient to determine whether a local requirement has this discriminatory effect. It is not necessary, because the focus of the inquiry is the extent to which carriers seeking to use a particular mode of entry are treated differently or whether new entrants as a class are treated differently. This can be determined based solely on an examination of the terms of the local requirement and applicable state law. If the local and state law cause a “material” difference in the treatment of facilities-based competitors, subsection (a) has been violated. This is the case here. Fibertech adequately articulated a *prima facie* case that the fees imposed under the Ordinance, while competitively neutral on their face, apply in practice only to CLECs (especially facilities-based CLECs). *See* Petition at 6-8. The Borough implicitly concedes that this is the case. *See* Borough of Blawnox Comments at 8. Nor does it dispute that the amount of charges applicable only to CLECs equals

⁷ *Cf. Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, Memorandum Opinion and Order, 16 FCC Rcd 16227 ¶ 8 (2000).

the cost of installing fiber in aerial rights-of-way. Such a differential must materially inhibit or limit Fibertech competing in a fair and balanced legal and regulatory environment.

But even if the Commission were to examine in detail the effect of a local requirement on carriers' financial position, it would be insufficient to look only at the petitioner's financial statements. For new entrants like Fibertech, the question under the relevant legal standard would be whether a local requirement would cause the carrier to lose the ability to serve customers in the *future*. To make that determination, the Commission would need to engage in a complex market analysis that assesses the effect of the requirement on petitioner's costs going forward and the costs of its competitors who receive more favorable treatment under the local regime. Fibertech is unlikely to have access to the kind of information needed to present such an analysis, and it makes no sense to require the petitioner to produce it.

In any event, requiring such an analysis would undermine the policy goal of preventing competition from being "frustrated by the isolated actions of individual municipal authorities." That goal is best served by establishing clear, consistent, and predictable presumptions and interpretative rules applicable to preemption proceedings, by establishing an efficient process for carriers to petition the Commission, and by ruling on such petitions in a timely manner. But it appears that NATOA opposes these steps because it fundamentally disagrees with the policy goals of Section 253. NATOA's argument boils down to nothing more than a thinly veiled attempt to limit the opportunities of carriers harmed by local rights-of-way policies to challenge those policies. The Commission cannot accept this view while remaining faithful to the policies underlying the 1996 Act.

Once a carrier has demonstrated that a local requirement violates subsection (a), the local government should bear the burden of demonstrating that the requirement is protected by the safe harbor in subsection (c). Blawnox has completely failed to make such a demonstration. *First*, it has failed to demonstrate that its fees are “competitively neutral and nondiscriminatory.” The Borough’s only defense of the manner in which it applies fees for access to rights-of-way is that the same rules apply to all carriers. *See Borough of Blawnox Comments at 6-7, 15.* But such a defense is irrelevant where the rules themselves exempt carriers, like the ILEC, that are subject to regulation by the state regulatory commission. The Borough essentially concedes that this is the case. *See id.* at 7. As the Second Circuit held, a local requirement must be deemed discriminatory if a state law makes it so. *See White Plains*, 305 F.3d at 80 (“section 253 does not limit municipalities to charging fees that are ‘competitively neutral’ to the extent permitted by state law; it forbids fees that are not competitively neutral, period, without regard to the municipality’s intent”).

Second, Blawnox could not and does not attempt to demonstrate that its fees are “fair and reasonable” because they are cost-based. Instead, it argues that this is not the appropriate standard for determining compliance with the “fair and reasonable” requirement. *See Borough of Blawnox Comments at 12-14.* TWTC explained at length in its comments why the cost-based standard is appropriate, and there is no need to repeat those arguments. TWTC Comments at 27-29. In the absence of any attempt to demonstrate that it meets this standard, the Blawnox Ordinance must be deemed to fall outside the subsection (c) safe harbor.

Finally, as TWTC also explained in its comments, the Ordinance and the Certification Application require carriers to provide a wide range of information that bears no relation to the Borough's management of public rights-of-way. *See id.* at 32. For the reasons explained by TWTC, un rebutted by Blawnox, these aspects of the local rules must also be deemed to fall outside the subsection (c) safe harbor.

V. FEDERAL REGISTER PUBLICATION IS NOT REQUIRED PRIOR TO THE ADOPTION OF PRESUMPTIONS AND INTERPRETIVE RULES CLARIFYING THE MEANING OF SUBSECTION (c).

In a last gasp effort to prevent (or at least delay) agency review, NATOA argues that the Commission may not interpret the meaning of subsection (c) in this proceeding without first publishing notice in the Federal Register. NATOA Comments at 11-12. But prior publication in the Federal Register is not required. Section 553(b) of the Administrative Procedure Act (“APA”) specifically exempts an agency’s interpretive rules from the requirement of prior notice in the Federal Register. *See* 5 U.S.C. § 553(b).⁸ The purpose of interpretive rules is “to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.”⁹ This is precisely the action that Fibertech, TWTC and many others have sought in the instant proceeding.

⁸ Once an agency formulates and adopts an interpretation of general applicability, §552(a)(1)(D) of the APA requires that the same be published in the *Federal Register* for the guidance of the public. *See* 5 U.S.C. § 552(a)(1)(D).

⁹ *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

As NATOA explains, courts have distinguished between legislative rules, which require prior publication in the Federal Register under the APA, and interpretative rules, which do not. It is striking, however, that the case NATOA cites for this proposition demonstrates why presumptions and rules of construction for subsection (c) are interpretative. In *White v. Shalala*,¹⁰ the Second Circuit explained that an agency is engaged in legislative rulemaking where it seeks to “create new law, rights, or duties,” but it is engaged in interpretative rulemaking where it seeks to “clarify an existing statute or regulation.” *See White*, 7 F.3d at 303. In that case, the Secretary of the Department of Health and Human Services changed its interpretation of an ambiguous statutory provision requiring social security recipients to offset their benefits with “payments received” from other sources, including veterans’ benefits. The old rule did not count a payment as “received” by a dependent if paid only to a veteran for the support of the dependent, while the new rule did count such payments as “received” by the dependent. *See id.* at 300. The petitioners argued that the agency violated the APA by failing to provide notice in the Federal Register prior to making this change. But the court held that the change was an interpretive rule, because it merely changed the agency’s interpretation of an existing requirement (the offset requirement for payments “received”); it was not the creation of a new requirement. *See id.* at 304. Publication in the Federal Register was therefore not required.

¹⁰ *See* 7 F.3d 296 (2d Cir. 1993) (“*White*”).

The same conclusion applies here. The terms of Section 253 establish the requirements applicable to local government rights-of-way management. The presumptions and interpretative rules that TWTC has urged the Commission to adopt would merely clarify the meaning of those requirements. No new rights or duties would be established.

Nor does *Sprint Corp. v. FCC*,¹¹ upon which NATOA relies, support a different conclusion. That case concerned an FCC decision to replace a system in which facilities-based interexchange carriers (“IXCs”) and switch-based resellers (“SBRs”) shared responsibility for compensating payphone operators to one in which only IXCs had such responsibilities. As the court explained, “[w]hereas a clarification [of an existing rule] may be embodied in an interpretive rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations [that were initially promulgated pursuant to notice and comment] are subject to the APA’s procedures.” *See Sprint*, 315 F.3d at 374. The change in the system of compensation responsibility established by the Commission clearly created new obligations for IXCs (*i.e.*, payment responsibility for calls that would previously have been the responsibility of SBRs). *See id.* The Commission was not just providing greater clarity to the meaning of an existing requirement. The court therefore found that the Commission was required to comply with the notice and comment requirements of the APA. *See id.* at 374-377. In contrast, here the Commission would merely be interpreting the meaning of existing statutory language in subsection (c) that already applies to local governments. The rules of the game

¹¹ *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) (“*Sprint*”).

would remain the same; parties would simply have greater clarity as to what those rules mean. In such cases, no Federal Register publication is required. *See id.* at 374.

Moreover, this is exactly how the Commission has treated prior interpretative rules established to give greater clarity to the meaning of Section 253. For example, in the California Payphone decision, the California Payphone Association (“CPA”) sought preemption, under subsections (a) and (d), of a local ordinance that prohibited payphones on private property in certain parts of a city’s central business district. CPA argued that the city’s ordinance violated subsection (a) in that it had “the effect of prohibiting” the ability of any payphone service provider to provide payphone service in the central business district. Prior to the proceeding, the Commission had not offered any guidance as to the meaning of the phrase “has the effect of prohibiting.” As in the instant proceeding, the Commission placed the preemption petition on public notice, but did not provide formal notice in the Federal Register. In its order denying the petition, the Commission resolved the textual ambiguity in subsection (a) by ruling that a local requirement has the effect of prohibiting a carrier from providing service if (as mentioned above) it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹² The instant proceeding presents an almost indistinguishable context in which presumptions and interpretative rules clarifying the

¹² *See California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, Memorandum Opinion and Order*, 12 FCC Rcd 14191, ¶ 42 (1997).

ambiguous language of Section 253 may be adopted without prior publication of a notice of proposed rulemaking in the Federal Register. The Commission can and should do so.

VI. CONCLUSION

For the reasons explained herein, the Commission should adopt presumptions and interpretative rules clarifying the meaning of subsections (a) and (c) in this proceeding as described in TWTC's comments. Moreover, the Commission should apply those presumptions and rules to grant Fibertech's petition for preemption.

Respectfully submitted,

_____/s/Thomas Jones

Thomas Jones
Jennifer Ashworth
McLean Sieverding
WILLKIE FARR & GALLAGHER
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEY FOR
TIME WARNER TELECOM

April 29, 2003