

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

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In the Matter of )  
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)  
Inquiry Concerning Deployment of ) GN Docket No. 04-54  
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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**REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS  
OFFICERS AND ADVISORS  
AND THE ALLIANCE FOR COMMUNITY MEDIA**

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## I. INTRODUCTION AND SUMMARY

The National Association of Telecommunications Officers and Advisors (NATOA) and the Alliance for Community Media (ACM) hereby submit these reply comments in response to the Commission's *Notice of Inquiry* under Section 706 of the Communications Act into the issue of advanced telecommunications deployment.

These Reply Comments address only those issues raised by other commenters in response to Paragraphs 38 through 40 of the Notice of Inquiry<sup>1</sup> regarding access to public rights-of-way and its impact on broadband deployment. NATOA and ACM applaud and support the comments filed by our sister associations and fellow local governments, and trust that the Commission will find those comments and subsequent replies instructive.<sup>2</sup>

From all of the comments filed, only five broadband providers ("Industry Commenters") made more than casual mention of rights-of-way in their comments. The five Industry Commenters that do raise issues relating to management of the public rights-of-way do so only generally, and without support for the propositions contained therein.<sup>3</sup> Each of the Industry Commenters argued that local government management of public rights-of-way has been a barrier to broadband deployment, and most suggested some form of federal preemption of this long-standing traditional local government

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<sup>1</sup> *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. March 17, 2004) ("Fourth Section 706 Inquiry")

<sup>2</sup> See, *Fourth Section 706 Inquiry*, 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.

<sup>3</sup> See, *Fourth Section 706 Inquiry*, Verizon, MCI, AT&T, Comcast and Current Communication Group, LLC., GN Docket No. 04-54, filed May 10, 2004.

authority. There are at least three primary reasons why the suggestions of the Industry Commenters should be disregarded.

First, as this Commission is aware, regardless of its views on what may or may not be good public policy, the Commission cannot act unless Congress has given it the legal authority to do so. As we articulated in our Comments, Congress specifically withheld the authority to preempt in this area. None of the Industry Commenters identified any statutory authority upon which the Commission can act to preempt the management of local rights-of-way or the collection of fees for the use thereof, because no such authority exists.

Second, in the narrow provision of § 253(a), where the Commission does have limited authority, the Commission must hesitate before preempting traditional state or local government authority, unless there is a demonstrated problem that cannot be adequately addressed by means other than preemption. Similarly, while Industry Commenters support broad preemption of all state and local control over rights-of-way generally, the Commission's authority to preempt is limited to those instances where the action of the state or local government prohibits or has the effect of prohibiting the ability of an entity to provide intrastate or interstate telecommunications service. Section 253(a) requires a case specific analysis and therefore cannot be used to preempt nationally. While the Industry Commenters may choose to bring individual actions under Section 253(a) and thereby seek preemption in specific cases, in doing so they must provide a degree of specificity that is wholly lacking in the comments filed in this proceeding.

Third, the Commission has recognized that due process requires entities that are named as bad actors in support of actions seeking preemption of local authority be

provided notice of the accusations, and given an opportunity to respond.<sup>4</sup> While this proceeding is a Notice of Inquiry, to the extent the Commission were to choose to take some form of action to accelerate broadband deployment, it cannot do so within this proceeding without additional proper notice. Further, entities that are identified as bad actors must be provided notice and be given an opportunity to respond. Two Industry Commenters in this proceeding have used specific local governments as examples of bad actors relating to rights-of-way, but have failed to provide the requisite notice to those entities. While Industry Commenters aver to problems in dealing with state and local governments, they wholly fail to adequately identify and provide notice to entities used as examples. Generalizations will not and should not suffice.

The Commission has no jurisdiction to preempt traditional local authority over the management of public rights-of-way or the compensation that is charged for the use thereof by private entities. Even assuming, *arguendo*, that Section 706 confers additional authority upon the Commission in this regard, the record in the instant proceeding is wholly inadequate to support the Commission taking further action.

## **II. THE COMMISSION HAS NO LEGAL AUTHORITY TO ACT.**

As the Commission has noted on previous occasions, even when it believes a state or local law, regulation or policy inhibits the deployment of broadband services, it cannot act to preempt that state or local action, unless it has specific legal authority to do so granted by Congress.<sup>5</sup> In our Comments, at pp. 14 – 17, we provided specific legal

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<sup>4</sup> C.F.R. 47 § 1.1206 (2003)

<sup>5</sup> *In re Missouri Municipal League*, 16 FCC Rcd. 1157, at 1172-1173 (2001).

analysis indicating why the Commission has no legal authority to preempt management of local rights-of-way, or the compensation charged for the use of the rights-of-way by private companies. Similar arguments were made in this proceeding on behalf the United States Conference of Mayors, National Association of Counties, American Public Works Association, et. al.<sup>6</sup> None of the Industry Commenters provided any specific legal authority to suggest anything to the contrary. In Section 253 of the Telecommunications Act of 1996, Congress made it clear that disputes over access to public rights-of-way by telecommunications companies would be addressed by the Courts, and the Commission should use this opportunity to express its clear understanding of the limits of its jurisdiction.

The actions complained of generally by Industry Commenters are those within the exclusive jurisdiction of the courts. Local governments' authority to manage the public rights-of-way and to charge for their use are actions that are specifically governed under Section 253(c) of the Communications Act. When the industry has found itself at odds with a local government over the management, control or compensation relating to rights-of-way, it has not been shy about using the court system to ascertain its rights. And, the courts have not evidenced an inability to address such issues.

**III. EVEN IF THE COMMISSION HAD BROAD AUTHORITY TO  
PREEMPT, THERE HAS BEEN NO CASE MADE THAT PREEMPTION  
IS APPROPRIATE.**

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<sup>6</sup> See, *Fourth Section 706 Inquiry*, Comments by United States Conference of Mayors, et. al. at 4, GN Docket No. 04-54, filed May 10, 2004.

As the Commission is aware, the management of public rights-of-way, and the compensation received for its use, whether it is in the form of a franchise, license, permit, or other grant of authority, is a traditional power of state and local government. Even if the Commission had broad authority to preempt traditional state or local power, as a matter of public policy it should never preempt unless it first determines (1) there is a widespread national problem that requires federal intervention; and (2) after exploring all alternatives, there are none short of preemption that would adequately address the clearly identified problem. Only then, should a preemptive action be tailored narrowly “to the extent necessary to correct such violation or inconsistencies.”<sup>7</sup>

Here, the evidence presented by the Industry Commenters does not come close to identifying a national problem. Verizon refers to “some state or local authorities” that allegedly abuse their regulatory authority over rights-of-way.<sup>8</sup> Verizon continues by calling upon the Commission to ignore its statutory constraints and to “prohibit state or local entities from requiring broadband providers to enter into agreements, franchises, or licenses....” Verizon would have the Commission do what it has been unable to convince a court to do on its behalf.<sup>9</sup> Current Communications also makes vague reference to “certain local governments” who allegedly abuse their authority, but again, they provide no specific information to back up this assertion.<sup>10</sup> MCI pointedly demands that the Commission declare that non-cost-based compensation for use of rights-of-way should be prohibited. The fact that the Commission lacks authority under Section 253 to

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<sup>7</sup> 47 U.S.C. § 253(d)

<sup>8</sup> See, *Fourth Section 706 Inquiry*, Comments of Verizon at 33, GN Docket No. 04-54, filed May 10, 2004.

<sup>9</sup> See *City of Rome, New York v. Verizon Communications, Inc.*, 362 F.3d 168, (2<sup>nd</sup> Cir. 2004).

<sup>10</sup> See, *Fourth Section 706 Inquiry*, Comments of Current Communications Group, LLC at 10, GN Docket No. 04-54, filed May 10, 2004.

make such a sweeping change does not appear to disturb MCI in the least.<sup>11</sup> None of these allegations come close to meeting the Commission’s own stated requirements for petitions for preemption<sup>12</sup>. Comments filed by AT&T at least note that “many localities recognize the benefits of competition and broadband deployment....” While they also complain that “others view new providers as a means of generating monopoly rents....” But to AT&T’s credit, they do not request that the Commission preempt all state and local government authority. Rather, they at least recognize the limitations of the Commission’s authority.<sup>13</sup>

**IV. LOCAL GOVERNMENTS THAT HAVE BEEN NAMED AS BAD ACTORS HAVE NOT BEEN GIVEN NOTICE OR AN OPPORTUNITY TO RESPOND.**

The Commission has adopted C.F.R. 47 § 1.1206 directing that in all proceedings seeking specific preemption of state or local authority, any entities who are identified as examples supporting preemption be provided notice and an opportunity to respond.

While the rule directs notice to be provided in actions specifically seeking preemption, and therefore may not be directly applicable to this Notice of Inquiry, fundamental

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<sup>11</sup> See, *Fourth Section 706 Inquiry*, Comments of MCI at 21, GN Docket No. 04-54, filed May 10, 2004. (“MCI’s Comments”)

<sup>12</sup> See *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, FCC 98-295, rel. Nov. 17, 1998.

<sup>13</sup> See, *Fourth Section 706 Inquiry*, Comments of AT&T at 18, GN Docket No. 04-54, filed May 10, 2004. (“AT&T’s Comments”)

It is worth noting that while AT&T’s comments refer to the Commission’s *amicus* brief in the White Plains case, the Supplemental Brief filed by the Commission at the request of the court made clear that the Commission had never addressed the question of whether it had jurisdiction to adjudicate a Section 253(c) question. See *TCG New York, Inc. v. City of White Plains, New York*, 99 Civ. 4419 (S.D.N.Y. 2000), *aff’d*, *TCG New York, Inc. et al. v. White Plains*, 305 F.3d 67 (2002).

fairness and the spirit of the rule would suggest that entities named as bad actors, whose alleged actions justify preemption of 36,000 units of local government nationwide, ought to be given notice of the manner in which their actions have been described, and an opportunity to respond.

One Industry Commenter (AT&T) named two local governments as examples of entities whose management practices justify preemption, but did not provide notice of its Comments to those entities. Another Industry Commenter (MCI) indirectly mentioned specific local governments, by referencing comments filed in a prior proceeding, and yet in neither the prior proceeding nor this proceeding did MCI provide notice to some of those entities as required by the Commission's rules.

Specifically, MCI referenced its October 12, 1999 Comments in WT Docket No. 99-217. We addressed many of the issues raised in those Comments in our Reply Comments to that proceeding, and incorporate those Reply Comments herein by reference.<sup>14</sup> It should be noted, however, that MCI claims in its Comments to this proceeding<sup>15</sup> that it previously demonstrated support for its preemption request in the record of WT Docket 99-217. Upon review of that earlier docket, we noticed that MCI did not provide notice to some of the communities it named as bad actors whose rights-of-way management practices require national preemption of traditional local authority. Indeed, if there were evidence to support MCI's allegations, it should have been able to document for this Commission how actions taken in the communities mentioned by MCI in WT Docket No. 99-217 have resulted in its inability to provide the desired services

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<sup>14</sup> See, *Promotion of Competitive Networks in Local Telecommunications Markets*, Reply Comments of the National Association of Counties, The United States Conference of Mayors, The National Association of Telecommunication Officers and Advisors, et. al., WT Docket No. 99-217, filed October 13, 1999.

<sup>15</sup> MCI's Comments at 21

within those communities. Further, the comments in that proceeding are now more than five years old.

Similarly, AT&T names both White Plains, New York and Colonie, New York as examples of local governments it would characterize as bad actors, without having served either community with its Comments in this proceeding.<sup>16</sup> While it is clear that the dispute between AT&T and these communities has subsequently been resolved by a court, it is not clear that AT&T's statements should go unchecked by the communities whose names are impugned by AT&T's Comments in this proceeding.

The telecommunications marketplace, and indeed the provision of broadband services have changed radically over just the past few years. Comments filed five years ago, and comments which use local governments as examples of bad actors without providing notice and opportunity to respond, should not be relied upon as evidence of activity in the marketplace today. In any event, the fact of the matter is that allegations were made against specific communities and those communities were not provided notice of the manner in which they were named and accused of bad actions. This should be viewed as a breach of the spirit if not the rule as established by the Commission.

## **V. CONCLUSION.**

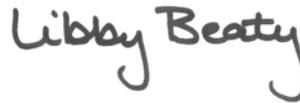
Given that the Commission has prefaced its discussion on rights-of-way within the Notice with its authority to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting

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<sup>16</sup> AT&T's Comments at 17

competition in the telecommunications market,”<sup>17</sup> it would appear that some Industry Commenters perceive this to be sufficient notice for the Commission to take preemptive action against any or all state or local governments. We strongly disagree. The Commission lacks authority to take preemptive action on issues under Section 253(c) pertaining to local government management, control or compensation for the use of the public rights-of-way. There is simply no evidence in this record to suggest that the Commission ought to move forward on any action that would involve preemption of local authority to manage rights-of-way or to collect compensation for the use thereof by private companies.

Respectfully Submitted,



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<sup>17</sup> See § 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104