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June 4, 2018

Honorable Ajit Pai

Chairman

Honorable Michael O’Rielly, Brendan Carr and Jessica Rosenworcel

Commissioners

Federal Communications Commission

445 12th Street, S.W.

Washington, DC 20554

Re: WT Docket No. 17-79: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*;
WC Docket No. 17-84: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*
GN Docket No. 17-83: Broadband Deployment Advisory Council

Dear Chairman Pai and Commissioners O’Rielly, Carr and Rosenworcel:

The Smart Communities and Special Districts Coalition¹ (“Coalition”) submits this letter to highlight the implications of the Supreme Court’s recent decision in *Murphy v. National Collegiate Athletic Association*.² Specifically, the Coalition calls the Commission’s attention to the *Murphy* Court’s articulation of the limitations on federal authority to compel state and local government action. The Coalition believes that many of the mandates proposed by commenters

¹ The Smart Communities and Special Districts Coalition for this filing is comprised of the following individual members: Ann Arbor, MI; Atlanta, GA; Boston, MA; Cary, NC; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Myrtle Beach, SC; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Portland, OR; Rye, NY; Santa Clara, CA; Santa Margarita Water District (CA); Walnut Valley Water District; Sweetwater Authority (CA); Valley Center Municipal Water District (CA); and Yuma, AZ. The coalition also includes the Texas Coalition of Cities for Utility Issues (TCCFUI), a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. TCCFUI is comprised of large municipalities and rural villages. The individual members of the Smart Cities and Special Districts Coalition express their gratitude to TCCFUI for underwriting the preparation of this letter.

² *Murphy v. National Collegiate Athletic Assn.*, 584 U.S. __ (May 14, 2018).

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and the Commission in the first two captioned dockets above as well as in the proposals of the Broadband Deployment Advisory Committee, including:

- proposed limitations on fees and charges for access to state and local property,
- accelerated shot clocks with a “deemed granted” remedy, and
- requirements that state and local governments grant access to publicly owned property, subject to federally-mandate terms

would be inconsistent with the Tenth Amendment’s anticommandeering rules as first articulated by the Supreme Court in *New York v. United States*, 505 U.S. 144, 166 (1992), clarified in *Printz v. United States*, 521 U.S. 898 (1997) and recently reaffirmed by Justice Alito and the majority of the Court in *Murphy*.

The Murphy Decision Limits Federal Power to Command States & Localities

The Supreme Court found that provisions of the Professional and Amateur Sports Protection Act (“PASPA”) which “prohibited state authorization of sports gambling . . . violate[d] the anticommandeering rule.”³ In so doing, the Court highlighted the longstanding separation between federal and state authority, and the dual sovereignty system contemplated by the Constitution.⁴ Writing for the majority, Justice Alito noted that “conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.”⁵ Furthermore, “‘the federal government’ may not ‘command the states officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.’”⁶ And this rule applies not only to policymaking officials, but to those acting in administrative or ministerial roles, as well.⁷ Furthermore, it makes no difference whether a law “commanded ‘affirmative’ action” or imposed a prohibition.⁸ “The basic principle – that Congress cannot issue direct orders to state legislatures – applies in either direction.”⁹

³ *Id.*, slip op. at 18.

⁴ *Id.*, slip op. at 14.

⁵ *Id.*, slip op. at 15.

⁶ *Id.*, slip op. at 17 (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997).)

⁷ *Murphy*, 584 U.S. ___, slip op. at 17 (citing *Printz*, 521 U.S. at 929-30.)

⁸ *Murphy*, 584 U.S. ___, slip op. at 19.

⁹ *Id.*

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Among those powers reserved for the states, and localities as their political subdivisions, are the power to manage land use, and administer and manage those lands owned by the public, or reserved for public benefit, such as public rights of way. The Constitution only “confers upon congress the power to regulate individuals, not States.”¹⁰ Congress, and the Federal government in general (including the Commission) simply cannot compel States or localities to take, or not take, specific actions. Even “where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”¹¹

The proposed mandates assume the reverse – that the FCC has been given authority to direct local governments to act, prescribe when they may act and limit their authority to obtain fair value for property (or even recover the full cost of regulation), and correspondingly, assumes that there is a federal mandate that permits the FCC to grant access to state and municipal rights of way and property, which there is not (the only provision in the Act that permits the FCC to grant affirmative rights of access to rights of way, 47 U.S.C. Section 224, expressly exclude municipally or state owned rights of way). Hence, as in PASPA, the proposals cannot be justified as a mere exercise of the Supremacy Clause, and instead must be viewed as a comprehensive effort to regulate states and their subdivisions. Under *Murphy*, a different and narrower approach is constitutionally required.

Conclusion

Local governments understand the importance of deployment of advanced communications technologies and continue to actively engage in significant efforts to encourage wireline and wireless broadband deployment. Commission efforts must, however, respect to dual sovereignty system embodied in the Constitution and its Amendments, and must recognize the limitations on the agency’s power to compel state or local government action, as recently highlighted by the *Murphy* decision.

¹⁰ *New York v. United States*, 505 U.S. 144, 166 (1992).

¹¹ *Id.* at 178.

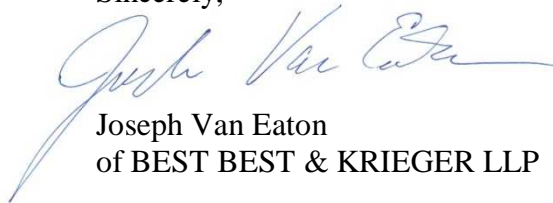
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This letter is being filed electronically with the Commission pursuant to Section 1.1206 of the Commission's rules.¹² Please do not hesitate to contact me with any questions or concerns.

Sincerely,



Joseph Van Eaton
of BEST BEST & KRIEGER LLP

cc: Ms. Marlene Dortch, Secretary
Rachel Bender
Umair Javed
Erin McGrath
Will Adams

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¹² See 47 C.F.R. § 1.1206.