

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

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment)	
By Removing Barriers to Infrastructure)	WT Docket No. 17-84
Investment)	
)	
)	

COMMENT OF THE LEAGUE OF MINNESOTA CITIES

I. INTRODUCTION

The League of Minnesota Cities (“LMC”)¹ submits these comments in response to the Federal Communication Commission’s (“FCC”) Notice of Inquiry and Request for Comment, published on May 11, 2017, captioned *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*². This Notice primarily focuses on seeking comments regarding reforming current FCC pole attachment rules and expediting the process for retiring copper facilities. Currently, the FCC pole attachment rules do not apply to poles owned by municipalities and non-utilities, so LMC refrains from commenting on the Notice of Proposed Rulemaking³. In the included Notice of Inquiry, however, the Commission asks for input on when the FCC could use its preemption authority to prevent enforcement

¹ 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.

² *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No 17-84, published May 11, 2017.

³ Section 224 of the Telecommunications Act.

of state and local laws that inhibit broadband deployment. With respect to the preemption inquiry, LMC respectfully submits this Comment.

LMC wants to make it clear that its members support broadband deployment and the existing laws in Minnesota do not have the effect of prohibiting that deployment. Regardless, LMC disagrees that the FCC, under Section 253 of the Telecommunications Act of 1996 (“TCA”), has the authority to preempt state and local laws or practices related to managing its rights-of-way or the deployment of small wireless facilities in those rights-of-way.

II. MINNESOTA’S BROADBAND PLAN

Minnesota, in state law⁴, has made delivering high speed internet access a goal throughout the state and Minnesota is fortunate to have a strong group of experienced broadband providers.⁵ Minnesota’s Office of Broadband Development recognizes that the delivery of broadband service occurs through not just wireless; but rather, 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.⁶ 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 serve as the primary method to deliver broadband, which, he stated, is and will be delivered in other ways, such as along power lines.⁷ Further testimony at the same

⁴ Minn. Stat. § 116J.39-116J.398.

⁵ *Broadband Development Report*, September 10, 2015 at https://mn.gov/deed/assets/broadband-dev-report_tcm1045-132774.pdf

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

⁷ 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

hearing from a Verizon representative indicated that, as of today, the intent of the wireless providers for small cell facilities in Minnesota was not to deliver broadband across the state; but rather to densify existing networks. In answering a question from Representative Mahoney about using small cells for providing broadband to smaller cities, the Verizon representative stated that delivery of broadband through small wireless facilities in this instance would not occur since “[w]e need fiber” and “without fiber, we can’t bring it”.⁸ LMC urges the Commission to refrain from interfering with local ordinances and practices, and continue to allow Minnesota to continue delivering broadband through its Minnesota’s Broadband Program⁹, as well as its management of public rights-of-way through existing Minnesota Statutes, specifically Chapter 237 (Minnesota’s Local Telecom ROW Act).¹⁰ 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, would conflict with the intent of Section 253 of the TCA and would undermine important local policies.

In Minnesota, not only do municipal roadblocks NOT impede deployment of broadband, the opposite holds true. Pursuant to state law, Minnesota has and continues to increase access to broadband. 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. Minnesota State law set goals for broadband,¹¹ providing 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

⁸*Id.* Testimony by Michael McDermott, Verizon Wireless Representative, to House Jobs Committee on Bill HF3739 (May 17, 2017).

⁹ Minn. Stat. § 116J.39-116J.398.

¹⁰ Minn. Stat. §§ 237.162 and 237.163, as recently amended, and 462.357.

¹¹ Minn. Stat. § 237.012.

megabits per second.¹² Minnesota has a healthy ecosystem of national and local broadband providers serving our state. Over 126 known established providers exist, including 66 incumbent telephone operators (CenturyLink, Frontier, Windstream, Albany Mutual Telephone Association, Woodstock Telephone Company, etc.) nine traditional cable operators (Charter, Mediacom, Midcontinent, Sjoberg's, etc.), seven municipal networks, 35 fixed wireless providers (WISPs), five cellular mobile providers, and four satellite operators.

While significant private investments have been made in the past, Minnesota, on its own initiative, recognized that traditional financial models did not cover the costs associated with remaining unmet needs, so Minnesota established a Border-to-Border broadband program. In May of 2014, Governor Dayton signed the Border-to-Border Broadband Development Grant Program into law to help meet the statutory goals of expanding broadband service to areas of Minnesota unserved or underserved.¹³ The Program initially allocated \$20 million for broadband infrastructure grants and established certain parameters for eligibility. During the 2016 session, the legislature included \$35 million in funds for the Border-to-Border Broadband grant program with an additional \$20 million earmarked during the most recent session. These monies, in the form of grants, provide state resources that help make the financial case for new and existing providers to invest in building infrastructure into unserved and underserved areas of the state, with infrastructure representing the primary focus. The grants can provide up to 50 percent of project development costs, and the maximum grant amount equals \$5 million dollars.

¹² Minnesota Office of Broadband at <https://mn.gov/deed/programs-services/broadband/goals/>.

¹³ See Office of Broadband Development website at <https://mn.gov/deed/programs-services/broadband/grant-program/>

Minnesota’s Local Telecom ROW Act, as well as other provisions in Chapter 237, apply to actual deployment of broadband and give cities the responsibility to manage public rights of way¹⁴. That responsibility represents a matter of public trust that cannot be delegated.¹⁵ This Local Telecom ROW Act regulates use of the ROW by “telecommunications rights of way users” and guarantees equality of treatment for access and use of the ROW. 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”.¹⁶ Telecommunication ROW users’ access to the ROW is absolute, but subject to the local government authority’s right to manage its public rights of way.¹⁷ In essence, the law allows 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 do not include payment to access the ROW.¹⁸ Since Minnesota’s statutory scheme clearly already encourages broadband and requires access for telecommunications rights-of-way users to the right-of-way, further federal intervention would offend the sovereign status of states and their political subdivisions. Additionally, LMC respectfully suggests that the FCC should not treat the deployment of small cell wireless as synonymous

¹⁴ Minn. Stat. §§ 237.162 – 237.163; The Minnesota Legislature passed and the governor signed SF 1456 which 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. See, https://www.revisor.mn.gov/bills/text.php?number=SF1456&session_year=2017&session_number=0&version=latest&format=pdf

¹⁵ *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).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

with deployment of broadband since small wireless facilities is one of many technologies that delivers broadband and doing so creates a discriminatory model for delivery.

III. SECTION 253 PREEMPTION DOES NOT APPLY

A. FCC Proposed Rulemaking Oversteps Authority

In the Request for Comments, the FCC states that "[it seeks comment on whether we should enact rules, consistent with our authority under Section 253 of the Act, to promote deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment".¹⁹ Overlapping with its Request for Comment on Rulemaking related to Accelerating Wireless Broadband Deployment, the FCC seeks input with respect to moratoria, rights of way permitting, fees, conditions to granting access to rights of way and bad faith actions. However, Section 253's language clearly intends for local government units to manage and control their rights-of-way without being subject to federal preemption. Indeed, doing so, at least in Minnesota, would have significant impact since existing Minnesota law already regulates the raised considerations.²⁰ In this Notice, the FCC suggests it intends to disregard the directives in Section 253 of the TCA and usurp its authority by creating a federal regulatory program dictating 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.²¹ Additionally, the Supreme Court has

¹⁹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No 17-84, published May 11, 2017.

²⁰ See SF1456, amending Minn. Stat. §§ 237.162, 237.163 at https://www.revisor.mn.gov/bills/text.php?number=SF1456&session_year=2017&session_number=0&version=latest&format=pdf

²¹ 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).

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”.²² At least one circuit, when reviewing wireless towers, provided some insight into what it 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.²³

Even though the TCA intends “to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition....”²⁴, Congress did not intend for the FCC to have unfettered authority to accomplish this goal. In fact, William E. Kennard, Chairman of the FCC from 1997 to 2001, clearly stated 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.”²⁵ 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 in a manner that makes sense for their specific community), local laws should govern the deployment of broadband and the siting of wireless facilities.²⁶ 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

²² *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).

²³ *Montgomery County Md. V. F.C.C.*, 81 F.3d 121 (4th Cir. 2015).

²⁴ H.R. Rep. No. 104-458 (1996)

²⁵ 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>.

²⁶ 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”.)

associated with the use and maintenance of public rights-of-way”²⁷, and made it clear it intended to protect local controls.

Section 253(c) expressly allows state or local governments to require telecommunications providers to pay “fair and reasonable compensation” for the use of public rights-of-way.”²⁸ Section 253(c) also provides that “nothing in this section affects the authority of a State or local government to manage the public rights of way”.²⁹ Section 253 does not mandate that cities allow these providers access into the *rights-of-way* (as opposed to other locations within the city). It is important to note, however, Minnesota law does provide that access. Rather, Section 253(a) limits state and local governments from imposing any legal requirement that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” within the locality. This language does not mean that federal law requires municipalities to give unfettered access to the ROW and, certainly, does not intend for municipalities to lose their ability to regulate the deployment of telecommunications services.³⁰ In fact, the Eighth Circuit found that the party seeking preemption must prove that the municipality, through either a formal ordinance or its procedure, prohibited entry in the entire telecommunications services market in that city, not just within the right-of-way.³¹

Supporting this lack of preemption, 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), 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

²⁷ H.R.Rep. No. 104-204 at 94-95.

²⁸ 47 U.S.C. § 253(c).

²⁹ *Id.*

³⁰ 47 U.S.C. § 253.

³¹ *Level 3 Communications, LLC v. City of St. Louis, Mo.*, 477 F.3d 528, 532 (8th Cir. 2007).

providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis...."³² Furthermore, in subdivision (d) of Section 253, Congress intentionally omitted FCC preemption of subsection (c), giving the FCC no specific authority to preempt the powers of local government either to manage public rights of way or to get *compensation* for use of public rights-of-way.³³ When reading this all together, no preemption authority exists at all, for either the management of the public rights-of-way by local government or for the ability to get fair and reasonable compensation from telecommunications providers for use of the rights-of-way. This aligns with legislative history which shows that Congress restricted the FCC's preemptive authority to reduce the financial burden that state and local governments would face in defending their ordinances before the FCC.³⁴ Additionally, courts have frowned on preemption. 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".³⁵ Within 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.³⁶

³² *Id.*

³³ 47 U.S.C. 253(d) (stating that "[i]f, after notice and an opportunity for public comment, the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection **(a) or (b) of this section** (emphasis added), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency").

³⁴ See. e.g., 141 Cong. Rec. 15,590 (1995).

³⁵ *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 deployment of wireless communication towers that was rejected in favor of a bill that rejected such a blanket preemption of local land use authority).

³⁶ *Sprint Spectrum L.P. v. County of Platte, Mo.*, No. 06-6049-CV, Oct. 11, 2007 (D.Mo. 2007).

Accordingly, the FCC cannot now adopt additional rules preempting local controls over deployment of small cell in the cities' rights-of-way. In Minnesota, state law provides authority for local government units to manage rights-of-way. In Minnesota, this same state law requires access to the right-of-way. In Minnesota, broadband delivery occurs through many mediums by many types of technologies – many of which sit in city ROW. In Minnesota, state law sets goals for broadband deployment. Finally, in Minnesota, legislative action even subsidizes broadband deployment by funding grants to make sure deployment happens. Clearly, no impediments to either broadband deployment or small wireless facility deployment exist in Minnesota. The FCC's current Notice suggests it intends go beyond what Congress prescribed them to do by promulgating additional directives on local government. Such attempts to micromanage local land use controls opposes 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 the law."³⁷

B. FCC Proposed Rulemaking on Moratoria Conflicts with Court Opinions

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."³⁸ Oftentimes, the offensiveness of moratoria arises out of an overly long stay in duration. Many cities, particularly smaller communities or communities more rural in nature, have yet to enact zoning ordinances and have no process in place for siting requests. The availability of moratoria, even if limited in duration, affords

³⁷ *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

³⁸ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302.

those smaller, less advanced communities, with limited resources and expertise, the opportunity to properly plan for their communities.³⁹

C. FCC Proposed Preemption 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.⁴⁰ 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.⁴¹ Taking away these local controls and 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. 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.⁴² 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."⁴³ 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

³⁹ 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.

⁴⁰ Minn. Stat. § 412.221.

⁴¹ *T-Mobile South, LLC v. City of Rosewall, Ga.*, 135 S.Ct. 800, 817 (2015).

⁴² *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).

⁴³ *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>.

harmonious and efficient buildout of communications facilities. Indeed, in Minnesota, deployment of broadband happens through many mediums already and small cell deployment does not represent the only delivery of broadband. As such, and because of the many examples provided to the FCC by the LMC in the companion comment to dockets 17-79 and 15-180, preemption of state law and local ordinances dictating deployment, rights-of-way permitting, construction or licensure would thwart the unique needs of all municipalities.

iii. Financial Burden. Local governments have a responsibility to negotiate in good faith to ensure communities are protected and compensated for use of publicly owned structures and costs of managing rights of ways, while also benefiting from broadband. The TCA allows “fair and reasonable compensation” and Section 253 preserves local government’s right to manage its rights of way.⁴⁴ By not recognizing cities interest as a landowner of municipal owned structures and limiting compensation to just strict cost recovery ignores 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 for 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. Without city structures already containing electricity and fiber, the wireless industry would have to pay market rates for locating or “renting” space 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. Additionally, in many instances, cities, for safety reasons of crowded or narrow ROWs or because of

⁴⁴ 47 U.S.C. § 253 (c).

zoning limitation, want to site facilities on private property as an alternative option. Unfortunately, even when this private property option is the wisest course of action, cities often get push back on this from the wireless industries because siting on the ROW presents a cheaper install and use of existing backhaul.

IV. CONCLUSION

LMC does not believe that Minnesota common law, statutes, rules or local ordinances have discouraged or created barriers to broadband. Minnesota cities welcome and desire smart planning and deployment of broadband 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 broadband deployment.

Respectfully Submitted,

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