

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment	)	
By Removing Barriers to Infrastructure	)	WT Docket No. 17-79
Investment	)	
	)	
Revising the Historic Preservation Review	)	WT Docket No. 15-180
Process for Wireless Facility Deployments	)	

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**COMMENT OF THE LEAGUE OF MINNESOTA CITIES**

**I. INTRODUCTION**

The League of Minnesota Cities (“LMC”)<sup>1</sup> submits these comments in response to the Federal Communication Commission’s (“FCC”) Request for Comments on its Notice of Proposed Rulemaking and Notice of Inquiry, published on 5/10/2017, and entitled *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Revising the Historic Preservation Review Process for Wireless Facility Deployments*. In the Notices, the Commission declared its intent to conduct a comprehensive review of the legal framework for infrastructure deployment, to identify regulatory barriers, to examine the Commission’s role in addressing these perceived barriers and to better understand the interaction between Sections 253 and 332(c)(7) of the Telecommunications Act (“TCA”)<sup>2</sup>.

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<sup>1</sup> LMC is a statewide cooperative association representing 833 cities, 11 townships, 61 special districts and one joint power entity. Only 20 cities in Minnesota do not belong to LMC. The LMC was established in 1913 within the school of public affairs at the University of Minnesota. It became an independent association representing and serving cities in 1974. A board of directors, elected by the LMC membership, govern LMC.

<sup>2</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 82 Fed. Reg. 21761 (May 10, 2017).

LMC supports wireless deployment, including smart deployment of 5G. However, LMC also recognizes that, not only do the wireless providers not view small cell facilities as the primary delivery method for broadband, small cell deployments also (1) impact the public assets of each municipality; (2) rely upon public resources (e.g. public poles and power); (3) uses shared antenna systems; (4) necessitates adequate public protections, and (5) warrants receiving both cost recovery and rent for use of its assets. The FCC states it believes further rulemaking necessary to promote “rapid deployment” of advanced wireless broadband services to all Americans. In response, LMC respectfully reminds the FCC that, while the FCC believes wireless broadband may bring enormous benefits to this Nation’s communities, the deployment of broadband can and does occur through many different mediums, not just through small cell wireless devices. In fact, testimony to the Minnesota House Jobs Committee from an AT&T representative stated that small cell technology is just a “part of the equation” and went on further to discuss how AT&T intends to use small cell facilities in Minnesota primarily to off-load data congestion on existing networks in larger areas, not to deliver broadband across the state.

Indeed, the testimony revealed AT&T plans to deliver broadband in other ways, such as along power lines.<sup>3</sup> Verizon’s testimony, at the same hearing, echoed AT&T’s testimony. In answering a question from Representative Mahoney about using small cells to deliver broadband to smaller cities, the Verizon representative stated that small cells are not for delivery of broadband in this instance since “[w]e need fiber” and “without fiber, can’t bring it”.<sup>4</sup> As such, LMC urges the FCC not to exceed its

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<sup>3</sup> Testimony of Paul Weirtz, President of AT&T Minnesota, to House Jobs Committee on Bill HF739 (May 17, 2017) (approximately 37 minutes in) at <http://ww2.house.leg.state.mn.us/audio/mp3ls90/job051717.mp3>; see also, *Project AirGig and Other AT&T Access Technologies Bring Faster Connectivity to Customers Anywhere*, at [http://about.att.com/story/trial\\_project\\_airgig.html](http://about.att.com/story/trial_project_airgig.html); see also, *American Tower Rises above Uncertainty in Wireless Tower Sector*, Market Realist (Matthews, J, June 9, 2017)(stating, The 5G networks are effective only in densely populated regions and work within a small distance) at <http://marketrealist.com/2017/06/5g-is-the-future-of-internet-data-is-it-a-threat-to-amt/>

<sup>4</sup>*Id.* Testimony by Michael McDermott, Verizon Wireless Representative, to House Jobs Committee on Bill HF3739 (May 17, 2017).

rulemaking authority to push deployment of one type of technology at the detriment of local control and to the discrimination of other technologies, especially since even the wireless providers do not view this deployment as the mode to deliver broadband statewide.

The FCC, on [www.Broadband.gov](http://www.Broadband.gov), acknowledges that broadband delivery occurs through not one, but several high-speed transmission technologies, including digital subscriber lines (DSL – telephone lines), cable modems, fiber, wireless, satellite and broadband over powerlines (BPLs). By adopting state law and promulgating a broadband program, Minnesota has made high speed internet access a priority throughout the state.<sup>5</sup> Minnesota’s Office of Broadband Development anticipates delivery of this broadband service through many means; such as through the fiber and coaxial networks of cable providers; DSL service over the telephone network; optical fiber to the home or business; mobile and fixed wireless systems; and satellite connections.<sup>6</sup> As further evidence that broadband nationwide deployment can occur without rapid small wireless deployment, a recent AT&T statement mirrors the testimony given in Minnesota by stating that although “small cells remain a key part of our advanced network toolset...we’re also finding that other technology advancements are helping us reach our goals in reliability and performance so we may not need to deploy as many small cells in our current deployment cycles as our initial plans from more than two years ago before the Leap acquisition indicate. That’s part of the technology business.”<sup>7</sup> As such, additional rules by the FCC that likely overstep the bounds of authority seem unnecessary.

LMC urges the Commission to refrain from interfering with local ordinances and practices, and continue to allow the application of Minnesota’s state zoning and Sections 237.162 and .163 of

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<sup>5</sup> Minn. Stat. §§ 116J.39-116J.398.

<sup>6</sup> Link to Office Broadband Development at <https://mn.gov/deed/programs-services/broadband/what-we-do/>

<sup>7</sup> AT&T drops goal of deploying 40,000 small cells by end of 2015, Phil Goldstein (March 5, 2015) at <http://www.fiercewireless.com/wireless/at-t-drops-goal-deploying-40-000-small-cells-by-end-2015-citing-benefits-leap-deal>

Minnesota States (“Local Telecom ROW Act”).<sup>8</sup> Imposing a new federal regulatory overlay not only would create confusion and administrative burden upon communities (many with limited resources and personnel); but also, would create unnecessary costs and would undermine important local policies.

## II. MINNESOTA LAW

LMC files these comments to explain ROW practices in Minnesota, to argue Congress intended to defer to local controls when it enacted the TCA, and to highlight how the different types and needs of communities in Minnesota necessitate each community maintaining that local control. In Minnesota, municipal roadblocks do not exist blocking the deployment of either broadband or small wireless facilities. Minnesota municipalities currently do and will continue to increase access to broadband, utilizing all types of technology, and already effectively process applications for wireless facilities, including small cell wireless facilities.

The state of Minnesota has prioritized delivery of both broadband and additional wireless services, but does so through multiple channels and not at the expense of municipal planning. The Minnesota Legislature recognized that municipalities face mounting problems in providing means of guiding future development of land so as to insure a safer, more pleasant and more economical environment for residential, commercial, industrial and public activities; to preserve agricultural and other open lands; and to promote the public health, safety, and general welfare.<sup>9</sup> Through municipal planning, cities provide public guides to future municipal action which enables other public and private agencies to plan their activities in harmony with the municipality's plans.<sup>10</sup> Local controls represent an integral part of such planning in Minnesota<sup>11</sup> and, for decades, Minnesota municipalities have been

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<sup>8</sup> Minn. Stat. §§ 237.162 and 237.163 and 462.357.

<sup>9</sup> Minn. Stat. § 462.351.

<sup>10</sup> *Id.*

<sup>11</sup> *See* Minn. Stat. § 462.357.

authorized to use local zoning authority to act upon wireless cell tower applications, regulate siting of wireless equipment on publicly owned structures and manage rights-of-way.<sup>12</sup> This process has been efficient and effective and will continue to be in the smart deployment of future wireless services, as it has been for the deployment of previous generations of wireless technologies.

To accommodate various types of telecommunications providers in rights-of-way, the Minnesota Legislature enacted a state telecommunications right-of-way user law 20 years ago, which granted cities a now, long-standing responsibility to manage public rights of way<sup>13</sup>. That responsibility represents a matter of public trust that cannot be delegated.<sup>14</sup> This Local Telecom ROW Act regulates use of the ROW by “telecommunications rights of way users”, which the Minnesota Legislature recently amended to unequivocally include wireless service providers.<sup>15</sup> Under the Act, a “telecommunications right-of-way user” may “construct, maintain and operate conduit, cable, switches and related appurtenances and facilities along, across, upon, above and under any public right of way”.<sup>16</sup> Telecommunication ROW users’ access to the ROW is subject to the local government authority’s right to manage its public rights of way, including requiring permits and permit application fees; allowing the charging of rent and entering into separate agreements; retaining ability to deny siting for furtherance of public health, welfare and safety; and creating construction coordination and some timing

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<sup>12</sup> *Id.*

<sup>13</sup> Minn. Stat. §§ 237.162 – 237.163; SF 1456, which has passed and has been signed by the governor, amends existing §§ 237.162 and 237.163 to recognize wireless providers under existing law as Telecommunications Rights-of-Way users and to amend existing law to create a more streamlined process for siting small wireless facilities, while still maintaining local government unit’s ability to manage its rights-of-way and to receive managements costs and rent for siting of small wireless facilities.

<sup>14</sup> *State ex Rel. City of St. Paul v. Great Northern Railway Company*, 158 N.W. 972 (Minn. 1916), *State ex Rel. City of St. Paul v. Minnesota Transfer Railway Company*, 83 N.W. 32, 35 (Minn. 1900).

<sup>15</sup> S.F. No. 1456, lines 155.12-155.15. See, [https://www.revisor.mn.gov/bills/text.php?number=SF1456&session\\_year=2017&session\\_number=0&version=latest&format=pdf](https://www.revisor.mn.gov/bills/text.php?number=SF1456&session_year=2017&session_number=0&version=latest&format=pdf) (“persons owning or controlling a facility in the public right-of-way, or seeking to own or control a facility in the public right-of-way, that is used or is intended to be used for providing wireless service”)

<sup>16</sup> *Id.*; see also Minn. Stat. §237.163.

requirements.<sup>17</sup> In essence, the law regulates usage of the ROW but leaves, intact, the ability of cities to manage its public assets in the ROW. The Local Telecom ROW Act addresses ROW permit fees and other management fees, which may include the cost of inspecting job sites, moving facilities during ROW work, restoring work inadequately performed or revoking permits; but does not include payment to access the ROW.<sup>18</sup> In May, 2017, the Minnesota Legislature amended this law to accommodate streamlining the deployment of small wireless facilities, but still left, intact, local government control to deny permits that jeopardize public health, welfare and safety as determined by the city.<sup>19</sup> Clearly, Minnesota’s common law and statutory scheme already encourage broadband, as well as wireless deployment, both in and out of the ROW. Accordingly, further federal intervention would offend the sovereign status of states and their political subdivisions.

### **III. FEDERAL RULEMAKING UNJUSTIFIED**

#### **A. No Deployment Roadblocks Exist**

Additional FCC intervention is unnecessary since deployment already is happening in Minnesota and nationwide. In its July, 2016 report, the IAC reported to the FCC that “the good news is that the process for siting wireless communications facilities is not broken” and that “[i]ndeed, with relatively few exceptions since competition was introduced in the wireless industry with the passage of the 1996 TCA, the wireless industry and governmental entities with the land use and right of way authority have worked quite well to facilitate the robust wireless broadband networks we enjoy today”<sup>20</sup>. In fact, the IAC found that “[b]oth industry and Commission data suggests that the site applications, whether they

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> S.F. No. 1456. See, [https://www.revisor.mn.gov/bills/text.php?number=SF1456&session\\_year=2017&session\\_number=0&version=latest&format=pdf](https://www.revisor.mn.gov/bills/text.php?number=SF1456&session_year=2017&session_number=0&version=latest&format=pdf)

<sup>20</sup> Report on Siting Wireless Communications Facilities, presented to the Federal Communications Commission, July 12, 2016 at <https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf>.

be for new sites or collocations, do not focus on filling in gaps in coverage; but rather, are seeking to upgrade equipment, incorporate technologies and expand network capacity” and that “to date, the number of disputes between industry members and local governments has been relatively small.”

According to analyst firm Mobile Experts, small cell deployments grew 140% in 2015, including both indoor and outdoor units.<sup>21</sup> Mobile Experts further reported that it expects enterprise small cell shipments to double this year, with a 270% spike in sales growth.<sup>22</sup> In a recent article, Rick Edwards, President of CityScape Consulting, stated, “I know of no local communities that want to stop new facilities” . . . “they want to get it right and to provide what is needed without creating a porcupine landscape”.<sup>23</sup> In a local meeting in Minnesota, on January 31, 2017, Mobilitie presented to a group of representatives from local cities and reported that it currently has 35 existing small cell sites in place and has plans to develop roughly 500 sites over the next 18 months. Indeed, numerous Minnesota cities have deployment going on with multiple carriers and collaboratively are working with wireless providers. An informal survey uncovered that almost all of Minnesota’s 853 cities have leases for antennas on water towers and, more than a dozen cities already have master licensing agreements in place for siting small wireless facilities on city owned poles (as opposed to water towers), with more currently in negotiations. Additionally, the Minnesota Legislature passed and the Governor signed SF 1456 which, among other things, amends Minnesota’s Local Telecom ROW Act to explicitly recognize wireless providers as Telecommunications Rights-of-Way users and creates a more streamlined process for siting small wireless facilities, while still maintaining local government unit’s ability to manage its rights-of-way and to receive managements costs and rent for siting of small wireless facilities.

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<sup>21</sup> Small Cell Forum, Market Status Report, February 2016, at [www.smallcellforum.org/site/wp-content/uploads/2016/03/050\\_Market\\_Status\\_Report\\_2016.pdf](http://www.smallcellforum.org/site/wp-content/uploads/2016/03/050_Market_Status_Report_2016.pdf)

<sup>22</sup> *Id.*

<sup>23</sup> *Cities walk a fine line with small cell providers*, September 20, 2016, at [nexus.com/cities-walk-a-fine-line-with-small-cell-providers](http://nexus.com/cities-walk-a-fine-line-with-small-cell-providers).

Irrespective of ongoing wireless facilities sitings, broadband deployment, delivered through many types of technology, also already is happening. Minnesota has adopted a state goal that (1) no later than 2022, all Minnesota businesses and homes have access to high-speed broadband that provides minimum download speeds of at least 25 megabits per second and minimum upload speeds of at least three megabits per second; and (2) no later than 2026, all Minnesota businesses and homes have access to at least one provider of broadband with download speeds of at least 100 megabits per second and upload speeds of at least 20 megabits per second.<sup>24</sup> During the 2016 session, the legislature included \$35 million in funds for the Border-to-Border Broadband grant program with an additional \$20 million in grant monies coming out of the 2017 session, along with legislative approval for full funding of the Office of Broadband. The Border-to-Border Broadband grant program provides state resources that help persuade new and existing providers to invest in building infrastructure into unserved and underserved areas of the state. The grants can provide up to 50 percent of project development costs, and the maximum grant amount is \$5 million. Clearly deployment in Minnesota is happening, and preserving local control allows it to happen within the confines of each community's unique set of circumstances, making additional FCC regulations unnecessary.

**B. FCC Proposed Rulemaking Oversteps Authority**

In the Request for Comments, the FCC states that "[t]his Notice of Proposed Rulemaking and Notice of Inquiry commences an examination of the regulatory impediments to wireless networks infrastructure investment and deployment and how we may remove or reduce such impediments consistent with the law and public interest, in order to promote the rapid deployment of advanced wireless broadband service to all Americans."<sup>25</sup> The FCC indicated it may use this information to make

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<sup>24</sup> Minnesota Office of Broadband at <https://mn.gov/deed/programs-services/broadband/goals/>.

<sup>25</sup> *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment & Revising the Historic Preservation Review Process for Wireless Facility Deployment*, WT Dockets No. 17-79, No. 15-180, published at 82 Fed. Reg. 21761 (May 10, 2017).

specific interpretations related to local authority's treatment of siting requests, including establishing a specific shot clock, promulgating a deemed granted provision under a shot clock, prohibiting moratoria, analyzing prohibitive practices and reviewing discriminatory practices.<sup>26</sup>

In addition to the concern that wireless providers do not see small cell deployment as the primary delivery method for broadband<sup>27</sup>, the Notice raises concerns that the FCC plans to overstep the authority granted to it in the TCA by creating a federal regulatory program dictating the scope and policies involved in local land use. The U.S. Supreme Court has interpreted the 10th Amendment--and the Commerce Clause--in favor of states, municipalities and our "dual system of governance" so as to strike down federal statutes which improperly intrude on state and local rights and authority.<sup>28</sup> Additionally, the Supreme Court has stated that "the Federal Government may not compel the States to enact or administer a federal regulatory program due to the blurring of lines of political accountability".<sup>29</sup> At least one circuit, when reviewing wireless towers, provided some insight into what is means to "compel local governments to administer a federal regulatory program" by allowing federally directed administration only when the language of a federal law itself (not regulations interpreting a law) unambiguously and specifically requires further interpretation of some aspect of wireless siting.<sup>30</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> Testimony of Paul Weirtz, President of AT&T Minnesota, to House Jobs Committee on Bill HF739 (May 17, 2017) (approximately 37 minutes in) at <http://ww2.house.leg.state.mn.us/audio/mp3ls90/job051717.mp3>; see also, *Project AirGig and Other AT&T Access Technologies Bring Faster Connectivity to Customers Anywhere*, at [http://about.att.com/story/trial\\_project\\_airgig.html](http://about.att.com/story/trial_project_airgig.html); Testimony by Michael McDermott, Verizon Wireless Representative, to House Jobs Committee on Bill HF3739 (May 17, 2017) (approximately 40 minutes in) at <http://ww2.house.leg.state.mn.us/audio/mp3ls90/job051717.mp3>.

<sup>28</sup> See, e.g. *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (construing Federal Clean Water Act so as not to preempt state and local authority because statute likely would be unconstitutional if so construed).

<sup>29</sup> *New York v. United States*, 505 U.S. 144, 168-169 (1992) (in case involving review of federal act regulating low level radioactive waste, Courts stated that Congress may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program).

<sup>30</sup> *Montgomery County Md. V. F.C.C.*, 81 F.3d 121 (4th Cir. 2015).

Even though the TCA intends “to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapid private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition....”<sup>31</sup>, Congress did not intend for the FCC to have unfettered authority to accomplish this goal nor to do so by pushing one type of technology over others. In fact, William E. Kennard, Chairman of the FCC from 1997 to 2001, clearly stated, following the enactment of Telecommunications Act of 1996, that it is not FCC’s “intention of turning the FCC into a national zoning board,” as “that is neither in the FCC’s interest, nor the industry’s interest”.<sup>32</sup> Since the Tenth Amendment to the United States Constitution protects state authority and local controls, including allowing local government to have authority over their own land use processes and public assets (enabling each community to deploy broadband and small cell facilities in a manner that makes sense for their specific community), local laws should govern.<sup>33</sup> In fact, Congress specifically recognized the “legitimate State and local concerns involved in regulating the siting of such facilities...such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way”<sup>34</sup> and made it clear it intended to protect local controls. Section 332(c)(7), the section of the TCA that pertains to “commercial mobile services”<sup>35</sup>(which wireless providers offer through different technologies, including small wireless facilities) is not ambiguous and clearly preserves the authority of State and local governments’ controls over siting of wireless facilities and deploying personal communications service,<sup>36</sup> including mobile internet broadband.<sup>37</sup>

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<sup>31</sup> H.R. Rep. No. 104-458 (1996).

<sup>32</sup>See, Remarks by William E. Kennard, Chairman, Federal Communications Commission, to WIRELESS 98, Atlanta, Ga., (February 23, 1998) at <http://www.fcc.gov/Speeches/Kennard/spwek805.html>.

<sup>33</sup> See *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir.1999) (“[T]he TCA does not affect or encroach upon the substantive standards to be applied under established principles of state and local law”.)

<sup>34</sup> H.R.Rep. No. 104-204 at 94-95.

<sup>35</sup> 47 CFR 20.3.

<sup>36</sup> H.R. Conf. Rep. No. 104-458(1996) at 207-08.

<sup>37</sup> H.R. CFR 20.3; 47 CFR 8.2.

In the Notice, the FCC also ask “for comment on how Sections 253 and 332(c)(7) of the Communications Act apply to wireless facilities.” The FCC recently answered its own question, acknowledging that it reads these sections together as they apply to the deployment and siting of wireless facilities, particularly with respect to rights-of-way<sup>38</sup>:

“Section 253 expressly provides that state or local governments may require telecommunications providers to pay “compensation” for the use of public rights-of-way, but specifies that the amounts of such compensation must be ‘fair and reasonable,’ ‘competitively neutral and nondiscriminatory,’ and ‘publicly disclosed.’ Section 253 also authorizes the Commission to issue orders that “preempt the enforcement” of state or local statutes, regulations, or legal requirements that preclude any entity from providing telecommunications service (emphasis added to highlight language “preclude” infers complete prohibition<sup>39</sup>). Section 332 requires state and local land-use authorities to act on requests to place, construct, or modify personal wireless service facilities within a reasonable period of time after such requests are filed. Section 332 also provides that state and local governments may not deny wireless facilities siting applications ‘on the basis of the environmental effects of radio frequency emissions,’ a matter over which the Commission has exclusive jurisdiction. Pursuant to Section 332(c)(7)(B)(v), a person adversely affected by a state or local government agency's ‘final action’ or ‘failure to act’ on a personal wireless service facilities siting application ‘within a reasonable period of time after the request is duly filed’ may sue such an agency ‘in any court of competent jurisdiction.’ The Supreme Court has made clear, however, that courts may order only injunctive relief, not monetary remedies, in such actions.”

Section 253 regulates the larger group of telecommunications providers, of which wireless providers represents a subset. Section 332 focuses specifically on that smaller group of providers who offer mobile commercial services. For purposes of deployment small wireless facilities, and the use of those facilities to deliver broadband, both Sections apply.

In breaking Section 253 down, Section 253(a) prohibits state and local governments from imposing any legal requirement that may “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” within the locality, but neither

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<sup>38</sup> *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, Public Notice*, pp. 2-3, WT Docket No. 16-421 (WTB 2016) (Public Notice).

<sup>39</sup> See also, *Minnesota Towers Inc. v. City of Duluth*, No. Civ. 04-5068 (D. Minn. July 1, 2005) (holding that when wireless provider does not thoroughly investigate other viable alternatives, a city’s denial does not prohibit or have effect of prohibiting personal wireless services in violation of 47 U.S.C. 332(c)(7)(B)(i)(II)).

mandates the provision of this service to be within the ROW nor bans the local governmental unit from regulating these entities.<sup>40</sup> In fact, Subsections(b) and (c) of Section 253 clearly state that certain powers of state and local governments are not impeded or affected by subsection (a)<sup>41</sup> with Section 253(c) unambiguously preserving 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, ...."<sup>42</sup> In subdivision (d), Congress intentionally did not allow FCC preemption of subsection (c), giving the FCC no authority to preempt powers of local government either to manage public rights of way or to require fair and reasonable *compensation* for use of public rights of way on a nondiscriminatory basis.

Section 332 has a similar local controls provision to Section 253. Section 332(c)(7)(a) expressly states "[n]othing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."<sup>43</sup> Under the general rules of statutory construction, Section 332(c)(7)(A)'s "nothing in this chapter" language guides the reading of the balance of Section 332(c)(7),<sup>44</sup> demonstrating that Congress did not intend preemption of local and State land use.<sup>45</sup> The First Circuit, in reviewing possible preemption of a state regulation by a different section of the TCA, cautioned that the interplay represents "a deliberate compromise between two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain local control over siting".<sup>46</sup> Within

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<sup>40</sup> 47 U.S. Code § 253.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 47 U.S.C. § 332(c)(7)(A)

<sup>44</sup> See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986).

<sup>45</sup> H.R. Rep. No. 104-458, at 207-08 (1996), as reprinted in 1996 U.S.C.C.A.N. 222 (Conference Report).

<sup>46</sup> *Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 13 & n.3 (1st Cir. 1999) (discussing initial House version of provision that would have charged the FCC with developing a uniform national policy for the

the Eighth Circuit, a federal district court confirmed that the structure of the TCA demonstrated that Congress explicitly preserved local zoning authority over the siting of wireless facilities while permitting judicial oversight of the zoning decision as a safeguard.<sup>47</sup> Indeed, a federal district court confirmed this finding when affirming a city council's decision to deny a tower permit was supported by substantial evidence since the tower did not blend in with its surroundings and would diminish property values.<sup>48</sup>

To the extent Congress intended to allow FCC oversight of local government through Section 253 and Section 332, it did so specifically in the language of the statute. For example, the statute specifically provides that local government cannot unreasonably discriminate between wireless service providers of functionally equivalent services and cannot outright prohibit wireless services in the city in general.<sup>49</sup> The FCC's current Notices suggest it intends go beyond what Congress prescribed them to do by promulgating additional directives on local government with respect to siting of wireless facilities – asking about shot clocks, moratoria, preemption of local zoning standards, impact of undergrounding and the extent to which aesthetics matter. The FCC, in its Notice, cites to how the various circuits diverge on what conduct “prohibits” wireless services. However, doing so creates a red herring since judicial review represents the statutory road to oversight of local zoning practices and, by common sense, each review will vary depending on the circumstances of each siting request since no city, no community, no set of factors surrounding permit approval or denial are the same.

Such attempts to micromanage local land use controls ignores the Supreme Court's warning that, “no legislation pursues its purposes at all costs . . . and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be

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deployment of wireless communication towers that was rejected in favor of a bill that rejected such a blanket preemption of local land use authority).

<sup>47</sup> *Sprint Spectrum L.P. v. County of Platte, Mo.*, No. 06-6049-CV, Oct. 11, 2007 (D.Mo. 2007).

<sup>48</sup> *Minnesota Towers Inc. v. City of Duluth*, No. Civ. 04-5068 (D. Minn. July 1, 2005).

<sup>49</sup> 47 U.S.C. §§253, 332(c)(7)(B).

the law.”<sup>50</sup> Just recently, in July 2016, the Intergovernmental Advisory Committee to the Federal Communications Commission (IAC) presented a paper to the Commission on “siting wireless communications facilities” in which it urged the FCC not to interfere with local controls.<sup>51</sup> Congress had no intention of allowing the FCC to get into the weeds of how local government sites wireless or small cell facilities or what fees and revenues are appropriate for each community. To do so would make no sense and would ignore the vast differences among communities, like low density versus high density population, less crowded rural ROWs versus ROWs in urban settings, undergrounded utilities, specific city planning and designated cityscapes.

### **C. FCC Proposed Rulemaking Conflicts with TCA and Other Laws**

**i. Shot Clock.** The TCA clearly states that local regulation of “the placement, construction, and modification of personal wireless service facilities ... shall not unreasonably discriminate among providers of functionally equivalent services”. Here promulgating a specific shot clock for small wireless deployment would create a streamlined process for one type of technology to the detriment of other providers of functionally equivalent services who provide those services. A shot clock and a ‘deemed granted’ provision for review of some permits, but not all telecommunications rights-of-way user permits, clearly forces the hand of cities to unfairly move small wireless facility requests to the top of the permit review pile, even if permit applications of other functionally equivalent services pre-dated the small wireless submissions. Doing so detrimentally prejudices and discriminates against these other like providers. LMC made this same argument to state legislators in discussions about recently passed bill SF 1456. In SF 1456, the Minnesota Legislature created a shot clock with some “deemed granted”

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<sup>50</sup> *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

<sup>51</sup> *Report on Siting Wireless Communications Facilities*, presented to the Federal Communications Commission, July 12, 2016 at <https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf>. The Intergovernmental Advisory Committee, created in 1997, provides guidance to the Commission on issues of importance to state, local and tribal governments, as well as to the Commission. The IAC is composed of 15 elected and appointed officials of municipal, county, state, and tribal governments.

language for deployment of small wireless facilities. However, in negotiations, as well as in testimony to committees, opponents to the bill continued to raise concern about the creation of a specialized process for one type of technology.<sup>52</sup>

**ii. Moratoria.** Courts continue to uphold moratoria used in limited circumstance as "interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either 'freezing' existing land uses or by allowing the issuance of .... permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change."<sup>53</sup> Oftentimes, the offensiveness of moratoria arises out of an overly long stay in duration. The FCC already banned moratoria when used in response to Section 6409(a) collocations and further held that moratoria do not toll presumptively reasonable periods.<sup>54</sup> LMC is not aware of any Minnesota city that adopted a moratorium to delay or prohibit a siting request for a small cell facility on a city owned structure in the right of way. Having said that, many cities, particularly smaller communities or communities more rural in nature, have yet to enact zoning ordinances, in general, and have no process in place for siting requests. The availability of moratoria, even if limited in duration or in use to enactment before receiving any applications, affords communities, less advanced in terms of resources and expertise regarding anticipated new technology, the opportunity to properly plan for their communities by getting necessary ordinances or process in place.<sup>55</sup>

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<sup>52</sup> See generally, <http://ww2.house.leg.state.mn.us/audio/mp3ls90/job051717.mp3>

<sup>53</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302

<sup>54</sup> *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, et. al.*, WT Docket Nos. 13-238, 11-59 and 13-32 (October 21, 2014) at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-14-153A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf)

<sup>55</sup> Again, in the recently passed bill in Minnesota, the Minnesota Legislature prohibited moratoria on the processing of small wireless facilities permits, but accommodated the concern of communities needing time to prepare for requests by generously pushing out the enactment date of the moratoria section of the bill.

**D. FCC Proposed Rules Would Unjustly Burden Cities and Public Resources**

**i. Public Duty to Police Right of Way.** Both federal and state legislatures, as well as courts, have long recognized and respected cities' rights through its police power to promote and ensure order, safety, health and the general welfare of their community.<sup>56</sup> Indeed, the Supreme Court has stated that the Telecommunication Act intends to generally preserve the traditional authority of local government to regulate rights of way and the Court has cautioned against rules that unduly burden localities.<sup>57</sup> Mandating specific permitting controls better left to each community frustrates a local governmental unit's ability to promote and ensure the public health, welfare and safety of its own community.

**ii. One Size Does Not Fit All.** When passing the 1996 Act, Congress indicated that wireless siting requests may involve "a zoning variance or a public hearing" and noted that "[i]t is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests."<sup>58</sup> Then, just over two years ago, in an October 20, 2014 Report, the FCC recognized that municipal property preferences vary depending on the community and cautioned that each must be looked at on a case-by-case basis.<sup>59</sup> The IAC recently reported that "[t]here are approximately 40,000 local governments nationwide with land use authority, varying greatly from local governments with as little as a few dozen residents to those with millions of residents."<sup>60</sup> Further, the IAC recognized that "there are likely hundreds of wireless service providers and members of the wireless infrastructure industry that seek to install wireless facilities, also varying greatly from wireless service providers with millions of customers to those that serve only one property, and from infrastructure owners with

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<sup>56</sup> Minn. Stat. § 412.221.

<sup>57</sup> *T-Mobile South, LLC v. City of Rosewall, Ga.*, 135 S.Ct. 800, 817 (2015).

<sup>58</sup> H.R. Conf. Rep. No. 104-458, at 207-08 (1996), reprinted in 1996 U.S.C.C.A.N. 142, 222.

<sup>59</sup> *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-258, Report and Order, FCC 14-153 (rel. Oct. 21, 2014).

<sup>60</sup> *IAC Report on Siting Wireless Communications Facilities*, presented to the Federal Communications Commission, July 12, 2016, at <https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf>.

millions of facilities to those with only a handful.”<sup>61</sup> As the IAC already has pointed out to the FCC, priorities and needs vary greatly by locality and a “one size fits all” approach never would work for processing land use development applications nor would it ensure harmonious and efficient buildout of wireless communications facilities.

Data from the U.S. Census Bureau demonstrates how the amounts of resources and expertise available to local governments vary drastically between localities of different sizes and in different locations.<sup>62</sup> The 2012 Census data concluded that 71% of municipalities and townships do not have more than one full-time paid employee, and 33% of that group have no more than one part-time paid employee as well. Additional federal processes or limitation on fees would impact communities very differently, creating significant burden on some with small budgets and no personnel. Thus, in light of the personnel and other resources of each community, each community should have the discretion to decide how to best site wireless structures for their community.

As an example of differences, in Minnesota, many communities have expended significant dollars developing cityscapes with decorative poles and main streets. Others have invested in undergrounding everything in their rights-of-way. In planning their communities, cities expend not only significant dollars on city design and planning, but also staff and elected official time.<sup>63</sup> These types of planning decisions create an aesthetic look and feel relied upon by the residents and potential residents. In comparison, other cities, not uncommonly more rural in nature, may not have such intricate cityscapes, may still have wooden poles and may have less crowded ROWs. These factors, along with the population differences of Minnesota’s communities and the existing location of macro networks, cause

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<sup>61</sup> *Id.*

<sup>62</sup> U.S. Census Bureau, 2012 Census of Governments: Employment, 2012 Local Government: Individual Government Data and ID File, found at [Census.gov](http://Census.gov)

<sup>63</sup> FCC has specifically in the Notice of Inquiry have questioned the appropriateness of regulations in undergrounding communities.

the siting requests received by each community for wireless deployment to vary greatly. Indeed, to streamline a deployment process or even limit “fair and reasonable” compensations would disregard the individualized circumstances and challenges of each community and would impede the local governmental unit’s well-established police power to regulate their ROWS and deny permits in instances of nonconformance.

In response to LMC inquiries, one city discussed how their community has expended significant time and money on a cityscape that includes decorative poles. Each pole can only handle a specific wind load given a square footage calculations of attachments, and, in that instance, the city decorative poles can handle the lights, one (1) 2’X4’ banner and nothing else. Banners come off before Christmas decorations go up and the city had to deny the Chamber of Commerce’s (and even their own public works department’s) request for additional attachments. If adding something the size of 2’x2’ exceeds wind load, then requiring this city to attach small cell or DAS (and possibly more than one due to requirement of allowing functionally equivalent providers) would require new poles, take up additional personnel time, would disrupt the planned cityscape in which the community invested and likely result in unforeseen additional expenditures.

Indeed, a one size deployment process or fee structure does not fit all. Depending on the community or the right of way, wireless facilities could (1) create land use conflicts and incompatibilities including excessive height of poles and towers; (2) create visual and aesthetic blights and potential safety concerns (based on the conditions, issues may arise from the excessive size, heights, noise or lack of camouflaging); (3) create unnecessary visual and aesthetic blight by failing to utilize alternative technologies or collocation because of streamlined process; (4) cause substantial disturbances to rights-of-way through installation and maintenance of wireless facilities; (5) create traffic and pedestrian safety hazards due to unsafe locations which could have been addressed during local government review of siting request; (6) result in a negative impact to the unique quality or character of the city in

general and (7) result in discrimination from an unavoidable prioritization of processing one type of permit over another.<sup>64</sup>

**iii. Financial Burden.** Local governments have a responsibility to negotiate in good faith to ensure communities are protected and compensated while also benefiting from the technologies that wireless companies can offer. The TCA allows “fair and reasonable compensation” and Section 253 preserves local government’s right to manage its rights of way.<sup>65</sup> Courts have found cities have a proprietary or landlord interest in its publicly owned structures. By not recognizing cities’ interest as a landowner of municipally owned structures on which small cell facilities attach, the FCC ignores judicial precedence.<sup>66</sup> The resulting limitation on compensation to just strict cost recovery doesn’t accommodate the “other” costs related to siting that may arise, including, but not limited to, moving poles, adding poles, repairing equipment, moving other equipment in the ROW and accommodating other collocation requests. Additionally, by using the term “compensation,” Congress intended more than mere “cost recovery”. To make a different determination would result in cities losing their status as proprietary owners, resulting in taxpayers shouldering unanticipated costs to deployment, while, at the same time, allowing private business owners to decrease costs by using backhaul and electricity in the ROW and to make a profit off the provided service<sup>67</sup>. Without city structures already containing electricity and fiber, the wireless industry would have to pay market rates for locating or “renting” space

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<sup>64</sup> Keep in mind, the “small cells” vary themselves. Some small cells have noisy cooling fans for computers; some ground equipment, like cabinets, can equal the size of a coffin or a refrigerator; some small cell facilities have back up batteries mounted on sidewalks or lawns and others use messy diesel generators for their backup.

<sup>65</sup> 47 U.S.C. § 253 (c).

<sup>66</sup> *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 193, 198 (9<sup>th</sup> Cir. 2013); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2<sup>nd</sup> Cir. 2002).

<sup>67</sup> In a recent article, Crown Castle’s CEO is reported to have stated that he “believes small cells could account for \$9 billion to \$10 billion per year”. *Crown Castle’s small-cell business is paying off, while American Tower remains focused on DAS*, Fierce Wireless (Gibbs, C., 6/8/2017) at <http://www.fiercewireless.com/wireless/crown-castle-s-small-cell-business-paying-off-while-american-tower-remains-focused-das>

on non-right-of-way property or private property. Fairness and common sense dictates that they should have to pay for similar rights on public right-of-way property.

**iv. Conflict with Other Regulations.** Other adopted industry standards also may apply to small cell/DAS deployment since the small cell equipment installed oftentimes becomes mounted on existing structures and uses existing backhaul. An FCC mandated process or limitation on fees would not take into consideration these other applicable standards. For example, the National Electric Safety Code (NESC) applies to deployment in many instances. These standards address both working clearance, structural design, and placement of telecommunication facilities on utility poles. The NESC standards specifically regulate clearances between energized live parts and telecommunications equipment. All wireless facilities must comply with the like requirements, as well as climbing and working space requirements and wind loading requirements for attachments. Without having local authority to negotiate placement or deny, if necessary, mandatory siting may result in noncompliance with other standards or end up costing cities a lot of money to move existing structures or rework existing landscapes to ensure compliance.

**E. Section 106 Concerns & Twilight Towers**

The Notices also propose taking a comprehensive look at FCC rules and procedures implementing the National Historic Preservation Act (“NHPA”) as they relate to wireless infrastructure deployment. As part of this, the FCC seeks input on the Section 106 process required by the National Historic Preservation Act (NHPA) generally, as well as input on treatment of communications structures built between 2001 and 2005 that did not go through the section 106 review (“Twilight Towers”). In the Notices, the FCC references programmatic agreements in existence and notes that any changes to FCC review under NHPA would require the agreement of the Advisory Council on Historic Preservation (ACHP) and the National Conference of State Historic Preservation Officers (NCSHPO). Accordingly, since

Section 106 applies to federal lands and property, LMC has no comment. Just for purposes of clarity, the LMC is aware that the Advisory Council on Historic Preservation did recently issue a “Program Comment to Tailor the Section 106 Review Process for Communications Projects on Federal Lands and Property” to assist federal land managing agencies/property managing agencies in permitting and approving deployment of next generation technologies and notes that it specifically excludes National Historic Landmarks (or the portion thereof that is located on federal land), National Monuments, National Memorials, National Historical Parks, National Historic Trails, National Historic Sites, National Military Parks, and National Battlefields, as well as tribal lands without prior written consent of tribe for the new process.

## **V. CONCLUSION**

LMC does not believe that Minnesota common law, statutes, rules or local ordinances have discouraged or created barriers to either broadband or small cell wireless deployment. Minnesota cities welcome and desire smart planning and deployment of wireless services and our policies allow us to work with companies willing to work with us to provide services. Evidence of this exists in the networks and deployment already in place in Minnesota, as well as the ongoing deployment continuing to happen. Additional federal regulations or limitations on fees would prove costly and disruptive to Minnesota cities and, as such, LMC urges the FCC to not make any declarations further interpreting the TCA requirements on how local government handles and charges for wireless siting in their communities.

Respectfully Submitted,

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