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VIA ECFS

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: GN Docket Nos. 09-47, 09-51, 09-137; WC Docket No. 09-153

Dear Ms. Dortch:

As Verizon¹ has suggested here and elsewhere,² in order to eliminate one type of constraint on broadband deployment, the Commission should interpret § 253 in the National Broadband Plan to provide clarity to localities and providers regarding the terms by which providers may obtain access to public rights-of-way. Limiting the fees that localities may charge providers to localities' management costs and requiring that such fees be non-discriminatory would remove a significant hindrance to broadband deployment – one the Commission itself has acknowledged.³

Any provider that wishes to install broadband facilities in public rights-of-way, or to renew its license to use such facilities, must first get permission from local authorities. While some localities negotiate reasonable rates, others require rates (or impose other costs) that provide the localities with monopoly rents. The localities may delay negotiations until providers concede to pay the rates. Such conduct poses a direct threat to the achievement of universal broadband access. When these local actions make it more expensive to deploy broadband facilities, they make it less likely that providers will build such facilities in the area. In some cases, providers may have little choice to leave the market and must accede to local demands, diminishing financial resources that could have been used to improve service or deploy new facilities elsewhere. Higher costs also ultimately result in higher prices for consumers.

¹ With the exception of Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc. ("Verizon").

² See Comments of Verizon and Verizon Wireless, *Level 3 Communications, LLC; Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153 (Oct. 15, 2009) ("Verizon Comments").

³ See, e.g., *Bringing Broadband to Rural America*, Report on a Rural Broadband Strategy, GN Docket 09-29, ¶ 157 (May 27, 2009) ("Timely and reasonably priced access to . . . rights of way is critical to the buildout of broadband infrastructure in rural areas.").

Excessive rights-of-way fees can take many forms. For instance, some localities charge fees based on a percentage of gross revenues from the use of the right-of-way, which are typically around 5%, but can approach 10%.⁴ In fact, AT&T has described a locality that tried to extract a percentage of *all* AT&T's revenues for *all* services in the locality.⁵ Even though any fees based on a percentage of gross revenues are wholly unrelated to rights-of-way management costs – and may far exceed them – the National Association of Telecommunications Officers and Advisors (NATOA) and other localities claim that they are entitled to assess such fees on providers.⁶

The record in the docket for Level 3's petition for a declaratory ruling to preempt certain right-of-way fees charged by the New York State Thruway Authority (NYSTA) (WC Docket No. 09-153) is replete with other examples of excessive fees. For example, in 2002, NYSTA required MCI⁷ to pay \$24,000 to occupy just 19 feet of public rights-of-way along the Thruway. Adjusted for inflation, the annual fee now exceeds \$33,000. Verizon's facilities, however, do not disrupt or damage the rights-of-way, and NYSTA's fees therefore far exceed any reasonable measure of cost.⁸ Similarly, Qwest has described rights-of-way fees that increased over 1,000% from one year to the next – an increase the locality admitted was designed to raise revenue.⁹

Localities can coerce carriers into paying these outlandish fees by delaying negotiations, leaving sunk investments stranded until carriers accede to their demands. Commission staff recently found that “delays of up to 18–24 months [in obtaining right-of-way permits] can also raise cost of fiber deployment.”¹⁰ In a similar context, the Commission found that local franchising authorities were using delay tactics to coerce cable operators into accepting unreasonable demands.¹¹ Because the Commission found that these delays, coupled with unreasonable demands, deterred competition in the provision of cable services, it adopted rules that preempted local abuse in the local franchising process.¹²

Localities may also favor some providers over their competitors. In Eugene, Oregon, for example, the incumbent local exchange carrier is subject to substantially lower fees than Verizon, despite its significantly greater use of the City's public rights-of-way. In some cases,

⁴ See Verizon Comments at 5-6 (detailing the City of Eugene, Oregon charging fees of 9% of gross revenues).

⁵ See Comments of AT&T, *Level 3 Communications, LLC; Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153, at 8 n.23 (Oct. 15, 2009).

⁶ See Reply Comments of NATOA *et al.*, NBP Public Notice #30, *International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47, *et al.*, at 20-23 (Jan. 27, 2010) (NATOA Comments).

⁷ MCI is now owned by Verizon.

⁸ See also Verizon Comments at 4-6 (describing other localities' excessive fees, such as a fee of 3% of revenues for right-of-way access for less than 50 miles).

⁹ See Comments of Qwest, *Level 3 Communications, LLC; Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153, at 3-9 (Oct. 15, 2009).

¹⁰ Commission Meeting Slides from Open Meeting, <http://www.fcc.gov/openmeetings/092909slides.pdf>, at 50 (Sept. 29, 2009).

¹¹ See *Implementation of Section 621(a)(1)*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 19 (2007) (observing that localities often subjected applications to “months of unnecessary delay”).

¹² *Id.* ¶ 137.

localities themselves provide competing services. Discriminatory fees make fair competition impossible and interfere with the Commission's goal of stimulating broadband deployment.

To eliminate this conduct that deters or delays the deployment of broadband services, the Commission should propose in the National Broadband Plan that it provide explicit guidance to localities regarding the application of § 253 to the fees they may charge for access to rights-of-way. Specifically, the Commission should limit the fees that localities may charge providers to localities' management costs and require that such fees be non-discriminatory. The open Level 3 proceeding (WC Docket No. 09-153) is one venue where the Commission could take this action.

Under § 253(a), "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."¹³ The Commission has previously interpreted this section as preempting local action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."¹⁴ The Commission should explain how that standard applies to the most common local action – charging fees for access to public rights-of-way – and announce that § 253 preempts local right-of-way fees if they are unreasonable or competitively discriminatory.

Read as a whole, § 253 shows that Congress intended to prohibit unreasonable and discriminatory right-of-way fees. Congress explicitly addressed local authority over right-of-way fees in § 253(c), which preserves localities' right to charge right-of-way fees so long as they are reasonable and imposed on a competitively neutral and nondiscriminatory basis. The most logical way to harmonize the statute as a whole, and to give effect to Congress's pro-competitive objectives, is to construe § 253(a) as preempting any right-of-way fees that are not saved by § 253(c).¹⁵

Moreover, the Commission should articulate clear standards for determining when fees are unreasonable or discriminatory. The Commission should declare that right-of-way fees are unreasonable when they exceed the municipal expenses incurred because of a carrier's deployment of facilities in public rights-of-way. Accordingly, the Commission should reject the proposal of NATOA and instead declare that fees that are calculated as a percentage of a provider's gross revenue are no longer permitted.

For two reasons, localities may not simply charge the maximum rate carriers will agree to pay or arbitrary charges based on revenues. First, localities manage the rights-of-way in trust for

¹³ The reference to a "telecommunications service" does not render § 253 inapplicable in the broadband context. To the contrary, telecommunications and broadband services are often provisioned together, and improved offerings of telecommunications services are often provisioned over broadband.

¹⁴ *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Kuntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14,191, ¶ 31 (1997).

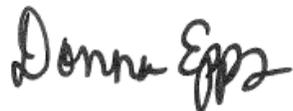
¹⁵ The Commission has previously looked to § 253(c) to inform the scope of the limitations under § 253(a). See *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21,396, ¶ 108 (1997).

the benefit of the public, not as a private property owner entitled to seek profits.¹⁶ When a particular use – such as the deployment of broadband and other services – is beneficial to the public, it is not reasonable for localities to constrain such use by seeking to profit from it. Instead, localities should be limited to recovering their cost of administering the property. Second, localities' monopoly power would allow them to impose inappropriate anticompetitive rates. In discussing the meaning of § 253 in its brief to a federal court of appeals, the Commission suggested that fees exceeding municipal costs or otherwise unrelated to carrier use would constitute unreasonable barriers to entry.¹⁷ The Commission cited a federal district court's conclusion that "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"¹⁸ That court reasoned that the most persuasive reading of "fair and reasonable compensation" is to limit fees to the "recoupment of costs directly incurred through the use of public rights-of-way."¹⁹ In other words, localities should not make a profit from their management of the rights-of-way.²⁰

Thus, NATOA's claim that localities are entitled to rights-of-way fees that reflect "fair market value" and yield profits²¹ should be rejected. NATOA's analogy to just and reasonable rates charged by carriers for their services²² is not apt. Unlike service providers, localities are not in the *business* of providing rights-of-way. Rather than providing a new service to consumers, leasing rights-of-way merely rations the ability of providers to expand their broadband offerings. Furthermore, determining what "fair market value" would be – or what profit margin would be reasonable – in the context of an artificial market localities themselves created and control would be nearly impossible.

In addition, the Commission should declare that discriminatory fees are prohibited to the extent that they exceed the lowest rate charged to any competitor in the locality. In other words, the remedy for discriminatory fees should be to require localities to lower excessive fees, rather than allowing them to raise fees. Together, these tests give effect to Congress's objectives and advance broadband policies while providing administrable standards.

Sincerely,



¹⁶ See *Liberty Cablevision of P.R. v. Municipality of Caguas*, 417 F.3d 216, 221–22 (1st Cir. 2005).

¹⁷ Brief of the Federal Communications Commission and the United States as Amici Curiae at 15 n.7, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2001) (Nos. 01-7213, 01-7255), 2001 WL 34355501.

¹⁸ *Id.* (quoting *N.J. Payphone Ass'n, Inc. v. Town of W. New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001)).

¹⁹ *N.J. Payphone Ass'n*, 130 F. Supp. 2d at 638.

²⁰ States have also recognized the importance of linking right-of-way fees to actual costs. For example, Governor Schwarzenegger of California recently signed an executive order requiring that "any charge to wired broadband providers for State ROW usage shall be based on the actual costs incurred by the State." Twenty-First Century Government: Expanding Broadband Access and Usage in California (Revised), Exec. Order S-23-06, <http://gov.ca.gov/index.php?executive-order/4585/> (last visited Feb. 11, 2010).

²¹ See NATOA Comments at 21-23.

²² *Id.* at 21.