



February 18, 2010

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

**Re: Ex Parte Communication, 47 C.F.R. § 1.1206
GN Docket Nos. 09-47, 09-51, 09-137; WC Docket No. 09-153**

Dear Ms. Dortch:

On February 16, 2010, Verizon Communications, Inc. (“Verizon”), filed an ex parte letter in the above-referenced dockets (“Verizon Letter”). The National Association of Telecommunications Officers and Advisors (“NATOA”) files this letter to remind the Commission of the evidence that directly contradicts the rehashed, unsupported arguments of Verizon and also points out some of the intentionally or carelessly deceptive statements made by Verizon in reference to the case of the City of Eugene, Oregon. A brief recap of the Reply Comments of NATOA and the International Municipal Lawyers Association (“IMLA”) in the *Level 3* Proceeding shows that the Verizon Letter adds nothing to the record, and given the misstatements regarding Eugene, should not be relied upon by the Commission for any reason.¹

- *First*, the NATOA/IMLA Reply Comments show that, contrary to the claims in the Verizon Letter, the language of Section 253, its legislative history, and court precedent make clear that Sec. 253(c) is a safe harbor and Section 253(a) is not an affirmative prohibition on all rights-of-way compensation that does not fall within the Sec. 253(c) safe harbor.²
- *Second*, the Reply Comments show that Congress intended that courts, not the FCC, have jurisdiction over Sec. 253(c) rights-of-way compensation and management matters.³
- *Third*, the Reply Comments show that Congress intended the term "fair and reasonable compensation" to include gross revenue-based and other rent-based fees.⁴ These points, set out in NATOA/IMLA’s Reply Comments are not rebutted by Verizon; indeed, the points made by

¹ Reply Comments of NATOA and IMLA, *In the Matter of 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 (filed Nov. 5, 2009) (“Reply Comments of NATOA/IMLA”).

² Reply Comments of NATOA/IMLA at 29.

³ *Id.* at 20-21.

⁴ *Id.* at 27-29.



NATOa/IMLA – supported by significant legislative history and case law - are wholly *ignored* by Verizon, which seeks to repackage the same stale arguments, made mostly by others in the past, rather than offer any new evidence to counter our thorough rebuttal of such claims.

Additionally, the Verizon Letter's claims regarding the effect of fees on broadband deployment also fail to address ample factual and expert evidence presented by NATOa that shows that broadband deployment is not inversely correlated to right-of-way fees and that right-of-way fees have no adverse impact on broadband deployment.⁵ Verizon does not present *counter* evidence to the studies NATOa has submitted; rather the Verizon Letter simply ignores that substantial and persuasive evidence in the apparent hope that it can induce the Commission to ignore that evidence as well.

Furthermore, the Verizon Letter incorrectly assumes that right-of-way compensation fees reflect local governments' exercise of monopoly power over rights-of-way. Again, Verizon fails to take into account evidence highlighted by the NATOa/IMLA Reply Comments that "[w]ireless providers may often install facilities without placing any property in the rights-of-way – municipal property may just be convenient to use. Convenience does not equate to monopoly power."⁶ Moreover, even if one assumes that there are situations where local rights-of-way are essential facilities, local government fees are often constrained by state law. And, there is no evidence to support a claim that local governments engage in the sort of profit-maximizing behavior engaged in by dominant commercial companies – much less that they do so by charging "monopoly rates" for access to rights-of-way. In fact, as the evidence submitted by NATOa indicated, not only are local governments subject to the democratic self-correcting constraints of their constituents, a local government that overcharged for right-of-way in a way that discouraged deployment of advanced technologies would soon find itself disadvantaged vis a vis other communities that encouraged deployment.⁷

The Verizon Letter also attempts to recycle allegations about the City of Eugene's telecommunications ordinance right-of-way fees. In doing so, Verizon either carelessly or intentionally misleads the Commission about the facts of the situation in Eugene. Verizon falsely asserts that those fees are "9% of gross revenues" and that the ILEC in Eugene (Qwest) pays lower fees than Verizon does even though Qwest uses more rights-of-way.⁸ As pointed out in the NATOa/IMLA Reply Comments, Verizon's allegations about Eugene are a combination of falsehoods and gross

⁵ See Reply Comments of NATOa et al., NBP Public Notice # 30, GN Docket Nos. 09-47, 09-51, 09-137 (filed January 27, 2010) at 25-30 (Reply Comments of NATOa et al.) (*citing* W. Ed Whitelaw and Bryce Ward, "Economic Principles of Charging Fees to Access Government Trust Properties," attached to Reply Comments of NATOa et al. as Attachment A) See also Reply Comments of NATOa/IMLA at 11-13 & Exhs. A & B.

⁶ Reply Comments of NATOa/IMLA at 31.

⁷ See *id.*; see also W. Ed Whitelaw and Bryce Ward, "Economic Principles of Charging Fees to Access Government Trust Properties," attached to Reply Comments of NATOa et al. as Attachment A.

⁸ See Verizon Letter at 2 & n.4.



distortions, in no fewer than *nine* different respects.⁹ We refer the Commission to those Reply Comments and will not bother the Commission by reiterating all nine of Verizon's factual errors and omissions here. We note, however, that by persisting in its allegations about Eugene's right-of-way fees without even bothering to mention, much less attempting to dispute, the detailed rebuttal to those allegations in the NATOA/IMLA Reply Comments, the Verizon Letter has, whether by intention or carelessness, misled the Commission concerning the record facts about Eugene.

For legal and policy reasons we have set forth elsewhere,¹⁰ we believe that the Commission should not address local right-of-way compensation issues in Docket Nos. 09-153 or 09-51. If the Commission should nevertheless decide to do so, it should do so based on the record evidence and Sec. 253 law and precedent before it, not the type of unsupported anecdotes and rhetoric divorced from reality that the Verizon Letter represents. We urge the Commission to entirely disregard the Verizon Letter for all of the above stated reasons.

Pursuant to Commission rules, please include a copy of this notice in the record for the proceeding noted above.

Sincerely,
/s/ *Matthew R. Johnson*
Matthew R. Johnson
Legal Fellow
NATOA

Cc: Sharon Gillett, Bureau Chief, Wireline Bureau

Priya Aiyar, Legal Advisor for Wireline Competition and International Issues, Office of Chairman Julius Genachowski

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⁹ Reply Comments of NATOA/IMLA at 15-18.

¹⁰ See Reply Comments of NATOA/IMLA at 7-8; see also Reply Comments of NATOA et al. at 16-31.