NLC NATIONAL LEAGUE OF CITIES
CITIES STRONG TOGETHER

December 21, 2017

Ms. Elizabeth Bowles
Chair, Broadband Deployment Advisory Committee
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Broadband Deployment Advisory Committee*, GN Docket No. 17-83

Dear Secretary Dortch and Chair Bowles:

On behalf of the National League of Cities, I write to submit for the Broadband Deployment Advisory Committee's consideration filings made by a number of local government associations in the following recent and related dockets: *Accelerating Wireline Broadband Deployment*, WC Docket No. 17-84, *Accelerating Wireless Broadband Deployment*, WT Docket No. 17-79, and *Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421.

We submit these comments to draw the BDAC's attention to these points in particular:

1. **The Commission cannot rewrite relevant statutory language to preempt local government laws that *might inhibit* broadband deployment.**

   In our comments, we responded to the Commission's question about whether it should preempt state and local laws with "inhibit" broadband deployment, and we answered in the negative. We remain concerned that the BDAC continues to conflate other concepts with the statutory language that allows the Commission to preempt state and local laws that may "prohibit or have the effect of prohibiting" telecommunications service. Congress did not intend the Commission to preempt state and local laws that make the provision of service more difficult – just those that ban, or have the effect of banning, service provision. The alleged inconveniences and expenses outlined in the draft documents are not bans and do not provide the Commission with grounds for preemption.[1]

2. **Sections 253(c) and (d) prevent the Commission from preempting beyond a limited scope local management of the rights of way.**

   The BDAC Working Group should take note, when finalizing their report, that

[1] *See,* Reply Comments of NATOA et. al in *Accelerating Wireline Broadband Deployment*, WC Docket No. 17-84 (filed on July 17, 2017) at 3.

before the Commission can preempt local government based on Section 253, there must be a finding that section 253(a) has been violated, and then determine whether Section 253(c) applies and therefore exempts local government action from the preemption. Congress clearly states in this section that "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[2] This would prevent the Commission from using Section 253 to preempt rental rates charged by local governments.

3. **The text of Section 332(c)(7) does not permit the Commission to broadly preempt local action on wireless facilities.**

   Similarly, as we noted with Section 253, if a local law regarding the placement, construction, and modification of personal wireless facilities does not either explicitly ban or result in a ban on the provision of wireless services, that law may not be preempted by the Commission. Additionally, wireless facilities are solely governed by Section 332(c)(7), and the Commission cannot use Section 253 to preempt local authority over wireless facilities under an effort to speed wireless broadband deployment.[3]

4. **"Fair and reasonable compensation" includes market-based rent.**

   We wish to incorporate our comments from previous filings to note that "fair and reasonable compensation" for access to the rights of way or other public assets includes market-based rent. As noted in those filings, the courts have long found that Congress and the Commission do not have the power to compel local governments to allow private companies to enter public property and construct facilities "without paying the value of the property thus appropriated."[4] The courts have also found that "nothing appears to limit the city's right to insist upon [rent], as fully as a private owner might."[5]

We thank you and the other members of the BDAC for your service this year. We hope that the BDAC will avoid making any recommendations to the Commission that advise actions that are not within the Commission's current legal authority. Excessive overreach by the Commission into congressionally defined local authority will only harm efforts to deploy broadband in the United States, not speed them. We hope that the BDAC, in crafting its final recommendations, will consider the feedback provided by local governments and the

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[2] 47 U.S.C. 253(c).
[3] *Id.* at 10.
[4] *Western Union Telegraph Co. v. Richmond,* 224 US at 169-70.
[5] *Richmond v. Southern Bell Telephone & Telegraph Co.,* 174 US 761, 772 (1899).

statements put forth by local government BDAC participants to create a fair and actionable final report.

Sincerely,

Clarence Anthony
CEO and Executive Director
National League of Cities

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Attachments:

Reply Comments of NATOA et. al in *Accelerating Wireline Broadband Deployment*, WC Docket No. 17-84 (filed on July 17, 2017)

Comments of NLC et. al in *Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421 (filed on March 8, 2017)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-79

REPLY COMMENTS OF THE
THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS, THE UNITED STATES CONFERENCE OF MAYORS AND THE GOVERNMENT FINANCE OFFICERS ASSOCIATION

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July 17, 2017

SUMMARY

Local governments want more advanced communications services in their communities because they appreciate the many benefits these services bring to their residents, schools, and businesses. But they also realize that the smart deployment of the infrastructure needed to support new technologies must carefully balance the needs of industry with the economic and regulatory concerns of their communities. It is impossible that a one-size-fits-all federal regulatory scheme can adequately take into account the various needs and interests of all communities across the nation.

Neither the law nor the facts justify any further federal interference in what is unquestionably a local government concern – community land use decisions. Rather than impose additional federal regulatory burdens on America's local communities, the FCC should work to foster cooperation and dialog between communities and industry.

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These Reply Comments are filed by the National Association of Telecommunications Officers and Advisors (NATOA), the National Association of Towns and Townships (NATaT), the National Association of Regional Councils (NARC), United State Conference of Mayors (USCM), and the Government Finance Officers Association (GFOA). NATOA is a national trade association that promotes local government interests in communications, and serves as a resource for local officials as they seek to promote the efficient deployment of telecommunications infrastructure in the public rights-of-way, in and on other public property, and on private property. NLC is a national organization representing the nation's more than 19,000 cities, towns and villages, representing more than 218 million Americans and dedicated to helping city leaders build better communities. NATaT is a national organization that gives a voice to the more than 10,000 towns and townships across the country seeking to enhance the ability of smaller communities to deliver public services, economic vitality, and good government to their citizens. For over 50 years, NARC has been the voice for collaborative approaches to regional economic prosperity, efficient use of local resources and ensuring a high quality of life for their member communities. NARC members work with their member cities, counties and towns to address citizen needs and promote a regional approach to planning for the future. The United States Conference of Mayors is the official non-partisan organization of cities with a population of 30,000 or larger. Each city is represented by its chief elected official, the mayor. Founded in 1906, GFOA represents nearly 19,000 federal, state and local finance

officials who are deeply involved in planning, financing, and implementing thousands of governmental operations in each of their jurisdictions. GFOA's mission is to promote excellence in state and local government financial management.

INTRODUCTION

NATOA appreciates the opportunity to provide comment on these proceedings, and thanks the Commission for its interest in the work that local governments do to keep their communities safe, presentable, and connected. Local governments of all sizes welcome the deployment of advanced communications infrastructure in their communities because of the many benefits that these technologies may bring to their residents, schools, and businesses.

Nonetheless, we oppose further federal guidelines and interpretations that result in preemption of local siting authority. In addition to the Reply Comments below, we ask the Commission to review our previous filings in similar actions, that we have filed separately in these proceedings. We ask the Commission to avoid placing any further restrictions on local governments as they continue to collaborate with wireless carriers and infrastructure providers.

I. THE STATUTORY TEXT PREVENTS THE COMMISSION FROM ADOPTING MANY, IF NOT ALL, OF ITS PROPOSALS

Statutory analysis and evaluation of whether an agency can "interpret" a statute by issuing rules and guidance begins with an analysis of whether the language of a statute is clear or ambiguous. The language of § 253 is clear and the Commission therefore has no ability to create rules or guidance "interpreting" its terms.[1]

[1] Sprint v. County of San Diego, 543 F.3d 571, 578 (9th Cir. 2008) ("Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC's.")

A. THE COMMISSION CANNOT REWRITE RELEVANT STATUTORY LANGUAGE TO PREEMPT LOCAL GOVERNMENT LAWS THAT *MIGHT INHIBIT* BROADBAND DEPLOYMENT

Section 253 (a) states that "[n]o 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."[2] However, in paragraph 3 of the Wireline NOI[3], the Commission asks whether the it should enact rules which "preempt state and local laws that *inhibit* broadband deployment…."[4] NATOA points out that the word "inhibit" is not synonymous with the word "prohibit" and cautions the Commission to be mindful of the actual language of the federal statute.[5] While we appreciate the fact that the Commission recognizes that not all local regulations are a barrier to entry,[6] NATOA urges the Commission to stay true to the meaning of the word "prohibition" and not substitute the word "inhibition" instead. The starting place for the Commission in this proceeding should be the text of that statute.

The text of the statute is clear in that it preempts explicit "prohibitions," in other words, *bans*, on the provision of telecommunications service. The statute also preempts statutes, regulations, and legal requirements that "have the effect of prohibiting" the provision of telecommunications service. As a result, § 253 (a) also preempts statutes, regulations, and

[2] 47 U.S.C. 253 (c) (1996).
[3] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WC Docket No. 17-84, FCC 17-37 (rel. Apr. 21, 2017).
[4] NOI at ¶3. Emphasis added.
[5] Also in ¶3, the Commission states that § 253 (b) provides an exception to preemption for "local legal requirements that are competitively neutral, consistent with Section 254 of the Act, and necessary to preserve and advance universal service." The text of § 253 (b) does not include local governments by its explicit terms. It is possible the Commission made a mistake in its language. If it did not make a mistake, NATOA would appreciate greater clarification for the Commission's conclusion that local governments are included in the preemption exception of 253 (b) so that NATOA can respond to the Commission's rationale.
[6] *Id*. at ¶4.

requirements that *result in banning* the provision of services even if the statutes, regulations, and requirements do not *explicitly* ban an entity from providing services.

"Inhibit," on the other hand, can simply mean "to make more difficult." Just because something is made more difficult than it would be without a regulation does not mean that the "inhibition" results in a ban and thus constitutes with a "prohibition." Congress did not intend that statutes, regulations, and requirements which potentially make the provision of service more difficult (such as complying with bonding or safety code regulations before telecommunications facilities can be deployed), should be preempted. Congress did not intend to relieve telecommunications service providers of obligations to comply with such requirements. Rather Congress was instead interested in those requirements which truly ban or prohibit the deployment of telecommunications service. A regulation that makes the provision of service less profitable for the provider and results in the provider choosing not to deploy because of the return on investment is not as high as they would like is not the kind of regulation Congress was intent on preempting. Congress did not intend to give telecommunications providers preferred status as compared to other businesses.

Just as the Commission should not equate "inhibit" with "prohibit," it also should not change the meaning of the word "may" in the statute to claim greater preemptive authority. The Commission suggests that it believes "restrictions on broadband deployment may effectively prohibit the provisions of telecommunications services."[7] NATOA again cautions the Commission in its use of grammar and notes that when the Commission makes this statement it is rewriting the clear meaning of the statutory text to achieve a result the Commission believes is desirable.

[7] NOI at ¶ 4.

The Commission's phrasing suggests that it believes there are regulations that "might," or "could possibly, in the right set of currently unknown circumstances," result in a prohibition on the provision of services. Section 253 does not preempt regulations that "might" result in a prohibition on the provision of telecommunications services. Section 253(a) preempts those regulations that actually result in a ban on services. It does not preempt those that do not result in a ban on services.

The word "may" in § 253 is used to indicate permission (or lack therefor in this case, as it is proceeded by the word "no"). To use and interpret the word "may" in its speculative meaning ("could possibly" or "might") renders § 253 (a) nonsense, as can be seen when the statutory text is examined closely. To use and interpret the word "may" as meaning "could possibly" or "might" also reads the word "no" completely out of the statute.

As a reminder, the text of § 253 provides:

> (a) In general
>
> 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.

Simplifying the statutory text into its pertinent components shows that that "may" cannot mean "could possibly" or "might." What follows below is, first, a simplifying of § 253 (a) with no substitutions.

The simplified statutory language:

> 1) No local requirement may prohibit the ability of any entity to provide telecommunications services, and
>
> 2) No local requirement may have the effect of prohibiting the ability of any entity to provide any telecommunications service.

Once the subsection has been simplified by removing words without changing the meaning of the statute, various substitutions of the word "may" can be made to illustrate what the word may means in the context of the statute. We begin by substituting the phrase "is allowed to" (the correct and unambiguous statutory meaning of "may") for "may."

The simplified statutory language, with the correct meaning substituted:

> 1) No local requirement is allowed to prohibit the ability of any entity to provide telecommunications services, and
>
> 2) No local requirement is allowed to have the effect of prohibiting the ability of any entity to provide any telecommunications service.

Next, we substitute "might" and "could possibly" for "may," which seems to be the meaning the Commission attempts to assign to the word "may" in § 253(a) and which is the meaning advocated by industry commentators.

The simplified statutory language, substituting "may" with "might" and "could possibly":

> 1) No local requirement might prohibit the ability of any entity to provide telecommunications services, and
>
> 2) No local requirement might have the effect of prohibiting the ability of any entity to provide any telecommunications service.

Alternatively:

> 1) No local requirement could possibly prohibit the ability of any entity to provide telecommunications services, and
>
> 2) No local requirement could possibly have the effect of prohibiting the ability of any entity to provide any telecommunications service.

These substitutions result in the sentences meaning that it is not possible for a local government requirement to prohibit or have the effect of prohibiting services. As it is highly unlikely that Congress meant that no local government regulation is capable of prohibiting or effectively prohibiting the provision of telecommunications service, the word "may" cannot mean "might" or "could possibly."

To further explicate the Commission's mistake, the opposite results are achieved when one conducts the same substitutions using the phrasing from the NOI. The Commission's statement is

"In our preliminary view, restrictions[8] on broadband deployment may effectively prohibit the provision of telecommunications service. . . ."[9]

The same substitutions from above result in the following:

"In our preliminary view, restrictions on broadband deployment *is allowed to* effectively prohibit the provision of telecommunications service. . . ." We are fairly certain that, even putting aside the lack of subject-verb agreement, this is not what the Commission meant.

Alternatively,

"In our preliminary view, restrictions on broadband deployment might effectively prohibit the provision of telecommunications service. . . ." A re-writing of the Commission's sentence that remains true to the Commission's view.

[8] We also note that "restrictions" are not the same as "prohibitions," or even "inhibitions." Rather than continue to beat this proverbial horse to death, we will assume that the Commission understands why its preemptive tendencies can't reach "restrictions." Otherwise, pretty soon the Commission will be preempting "helpful suggestions" directed to telecommunications providers.

[9] NOI at ¶4.

"In our preliminary view, restrictions on broadband deployment could possibly effectively prohibit the provision of telecommunications service. . . ." Another re-writing of the Commission's sentence that remains true to the Commission's view.

Just as NATOA cannot substitute one meaning of the word "may" for another to render the Commission's sentiments on this issue nonsense, neither can the Commission substitute a different meaning of the word "may" to render Congress's statutory language nonsensical. The statute's clear and unambiguous text mandates that "may" can only mean "is allowed to." Therefore, only those local statutes, regulations or legal requirements that are explicit bans or those that rise to the level of effecting a ban, are preempted. The Commission cannot deliberately misinterpret the meaning of words in a statute and then provide rules and interpretations to prevent the occurrence of its misinterpretation. Unless a local legal requirement actually results in a prohibition or an effective prohibition, the local legal requirement is not preempted.

B. SECTIONS 253 (c) AND (d) PREVENT THE COMMISSION'S OTHER PROPOSED ACTIONS

The Commission asks for comments on adopting rules governing deployment moratoria, rights-of-way negotiation and approval process "delays," "unreasonable conditions" and "bad faith negotiations." [10] As noted above, before the Commission can take any action to preempt local government pursuant to § 253, there must be a finding that §253 (a) has been violated. Once that threshold has been crossed, the question is whether § 253 (c) applies and therefore exempts the local government action from the preemptive reach of the statute.

Section 253(c) provides that

[10] NATOA objects vociferously to the language the Commission used to seek comments regarding negotiations and deployment processes. By using negative language to characterize arms-length interactions between two independent parties, the Commission certainly seems to be signaling it has determined that local governments are to blame for all deployment delay before the comments are even filed and even though previous filings by NATOA and other representative local government organizations and local governments themselves show otherwise.

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[11]

If it is determined that the provisions of § 253 (c) apply, the preemption question can be answered only by a state or federal court. Section 253 (d) gives the Commission authority only to decide preemption questions related to § 253 (a) and (b). The language could not be clearer on that count:

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[12]

NATOA again incorporates its filings in the Mobilitie Declaratory Ruling proceeding, which contains a lengthy discussion of the statutory history related to this section and explains why the Commission cannot decide issues related to § 253(c). The Commission seeks to make an end-run around the statutorily provided court adjudication process by defining various terms in subsection § 253 (c). Yet, the Commission has no authority to make an end-run around the courts by giving terms in § 253 (c) meanings that would compel a certain result in court or that would expand the preemption beyond that which Congress had in mind. It also cannot narrowly interpret phrases and words in § 253 (c) to create a broader preemptive reach than Congress enacted nor can it broaden preemptive effect by interpreting a preemption savings clause in such a way as to limit its reach.[13] It would be a strange result indeed for Congress to remove the

[11] 47 U.S.C. 253(c).
[12] 47 U.S.C. 253 (d).
[13] *See, e.g., Sprint v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) ("Our narrow interpretation of the preemptive effect of § 253(a) also is consistent with the presumption that "express preemption statutory provisions should be given a narrow interpretation." Citing, *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir.2005)).

Commission's ability to adjudicate disputes related to § 253 (c), but to nonetheless allow the Commission to dictate what is and is not permissible under that portion of the statute, thereby compelling preemptive decisions by the courts. Such an interpretation would defeat the very purpose of the limitation in § 253 (d). The Commission cannot undertake any action pursuant to the myriad of questions it asks in ¶¶ 5 through 11.

C. THE TEXT OF § 332 (c) (7) DOES NOT PERMIT THE COMMISSION TO TAKE ITS PROPOSED ACTIONS

As mentioned on page 2 of these Comments, NATOA asks the Commission to review NATOA's Comments in prior proceedings – specifically with respect to questions raised in the Wireless NPRM/NOI.[14] NATOA also reiterates and incorporates the points raised on pages 2-6 of this filing related to the interpretation of "prohibit or have the effect of prohibiting" as used in § 332(c)(7). If a local regulation regarding the placement, construction, and modification of personal wireless facilities does not either explicitly ban or result in a ban on the provision of wireless services, the regulation is not preempted.

II. "FAIR AND REASONABLE COMPENSATION" INCLUDES RENT

Commenters again incorporate in these Comments its prior submissions regarding the fact that the language in § 253 (c) referencing "fair and reasonable compensation" encompasses the ability of local governments to charge rent. *See*, NATOA, *et al.*, Comments and Reply Comments in Mobilitie Declaratory Ruling Proceeding. NATOA also reiterates that the ability of local governments to charge for the use of rights-of-way as well as other property they either own out right or exercise management control over is an issue of state law that the Commission is without authority to alter.

[14] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking and Notice of Inquiry*, WC Docket No. 17-84, FCC 17-37 (rel. Apr. 21, 2017).

Preliminarily, the Commenters highlight *Meriwether v. Garrett*,[15] cited by AT&T Services, Inc. for the proposition that local governments have no authority to charge rent for the use of rights-of-way because they are held in trust for public use.[16] AT&T Services misinterprets the holding of *Meriwhether*. The case arose because the City of Memphis, Tennessee was severely indebted and could not repay its debts. The debt holders attempted to take the property of the city, including that property held in trust for public use. The United States Supreme Court held that the debt holders could not obtain title to property *held in trust for the use of the public* to satisfy the debts of the municipality. That holding does not address whether local governments may charge entities who wish to make *private use* of property held in trust for the public.

AT&T cites the following for its proposition: "In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses." From this language, AT&T suggests that local governments management (and presumably compensation) requirements are invalid. AT&T's interpretation is simply incorrect and we highlight that in addition to the very specific context in which the Supreme Court made quoted statements, the industry commenters are seeking to make *private* use of the rights-of-way. The Supreme Court's language notes that without special legislative action, no use but *public* use can be made of property held in trust. The case does not support AT&T's suggestion at all.

[15] 102 U.S. 472 (1880).
[16] *See*, Comments of AT&T Services, Inc. in *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking and Notice of Inquiry*, WC Docket No. 17-84, FCC 17-37 (filed on June 15, 2017) at 72-73, fn. 203.

We remind that Commission, that unlike a private corporation which seeks to enrich its shareholders or owners, a municipality acts in furtherance of the interests of its citizens, especially when it manages the property it holds in trust for those citizens. Many of the arguments by industry commenters create the inference that local governments are like other corporations whose "profits" inure to the public at large. That is not the case for local governments. Funds they collect for the private use of property held in trust for the public become part of the local government budget and are used for the benefit of both the local government's citizens as well as any visitors who enter the jurisdiction.

Commenters additionally highlight that the Reply Comments filed by Verizon in the Mobilitie Declaratory Ruling proceeding misrepresent the subsequent history of *St. Louis v. Western Union Telegraph,*[17] (holding that the City of St. Louis had the authority to charge rent for the use of its public rights-of-way, and relied on by Commenters).[18] In its Reply Comments in the Mobilitie Declaratory Ruling proceeding, Verizon states that the United States Supreme Court repudiated its holding in *St. Louis I* with its decision in *St. Louis v. Western Union Telegraph Co.*, 149 U.S. 465 (1893) (*St. Louis II*).[19] This is wrong. The first problem with Verizon's contention is that *St. Louis II* is a *denial of a petition for rehearing St. Louis I*. The second problem with Verizon's contention is that the Supreme Court started its discussion of the decision to deny of the petition for rehearing by stating "***We see no reason to change the views expressed as to the power of the city of St. Louis in this matter***."[20]

[17] 148 U.S. 92 (1893) (*St. Louis I*).
[18] See, Verizon Reply Comments at 21-22, (filed April 7, 2017) in Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016).
[19] *Id*.
[20] *St. Louis II*, 149 U.S. at 467.

The Court held that the meaning of the word "regulate" (with respect to the power to "regulate" the streets) is "broad" and that "[u]nless … the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use."[21] In no way did the Court suggest, much less hold, that the authority to charge *rent* was foreclosed.

The court concluded by noting that, if the city had the power to enter into a contract for the use of the streets, it could require payment for the use of the streets: "But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city has such control over the use of the streets as enables it to demand pay therefor?" In other words, if a city has the authority to allow a corporation to make use of the public rights-of-way or any other property, whether held in trust for the public or whether held in a proprietary manner, the city has the authority to require rent for the use of the property.

The Court further upheld the principle of rent in *Western Union Telegraph Co. v. Richmond.*[22] "[N]othing appears to limit the city's right to insist upon [rent], *as fully as a private owner might.*"[23] In fact, the Court stated that while the city could not prohibit (or ban) the company from operating within its jurisdiction, the company nonetheless had "no right to use the

[21] *St. Louis II*, 149 U.S at 469.
[22] 224 U.S. 160, 169-70 (1912).
[23] *Western Union Telegraph Co. v. Richmond*, 224 U.S. at 169-70.

soil of the streets, even though post-roads, as against private owners or as against the city…it owns the land."[24]

In 1899, the Supreme Court held that one level of government "cannot abridge any property rights of a public character created by the authority of another sovereignty."[25] Even then it was well established that the federal government could not grant a corporation the ability it to enter the private property of an individual and appropriate it without just compensation.[26] "[T]he principle is the same when, under the grant of franchise from the National Government, a corporation assumes to enter upon property of a public nature belonging to a State."[27] Congress does not have the power to grant a corporation the ability to enter public property, and construct its facilities there, "without paying the value of the property thus appropriated."[28]

> Although the State-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the National Government to dispossess the State of such control and use or appropriate the same to its own benefit or the benefit of any of its corporations or grantees, *without suitable compensation* to the State. This rule extends to streets and highways; they are the public property of the State.[29]

Further, "it is within the competency of the [local government], *representing the sovereignty of that local public*, to exact for [the local public's] benefit compensation for this exclusive appropriation.[30]

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[24] *Western Union Telegraph Co. v. Richmond*, 224 U.S. at 169, c*iting St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U.S. 761, 771 (1899), *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U.S. 160, 163 (1903), *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).
[25] *Richmond v. Southern Bell Telephone & Telegraph Co*., 174 US 761, 772 (1899).
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*. (Emphasis added).
[30] *Id*. at 772-73. (Emphasis added).

Lastly, it is simply not within the Commission's powers to determine what comprises "fair and reasonable compensation." This matter is reserved for the courts under both by the plain text of the statute, as evidenced by Congress's failure to include § 253 (c) within the Commission's preemptive authority, and by centuries old Supreme Court precedent. The Supreme Court in *Monongahela Navigation Co. v. United States*,[31] held it is not within the purview of Congress (much less an unelected federal agency) "to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."[32] As such, the Commission cannot issue rules define what compensation is "fair and reasonable."

III. RADIOFREQUENCY EXPOSURE CONCERNS

We agree with the Information Technology and Innovation Foundation ("ITIF") that the Commission "is well overdue for the completion of its Reassessment of FCC Radiofrequency Exposure Limits and Policies, and should seek to complete this assessment."[33] While local governments may not regulate the siting of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions,[34] local government officials are often faced with residents raising RF concerns at public hearings dealing with the siting of new wireless concerns.[35] We continue to believe that a comprehensive review of the current RF rules "may not alleviate all consumer concerns, but it would go a long way in providing badly needed

[31] 148 U.S. 312, 327 (1893).
[32] *Id*. *See also, Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 571 (1837) (It is up to the judiciary and juries to "assess the amount of compensation to which the complainants are entitled.")
[33] Comments of the Information Technology and Innovation Foundation ("ITIF") (filed June 15, 2017) at 7.
[34] 47 U.S.C. 332(c)(7).
[35] Reply Comments of the National Association of Telecommunications Officers and Advisors ("NATOA"), *In the Matter of Reassessment of Federal communications Commission Radiofrequency Exposure Limits and Policies,* ET Docket No. 13-84, and *In the Matter of Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields,* ET Docket No. 03-137 (filed November 18, 2013) at 2.

assistance to local government officials when faced with questions regarding RF emissions and public health and safety."[36]

IV. COPPER RETIREMENT

While others offer more extensive comments addressing the various issues surrounding copper line retirement,[37] we find it necessary to repeat our earlier concerns that any new service substitutions must offer consumers the same level of functionality they currently receive and have come to depend upon.[38] Furthermore, we continue to insist that incumbent ILECs provide notice to all consumers that may be affected by any copper retirement, including information regarding the consumer's rights and the process by which a consumer may comment on the planned copper retirement. "The right to depend on reliable service in times of emergencies must not be abandoned along with legacy copper networks – at least not without notice to all retail customers directly impacted by the retirement of the copper network."[39]

V. COLLABORATIVE EFFORTS BETWEEN STATE AND LOCAL GOVERNMENTS AND INDUSTRY

NATOA applauds the Commission for seeking ways to encourage collaboration among the various parties. Certainly, efforts to educate both sides on the limitations each faces when it comes to deployment should be a focus for the Commission. Furthermore, as we have previously stated, the Commission should encourage industry and local governments to develop voluntary siting practices that accommodate the unique needs and interests of jurisdictions and regions of different sizes and circumstances.[40] Also, facilitating finding agreement on issues outside the

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[36] *Id.*
[37] *See*, Comments of Public Knowledge (filed June 15, 2017).
[38] Comments of the National Association of Telecommunications Officers and Advisors and the National League of Cities, *In the Matter of Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers,* RM-11358 (filed Feb. 5, 2015).
[39] *Id.* at 4.
[40] Comments of NATOA, 11-59.

litigation process would also be helpful and we again suggest the "development of an informal dispute resolution process to remove parties from an adversarial relationship to a partnership process designed to bring about the best result for all involved."[41] The Commission could explore developing a mediation program which could help facilitate negotiations for deployments for parties who seem to have reached a point of intractability. Other federal agencies make use of mediators to move past seemingly intractable impasses and have experienced success with such a strategy. "We believe a workable solution for all is for industry and local government representatives to meet to address specific instances of alleged delay and work to resolve issues that may hinder the continued deployment of wireless infrastructure."[42]

VI. THE COMMISSION SHOULD DISCOUNT INDUSTRY "EVIDENCE" OF LOCAL GOVERNMENT WRONG DOING

Industry Commenters in the Mobilitie Declaratory Ruling proceeding submitted anecdotes and allegations regarding what they alleged to be instances of local government misconduct. While Industry Commenters did not supply the local governments with notice of their allegations, NATOA expended significant resources in attempting to reach out to as many identifiable communities as possible, explain the proceeding to them, and encourage them to participate before the Commission. In this proceeding, Industry Commentators once again make allegations regarding local government misconduct, though they identify even fewer communities by name, making it virtually impossible to address the allegations. NATOA will attempt to point out each instance of such unsubstantiated allegations.

However, NATOA will address specifically the Comments filed by T-Mobile in this proceeding. T-Mobile relies on Comments filed by others in the Mobilitie Declaratory Ruling

[41] *Id.*
[42] *Id.*

proceeding as evidence of local government misconduct. T-Mobile fails to recognize that in a number of the instances where a community was identified by name, those communities filed responses to the allegations made against them. Again, NATOA does not feel it should be incumbent on NATOA to remind the Commission of the filings that specifically refuted industry allegations.

Nonetheless, NATOA will provide one example to highlight for the Commission why it should not accept baseless allegations from industry as to what is happening with respect to interactions between local governments and industry representatives. T-Mobile cites to Crown Castle's Comments (page 15) stating that Redwood City, California, does not allow "the installation of any wireless facilities on city-owned poles or ROWs…."[43] Alerted to this allegation by NATOA during the reply comment period for the Mobilitie Declaratory Ruling proceeding, the City filed Reply Comments noting that this is NOT its policy and that this statement on its website was the result of a misunderstanding by city staff. The City went on to state: "[T]he City is in active discussions with multiple providers, including Mobilitie, LLC, about siting wireless facilities in the public right-of-way. *Indeed, in August 2016, the City indicated to a representative of Crown Castle* that it was willing to negotiate a lease for siting a wireless facility on City-owned property in the right-of-way."[44]

Despite having been told in August 2016 that the City was willing to negotiate a lease for the placement of wireless facilities on City-owned property in the right-of-way, Crown Castle, on March 8, 2017, nonetheless represented to the Commission that Redwood City did not allow wireless deployment on its property. Crown Castle knew this to be false, yet pointed the

[43] T-Mobile Comments at 9, fn. 3 (filed June 15, 2017).
[44] Redwood City Reply Comments in Mobilitie Declaratory Ruling proceeding at 2-3 (filed April 7, 2017)(Emphasis added).

Commission to the city's mistake on its website as proof of wrong doing on the part of cities generally. This representation of "alternative facts" should give the Commission pause.

T-Mobile then compounds the potential negative consequences of Crown Castle's untruthfulness by repeating Crown Castle's untruthful statement in its Comments in this proceeding. The Commission must discount T-Mobile's allegations as unreliable.

In addition, NATOA notes that T-Mobile did not name Redwood City outright but merely cited to Crown Castle's Comments, which did name Redwood City. It is as though T-Mobile is trying to hide whom they were making allegations about, assuming that no one would check their sources. Only by returning to the filings in the Mobilite Declaratory Ruling proceeding was NATOA able to determine which community was being maligned and to verify that Redwood City had filed Reply Comments, sharing with the Commission the actual facts of its wireless policy. While NATOA could detail each instance where T-Mobile and other Commenters have perpetuated an unsubstantiated, untruthful or anonymous allegations, we urge the Commission to require those making allegations of misconduct to identify with specificity the wrong doer and the wrongful conduct and to discount those comments where this requirement is not met. The Commission should review and incorporate all the local government filings in the Mobilitie Declaratory Ruling proceeding as part of its efforts in this proceeding.

CONCLUSION

The National Association of Telecommunications Officers and Advisors respectfully request the Commission consider our Comments, as well as those submitted by communities across the country, before taking any action that may adversely affect local governments' authority.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS, AND THE GOVERNMENT FINANCE OFFICERS ASSOCIATION

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March 8, 2017

SUMMARY

Local governments want more advanced communications services in their communities because they appreciate the many benefits these services bring to their residents, schools, and businesses. But they also realize that the smart deployment of the infrastructure needed to support new technologies must carefully balance the needs of industry with the public health and safety concerns of their communities. As such, it is impossible that a one-size-fits-all regulatory scheme can adequately take into account the various needs and interests of all communities across the nation.

To date, no factual basis has been established that would justify any further federal interference in what is unquestionably a local government concern – the control and management of the public rights-of-way. Further, nothing but unsubstantiated assertions have been presented - and certainly no legal basis has been established - necessitating any action by the Bureau on the issue of applications fees and rights-of-way access charges.

Rather than impose additional federal regulatory burdens on America's local communities, the Bureau should heed the advice of the FCC's Intergovernmental Advisory Committee and permit "industry and local government representatives to meet to address specific instances of alleged delay and work to resolve issues that may hinder the continued deployment of wireless infrastructure."

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These Comments are filed by the National League of Cities (NLC), the National Association of Telecommunications Officers and Advisors (NATOA), the National Association of Towns and Townships (NATaT), the National Association of Counties (NACo), the National Association of Regional Councils, and the Government Finance Officers Association (GFOA) in response to the Public Notice,[1] released December 22, 2016, and the Petition for Declaratory Ruling filed by Mobilitie, LLC, on November 15, 2016,[2] in the above-entitled matter. NLC is a national organization representing the nation's more than 19,000 cities, towns and villages, representing more than 218 million Americans and dedicated to helping city leaders build better communities. NATOA is a national trade association that promotes local government interests in communications, and serves as a resource for local officials as they seek to promote the efficient deployment of wireless infrastructure in the public rights-of-way ("ROW"). NATaT is a national organization that gives a voice to the more than 10,000 towns and townships across the country seeking to enhance the ability of smaller communities to deliver public services, economic vitality, and good government to their citizens. NACo is a national association that represents each of the nation's 3,069 counties, and promotes county government interest in matters related to legislative and regulatory actions taken by the Federal Government that directly impact the role of county government to provide voluntary and mandated services to county residents. For

[1] Federal Communications Commission, *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, December 22, 2016 (Public Notice).

[2] *See* Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) (Mobilitie Petition).

over 50 years, NARC has been the voice for collaborative approaches to regional economic prosperity, efficient use of local resources and ensuring a high quality of life for their member communities. NARC members work with their member cities, counties and towns to address citizen needs and promote a regional approach to planning for the future. Founded in 1906, GFOA represents nearly 19,000 federal, state and local finance officials who are deeply involved in planning, financing, and implementing thousands of governmental operations in each of their jurisdictions. GFOA's mission is to promote excellence in state and local government financial management.

I. INTRODUCTION

We appreciate the opportunity to provide comment on this proceeding, and thank the Commission for its interest in the work that local governments do to keep their communities safe, presentable, and connected. Local governments of all sizes welcome the deployment of advanced communications infrastructure in their communities because of the many benefits that 5G wireless technologies may bring to their residents, schools, and businesses. With speeds of up to 10 gigabits per second, 5G networks "can start to completely reshape entire industries, and rethink how we run and manage critical national infrastructures."[3] Indeed, as the Bureau correctly points out, local governments, eager for these new services, have updated ordinances to expedite the approval of new deployments. And some cities, including Boston, San Francisco, and San Antonio, have, in consultation with industry, developed master agreements for the

[3] Hossein Moiin, "The Promise of 5G," *TechCrunch*, August 15, 2015, https://techcrunch.com/2015/08/15/the-promise-of-5g/

placement of this equipment in the public rights-of-way.

Yet, like with any new technological advance, there remain unanswered questions regarding the deployment of these new facilities. We urge the Commission to exercise caution as it works to enable the widespread deployment of small cell infrastructure throughout the nation. We oppose further federal guidelines and interpretations which result in preemption of local siting authority, and ask the Commission to consider carefully the many differences between communities that necessitate local decisions: variations in state statutes, geographic challenges, climate variations, size, budgetary and staff resources, aesthetic character, the type and amount of existing infrastructure, and more. We ask the Commission to avoid placing any further restrictions on local governments as they collaborate with their local wireless carriers and infrastructure providers to integrate this very new technology, and very new approach to infrastructure development, into their planning and zoning processes in a way that preserves and protects the finite rights-of-way belonging to their residents.

II. LOCAL GOVERNMENT SITING PRACTICES DO NOT HINDER THE PROVISION OF WIRELESS SERVICE

The Commission requests information about whether local government wireless facility siting practices hinder the provision of wireless service in their communities. They do not. Local government priorities around wireless services continue to ensure coverage for all communities.

As noted by the FCC Intergovernmental Advisory Committee (IAC) in its 2016 "Report on Siting Wireless Communications Facilities," when the FCC adopted its 2009 shot clock order and its 2014 rules on collocation, "many local governments did not believe that federal shot

clock rules were necessary or helpful to create faster, more efficient deployment."[4] Despite our request to the Commission in 2014 that it avoid further regulation around Section 6409 and allow "industry and local government representatives to meet to address specific instances of alleged delay and work to resolve issues that may hinder the continued deployment of wireless infrastructure,"[5] the Commission chose to impose further restrictions on that process. We continue to believe that the existing interpretation of statute is sufficient for the deployment of wireless infrastructure, and ask the Commission not to place any further one-size-fits-all restrictions on communities working to deploy infrastructure safely and efficiently.

The coverage data provided by the wireless industry does not seem to indicate that local government practices hinder the provision of wireless service to the residents or business across the country. Instead, the greatest barrier to the provision of service is the population density of a given local community (urban versus rural), and the relative profitability of the market in that location.

We are encouraged that the FCC is following recommendations of the IAC, in its report, to gather additional data on provider coverage to supplement the anecdotes provided by both industry and local governments,[6] and we repeat that encouragement. Uniform, granular data on wireless coverage would help to settle disputes about the actual need for additional

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[4] FCC Intergovernmental Advisory Committee, "Report on Siting Wireless Communications Facilities," page 3, July 12, 2016, https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf

[5] *See*, Comments of the National Association of Telecommunications Officers and Advisors, *et al*., *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices,* WT Docket No. 13-238 (filed February 3, 2014), at 11.

[6] FCC Intergovernmental Advisory Committee, 16.

infrastructure, and identify real coverage gaps facing residents.

III. LOCAL GOVERNMENTS ARE WORKING TO DEPLOY WIRELESS INFRASTRUCTURE

Local governments are greatly motivated to provide their residents, schools, businesses, and health care providers with access to quality connectivity. They know that broadband access and adoption help promote economic development in the community, while enhancing public health, public safety, and educational opportunities. And as the IAC noted, "most local governments and industry applicants work well together to process applications in a manner that satisfies both industry and community concerns….The vast majority of these communities and industry members work well together to complete the wireless siting process and locate wireless facilities in an efficient and timely manner."[7]

They have also been supported by their municipal associations in this work. In 2014, the National League of Cities, the National Association of Counties, and National Association of Telecommunications Officers and Advisors made available a model ordinance for local governments to comply with the 2014 shot clock order. More recently, the Illinois Municipal League has developed for its members an Illinois-specific model ordinance that takes into account that state's laws, to assist Illinois municipalities with the deployment of small-cell infrastructure.[8] The Georgia Municipal Association has worked with its membership and industry to create a model agreement, as a negotiating tool and framework for cities and

[7] *Id*. 2-3.
[8] Illinois Municipal League, "Small Cell Antenna/Tower Right-of-Way Siting Ordinance," http://iml.org/page.cfm?key=2191

members of industry to work together on smaller infrastructure sites.[9]

At the city level, those local governments not preempted by state law in this area have found some success in agreements made at the start of a process with their local providers. For example, the City of San Antonio, which was profiled in a workshop on small-cell deployment held at the FCC last year, has entered a master license agreement with Verizon to allow the company access to city rights-of-way and to attach to certain city structures for an agreed-upon fee schedule. The city found that this proactive agreement allowed Verizon to increase its coverage and reliability, benefiting both the company and resident customers, and allowed the city to retain its land-use authority and unique historical aesthetic.

These agreements, ordinance changes, pre-application consultations, and other actions are voluntary, proactive efforts by local governments and their partners in industry to work through a still-developing situation. Those that have been most successful are those that respect both the needs of specific municipalities, and the business efforts of industry partners.

IV. LOCAL GOVERNMENTS HAVE A DUTY TO MANAGE THE PUBLIC RIGHTS-OF-WAY

Local governments have a duty to their residents to protect and manage the public rights-of-way – a finite resource belonging to residents and serving a variety of needs. Public rights-of-way are properties owned by the citizens of a municipality that are managed by local governments for the benefit of those citizens. Proper management is essential for the

[9] Georgia Municipal Association, "Summary of GMA Master Right-of-Way License Agreement with Mobilitie, LLC," January 30, 2017, http://www.gmanet.com/Services/Operations/Telecomm/Summary-of-GMA-Master-Right-of-Way-License-Agreeme.aspx

transportation of people and goods and services, and for utilities; including power, clean water, stormwater, sanitary sewer, and communications.

Municipalities process and deploy the vast majority of wireless broadband infrastructure projects in a timely manner, respecting not only the needs of providers, but also the needs of the communities they serve. Local governments have the right and the obligation to ensure wireless siting requests comply with current health, safety, building, engineering, and electrical requirements. Municipal governments manage the rights-of-way to protect the public safety and welfare, to minimize service disruptions to the public, to protect public investments in rights-of-way, to assure the proper placement of service lines, to regulate the placement of service facilities, and to realize the value of this public asset. Underlying these municipal roles and control is the fact that the use of publicly-owned rights-of-way is a privilege, not a right.

V. SMALL WIRELESS FACILITIES

In its Public Notice, the Bureau points out that new wireless networks will require the dense deployment of facilities that are "smaller and less obtrusive than traditional cell towers and antennas."[10] And the Bureau has used the terms "small wireless facilities" and "small facility deployments" that can be placed on "small structures" to characterize the technological developments necessary for the "ubiquitous connection of smart digital devices."[11] Likewise, Mobilitie characterizes these facilities as "extremely small equipment" of "reduced size and

[10] Public Notice at 1.
[11] *Id.* at 3.

weight" with some being "nearly as small as a laptop"[12] while others have repeatedly asserted that the new equipment is about the size of a pizza box.[13]

"Ay, there's the rub."[14] Because simply calling this equipment "small" doesn't make it so. Indeed, the Bureau's misnomer of the present matter as involving the deployment of "small" cells simply fails to convey the true scope and breadth of this proceeding and the true impact that the installation of nearly 800,000 "small" cell deployments by 2026[15] will have on our communities. When you add in the Bureau's misstep to look at application processing fees and charges for the private use of the public rights-of-way, it's no wonder that local governments are apprehensive about any further federal intervention in local siting decisions.

But what exactly is a *small* wireless facility? What sort of equipment are we dealing with here? It's arguable that Mobilitie considers 120-foot monopoles small cell facilities. Or as defined in a rash of state-level wireless siting legislative proposals backed by industry, a small wireless facility could be a "wireless facility having (1) an antenna with an enclosure exterior displacement volume of no more than six cubic feet; and (2) associated equipment with a cumulative enclosure exterior displacement volume no larger than 28 cubic feet." One hundred and twenty foot poles? Six cubic feet? Twenty-eight cubic feet? Clearly, we are not talking about laptops and pizza boxes! And when industry wants to place these facilities on utility poles,

[12] Mobilitie Petition at 11.
[13] *See* Diana Goovaerts, FCC Streamlines Rules for 5G Small Cell, DAS Roll Outs, (Aug. 9, 2016), https://www.wirelessweek.com/news/2016/08/fcc-streamlines-rules-5g-small-cell-das-roll-outs.
[14] *Hamlet* (3.1.68)
[15] Public Notice at 4.

phone poles, light poles, traffic signals, and signage structures, there is simply no way one can truthfully assert these are small, less obtrusive deployments. Further, when one considers that advanced networks "require the construction and strategic placement of a large number of small cells, frequently placed close together,"[16] it is easy to understand local government's uneasiness with granting industry carte blanche access to the public ROW.

Finally, we must keep in mind that these installations could be subject to the Commission's Section 6409(a) collocation rules that would result in ever-increasingly larger installations. So, these "small" cell deployments have mushroomed in size and the proverbial pizza box is quickly becoming a pizza delivery car.

The FCC has already acted via its *2009 Declaratory Ruling* and *2014 Infrastructure Order* aimed at resolving what it viewed as infrastructure siting controversies. We believe those interpretations of Section 332(c)(7) and Section 6409(a) are sufficient to resolve any problems that may arise with future infrastructure densification. To date, we do not believe that sufficient verifiable information has been publicly provided warranting any further action by the Bureau or Commission.

VI. INDUSTRY SHOULD DO MORE VOLUNTARILY TO IMPROVE WIRELESS SITING

Members of the wireless industry and related businesses can and should do more voluntarily to improve deployment of infrastructure. One of the greatest causes of delay in the process of local government review and approval of a wireless facility siting request is

[16] *Id.*

incomplete application materials. This is a circumstance entirely within the control of the company making the application, and one with simple options for remedy, including pre-application dialog or consultation with the municipality.

In addition, these conversations must be undertaken in the spirit of cooperation. In the Public Notice, the Commission requests feedback on Mobilitie's petition for declaratory ruling, and uses the issues raised in that petition to inform the questions it asks in the Public Notice. However, Mobilitie's petition mischaracterizes its actions and the actions of local governments when discussing placing wireless infrastructure in the rights-of-way. Mobilitie has attempted to place the bulk of its new structures within the public rights-of-way, and objects to the time and expense necessary to ensure that these placements are safe and appropriately compensated.

In contrast to the good news that industry and local governments are working together to bring new services to the public, the Bureau throws in unsubstantiated allegations of permitting and zoning delays and high fees and excessive charges resulting in applicants having to "contend with a long and costly process."[17] But what company does the Bureau hold up as the poster child suffering the slings and arrows of local government delay? Mobilitie.[18]

It is anticipated that many local governments will be filing comments with the Commission over the course of this proceeding describing their interactions with Mobilitie.

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[17] Public Notice at 7.

[18] Curiously, Mobilitie blames government-imposed application and access fees for delaying its deployment of proposed infrastructure. Yet Sprint, the company's network partner, reported plans to cut costs by relocating "its leased tower space from private property owners to locations on **government-owned properties where rents are cheaper**." (Emphasis added.) *See* Paul Ausick, Sprint to Save $1 Billion by Moving Cell Towers, (Jan. 15, 2016), http://247wallst.com/telecom-wireless/2016/01/15/sprint-to-save-1-billion-by-moving-cell-towers/ .

Many comments are expected to show that the company came to town, filed incomplete applications for 120-foot monopoles in the public ROW, and then left town, never to be heard from again. A prime example is the attached Staff Report from the City of Farmersville, Cal. in which the company proposes to install a 123-foot pole even though "most electricity and telephone poles in the City are 45-60 feet high."[19] Or that Mobilitie placed equipment in the ROW without permission that had to be removed by authorities. Or they claimed unfettered access to the ROW in an attempt to browbeat local officials into granting their deployment requests until at least one state acted and issued the company a "cease and desist" letter.[20]

In fact, Mobilitie's actions across the nation started to get attention from other providers, concerned that their own deployment efforts could be hindered by the poster child's actions. Back in July 2016, well before the Bureau issued its Public Notice, FierceTelecom reported that Nick Del Deo, an analyst with MoffettNathanson "suggested reported shoddy construction and unsightly deployments from the two companies [Sprint and its network partner, Mobilitie] is garnering backlash from municipalities, which could result in site removal and stricter zoning regulations for future small cell deployments."[21] We suggest that any deployment delays of small cell facilities on the behalf of local governments, if indeed there are any, squarely result from the

[19] The City of Farmersville's Staff Report concerns Mobilitie's application to place a 123-foot high wireless transmission tower in the city's right-of-way. "As a comparison the existing cell tower behind City Hall is about 100 feet high." See City of Farmersville, Staff Report, (July 25, 2016), http://www.cityoffarmersville-ca.gov/AgendaCenter/ViewFile/Item/1532?fileID=750

[20] Minnesota Department of Commerce issued a "cease and desist" letter to Mobilitie on August 4, 2016, requesting the company refrain from "asserting that PUC authority has exempted it from the regulatory requirements of local government units." *See* Minnesota Department of Commerce, Re: Inquiries Regarding Mobilitie, LLC, Docket Nos. P6636/NA-07-470, P6966/NA-16-607, (August 4, 2016), http://www.lwm-info.org/DocumentCenter/View/788

[21] *See* Ben Munson, Small cell deployment estimates 'radically off' the mark, analyst says, (Jul. 13, 2016), http://www.fiercetelecom.com/installer/small-cell-deployment-estimates-radically-off-mark-analyst-says

actions taken by Mobilitie.

Furthermore, we strongly urge the Bureau to compare Mobilitie's unfounded allegations of delay in its Petition with public statements made by its CEO Gary Jabara in June 2016. During a panel discussion at the Wells Fargo Convergence & Connectivity Symposium, he stated that Mobilitie was "moving through the zoning and permitting stage much faster, overcoming many of the regulations hurdles that have often delayed or deterred infrastructure investment and broadband deployment in the past." ""Carriers are moving full steam ahead with their network upgrade projects and we predict more than a million small cell deployments within five years. . . Our close cooperation with local authorities has allowed us to navigate bureaucratic processes and help service providers bring greater connectivity to communities across the country more quickly than ever before. . . . We have built thousands of sites and have thousands of approved permits in hand and we don't see this slowing anytime soon.""[22] And Jennifer Fritzsche, an analyst with Wells Fargo, added: "Mobilitie did indicate despite all the noise out there, it is getting through the zoning and permitting stage faster than the market appreciates and there have been no municipalities that have pushed a full-on moratorium on small cell deployment as some have speculated."[23]

One thing that this proceeding has been successful at is diverting attention away from

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[22] *See* PR Newswire, Mobilitie CEO, Gary Jabara, Talks Small Cell Market Momentum at 2016 Wells Fargo Convergence & Connectivity Symposium, (Jun. 22, 2016), http://www.prnewswire.com/news-releases/mobilitie-ceo-gary-jabara-talks-small-cell-market-momentum-at-2016-wells-fargo-convergence--connectivity-symposium-300289122.html

[23] *See* Colin Gibbs, Mobilitie downplays small cell concerns, says Sprint really is spending on network upgrades, (Jun. 22, 2016) http://www.fiercewireless.com/wireless/mobilitie-downplays-small-cell-concerns-says-sprint-really-spending-network-upgrades

industry's actions hindering deployment. While we have mentioned Mobilitie's missteps, we need to call attention to harmful actions taken by other industry players that truly hamper the deployment of wireless broadband infrastructure. It is unquestionable that some providers are actively taking steps to throw up barriers to deployment by competitors.

For example, after the city of Nashville, Tenn. enacted a One Touch Make Ready ordinance to speed up the installation of new lines to utility poles, two incumbent providers filed suit against the city contending, in part, that the city lacked authority to regulate the poles. A similar lawsuit on the same grounds was filed against the city of Louisville, Ken. In commenting on the lawsuit, Nashville Councilmember Anthony Davis stated: "I feel like we absolutely spoke for our constituents and the residents of Nashville who want this 'Make Ready' to hopefully spur new carriers and more technology investment in Nashville."[24] Providers insist that local governments must ease the way for providers who obstruct competition. However, when local governments take actions to ensure these new wireless infrastructure installations do not inconvenience residents or must comply with applicable codes to protect the public health and safety, they are criticized that such steps hinder or delay deployment.

VII. TERMS OR PHRASES IN SECTION 253 (c) NEED NO CLARIFICATION

The Commission seeks comments on whether the public interest would be served by issuing clarifications of any of the terminology or phrases in Section 253 (c). In particular, the

[24] *See* Jamie McGee and Joey Garrison, Comcast Sues Nashville Over Google Fiber-backed pole ordinance, Jamie McGee and Joey Garrison, (Oct. 25, 2016), http://www.tennessean.com/story/news/local/2016/10/25/comcast-sues-metro-over-google-fiber-backed-pole-otmr-ordinance/92748490/

Commission seeks comments on the need for interpreting "fair and reasonable compensation;" "competitively neutral and nondiscriminatory;" and "publicly disclosed by such government." The short answer as to whether clarification is needed or would serve the public interest is "No." None of the three phrases for which the Commission specifically requests comment is ambiguous. Because they are not ambiguous, the Commission has no statutory gap to fill with an interpretation. The Commission should not confuse statutory phrases' lack of definitions with a finding that their meaning is ambiguous.

VIII. SUPREME COURT PRECEDENT HOLDS THAT LOCAL GOVERNMENTS MAY CHARGE RENT FOR THE USE OF THEIR PROPERTY IF THEY SO CHOOSE

In *St. Louis v. Western Union Telegraph Co.*,[25] the Supreme Court, reviewing whether compensation for use of city property was in a tax declared the compensation to be "in nature of a charge for the use of property belonging to the city — that which may properly be called rental." That Court also stated that "the revenues of a municipality may come from rentals as legitimately and as properly as from taxes."[26]

If an occupier of the public rights-of-way or other public property does not like having to pay rent to a local government, there is a solution. The Supreme Court recognized this solution more than a hundred and twenty years ago. To wit: "If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the

[25] 148 U.S. 92, 97 (1893).
[26] *Id.*

[requirement for rent] would no longer have any application to it." [27]

Mobilitie does not like this solution. It prefers to be in the rights-of-way because it "reduces the transaction costs providers incur to negotiate with private landowners for access to individual buildings, which can involve hundreds of different leases across a geographic area."[28] Mobilitie has chosen a path for its own economic good and now wants the Commission to further reduce its costs of doing business by limiting the amounts local governments can charge for the privilege of exclusively occupying a portion of local government property – whether with a 120 foot pole or a small cell potentially as small as a bread box.

The Court went on to explain why the City's position in seeking compensation in the form of rent was appropriate. In fact, the Supreme Court's next statements were prescient indeed. "The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect *rent*." [29]

"[F]irst, it may be well to consider the nature of the use which is made by the defendant of the streets, and the general power of the public to exact *compensation* for the use of streets and roads." [30] The Court used the word "compensation," having just discussed the City's ordinance as seeking rent. The Court did not use the word "compensation" in the sense that it meant "cost." Further, "the use which the defendant makes of the streets is an *exclusive and permanent one. . . .*" [31]

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[27] *Id*. at 97.
[28] Mobilitie Petition at 7-8.
[29] *Id*. at 98. (Emphasis added).
[30] *Id*. (Emphasis added).
[31] *Id*. (Emphasis added).

The Court noted that occupations of the rights-of-way were ordinarily temporary and shifting, whether by vehicle or by foot, and that one occupation was soon abandoned in favor of another. The Court explained well the difference between the public's use of rights-of-way versus the use of the rights-of-way as contemplated by the telecommunications company. "This use is common to all members of the public, and it is use open equally to citizens of other States with those of the State in which the street is situate."[32] In contrast, "the use made by the [telecommunications] company is ... permanent and exclusive, and "effectually and permanently dispossesses the general public *as if it had destroyed that amount of ground*."[33] The Court further explained that "[w]hatever benefit the public may receive in the way of transportation of messages," the actual use of the right of way by the public was "wholly lost to the public."[34] The Court supposed that "[b]y sufficient multiplication [telecommunications] companies[,] the whole space of the [right of way] might be occupied, and . . . *entirely* appropriated to the . . . use of companies and for the transportation of messages.[35] The Court reiterated that the placement of telecommunications equipment in the rights-of-way constituted the "absolute, permanent and exclusive appropriation of the rights-of-way.[36]

It then asked the question which is at the heart of this proceeding:

> "**Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied**?"

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[32] *Id*. at 98-99.
[33] *Id*. at 99.
[34] *Id*. at 99.
[35] *Id*.
[36] *Id*.

The Court also answered the question:

"**Obviously not**."[37]

The Court followed this by reviewing a hypothetical. "Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge . . . anything else except rental?"[38] The Court concluded giving permission to a telecommunications company to occupy the right-of-way "is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of *rental*."[39]

More than a hundred and twenty years ago, the Supreme Court recognized the effect of having communications equipment (and other equipment important to modern life) in public rights-of-way in particular. As the Comments of others in this proceeding demonstrate, public rights-of-way are increasingly crowded with telecommunications, sewer, water, electric and gas infrastructure.

Regardless of the size of equipment sought to be placed in the right of way, Mobilitie (or any other entity wanting to place a physical item on or in public rights-of-way) is occupying space which cannot be used for anything else. The Commission should decline the request to enhance a private business's economic bottom line at the expense of the public.

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[37] *Id*. (Emphasis added.)
[38] *Id*.
[39] Id. (Emphasis added.)

IX. RENT IS "FAIR AND REASONABLE COMPENSATION" AND ITS EVALUATION IS NECESSARILY FACT-BOUND

"Whether a city can charge rent for its property is entirely distinct from whether, if it has, the charge is excessive."[40] After the discussion highlighted above, the *St. Louis* Court turned to the question of whether the rent at issue was "unreasonable, unjust and excessive." To start, the court noted that *prima facie*, charging rent for a permanent occupation is reasonable. "The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable."[41]

The Court went on to note that different locales would have different ways of valuing the annual rental for the occupation of the right of way. The Court specifically noted that there were likely valuation differences between locating numerous, large poles in densely populated areas versus locating poles in areas where land was abundant and valued differently.[42] While the question of whether a particular annual rental charge was excessive had to be amenable to judicial review, evaluation of this question could *only* be based on the actual "state of affairs in the city."[43] This portion of the holding, that evaluation of charges for the use of the public rights-of-way must be based on the facts in existence in any particular local government, forecloses the Commission's ability to interpret what "fair and reasonable compensation" means for local governments as a whole.

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[40] *St. Louis*, 148 U.S. at 98
[41] *Id*. at 104.
[42] *Id*. at 104.
[43] *Id*. at 104-5.

X. CONGRESSIONAL INTENT IS AN IMPORTANT TOUCHSTONE IN EVALUATING THE MEANING OF COMPENSATION IN SECTION 253 (c)

"[A]dministrative [agency] constructions which are contrary to clear congressional intent" will be rejected by the courts.[44] When evaluating congressional intent "it is always appropriate to assume that our elected representatives, like other citizens, know the law."[45] Therefore, it must be assumed that Congress knew that the Supreme Court had upheld rental charges for the use of rights-of-way more than 100 and twenty years before the enactment of the Telecommunications Act of 1996. And Congress was aware that local governments did in fact seek compensation in the form of rent for occupation of public property. Indeed, contrary to Mobilitie's assertion, a review of the legislative history of what eventually became Section 253 (c), shows that Congress intended local government to be able to charge rent for the local rights-of-way.[46]

Mobilitie cites Senator Feinstein for outlining the supposedly "limited" types of activities localities could conduct. While Mobilitie cites to the portion of the Congressional Record containing Senator Feinstein's statement, it is apparent that those who prepared Mobilitie's Petition didn't actually read the esteemed Senator's statement. If they had read it, they would have realized their mistake.

Senator Feinstein's discussion was about 1) making sure the FCC did not have exclusive jurisdiction to decide disputes under Section 253 because of the burden placed on local

[44] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).
[45] *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979).
[46] *See*, Mobilitie Petition at 24-25, incorrectly characterizing Congressional intent.

governments if they had to litigate such disputes in Washington, D.C. and 2) reading into the record portions of letters from city attorneys around the country the types of activities they suspected telecommunications providers would attempt to litigate in Washington, D.C. before the Commission. In fact, the quote Mobilitie cherry picks is not a statement by Senator Feinstein describing the limitations on local governments. Rather, Senator Feinstein quoted then-San Francisco City Attorney Louise Renne's concern about the need for her attorneys to travel to Washington D.C. to defend the City's requirements. Hopefully, the Commission and Mobilitie won't continue the completely wrong reading of the Congressional Record and Senator Feinstein's statement.[47]

The actual discussion of "compensation" in the Congressional Record is found in the House Debates focusing on parity. Discussing an amendment he offered to the bill which eventually became the Telecommunications Act of 1996, Representative Joe Barton stated the Act "explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but *also to set the compensation level* for the use of that right-of-way."[48]

While not directly related to Sec. 253, in 2004, members of Congress continued to understand and accept that local governments had broad discretion in seeking compensation for the use of their rights-of-way and specifically understood that gross revenue fees for the use of the rights-of-way were allowable. During the 2004 debates on the Internet Tax

[47] 141 Cong. Rec. S8170-72 (June 12, 1995) (Senator Feinstein's discussion on this issue starts on S8170 and continues mi-way through S8171. Letters from City Attorneys start mid-way on S8171 and continue mid-way on S8172.)
[48] 141 Cong. Rec. H8460-01 (statement of Representative Barton) (emphasis added).

Nondiscrimination Act, S. 150, Senator Kay Bailey Hutchison offered an amendment to clarify that gross revenues fees for the use of public rights-of-way would have been exempt from the moratorium on taxation of access to the internet:

> That is why I have introduced an amendment that will clarify the definition of what is excepted from this Internet access tax ban. It says:
> *. . . any payment made for the use of a public right-of-way or made in lieu of a fee for use of the public right-of-way, however it may be denominated, including but not limited to an access line fee, a franchise fee, license fee or gross receipts or gross revenue fee.*
> ***
>
> [This amendment] protect[s] cities, particularly since we have certain laws in some States that do have a component of a gross receipts fee within the access line issue. . . .[49]

Though her amendment was tabled, it is clear that gross revenue fees and other methods for compensating local governments for the occupation of public rights-of-way were acceptable to Congress when it enacted Section 253 (c).

Historically, local governments have, depending on the vagaries of state law, been free to charge various fees for the use of the rights-of-way. The statements by members of Congress with respect to the Telecommunications Act of 1996, as well as other legislation, support the freedom of local governments to act as any other land owners. Section 253 (c) did not change this or long standing precedent from the United States Supreme Court.

Congress understood local government authority to charge rent for the use of the rights-of-way and that compensation was not limited to costs. The Commission should decline Mobilitie's invitation to issue an interpretation of "fair and reasonable compensation" which ties

[49] 150 Cong. Rec. S4402-0, *4405 (daily ed. Apr. 27, 2004) (statement of Senator Hutchison)(emphasis added).

compensation to "costs" of managing the right of way.

XI. THE MEANING OF "COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY" IS CLEAR

Mobilitie asks the Commission to interpret "competitively neutral and nondiscriminatory" by extending Sec. 253 (c) to wireless services. It spends the majority of its argument discussing court opinions interpreting this phrase and agrees with those interpretations, stating that the Commission "clarification" it seeks would be consistent with those court opinions.[50] Mobilitie spends no time explaining why Sec. 253 (c) should apply to wireless providers. Mobilitie's requested Commission action is the proverbial solution in search of a problem.

Section 253 (c) does not require exact parity between providers, as is borne out by the legislative history of the Act, as well as the court decisions interpreting the Act. Local governments "may, of course, make distinctions that result in the *de facto* application of different rules to different service providers so long as the distinctions are based on valid considerations."[51] The requirements of Sec. 253 are not inflexible and the statute does not require precise parity of treatment.[52] This is borne out by the discussion above which noted that gross revenue fees were not objectionable and that the primary disagreement in the congressional debates dealt with whether to require equal treatment between providers or allow for flexibility. Congress chose to allow local governments the ability to tailor agreements with providers as

[50] Mobilitie Petition at 31-34.
[51] *New Jersey Payphone Association, Inc. v. Town of West New York*, 299 F.3d 235, 247 (3d Cir. 2002).
[52] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2nd Cir. 2002).

needed.

Local governments can and do take into account the scale of the use of rights-of-way by different providers and they also retain the flexibility to adopt requirements appropriate for the circumstances in their communities. "[Cities] can negotiate different agreements with different service providers; thus, a city could enter into competitively neutral agreements where one service provider would provide the city with below-market-rate telecommunications services and another service provider would have to pay a larger franchise fee, provided the effect is a rough parity between competitors."[53] Mobilitie does not cite one court case which it claims was incorrectly decided as support for why guidance is needed or any rational for extending Sec. 253 to wireless service providers, nor does it provide any rationale for why the requirements of Sec. 332 are not sufficient to protect the interests of wireless providers.

XII. LOCAL GOVERNMENTS AGREES THAT THE ACT REQUIRES THE PUBLIC DISCLOSURE OF COMPENSATION FOR OCCUPYING THE RIGHTS-OF-WAY

Mobilitie asks the Commission to require that local governments disclose charges they have previously assessed other occupants of the rights of way. This is again a solution in search of a problem. It is true that the Act does not detail exactly how compensation information is to be made public. However, states and local governments have processes in place for handling requests for compensation information under local freedom of information and/or Sunshine Acts. Just because Mobilitie does not like having to understand local processes for accessing this information does not mean that the Commission has the authority or expertise to dictate the

[53] *White Plains*, 305 F.3d at 80

release of information seeking potentially proprietary and confidential business information of third parties to competitors.[54] The Commission should decline to take action on this issue.

XIII. CONCLUSION

The National Association of Telecommunications Officers and Advisors, National League of Cities, and National Association of Towns and Townships would like to thank the Commission for its efforts to better understand the work being done at the local government level to ensure safe, responsible deployment of wireless infrastructure, particularly that built in the public rights-of-way. We strongly urge the Commission to consider our comments, as well as those submitted by communities across the country, before taking any action that may adversely affect local governments' rights-of-way authority.

Respectfully submitted,

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[54] A collection of State Freedom of Information or "Sunshine" laws is available here http://www.nfoic.org/state-freedom-of-information-laws.