

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C. 20554

In the Matter of)
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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)
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GN Docket No 04-54

REPLY COMMENTS OF THE TOWN OF COLONIE, NEW YORK

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May 24, 2004

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The Town of Colonie, New York (the "Town") hereby submits these reply comments in response to the Commission's *Notice of Inquiry* into the issue of advanced telecommunications deployment¹

I. INTRODUCTION

Local rights-of-way regulations have not been a barrier to entry for telecommunications providers. Despite attempts by some commenters in this proceeding to suggest that local right-of-way management or compensation policies, such as the Town's telecommunications law

¹ *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*, Notice of Inquiry, GN Docket No. 04-54 (rel. Mar. 17, 2004) (hereinafter "NOI")

(“Local Law No. 13”), have impeded the entry of competitive providers into the market², there is no evidence to suggest that such regulations are having such an effect.³

Congress adopted the Telecommunications Act of 1996 to encourage facilities-based local competition. At the same time, however, Congress recognized that local governments have important rights and responsibilities with respect to local rights-of-way. Thus, 47 U.S.C. § 253(c) specifically preserves local authority to manage and obtain compensation for the use of local rights-of-way.⁴ In 1999, the Town adopted Local Law No. 13 in order to exercise its rights and responsibilities under state and federal law. Local Law No. 13 contains right-of-way management regulations and compensation requirements to accommodate multiple right-of-way users while protecting the Town’s citizens and preserving the Town’s valuable rights-of-way.⁵

² 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, Notice of Inquiry, GN Docket No. 04-54, Comments of AT&T Corp. (hereinafter “AT&T Comments”) at 16-18, filed on May 10, 2004.

³ 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*, Notice of Inquiry, GN Docket No. 04-54, Comments of the United States Conference of Mayors, National Association of Counties, American Public Works Association, Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission (hereinafter “Local Groups Comments”) at 16, filed on May 10, 2004.

⁴ As the Local Groups in their initial comments in this proceeding at pp. 8-10 demonstrate, both the language of 47 U.S.C. § 253(c) and the intent of Congress are explicit and unambiguous on this point.

⁵ Telecommunications providers are in no position to arbitrate the conflicts and difficulties that arise among themselves, as the interests of competing carriers are not always congruent with each other or with the legitimate interests of local governments and their citizens. *Id.* at 18. In

II. AT&T MISCHARACTERIZES BOTH THE FACTS OF AND THE DISTRICT COURT'S DECISION IN *TC SYSTEMS ET AL. V. TOWN OF COLONIE*

In its comments in this proceeding, AT&T named the Town as an example of a local government that “abuse[s] [its] monopoly power over rights-of-way by requiring AT&T to agree to onerous terms and conditions as a prerequisite to providing service, and delaying deployment if AT&T does not acquiesce.”⁶ AT&T’s discussion of Local Law No. 13 and the decision of the court in *TC Systems et al. v. Town of Colonie, New York*, 263 F Supp. 471 (N D N Y 2003)⁷ is incomplete and misleading.

Even a cursory review of the district court’s decisions in the Colonie litigation demonstrates that Local Law No. 13 is not an example of abuse of local power over local rights-of-way. What AT&T fails to mention in its discussion of the case is that the AT&T subsidiaries that instituted the challenge to Local Law No. 13 were both already providing service in the Town (even though they had failed to obtain permission from the Town to use its rights-of-way) at the time they brought their lawsuit against the Town. Moreover, the facts developed in the case indicate that the subsidiaries continued to install facilities and provide service in the Town

addition, a local government’s responsibility to protect the public health and safety cannot be understated. *Id.* at pp. 19-22.

⁶ AT&T Comments at p. 17.

⁷ *TC Systems and Teleport Communications –New York*, both subsidiaries of AT&T, challenged the Town of Colonie’s telecommunications law (“Local Law No. 13”) and the corresponding draft franchise agreement proposed by the Town (“Draft Agreement”). The Plaintiffs argued that the Town’s Local Law and Draft Agreement violated Section 253(a) of the Telecommunications Act of 1996 and state law.

even after they filed the lawsuit.⁸ The court ultimately found for the Town on both of the Town's counterclaims: the court found that the plaintiffs had been violating Local Law No. 13 because they were using facilities located in the Town's rights-of-way to provide service in the Town without having obtained a franchise; and the plaintiffs had been violating § 27 of the New York Transportation Corporation Law using the Town's rights-of-way without permission⁹

AT&T, in its comments, also incorrectly suggests that the court in *TC Systems* relieved AT&T's subsidiaries from a host of "onerous terms and conditions." AT&T implies that the court struck down many provisions of Local Law No. 13. In fact, the court's decision largely upheld both Local Law No. 13 and the Town's draft Franchise Agreement. For example, the court upheld the Town's authority to require a franchise; the provision of Local Law No. 13 requiring the Town's consent to the transfer of a franchise; the reporting provisions of Local Law No. 13 (as long as long as they are applied narrowly); and provisions governing construction of facilities and other activities in the rights-of-way. See *TC Systems*, 263 F Supp 471.

⁸ Incidentally, AT&T sued the Town in December of 2000. The Second Circuit did not decide the *White Plains* case until 2002, at which point AT&T's litigation with the Town was well-advanced. Thus the implication that the Town should have modified its requirements before the district court ruled in 2003 is, like the rest of AT&T's discussion of the case, unfair.

⁹ In its initial decision, the district court found for the Town on its first counterclaim, which was that both plaintiffs have been violating Local Law No. 13 because they had been using the rights-of-way without having obtained a franchise. *TC Systems*, 263 F Supp at 495. On the Town's second counterclaim, however, the court found that it did not have a sufficient factual basis to rule on that claim at that time. The district court subsequently found for the Town on its second counterclaim, which was that Plaintiffs were using the Town's right-of-way without permission in violation of Section 27 of the New York Transportation Corporation Law. *TC Systems et al. v. Town of Colonie, New York*, CV-01972, Order, April 2, 2004.

The court also found that the fee provision of Local Law No. 13 (a gross revenues fee) applies to all providers on its face. *Id.* at 489. Because Verizon refused to comply with the fee provision, however, and the Town had not taken specific enforcement action against Verizon, the court, following the Second Circuit's decision in *TCG v. White Plains*, 305 F.3d 67 (2002), held that the fee provision was being applied discriminatorily and therefore was not saved by 47 U.S.C. § 253(c). *TC Systems*, 263 F.Supp. at 489.

The Town also notes that, although AT&T has leveled certain allegations against it in its comments, AT&T failed to provide a copy of its comments to the Town or even to notify the Town that it had named the Town in its comments. In other proceedings the Commission has generally followed a policy which requires a party which alleges misconduct by a community to serve the community against which the allegation is leveled with a copy of such allegations.¹⁰ The purpose of such a requirement is to allow state and local governments a fair opportunity to respond to allegations made against them by interested parties before the Commission. The Commission should extend this policy to proceedings such as this one, preventing AT&T and other Commenters from engaging in such behind-the-back allegations.¹¹

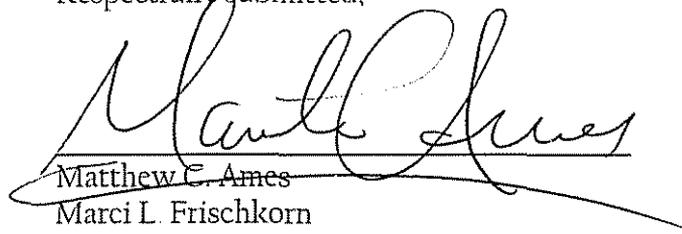
¹⁰ In 1998, the Commission revised its *ex parte* rules to require that petitioners serve a copy of any preemption petition on each state or local government cited in the petition. See Suggested Guidelines for Petitions for Ruling Under § 253 of the Communications Act, 13 FCC Rcd 22970 (1998). The Commission has been asked to extend these requirements to Notices of Proposed Rulemakings and Notices of Inquiries as well.

¹¹ As the Local Groups stated in their initial comments in this proceeding, repeated assaults on local governments in multiple proceedings require local communities to maintain constant vigilance and expend scarce resources to respond to claims that otherwise would seem to gain credibility from their repetition alone. Few local communities can afford to maintain such vigilance, placing them at a disadvantage to those industry entities that have the resources to participate constantly in the Commission's multiple dockets.

III. CONCLUSION

Local right-of-way regulations, like the Town's Local Law No. 13, are a necessary and appropriate means for local governments to protect their citizens, preserve their valuable rights-of-way, and accommodate multiple right-of-way users. The Town's Local Law No. 13 has not been a barrier to entry for telecommunications providers and the Commission should give no credence to the unfounded allegations of industry commenters like AT&T.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew C. Ames", is written over a horizontal line. The signature is fluid and cursive.

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