June 15, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

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

Dear Ms. Dortch:

In an effort to ensure a full and complete record in each of the above-referenced matters, the undersigned submits the attached filings previously made in other FCC proceedings that address the same or similar issues dealing with the deployment of wireless and wired broadband services.

Respectfully submitted,

Stephen Traylor
Executive Director
NATOA

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices	)	WT Docket No. 13-238
	)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59
	)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	)	RM-11688 (terminated)
	)	
2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, AND THE UNITED STATES CONFERENCE OF MAYORS

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February 3, 2014

SUMMARY

The National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and The United States Conference of Mayors (collectively, "Commenters") believe that the vast majority of wireless broadband infrastructure projects are processed and deployed in a timely manner, respecting not only the needs of providers, but also the desires of the communities they serve. Therefore, Commenters urge the Commission to refrain from adopting formal rules that would impose a one-size-fits-all interpretation of Section 6409, which, we believe, could prove to be unworkable to the extent that such rules could hinder deployment.

However, if the Commission feels compelled to take any action, we urge the Commission to proceed with caution in adopting any rules that may run afoul of well-established principles of Federalism and the Tenth Amendment to the United States Constitution. Further, we agree with the FCC's Intergovernmental Advisory Committee that the Commission act in the "narrowest possible fashion."

Commenters assert that local governments should be permitted to require the filing of an application with an eligible facilities request under 6409(a). Local governments have the right and obligation to ensure such a request complies with current health, safety, building, engineering, and electrical requirements, as well as compliance with fall zones and set-back ordinances.

TABLE OF CONTENTS

Page

I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors ("NATOA"),[1] the National Association of Counties ("NACo"),[2] the National League of Cities ("NLC"),[3] and The United States Conference of Mayors ("USCM")[4] (collectively, "Commenters"), submit these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released September 26, 2013, in the above-captioned proceedings.

Commenters commend the Commission for actively seeking input from *all* stakeholders in an effort to better understand the various issues and interests involved in the deployment of advanced wireless broadband facilities. While various stakeholders' approaches to "accelerating" deployment may differ, we believe it is safe to conclude that all of us have the same goals – to ensure that all Americans have "universal, affordable access" to advanced broadband services[5] and that deployment is timely without compromising the public's health and safety.[6]

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[1] NATOA's membership includes local government officials and staff members from across the Nation whose responsibility it is to develop and administer communications policy and the provision of such services for the Nation's local governments.

[2] NACo represents county governments, and provides essential services to the nation's 3,069 counties.

[3] NLC serves as a resource to and an advocate for the more than 19,000 cities, villages, and towns it represents.

[4] USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,192 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

[5] Pres. G.W. Bush, Address at Expo New Mexico, Albuquerque, N.M., (March 26, 2004).

[6] For example, NACo "strongly supports legislation and administrative policies that help counties attract broadband services regardless of population or technology used." Telecommunications and Technology, NACo American County Platform and Resolutions 2013-2014 at 144, available at http://www.naco.org/legislation/Documents/TT-2013-2014-Platform-and-Resolutions.pdf. Likewise, NLC "advocates for all levels of government (local, state, and federal) to facilitate the deployment of broadband networks and services through policies and regulations that favor government and private sector investments and further encourage development." Chapter 7.01, NLC National Municipal Policy (2014); available at:

It is undeniable that the growing demand for wireless broadband services, coupled with the growing use of personal wireless devices, requires the deployment of additional infrastructure. But the need for additional equipment deployments must be balanced with the absolute need for local governments to maintain reasonable control and authority over the placement of these facilities in their communities. "[F]ederal policies should not undermine the ability of municipal officials to protect the health, safety and welfare of their residents by diminishing local authority to manage public rights-of-way, to zone, to collect just and fair compensation for the use of public assets, or to work cooperatively with the private sector to offer broadband services."[7] Indeed, "because disruption to streets and businesses can have a negative impact on public safety and industry, local governments should have control over allocation of the rights-of-way and be able to ensure that there is neither disruption to other 'tenants' or transportation nor any diminution of the useful life of the right-of-way."[8] While proof of cooperation between local governments and industry is evident by the sheer number of sites deployed to date, new technologies and wireless broadband services continue to create deployment challenges in some localities. And with the goal to deploy a new nationwide, interoperable, wireless broadband network for public safety communications ("FirstNet") to both urban and rural America within the next several years, these challenges will only increase.

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http://www.nlc.org/Documents/Influence%20Federal%20Policy/NMP/2014%20NATIONAL%20MUNICIPAL%20POLICY%20BOOK.pdf.

[7] Chapter 7.00(B), NLC National Municipal Policy (2014); available at: http://www.nlc.org/Documents/Influence%20Federal%20Policy/NMP/2014%20NATIONAL%20MUNICIPAL%20POLICY%20BOOK.pdf.

[8] Telecommunications and Technology, NACo American County Platform and Resolutions 2013-2014 at 143; available at: http://www.naco.org/legislation/Documents/American-County-Platform-and-Resolutions-2013-2014.pdf.

But let there be no mistake – local governments actively encourage and want the continued deployment of wireless broadband facilities. Increased access and better wireless broadband services bring a wealth of benefits to America's cities and counties, including increased economic development and job creation, telemedicine, distance learning, and improved civic engagement. And next generation 911 services will greatly enhance the health and safety of all our residents.[9]

However, coupled with local governments' desire for increased deployment and access to these services is the equally valid proposition that deployment must be consistent with local permitting and zoning practices. For example, while few DAS deployments will lead to the disastrous results we witnessed in the 2007 Malibu Canyon fire,[10] there are instances where planned deployments may, among other things, have negative effects on environmentally delicate areas, encroach onto historically preserved locations, and negatively affect the aesthetic sensibilities of our neighborhoods. Commenters acknowledge that there may be some instances where deployment does not occur as quickly as industry would like. But not all delays are unreasonable nor are they necessarily the sole cause of local governments.

For the most part, Commenters believe that the vast majority of projects in our communities are processed and deployed in a timely manner, respecting not only the needs of providers, but also the desires of the communities they serve. In fact, many communities, with industry input, have taken steps to streamline their siting practices in an effort to provide certainly in the permitting and zoning processes. Many communities have enacted ordinances that express a preference for collocations and subject such siting requests solely to an administrative review process that results in more efficient processing.

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[9] *See*, Comments of American Public Works Association, (filed Feb. 3, 2014).
[10] *See*, Comments of the City of Alexandria, *et al.*, (filed Feb. 3, 2014).

Some may argue that the adoption of formal rules interpreting Section 6409 is necessary to ensure the timely and successful build-out of the FirstNet system. And perhaps some basic "rules of the road" may be necessary to facilitate its build-out across federal, state, tribal, and local jurisdictions. However, any assertion that local governments would serve as any sort of barrier to public safety infrastructure deployment is simply wrong. As representatives of local governments, we know firsthand how vitally important communications services are to police, fire, and other emergency response personnel – the vast majority of whom are local government employees.

Local governments have extensive experience planning, designing, and operating survivable communications networks. Local governments have constructed hundreds of land-mobile radio, fiber optic, and broadband wireless networks, developed concepts of operations, and performed network operations and monitoring. Any assertion that local governments would act in any manner to delay the deployment of FirstNet as a rationale for adopting overly board formal rules interpreting Section 6409 simply ignores the long-established role that local governments play in providing public safety communications and protecting life and property and must be dismissed out of hand by the Commission.

Commenters strongly believe that the Commission should refrain from adopting formal rules that would impose a one-size-fits-all interpretation of Section 6409, which, we believe, could prove to be unworkable to the extent that such rules could hinder deployment. Indeed, as others have pointed out in this proceeding, formal rules concerning equipment collocations, modifications, and replacements could hinder the deployment of *new* structures and spell the end for stealth facilities.[11] Rather, Commenters urge that the Commission work cooperatively with

[11] *See*, Comments of the City of Alexandria, *et al*., (filed Feb. 3, 2014).

local governments and industry to revise its guidance on Section 6409. Further, we believe the Commission should encourage local governments and industry to continue their work on devising wireless broadband siting best practices. Also, we believe that joint FCC/industry/local government workshops and webinars are important vehicles to educate all interested parties on new wireless technologies and deployment practices and should continue.[12]

Finally, Commenters, like others,[13] urge the Commission to proceed with caution in adopting any rules that may run afoul of well-established principles of Federalism and the Tenth Amendment to the United States Constitution. Local governments' authority, including the continuing ability to protect public safety, must be preserved.

But recognizing the Commission may feel compelled to take some action and impose some formal rules interpreting Section 6409, we offer the following comments.

II. THE COMMISSION MUST TAKE A NARROW APPROACH IN INTERPRETING AND IMPLEMENTING SECTION 6409 OF THE MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT OF 2012

The Commission asks whether it should adopt rules interpreting and implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act").[14] Commenters believe that any rules the Commission *might* adopt must ensure the reasonable and responsible deployment of wireless facilities while neither unduly advantaging nor disadvantaging providers or local governments. At this juncture, Commenters do not address all the issues and various proposed definitions brought up in the NPRM. It is our intent to review the submissions of interested parties and come to a reasoned decision as to whether we

[12] All Commenters are actively involved in educating our members on rights-of-way practices and the deployment of wireless facilities through webinars, conferences, workshops, and publications.
[13] *See,* Comments of Colorado Communications and Utility Alliance, *et al*., (filed Feb. 3, 2014).
[14] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices*, WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 90.

are in agreement or disagreement with any offered definition or issue and share those decisions with the Commission at a later date. However, Commenters' position on a number of items is clear cut and we share those opinions now.

At the outset, Commenters respectfully remind the Commission of the requirements surrounding statutory construction. True, Congress did not provide a definition for several words and phrases in Section 6409. However, the canons of construction teach that absent evidence of some special usage, statutory terms should be understood according to their ordinary meaning.[15] The United States Supreme Court regularly uses and references the "common English usage" standard.[16] "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'"[17] As such, Commenters agree with the FCC's Intergovernmental Advisory Committee ("IAC") recommendation that, if the Commission opts to adopt any specific rules interpreting Section 6409(a) it "should do so in the narrowest possible fashion, and refrain from expanding federal preemption in areas of traditional local, state, and tribal government authority."[18] Failure to do so would result in crafting a federal policy that would "undermine the ability of [local government] officials to protect the health, safety and welfare of their residents by diminishing local authority to manage public rights-of-

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[15] See, William Eskridge, Jr. Phillip Frickey & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 251-53 (2000).

[16] *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 860 (1984) and *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 500- 502 (1998).

[17] *Walters v. Metro. Ed. Enters., Inc.,* 519 U.S. 202, 207 (1997) (*quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)).

[18] *See* Intergovernmental Advisory Committee to the Federal Communications Commission: Advisory Recommendation Number 2013-9, "Response to Wireless Telecommunications Bureau's Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012," dated July 31, 2013 ("IAC Recommendation"). This document has been filed in WC Docket No. 11-59 (Aug. 2, 2013) and is also available at: http://www.fcc.gov/encyclopedia/intergovernmental-advisory-committee-comments.

way, to zone, to collect just and fair compensation for the use of public assets, or to work cooperatively with the private sector to offer broadband services."[19]

Commenters believe that by adopting a narrow approach, such as that recommended by the IAC and others,[20] the Commission can strike a proper balance between increased wireless facilities deployment and local government authority and management over the public rights-of-way.

Further, Commenters urge the Commission to carefully consider the comments it receives in this proceeding and, as it considers if and how to interpret and implement Section 6409, that it do so by hewing narrowly to plain English standards so that even a lay person can understand the provisions of the law, or, as others have stated, "how the average person would define those terms."[21]

Some will argue that the Commission must adopt a specific numeric standard in its definitions. For the reasons we articulate here, and consistent with the comments filed by many individual local governments, we disagree. If the Commission is convinced that a numeric standard is required, however, Commenters request that the Commission carefully consider underlying engineering and other technical standards; recognize those instances where reasonable experts might disagree; and try to chart a middle ground between competing interests.

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[19] Chapter 7.00(B), NLC National Municipal Policy (2014); available at: http://www.nlc.org/Documents/Influence%20Federal%20Policy/NMP/2014%20NATIONAL%20MUNICIPAL%20POLICY%20BOOK.pdf. Similarly, "Federal and state governments must recognize the authority of local governments to protect the public investment, to balance competing demands on [the public rights-of-way] and to require fair and reasonable compensation from communications providers for use of the public rights-of-way on a nondiscriminatory (but not necessarily identical) basis." Telecommunications and Technology, NACo American County Platform and Resolutions 2013-2014; available at: http://www.naco.org/legislation/Documents/American-County-Platform-and-Resolutions-2013-2014.pdf.

[20] *See*, Comments of Colorado Communications and Utility Alliance, *et al*. (filed Feb. 3, 2014).

[21] *Id*.

In other words, the Commission should not place its thumb on the side of the scale for either providers or local governments.

Showing deference to and a willingness to respect the authority and interests of local governments, the Commission asks whether there are any matters where it should wait to develop rules to allow more flexibility for developing solutions.[22] To this end, Commenters request that the Commission strongly encourage industry and local government representatives to develop voluntary siting best practices, along with 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.[23] Commenters believe that on the whole deployment has been moving forward and we are unaware of systemic problems with the implementation of Section 6409. 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.

However, while we prefer to take a wait and see approach before diving into the particulars of any proposed definition, there are several Commission proposals that give us pause and that we believe must be addressed at this time. The first involves proposed definitions for 'wireless tower or base station." Despite recognizing that definitions already exist for these terms elsewhere in Commission rules and documents, the Commission proposes that these terms include "structures that support or house an antenna, transceiver, or other associated equipment...

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[22] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices,* WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 98.

[23] *See*, Comments of the National League of Cities, *et al., In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59 (filed July 18, 2011) at 50.

even if they were not built for the sole or primary purpose of providing such support."[24] Commenters suggest that consistency among and across existing Commission rules and documents is important and urge the Commission not to depart from existing definitions lightly.

While many types of structures, including buildings, water towers, streetlights, and utility poles may support antennae or other base station equipment, we do not agree that these structures should fall within the definition of "tower" or "base station" as used in the phrase "existing wireless tower or base station" simply because an antennae or base station is currently located on such a structure. While we agree that it may be appropriate to locate wireless tower or base station equipment on a particular building, water tower, or pole, the mere existence of such a structure does not and should not bring it within the purview of Section 6409(a). Each of these types of structures has a very different and important primary purpose and any request to locate a wireless tower or base station equipment should be evaluated on an individual basis with an eye to whether the proposed wireless use is compatible with the structure's primary purpose. Including these types of structures in an overbroad definition of "tower" or "base station" has the potential of removing local government oversight, especially in the area of public health and safety.

Another definition that gives us pause is that proposed for the word "existing." The modifier "existing" in the phrase "existing wireless tower or base station" simply cannot be divorced from the phrase it modifies. Utilizing plain English standards, "existing" must be understood in terms of whether a wireless tower or base station actually, currently, occupies space. It must *exist*!

[24] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices*, WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 108.

The Commission cannot stretch the definition of base station to include "structures" nor can the plain meaning of "tower" be altered to include any structure to which an antenna may be attached whose *primary* purpose is not to support wireless towers or base station equipment. The Commission must recognize that such a definition stretches beyond the actual meaning of the statutory language, and could only be explained as the Commission's making of inferences and importing meanings beyond what would be considered the ordinary meaning of these terms.

III. "MAY NOT DENY AND SHALL APPROVE" MUST BE CONDITIONED ON COMPLIANCE WITH LOCAL CONCERNS

Section 6409(a) mandates that a local government "may not deny and shall approve" an eligible facilities request for a modification, collocation, or replacement of transmission equipment of an existing wireless tower or base station. Commenters assert that such a request must comply with, but not necessarily limited to, current health, safety, building, engineering, and electrical requirements, as well as compliance with fall zones and set-back ordinances. Surely it was not the intent of Congress to permit the willy nilly deployment of wireless facilities in a manner that could endanger life or property. Nor is it out of line to assert that operators, too, must acknowledge and accept such a requirement. Indeed, for providers to hold otherwise would be tantamount to admitting a total lack of concern for the public's health and safety.

As such, local governments should be permitted to require the filing of an application with an eligible facilities request under 6409(a). Local governments have the right and obligation to be informed of construction within their jurisdiction, even if it is for a collocation, replacement, or modification of equipment on existing facilities.

Because the Commission is not familiar with every wireless tower, base station, DAS, or other wireless equipment location or proposed collocation, there is a need for local governments to independently review such requests. While we recognize that industry and providers intend to

collocate, replace, or modify their infrastructure in compliance with a local community's considerations, mistakes can – and do – happen. Such requirements can be overlooked or missed, not due to any nefarious circumstance, but simply because human beings can be fallible. Therefore, local governments should have the right to condition approval on same.

IV. SECTION 6409 DOES NOT APPLY TO A LOCAL GOVERNMENT ACTING IN ITS PROPRIETARY ROLE

Commenters agree with the IAC that Section 6409 "does not evince an intent to abrogate signed contractual agreements between state, local and tribal governments acting in their capacities as property owners" and that any restrictions based on local land use regulation "do not apply to state, local and tribal governments acting in a proprietary or contractual role."[25] In other words, when the city or county is acting as a landlord, Section 6409 does not require the entity to exceed any "mutually and contractually agreed-upon exact dimensions and specifications."[26] When the landlord is a public entity, Section 6409 cannot act to undermine the contractual obligations and limitations of the parties. The Commission has signaled its intent to adopt this interpretation and Commenters urge the Commission to do so.[27]

V. THE COMMISSION SHOULD NOT REVISIT ITS "SHOT CLOCK" ORDER

Commenters agree with others that the Commission should not revisit its 2009 "Shot

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[25] *See*, Intergovernmental Advisory Committee to the Federal Communications Commission: Advisory Recommendation Number 2013-9, "Response to Wireless Telecommunications Bureau's Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012," dated July 31, 2013 ("IAC Recommendation"). This document has been filed in WC Docket No. 11-59 (Aug. 2, 2013) and is also available at: http://www.fcc.gov/encyclopedia/intergovernmental-advisory-committee-comments.

[26] *Id.*

[27] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Practices*, WT Docket No. 13-238 (filed Sept. 26, 2013) at ¶ 129.

Clock" order.[28] Indeed, the very issue raised in the NPRM, namely, whether there should be a "deemed granted" remedy for violations of Section 332(c)(7) was rejected by the Commission in its order. Its rationale for doing so then is as pertinent as it is today –

> We reject the Petition's proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis." This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.

Commenters urge the Commission to stand by its earlier decision and reject industry calls to modify its 2009 order.

VI. CONCLUSION

For the reasons outlined above, Commenters urge the Commission to tread lightly in this proceeding. We look forward to evaluating industry's positions and look forward to working with all stakeholders as this proceeding progresses.

Respectfully submitted,

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February 3, 2014

[28] Order on *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165 (2009) ("2009 Shot Clock Order").

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2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, AND THE UNITED STATES CONFERENCE OF MAYORS

I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors ("NATOA"),[1] the National Association of Counties ("NACo"),[2] the National League of Cities ("NLC"),[3] and

[1] NATOA's membership includes local government officials and staff members from across the Nation whose responsibility it is to develop and administer communications policy and the provision of such services for the Nation's local governments.

The United States Conference of Mayors ("USCM")[4] (collectively, "Commenters"), submit these reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released September 26, 2013, in the above-captioned proceedings.

Commenters are encouraged that a number of concerns raised in the NPRM appear to be alleviated to some extent by many of the comments received to date. For example, there are few – if any – substantiated allegations that local governments hinder the deployment of wireless broadband infrastructure. And there is no support for the proposition that, based on these few unsubstantiated allegations, the Commission should adopt formal rules interpreting Section 6409, or weaken environmental and historical preservation review, or make changes to its 2009 "Shot Clock" order. Rather, the record and well-established principles of Federalism and the Tenth Amendment to the United States Constitution support Commenters' position that the Commission work cooperatively with local governments and industry to revise its guidance on Section 6409 and encourage the development of wireless broadband siting best practices.[5]

Furthermore, there is general consensus that a local government may require the filing of an application with an eligible facilities request and that such a request must adhere – at a minimum – to objective and nondiscretionary structural and safety codes. While there is no agreement yet on the full extent of information that may or may not be requested as part of the application process or on the full panoply of codes or other requirements that must be compiled

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[2] NACo represents county governments, and provides essential services to the nation's 3,069 counties.

[3] NLC serves as a resource to and an advocate for the more than 19,000 cities, villages, and towns it represents.

[4] USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,192 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor.

[5] *See,* Reply Comments of Colorado Communications and Utility Alliance, *et al.* (filed Mar. 5, 2014).

with, such as setbacks and fall zones, Commenters believe that FCC-facilitated discussions between industry and local governments would resolve many of these issues. There is no need for a Commission rule dictating what can and cannot be included as part of the local application process.

Also, industry apparently recognizes the legitimacy of local government concerns dealing with the effect of Section 6409 on stealth installations and multiple or subsequent requests for collocation on the same existing wireless tower or base station. Again, Commenters urge the Commission to work with industry and local governments in a cooperative manner to resolve these issues in a way that promotes additional deployment of these facilities while respecting local government siting authority and community concerns.

Lastly, there is no serious opposition to the proposition that Section 6409 does not apply to a local government acting in its proprietary role. Therefore, we respectfully request that the Commission adopt this interpretation.

II. NARROWLY TAILORED DEFINITIONS WILL BEST ENSURE THE EFFICIENT DEPLOYMENT OF WIRELESS BROADBAND INFRASTRUCTURE AND RESPECT LOCAL GOVERNMENT SITING AUTHORITY

As a whole, the comments show that narrowly tailored definitions, which adhere to plain English standards, are the most efficient and equitable way to speed deployment while protecting local sovereignty. Commenters reiterate their strong belief that the Commission should refrain from adopting formal rules that would impose a one-size-fits-all interpretation of Section 6409. We, along with many other local government commenters, believe formal rules could prove to be unworkable and may actually hinder deployment. For example, the city of Alexandria, Virginia and other cities across the nation believe such an interpretation "would strongly discourage local

governments from approving initial "towers" and "base stations" – because those facilities could be expanded in ways that undermine local values later."[6]

If the Commission opts to adopt formal rules, it should apply narrow, "plain English" interpretations of key Section 6409 terms. Among other things: 1) the Commission must not define "wireless tower" to include a range of structures that the Commission and the industry have rightly never considered a wireless tower (e.g., utility pole, light pole, or building); 2) the Commission cannot read "base station" to reach beyond communications equipment to other support structures; and 3) the Commission cannot define "substantially change the physical dimensions of the tower or base station" to completely ignore a tower's or base station's actual characteristics. For example, if the test would lead to the same automatic result for a 200-foot facility and 2-foot one, or for a facility in a historic district and one outside of it, it does not measure a "change" at all. Such an approach, supported by many other commenters, would act to implement Section 6409 without sacrificing local oversight or doing disservice to the stated goals and legislative limitations of Section 6409.

III. THE POTENTIAL ADVERSE IMPACTS OF DAS AND SMALL CELL INSTALLATIONS ARGUE AGAINST EXPEDITED ENVIRONMENTAL REVIEW MEASURES

The Commission sought and received numerous comments on its proposal to subject DAS and small cell installations to expedited environmental review measures under the National Environmental Policy Act of 1969 ("NEPA") and Section 106 of the National Historic Preservation Act ("NHPA") since these "new wireless technologies . . . may, because of their

[6] *See*, Comments of the City of Alexandria, Virginia, et al. (filed Feb. 3, 2014). "We therefore reiterate that whether it be through expanded informal guidance or in the adoption of formal rules, the Commission should refrain from adopting definitions of key statutory terms that would cause these terms to mean something beyond what the average person would think." Reply Comments of the Colorado Communications and Utility Alliance, *et al.*, at 10 (filed Mar. 6, 2014).

intrinsic characteristics, have minimal effects on the environment."[7] While Commenters agree that "a great number of installations could potentially have little to no effect on historic resources"[8] or may cause only a "minimal environmental footprint,"[9] we do not agree that such installations should be subject to a categorical exclusion from review nor do we believe the Commission should make a determination that such installations are not an "undertaking" under Section 106.[10]

As the Commission correctly points out, these installations "may require the deployment of dozens or hundreds of small cells or antennas in an area in order to achieve the ubiquitous coverage that would previously have been provided by the deployment of a single large cell site."[11] If the collocation mandate of Section 6409 applies to small cells to permit the sorts of expansions allowed under the proposed rules, it is impossible to say that the environmental or historic impact from the potential deployment of hundreds of antennas and other pieces of equipment in such installations would be non-existent or *de minimis.*[12] Rather, the *cumulative* effect of these installations could very easily result in significant and severe environmental or historic impacts. Indeed, as one commenter stated, the placement of equipment on "original historic street lamps or street signs also has the potential to cause an adverse effect."[13]

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[7] NPRM at ¶11.
[8] *See,* Comments of National Conference of State Historic Preservation Officers (filed Feb. 3, 2014).
[9] *See,* Comments of AT&T (filed Feb. 3, 2014).
[10] *Id.*
[11] NPRM at ¶12.
[12] It is not obvious at all that Section 6409 is meant to apply to small cells or to historical or environmental reviews, as the City of Alexandria, *et al*. explained. The Commission would need to recognize that the defining characteristic by which it allows the categorical exemption is that the small cell is, in fact, a small cell with limited supporting facilities. Under the rules as proposed, however, not just the small cell but the structure to which it is attached could be modified to support much larger facilities, and multiple equipment cabinets.
[13] *See,* Comments of Arkansas Historic Preservation Program (filed Feb. 3, 2014).

Furthermore, the proposition that these installations be excluded from environmental and historical review fails to appreciate the unique attributes and needs of our communities. Local governments and their residents are "in the best position to efficiently and adequately protect our historic resources due to our understanding and expertise with contextual issues."[14]

San Antonio, Texas is a prime example of a large metropolitan city (the 7th largest in the country) that must carefully balance the deployment of wireless and landline broadband infrastructure with preserving its "unique historic and cultural heritage."[15] While DAS deployments may be "less damaging to historic areas," the "[i]mpacts of the deployment of DAS components, including antennas, power supplies, converters, transceivers, and other equipment, on historic structures, such as building facades and street lights" cannot be ignored.[16] So while "individually" the deployment of a single small cell or antenna may not result in a significant effect on the environment, *collectively*, an installation may.

Likewise, Washington, DC faces various challenges as it seeks "a balance between the preservation of our nation's historical buildings and structures and the deployment of advanced technology."[17]

Section 6409(a)(3) contains the admonition that "[n]othing in paragraph (a) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969." Commenters join with others in urging the Commission to reject calls to categorically exclude DAS installations from environmental and historic preservation review. Rather, we believe in "pursuing a collaborative approach focused on best practices rather than [a] broad, one-size-fits-all rulemaking." We concur with the

[14] *See,* Reply Comments of the City of St. Paul, Minnesota (filed Mar. 5, 2014).
[15] *See,* Comments of the City of San Antonio, Texas (filed Feb. 3, 2014).
[16] *Id.*
[17] *See,* Comments of the District of Columbia (filed Feb. 3, 2014).

National Conference of State Historic Preservation Officers ("NCSHPO") that "using the principles of the existing signed national collocation agreement and the NPA will satisfactorily exclude many DAS and small cell systems – still leaving mechanisms in place to deal with the few situations where adverse effects may be possible. If these agreements need modifications to address elements of DAS, [the NCSHPO is] happy to work with the FCC and the ACHP in that direction. Additionally, we continue to be ready to help with the creation and approval of a separate NPA covering this or similar technologies."

IV. THE COMMISSION SHOULD NOT REVISIT ITS "SHOT CLOCK" ORDER

As we stated above, there is a lack of substantiated allegations that the 2009 "Shot Clock" order is not working as the Commission intended.[18] We strongly urge that the Commission make no changes to the order.

With respect to AT&T's vague allegation that "some local jurisdictions continue to take advantage of the ambiguities in the process by applying a separate Section 332(c)(7) shot clock to each of many local proceedings," we agree that once an applicant has submitted a *complete* application to the appropriate local government authority, the shot clock timeframes apply to the "overall municipal review from start to finish and does not restart with each subordinate local board or body."[19] There is no evidence in the record that any specific jurisdiction is "taking advantage" of ambiguities, and certainly no evidence that the "deemed granted" remedy previously considered and rejected by the Commission is now warranted.

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[18] Order on *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance,* WT Docket No. 08-165 (2009) ("2009 Shot Clock Order").

[19] *See,* Comments of AT&T (filed Feb. 3, 2014).

V. CONCLUSION

The comments show that local government processes are not hindering deployment on a wholesale level. Where issues may arise that cause conflict between local governments and industry, the Commission could be most helpful by creating an atmosphere conductive to mutually beneficial discussions. Commenters hope that the Commission will take this opportunity to navigate such a path.

Respectfully submitted,

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March 5, 2014

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."

TABLE OF CONTENTS

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.

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	)	

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

> "It comes down to how … stupid the elected officials … are. There are many stupid cities around the country - really dumb. They're greedy…They don't give a s*** about their constituents."

Mobilitie CEO Gary Jabara[1]

Obviously, Mobilitie and its CEO hold local governments in utter contempt. With this attitude, Mobilitie and its representatives march into jurisdictions and make demands, expecting local governments to accede to the demands regardless of the needs of the communities.

These Reply Comments are filed by the National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities (NLC), the National Association of Towns and Townships (NATaT), National Association of Counties (NACo), National Association of Regional Councils (NARC), Government Finance Officers Association (GFOA), and the United States Conference of Mayors (USCM),[2] in response to the Comments filed in the

[1] Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure*, AGL Magazine AGLM, p.38 (March 2017).
[2] 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.

above-entitled matter.

I. THE TAKINGS CLAUSE PREVENTS THE COMMISSION FROM LIMITING "FAIR AND REASONABLE COMPENSATION" IN § 253(c)

As we explained in our opening Comments, the United States Supreme Court has long recognized the ability of local governments to seek rent as compensation for physical occupations of local rights-of-way and other government property.[3] The Telecommunications Act of 1996 did not change that and, as NATOA and its fellow Commentators established, Congress was aware of local government's practice in charging rent and specifically protected that ability.[4] For the Commission to use interpretations and guidelines to find otherwise, as several Commentators request,[5] would violate the Fifth Amendment, which provides:

"[N]or shall private property be taken for public use, without *just compensation*."[6]

If the Commission adopts interpretations of the §§ 253 and 332(c) which require that local governments accept the placement of wireless facilities and associated equipment in their local rights-of-way and in, or on, other property (water towers, light poles, street signs, public buildings, and the similar property), such as through a "deemed granted" regime, then the Commission has committed a physical taking.[7] The Supreme Court's opinion *Loretto v.*

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[3] *See, Comments of NATOA, et al.*, at 16-21 (filed March 8, 2017).
[4] *See, Comments of NATOA, et al*, at 21-24.
[5] *Comments of Competitive Carriers Association* at 16 (filed March 8, 2017); *Comments of AT&T* at 22 (filed March 8, 2017); *Comments of Verizon* at 11 (filed March 8, 2017).
[6] U.S. Const., amend. V. (Emphasis added.) While the Fifth Amendment refers to "private property," it is "most reasonable to construe the reference…as encompassing the property of state and local governments. *United States v. 50 Acres of Land*, 469 U.S. 24, (1984). *See also, Town of Bedford v. United States*, 23 F.2d 453, 457 (1927) "[The federal government] can no more take, without compensation, [a local government's] property rights, than it can those of an individual."
[7] 458 U.S. 419, 429-30 (1982), *relying on Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 570 (1904) (holding that placement the telephone lines in railroad right of way was a compensable taking because the right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181 (1872)("[W]here real estate is actually invaded … so as to … impair its usefulness, it is a taking, within the meaning of the Constitution."), as well as citing *Lovett v. West Va. Central Gas Co.*, 65 S.E.196 (W. Va. 1909); *Southwestern Bell Telephone Co. v. Webb*, 393 S.W.2d 117, 121 (Mo.App.1965). for the proposition that telegraph and telephone lines and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space.

Teleprompter Manhattan CATV Corp., makes clear that a "property owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property."[8] Fair market value is the standard for "just compensation."

Absent requiring physical occupation, the Commission may yet commit a regulatory taking with any interpretations or guidelines it issues as a response to this proceeding. The Supreme Court discussed regulatory takings with respect to Commission action in *F.C.C. v. Florida Power Corp.*[9] In that case, the Court did not find a *Loretto* taking because nothing in the Pole Attachments Act, as interpreted by the FCC, gave cable companies any right to occupy space on utility poles, or prohibited utility companies from refusing to enter into attachment agreements with cable operators. Ultimately, the Supreme Court did not find that the Fifth Amendment's Takings Clause applied to rate regulation in *Florida Power Corp*. because the Florida Power did not argue that the regulation was "confiscatory." That is, it did not argue that the regulation threatened its "financial integrity."[10] We do argue that any Commission action which limits the ability of local governments to seek compensation in the form of rent or other fees for the use of their rights-of-way or other property will be confiscatory.

Any such limitation is confiscatory because, unlike telecommunications providers, local governments are not for-profit corporations. They are not-for-profit entities; convenient vehicles for groups of citizens to come together to undertake activities for the benefit of all within their jurisdiction. Their "investors" are their citizens who "invest" by paying taxes. Local governments can borrow money under certain circumstances, but they do not manufacture products or sell services for the purpose of making a return on investment for private

[8] *Id.* 458 U.S. at 436.
[9] 480 U.S. 245, 252-53.
[10] *See*, *Verizon Communications Inc. v. F.C.C.*, 535 U.S. 467, 524 (2002)

shareholders. The mechanisms by which local governments provide libraries, schools, police and fire protection, and roads, highways, and other infrastructure are primarily taxes. In addition, they make use of the property they hold in trust for the public by renting, leasing, or otherwise charging for the private use of that property. The Petition and the Comments supporting it ask the Commission to take that authority away from local governments and to allow private, for-profit entities, to make essentially free use of public property to further their own bottom line. They ask that the taxpayers subsidize private corporate business activities by limiting the amount the taxpayers, through their local governments, can charge for property they own collectively. That effectively destroys the value of the property, that is "confiscation," and that is a regulatory taking.

As an aside, the same rationale supporting compensation for the use of public rights-of-way applies with even greater force to other property owned by local governments. The Town Hall, city library, and municipal water tower, all owned by local government, are the local government's "private" property, to control as it wishes, including having the ability to exclude third parties regardless of the reason for the exclusion. If the federal government and third parties are going to take local government property by physically occupying it, "just compensation" must be paid as it would be for any other private party. "Manifestly, the 'just compensation'" must go to or for the benefit of the persons damaged by the taking - in this case the taxpayers….We can find *not even a dictum* in the decisions of the Supreme Court to support any other doctrine."[11]

II. FEDERALISM PRINCIPLES FORECLOSE PROPOSED INTERPRETATIONS

While any Commission "interpretation" limiting local government compensation to costs

[11] *Town of Bedford v. United States*, 23 F.2d 453, 455 (1st Cir. 1923) (*emphasis added*), *citing St. Louis v. Western U. Teleg. Co.*, 148 U.S. 92 (1893) and *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U.S. 160 (1903).

is foreclosed pursuant to the requirements of the Fifth Amendment as applied to physical and regulatory takings, there is also a serious question as to the extent of Commission authority to interpret phrases and terms in either §§ 253 or and 332(c) so as to limit local government authority, especially with respect to any "deemed granted" remedy or foreclosing the availability of moratoria while appropriate zoning and local regulatory processes are put in place.

It is unreasonable to assume that Congress intends to allow federal officials to interfere with the public purposes of sovereign states without express authority.[12] There exists a presumption that authorized public uses are not to be interfered with under general terms of federal legislation.[13] The Federal Highway Act[14] serves as an example of what express authority looks like. That Act specifically allowed the Secretary of Commerce to file condemnation suits to take local government property, upon the request of a State, to build the Federal Highway System. Unlike the Federal Highway Act, the Telecommunications Act contains **NO** provision allowing the Secretary of Commerce or the Federal Communications Commission to condemn or otherwise take public property for the purpose of constructing the nation's "Information Super-Highway." What the Telecommunications Act **does** contain is **two** clauses that specifically recognize local government authority over 1) zoning decisions (§332(c)(7)) and 2) the right to manage rights-of-way and charge "fair and reasonable" compensation (§ 253(c)). The Commission *cannot* interpret terms and phrases in code sections that recognize, reiterate, and preserve state and local authority in such a way as to limit that same authority. Such back-door, boot-strapping violates the very core of federalism requirements and is contrary to the obvious congressional intent of including two clauses noting the preservation of local authority.

[12] *Town of Bedford* 23 F.2d at 455, *quoting United States v. Certain Lands in Town of New Castle Case (C.C.)*, 165 F. 783, 788 (1908).
[13] *Id*.
[14] 23 U.S.C. 107(a).

"[R]egulation of land use [is] a function traditionally performed by local governments."[15] Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of [local governments]… to plan the development and use… of land"[16] for the purposes of telecommunications deployment. The Commission has no authority to reduce that preservation of authority by "interpreting" phrases in the statute. Where, as here, "an administrative interpretation of a statute invokes the outer limits of Congress' power," courts expect a clear indication that Congress intended that result.[17] "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[18] Federalism concerns are heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.[19] "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[20] Not only did Congress not convey its purpose clearly to allow the Commission to adopt the interpretations urged by industry commentators, Congress clearly expressed just the opposite in the text of the statute, as well as in the legislative history.

III. A NOTE ON THE LEGISLATIVE HISTORY

Industry Commentators make the same mistake as Mobilitie did in its petition and cite to the Statements of Senator Diane Feinstein as support for the proposition that local governments may only charge for "costs" associated with a physical invasion of the rights-of-way.[21] Because

[15] *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994).
[16] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).
[17] *Id.*, 531 U.S. at 172, *quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).
[18] *Id.*, 531 U.S. at 172-73.
[19] *Id.*, 531 U.S. at 173.
[20] *United States v. Bass*, 404 U.S. 336, 349 (1971).
[21] *See*, *Comments of Verizon*, at 15-16.

this has become such a common mistake on the part of not only industry Commentators, but also the Commission and even some courts, NATOA, *et al*., have attached the relevant pages from the Congressional Record as Exhibits A and B to this filing, and encourage the Commission to actually read Senator Feinstein's statements, as well as those of Representative Stupak.

IV. EVIDENCE IN THIS PROCEEDING

Regarding the evidence in this proceeding, we point the Commission to all the comments filed by local governments taking issue with the factual representations of Industry Commentators. We specifically urge the Commission to take note of the materials filed by Spotsylvania County, Virginia, the Village of Lloyd Harbor, New York, and Leesburg, Virginia, some of the communities named by the Industry Commentators but unaware of that until contacted by NATOA. Additionally, attached as Exhibit C are summaries of conversations with other local governments who were not in a position to file separate Reply Comments.

In evaluating the evidence before it, the Commission should know that as of 2012, 89,004 local governments existed in the United States.[22] This included 3,031 counties, 19,522 municipalities, 16,364 townships, 37,203 special districts and 12,884 independent school districts.[23] This proceeding focuses primarily on counties, municipalities, townships and perhaps a few special districts. To be conservative then, this proceeding concerns approximately 38,910 local governments. Industry Commentators have named approximately 60 local governments as allegedly doing something they think is somehow interfering with their ability to provide personal wireless or telecommunications services. It should be striking how few communities are alleged to be "effectively prohibiting" the provision of services considering the sweeping

[22] 2012 United States Census of Governments, available at https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html
[23] *Id.*

regulatory solution that is being sought.

It would be laughable, were the consequences not so serious, that the Commission would base any curtailment of local government authority on the often spurious and incorrect allegations made against such a small number of local governments. Even when one is generous to Industry Commentators and includes their veiled references to "A Mid-Atlantic City" or "a city in the Northeast," Industry Commentators have referenced approximately 600 local governments as somehow inhibiting their progress. This number is overly generous, as we believe that several allegations are listed separately, but, in reality, refer to the same community and are therefore double counted. Regarding the probative value of such allegations, Industry Commentators might as well assert that the moon is made of Swiss Cheese. Accordingly, the Commission should give no weight to this "evidence."

The Commission would do well to consider the reverse:

No local government was complained of in the following 19 states (the numbers behind the state names signify the number of local governments in each state): Alabama (528), Arkansas (577), Connecticut (179), Delaware (60), Idaho (244), Kentucky (536), Mississippi (380) , Montana (183), Nebraska (1,040), New Mexico (136), North Dakota (1,723), Rhode Island (39), South Carolina (316), South Dakota (1,284), Tennessee (437), Vermont (294), Utah (274), West Virginia (287), Wyoming (122).[24] Collectively, these states have a combined total of 8,639 local governments within their borders. *As none were named, the Commission must conclude that these 8,639 communities have processes that are working well and appropriately.* They are processing applications in a timely manner, with no burdensome conditions. The Industry Commentators' own comments stand for this proposition – were this not so, Industry

[24] Any error of with respecting to identifying named communities or the numbers of them is unintentional.

Commentators would have provided evidence to the contrary.

Similarly, only one allegation is made against an often-unnamed local government in each of these eights states: Alaska (162), Colorado (333), Hawaii (4), Kansas (1,997), Louisiana (364), Maine (504), New Hampshire (244), and Oklahoma (667) – a total of 4,275 communities. *The conclusion must be that the remaining 4,267 communities in these states are processing applications appropriately and not "effectively prohibiting" the provision of services.*

Likewise, approximately five allegations were made against largely unnamed local governments in the following 10 states: Indiana (1,666), Iowa (1,046), Maryland (180), Michigan (1,856), Missouri (1,380), Nevada (35), New Jersey (587), North Carolina (653), Ohio (333), Oregon (277), and Wisconsin (1,923) - a collective total of 11,936 governments. *This means that approximately 11,886 local government entities in these states are not impeding deployment in any way.*

Approximately ten local governments were complained of in each of these nine states: Arizona (106), Georgia (688), Illinois (2,831), Massachusetts (356), Minnesota (2,724), New York (1,600), Pennsylvania (2,627), Virginia (324), and Washington (320) – a collective total of 11,576 governments. *Based on these calculations, 11,486 local governments are working well with providers.*

The States of California, (539 communities and approximately 74 allegations of misconduct); Florida (476 local governments and approximately 27 allegations of misconduct), and Texas (1,468 communities and approximately 12 allegations of misconduct) make up the remaining states. And absent any detail, the Commission should take the providers allegations for exactly what they are worth: Nothing. Without specifics – at a minimum identification of the communities - there is NO EVIDENCE of effective prohibition before the Commission.

CONCLUSION

The Commission does not have the authority to issue interpretations or guidelines which would curtail local government authority under Sections 253 or 332(c) and the Industry Commentators have not supplied credible or substantial evidence on which the Commission could base its actions even if it was empowered to radically alter local government authority over public rights-of-way or local government property.

Respectfully submitted,

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Exhibit A to NATOA's Reply Comments in WT Docket No. 16-421

This is the Senate's business. We hope that we can move along now expeditiously on this side of the aisle. If there are any amendments, we do appreciate the Senator from California, ready and willing and able to present the next amendment. Beyond that, I hope we can get some other amendments.

I yield the floor.

AMENDMENT NO. 1270

(Purpose: To strike the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications services)

Mrs. FEINSTEIN. Mr. President, on behalf of Senator KEMPTHORNE and myself, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself and Mr. KEMPTHORNE, proposes an amendment numbered 1270.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 55, strike out line 4 and all that follows through page 55, line 12.

Mrs. FEINSTEIN. Mr. President, I come to the floor today joined by our colleague, Senator KEMPTHORNE, to offer this amendment on behalf of a broad coalition of State and local governments. Since announcing my intention to proceed with this amendment, I have received letters of support from hundreds of cities across the country, including the States of Arizona, Colorado, Florida, Illinois, Indiana, California, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Oregon, Ohio, Texas, and Washington.

This amendment is supported by the National Governors' Association, the National Association of Counties, the National Conference of State Legislatures, the National League of Cities, and the U.S. Conference of Mayors, to name a few.

Mr. President, as a former mayor, I fully understand why Governors, mayors, city councils, and county boards of supervisors question allowing the Federal Communications Commission to second-guess decisions made at State and local government levels.

On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; with the other hand, this bill, as it presently stands, takes these protections away.

The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority. The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC.

That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist at the FCC, on what may be very broad question of State or local government rights.

In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for States. I hope to explain why. I know my colleague, the Senator from Idaho, will do that as well.

A cable company would, and most likely will, appeal any local decision it does not like to the telecommunications experts at the Federal Communications Commission.

The city attorney of San Francisco advises that, in San Francisco, city laws provide that all street excavations must comply with local laws tailored to the specifics of the local communities, including the geography, the density of development, the age of public streets, their width, what other plumbing is under the street, the kind of surfacing the street has, et cetera.

The city attorney anticipates that whenever application of routine, local requirements interfere with the schedule or convenience of a telecommunications supplier, subsection (d), the provision we hope to strike, would authorize a cable company to seek FCC preemption. Any time they did not like the time and location of excavation to preserve effective traffic flow or to prevent hazardous road conditions, or minimize noise impacts, they could appeal to the FCC.

If they did not like an order to relocate facilities to accommodate a public improvement project, like the installation, repair, or replacement of water, sewer, our public transportation facilities, they would appeal.

If they did not like a requirement to utilize trenches owned by the city or another utility in order to avoid repeated excavation of heavily traveled streets, they would appeal.

If they did not like being required to place their facilities underground rather than overhead, consistent with the requirements imposed on other utilities, they could appeal.

If they were required to pay fees prior to installing any facility to cover the costs of reviewing plans and inspecting excavation work, they could appeal.

If they did not like being asked to pay fees to recover an appropriate share of increased street repair and paving costs that result from repeated excavation, they would appeal.

If they did not like the particular kinds of excavation equipment or techniques that a city mandate that they use, they could appeal.

If they did not like the indemnification, they could appeal.

The city attorney is right, that preemption would severely undermine local governments' ability to apply locally tailored requirements on a uniform basis.

Small cities are placed at risk and oppose the preemption because small cities are often financially strapped. As the city attorney of Redondo Beach, a suburb of Los Angeles writes, every time there is an appeal, they would have to find funds to come back to Washington to fight an appeal at the FCC.

Recently, the engineering design center at San Francisco State University, conducted an interesting study for San Francisco on the impact of street cuts on public roads. The expected life and value of public roads and streets directly correlates with the number of cuts into the road.

Although this is rather dull and esoteric to some, the study reveals that streets with three to nine utility cuts are expected to require resurfacing every 18 years, a 30-percent reduction in service life, relative to streets with less than three cuts. The more road cuts, the steeper the decline in value of the public's asset will be. Streets with more than nine cuts are expected to require resurfacing every 13 years, a 50-percent reduction in the service life of streets with less than three cuts.

An even more dramatic decline in a street's useful life is found on heavily traveled arterial streets with heavy wheel traffic. For those streets, the anticipated useful life declines even more rapidly, from 26 years for streets with fewer than three cuts to 17 years for streets with three to nine cuts, a 35-percent reduction, to 12 years for streets with more than nine cuts, a 54-percent reduction.

What does this mean? It means that financially struggling cities and counties will undoubtedly be forced to include in franchise fees, charges to allow the recovery of the additional maintenance requirements that constantly cutting into streets requires. The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator is going to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have control over their streets. Counties should have control over their roads. States should have control over their highways.

The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $86 billion in 1993 alone. Of the $86 billion, more than $22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on State and local governments for the use of public right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.

I would also like to point out the preemption will change the outcome in some of the dispute between communication companies and cities and States. The FCC is the Nation's telecommunications experts. But they do not have the broad experience and concerns a mayor, a city council, a board of supervisors, or a Governor would have in negotiating and weighing a cable agreement and setting a cable fee.

If the preemption provision remains, a city would be forced to challenge the FCC ruling to gain a fair hearing in Federal court.

This is important because presently they can go directly to their local Federal court. Under the preemption, a city, State, or county government would have to come to the Federal court in Washington after an appeal to the FCC.

A city appealing an adverse ruling by the FCC would appear before the D.C. Federal Appeals Court rather than in the Federal district court of the locality involved. Further, the Federal court will evaluate a very different legal question—whether the FCC abused their discretion in reaching its determination. The preemption will force small cities to defend themselves in Washington, and many will be just unable to afford the cost.

By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review whether the city or State acted reasonably under the circumstances.

Edward Perez, assistant city attorney for Los Angeles, states this will be a very difficult standard to reverse, if they have to come to Washington. On matters involving communication issues, courts are likely to require a tough, heightened scrutiny standard for matters involving first amendment rights involving freedom of speech. Courts are likely to defer to the FCC judgment.

The FCC proceeding and its appeal in Washington will be very different from the Federal court action in a locality. Both the city and the communications company are more likely to be able to develop a more complete and thorough record if the proceeding is before the local Federal court rather than before a Government body in Washington.

We also believe the FCC lacks the expertise to address cities' concerns. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.

Mr. President, this stack of letters opposing the preemption includes virtually every California city and virtually every major city in every State.

What the cities and the States tell us they want us to give local governments the opportunity for home rule on questions affecting their public rights-of-way. If the cable company does not like it, the cable company can go to court in that jurisdiction. By deleting the preemption, we can increase fairness, minimize cost to cities, counties, and States, and prevent an unfunded mandate.

If the preemption remains in this bill, it creates a major unfunded mandate for cities, for counties, and for States. I hope this body will sustain the cities and the counties and the States, and strike the preemption.

So I ask unanimous consent to have a number of letters printed in the RECORD.

There being no objections, the letters were ordered to be printed in the RECORD, as follows:

OFFICE OF THE CITY ATTORNEY,

Re S. 652, Section 245(d) Preemption.
Mr. KEVIN CRONIN,

DEAR MR. CRONIN: You asked for our thoughts regarding S. 652, Sec. 254(d), which would create broad preemption rights in the FCC with respect to actions taken by local governments. Specifically, you are interested as to how section 254(d) could frustrate the ability of local government to manage its rights of way as Congress believes Local Government should (See Sec. 254(c)) and how it could prevent Local Government from imposing competitively neutral requirements on telecommunications providers to preserve and advance Universal Service, protect the public safety and welfare and to ensure the continued quality of telecommunications services and safeguard the rights of consumers. (See Sec. 254(b)).

Section 254(d) would permit the Federal Communications Commission ("FCC") to preempt local government:

"(d) PREEMPTION.—If, after notice and an opportunity for public comment, the Commission determined that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

Section 254(d) reposes sweeping review powers in the FCC and in effect converts a federal administrative agency into a federal administrative Court. The FCC literally would have the power to review any local government action it wishes (either sua sponte or at the request of the industry.) The undesirable consequence of this result will be that a federal agency—with personnel who do not answer directly to public—will be dictating in fine detail what rules local government and their citizens in distant places shall have to follow. The FCC would be given plenary power to decide what actions of local government are "inconsistent with" the very broad provisions in the bill and, without further review, to decide to nullify or preempt such governmental actions. That is unprecedented and for reaching authority for a federal agency to have over local government.

The FCC does have an important role to play in the scheme of things. It has a professional staff with proven expertise in telecommunications matters such as technical requirements. Moreover, issues that transcend state borders need the FCC as the overseer in order to ensure consistency and fairness between the states. On the other hand, the FCC is not in the best position to know what is best for citizens at the local level regarding local issues. An example of a singularly local issue, historically recognized by Congress and the Courts, is the local government's right to manage the public right-of-way (See Section 254(c)). Federal officials do not have an adequate understanding of local issues nor do they have the staff, either in size or proficiency, to resolve local issues about every city in this country. Local Governments and the local courts (entities which are knowledgeable about local issues) should be the forum for resolution of local issues.

An important point that needs to be explicated to Congress is the procedural problems associated with the FCC resolving local issues in Washington. First is the obvious problem. Most citizens, community groups and cities do not have the financial wherewithal to litigate before a federal agency located in Washington. Even if an action of the FCC is reviewed by the Courts, that also would occur in the Washington D.C. Circuit miles away. Section 254(d) does contain due process language and such a provision may meet the technical requirements of the U.S. Constitution. However, the provision "If, after notice and an opportunity for public comments * * *" provides little solace for local governments and its citizens. The FCC all too often provides too little time to respond to its rules and rulemaking proceedings for anyone other than the expensive FCC Bar. It is impractical for local people to respond in a timely fashion and FCC preemption consequently precludes the voice of those most effected.

Second, as a general rule the courts pay great difference to administrative agencies that are created for specific purposes. There is no argument with that proposition because of the proven expertise of federal agencies in matters properly within their purview. However, a serious problem is created when a federal administrative agency is given power over issues where it has little expertise, such as the management of local rights-of-way. This is largely so because of the legal standards for review of administrative decisions. Generally, a decision will stand unless the agency has abused its discretion or has exceeded its authority.

Again, for matters properly within an agency's purview there is no quarrel. However, the sweeping review powers that Section 254(d) places in the FCC would in essence permit the FCC to preempt any statute, regulation, or legal requirement that it believes is inconsistent with the Section 254(a) of the Act. This awesome power clearly belongs with the Courts and not distant administrative staffers. As written, it will be extremely difficult for a court to find that the FCC has exceeded its authority. Consequently, with regard to this standard its decisions may in effect be unreviewable.

Equally troublesome is the abuse of discretion standard applied to federal agency actions. Practitioners in administrative law know all too well that the courts will uphold administrative decisions the vast majority of the time. A reversal occurs only when there is a clear abuse of discretion, a condition infrequently found by the Courts.

The bottom line becomes very clear to local governments, such as Los Angeles, and its citizens. Control regarding telecommunications and zoning issues will be exercised by federal officials three thousand miles away. Individuals who know little or nothing about local interests, the important everyday decisions that should be made by local officials and that should be reviewable by local

courts, will be made by faceless names in Washington.

In addition, because if the procedural structure of the FCC, the normal right to cross-examine witnesses and their testimony is not present. The right to comment and reply to another interested party's comments theorically permits the FCC to make a fair and impartial judgment. However, the comments are not under oath and the testimony that is filed under penalty of perjury is never is reality tested for truth and accuracy. The practical effect is that anybody may say anything they wish with impunity. The decisionmakers, therefore, may be misled into believing erroneous "facts". This view is not intended to suggest that the courts are the answer for all issues. There exist some practical problems with the courts; they may be too slow and they may lack the technical expertise. However, Section 254(d) appears to effectively eliminate the courts because of the absence of any real or effective review of FCC decisions. Senate Bill 652 must be amended to leave local issues to local government and thereby permit local citizens, local governments and local courts to be active participants in the resolution of local issues.

Finally, the industry has clearly captured the decision making of officials at the FCC. In recent years the voice of local governments and its citizens have been routinely rejected by the FCC and the industry appears to have a lopsided influence.

We recommend that Section 254(d) be eliminated in its entirety. If that is accomplished, violations of S. 652 will be decided in the forum properly equipped to do so—the local Federal Courts.

As an additional note, we wish to comment that section (a) of S. 652 also represents a serious and significant invasion of local government authority over local interests. Most any action taken by local government in this area can be construed as having "the effect of prohibiting" an entity from providing telecommunications services. Surely more precise wording can be developed which would not so significantly erode the power of local government over local matters. Please advise if you would like further comment regarding this section.

If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

EDWARD J. PEREZ,

OFFICE OF CITY ATTORNEY,
CITY AND COUNTY OF SAN FRANCISCO,

Re Telecommunications Competition and Deregulation Act.
Hon. DIANNE FEINSTEIN,

DEAR SENATOR FEINSTEIN: I am writing to commend you for sponsoring an amendment to the telecommunications bill to preserve local control over the public rights of way. It is critical to local governments that subsection (d) of proposed 47 U.S.C. Section 254, which would authorize the FCC to preempt state and local authority, be deleted from the bill.

In San Francisco, as in other cities, we welcome the prospect of new telecommunications providers making expanded services available on a competitive basis. However, deregulation only increases the importance of local control over our streets because it brings many new companies seeking to install facilities in our streets.

City laws now require all street excavators—including telecommunications providers—to comply with nondiscriminatory local laws designed to preserve the public health and safety and minimize the costs to the public of repeated street excavation. Throughout the country, such local laws are tailored to the specific characteristics of each local community, including local geography, density of development and the age of public streets and facilities. The language of subsection (d) would severely undermine local government ability to apply such locally tailored requirements on a uniform basis.

Whenever application of routine local requirements interferes with the schedule or convenience of a telecommunications supplier, subsection (d) would authorize the company to seek FCC preemption. To identify just a few examples, my colleague city attorneys and I will have to send an attorney off to Washington every time a telecommunications company challenges our authority to:

(1) Regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize noise impacts;

(2) Require a company to relocate its facilities to accommodate a public improvement project, like the installation, repair or replacement of water, sewer or public transportation facilities;

(3) Require a company to place facilities in joint trenches owned by the City or another utility company in order to avoid repeated excavation of heavily traveled streets;

(4) Require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;

(5) Require a company to pay fees prior to installing any facilities to cover the costs of reviewing plans and inspecting excavation work;

(6) Require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;

(7) Require a company to use particular kinds of excavation equipment or techniques suited to local circumstances to minimize the risk of major public health and safety hazards;

(8) Enforce local zoning regulations; and

(9) Require a company to indemnify the City against any claims of injury arising from the company's excavation.

All of the requirements described above are routinely imposed by local governments in exercise of our responsibility to manage the public rights of way. Granting special favors to telecommunications suppliers, compared for example to other utility companies, will undermine the uniformity of local law and could dramatically increase the costs to local taxpayers of maintaining public streets.

In these times, when the federal government is asking state and local governments to take on many additional duties, the FCC should not be empowered to interfere in this area of classic local authority. This is especially true because, for many cities, the FCC is a remote, costly and burdensome arena in which to resolve disputes. The courts are well-suited to resolve any disputes that may arise from the "Removal of Barriers to Entry" language of Section 254 without placing heavy burdens on local governments.

I appreciate the leadership you have shown on this difficult issue. Please let me know if I can offer any further assistance with your efforts on behalf of cities.

Very truly yours,

LOUISE H. RENNE,

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I am honored to join my friend from California, Senator FEINSTEIN, in this amendment. This is not the first time we have teamed up together. I think perhaps our background as both being former mayors has allowed us to bring to this position some perspective to help us realize, with regard to local and State governments, how this Federal-State-local partnership really ought to be ordered.

The Senator from California was very helpful when we brought forward the bill, the Unfunded Mandates Reform Act of 1995, which the majority leader had designated Senate bill 1, and which allowed me to team up with the Senator from Ohio, JOHN GLENN. In March of this year, as you know, Mr. President, that unfunded mandates legislation was signed into law.

Part of that new law in essence says that Federal agencies must develop a process to enable elected and other officials of State, local, and tribal units of government to provide input when Federal agencies are developing regulations.

The conference report of that legislation passed overwhelmingly. In the Senate it was 91 to 9. In the House it was 394 to 28.

An overwhelming majority said in essence enough is enough, that the Federal Government must reestablish a partnership with local government. It is very straightforward. This movement toward local empowerment has consistently been expressed in the legislative reform occurring in both Houses of Congress. But I feel, as I think the Senator from California feels, that this provision in this telecommunications bill is causing a slippage back to our old habits. What we have before us in section 254 of the bill before us is a reversal of the positive progress that we have been making.

As the Senator from California pointed out, in subsection (d) the committee has added broad and ambiguous FCC preemption language that states, if the FCC "determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the FCC shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

We are going to give this power to the FCC over the jurisdictions of the local communities and the State governments. This is a disturbing directive that instructs the Federal Commission to invalidate duly adopted State laws and local ordinances that the independent Commission may deem inappropriate. This preemption would be generated by a commission that in a majority of cases would be thousands of miles away from the local government jurisdiction that would be affected by their decision.

I know of no one in local government who objects to the language which ensures nondiscriminatory access to the

public right of way. But what they do vigorously object to is that this proposed FCC preemption does not allow them the prerogative to manage their right of way in a manner that they deem to be appropriate and in the best interest of their community.

If I may, Mr. President, let me give you an example. When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.

I think one of the things that you hear so often if you are in local government or if you tune into the radio talk shows, is when a new street has been paved, within 6 months you see crews out there cutting into that new pavement, and they are putting in a new utility. That is expensive, and it is unnecessary if you can coordinate things. Surely, we do not think that an independent commission in Washington, DC, is going to be able to better coordinate that than the local government in San Francisco or the local government in Boise, ID. It just does not happen.

This proposed preemption is based on two assumptions. First, that it is the role of the Federal Government to tell others what to do; second, that local units of government are not capable or responsible enough to make the right decisions. I reject both of those presumptions.

Like the Senator from California, with the hands-on experience that she has had at the local government level, we realize that Federal solutions do not always meet local problems. You have to take into account the local conditions and the local innovations. These Federal solutions have not worked in the past. They are not working now. They will not work in the future.

So why would we step back with all of the progress that we have been making this congressional session in reordering the partnership between the Federal, the State and the local governments in a working partnership?

This language which introduces expanded FCC jurisdiction into the local decisionmaking process is ill-conceived, and it should not be included in the final language of this important legislation. Our amendment would strike the offending subsection in its entirety. This would leave control of local right of way matters with local elected officials, which is exactly where it belongs.

The goal of Congress in regulatory reform should be to remove existing Federal roadblocks that limit productivity and creativity and innovation. We should legislate in a manner that enhances Federal-local intergovernmental partnerships for mutually beneficial results. We should not be guilty of imposing new, unnecessary bureaucratic hurdles as has been done in this case.

So, again, I am so proud to join the Senator from California in this effort. We make a good team. This is a worthy effort to team up with because this present preemption needs to be removed from the telecommunications bill.

I yield the floor, Mr. President.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I would like to thank the Senator from Idaho for those excellent remarks. I think he hit the nail on the head with respect to the rights of local government, and the way in which this Congress is moving. This preemption sets all of our progress regarding the relationship between Federal and local government back, and hurts cities, counties, and States in the process.

So I want the Senator to know how much I enjoy working with him on this. I thank him very much.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I reluctantly rise in opposition to this amendment from two of my most respected colleagues in the Senate. The issue addressed in this amendment goes to the very heart of S. 652, eliminating barriers to market entry.

In the case of section 254, which I have here in front of me, entitled "Removal of Barriers to Entry," we do preempt any State or local regulation or statute or State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The actual authority granted to the FCC in subsection (d) is critical to ensuring that State and local authorities do not get in a way that precludes or has the effect of precluding new entry by firms providing new telecommunications services. At the same time, make no mistake about it, the authority granted in subsections (b) and (c) to the State and local authorities respectively in turn protect them. For example, in subsection (c) it says, "Nothing in this section affects the authority of local government to manage the public rights of way."

Mr. President, this is a particularly difficult problem because all of us want to leave authority with State and local government. But this is a deregulatory bill to allow companies to enter and to compete without barriers. If this section were allowed to fall, it could mean that certain requirements would be placed on companies, such as public service projects or certain types of payments of one sort or another for a local universal service, or whatever. We are trying to deregulate the telecommunications markets in the United States. I know it sounds great to say let every city and municipality have a virtual veto power over what is occurring in their area.

Now, it is my strongest feeling that sections (b) and (c) to the State and local authorities, respectively, are more than sufficient to deal in a fair-handed and balanced manner with legitimate concerns of State and local authority. Sections (b) and (c) take into account State and local government authority, (b) says:

State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 253, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.

Section (c):

Local Government Authority. Nothing in this section affects the authority of a 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.

Now, the preemption clause (d) reads as follows:

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 or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The intent therefore is to leave protected State regulatory authority, to leave protected local government authority, but there have to be some cases of preemption or a certain city could impose a requirement of some sort or another that would be very anticompetitive, and that is where we come out.

I have joined in a lot of efforts here to ensure that our State and local authority be preserved. And I understand there will possibly be a second-degree amendment. We have worked closely with Senator HUTCHISON and the city, county, and State officials to achieve this balance. That is where the committee came out.

I feel very strongly that it is a fair balance. It takes into account State regulatory authority, takes into account local government authority. But it also recognizes the need to open up markets, the removal of barriers to entry. In many cases these do become barriers to entry, barriers to competition.

So I rise in reluctant opposition to the amendment.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, you have to be sure of foot to be opposing two distinguished former mayors. The Senator from California is the former mayor of San Francisco, and the distinguished Senator from Idaho is a former mayor of Boise. Both had outstanding records.

But let me suggest that what they have read into the preemption section is a requirement and an idea that just does not exist at all. I will have to agree with them in a flash that the Federal Communications Commission has no idea of coordinating, as the Senator from Idaho has outlined, the digging up in front of all of the sidewalks and stores and everything else, putting in the regular necessary conduit, refirming the soil and the sidewalks again in front. We have no idea of the FCC doing it.

Let us tell you how this comes about. Section 254 is the removal of the barriers to entry, and that is exactly the intent of the Congress, and it says no Government in Washington should, well, vote against it. But I think the two distinguished Senators are not objecting to the removal of the barriers to entry. What we are trying to do is say, now, let the games begin, and we do not want the States and the local folks prohibiting or having any effect of prohibiting the ability of any entity to enter interstate or intrastate telecommunications services. When we provided that, the States necessarily came and said, wait a minute, that sounds good, but we have the responsibilities over the public safety and welfare. We have a responsibility along with you with respect to universal service.

So what about that? How are we going to do our job with that overencompassing general section (a) that you have there. So we said, well, right to the point: "Nothing in this section shall affect the ability of a State to impose on a competitively neutral basis"—those are the key words there, the States on a competitively neutral basis, consistent with opening it up—"requirements necessary."

We did not want and had no idea of taking away that basic responsibility for protecting the public safety and welfare and also providing and advancing universal service. So that was written in at the request of the States, and they like it. The mayors came, as you well indicate, and they said we have our rights of way and we have to control—and every mayor must control the rights of way.

So then we wrote in there:

> Nothing shall affect the authority of a local government to manage the public rights of way or to acquire fair and reasonable compensation . . . on a competitively neutral and nondiscriminatory basis.

"Competitively neutral and nondiscriminatory basis." Then we said finally, indeed, if they do not do it on a competitively neutral or nondiscriminatory basis, we want the FCC to come in there in an injunction. We do not want a district court here interpreting here and a district court in this hometown and a Federal court in that hometown and another Federal court with a plethora of interpretations and different rulings and everything else. We are trying to get uniformity, understanding, open competition in interstate telecommunications—and intrastate, of course, telecommunications.

Now, that was the intent and that is how it is written. And if our distinguished colleagues have a better way to write it, we would be glad and we are open for any suggestion. But somewhere, sometime in this law when you say categorically you are going to remove all the barriers to entry, we went, I say to the Senator, with the experience of the cable TV. I sat around this town—I was in an advantaged section up near the cathedral. I had the cable TV service, but two-thirds of the city of Washington here did not have it for years on end because we know how these councils work. We know how in many a city the cable folks took care of just a couple of influential councilmen, and they would not give service or could give service or run up the price and everything else of that kind.

We have had experience here with the mayors coming and asking us. And this is the response. That particular section (c) is in response to the request of the mayors. If they do not do that, if they put it, not in a competitively neutral basis or if they put it in a discriminatory basis, then who is to enjoin? And we say the FCC should start it. Let us not go through the Administrative Procedures Act. Let us not go through every individual.

Yes, we want those mayors and all to come here and everybody to understand rules are rules and we are going to play by the rules and the rules protect those mayors to develop, to administer, to coordinate. I agree 100 percent, I say to the Senator from Idaho, that the FCC has never performed the job of a city mayor. But they shall and must perform this job here of removing the barriers to entry. And if we do not have them doing it, then I will yield the floor and listen to what suggestion they have. But do not overread the preemption section to other than centralizing the authority and responsibility in the FCC to make sure, like they have in administering all the other rules relative to communications here and all the other entities involved in telecommunications, they have that authority to make sure while the cities got their rights of way, while the States have got their public welfare and public interest sections to administer, that it is done on a nondiscriminatory basis.

Mr. KEMPTHORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I would like to respond to my two friends, the floor managers of this bill, and then I know the Senator from California would also like to respond.

They referenced, of course, section 254, which is removal of barriers to entry. That is the section and that is the key. They stated it:

> That no State, 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 services.

Period. Period. And nothing in this amendment alters that at all. We affirm that. It is my impression, Mr. President, that when it is referenced that section (b), State regulatory authority, yes, the States feel that that language is good; and section (c), local government authority, yes, mayors had something to do with the writing of that language. They feel good about that. But the problem is, then you go on to section (d) which, it is my understanding, came very late in the process. In section (d), there is this line that says: "The Commission shall immediately preempt * * *"

We see this so many times with Federal legislation: On the one hand, we give but, on the other hand, we take it away. In section (b) and section (c) we give, but, by golly, we have section (d) that then says that this Commission will immediately preempt. That is the problem. We are not saying that we should not be held accountable to this. That is why there is no language in this amendment to alter the opening statement of section 254. No problem. It is section (d) that then comes right along and, after everything has been said, preempts and pulls the plug, and that is wrong. We should not do this to our local and State partners. It is absolutely wrong.

I yield the floor.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, my colleague from Idaho took the words right out of my mouth. I think he is exactly right in his interpretation of this section. The barrier for entry is clearly done away with by this section. Nothing Senator KEMPTHORNE or I would do would change that. What we do change, however, is simply delete the ability of a remote technical commission to overturn a city decision and create an enormous hassle for cities all across this Nation.

I would like to just give you the exact wording of what the city attorney of Los Angeles said this section does. He says:

> It proposes sweeping review powers for the FCC and, in effect, converts a Federal administrative agency into a Federal administrative court. The FCC literally would have the power to review any local government action it wishes, either on its own or at the request of the industry.
>
> A Federal agency, with personnel who do not directly respond to the public, will be dictating in fine detail what rules local government and their citizens across the country shall have to follow. The FCC would be

given plenary power to decide what actions of local government are "inconsistent with" the very broad provisions in the bill and, without further review, hold the authority to nullify or preempt state and local governmental actions. That is an unprecedented and far-reaching authority for a Federal agency to have over local government.

I could not agree more. Senator KEMPTHORNE and I were both mayors at one time and we both understand that every city has different needs when it comes to cable television.

I remember as the mayor of San Francisco when Viacom came into the city. It wired just the affluent sections of the city. It refused to wire the poorer areas of the city. Unless local government had the right to require that kind of wiring, it was not going to be done at all. That is just one small area with which I think everyone can identify.

But when it comes to the rights-of-way and what is under city streets, the city must be in the position to set rules and regulations by which its street can be cut. This preemption gives the FCC the right to simply waive any local rulemaking and say that is not going to be the case. It gives the FCC the right to waive any local fee and say, "That's not the way it is going to be."

That is why countless cities and counties across the country, not just one or two, but virtually all of the big organizations, including the League of Cities, the national Governors, local officials and others, say, "Don't do this." If a cable company has a problem with anything we in local government do, let them go to court. Let a court in our jurisdiction settle the issue. I think that is the right way to go. For the life of me, I have a hard time understanding why people would want to preempt these local decisions with the technical, far-removed FCC agency.

So I think Senator KEMPTHORNE has well outlined the situation. I think we have made our case.

I thank the Chair.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, the distinguished colleague from Idaho said "came so late in the process." I want to correct that thought. I am referring back over a year ago to a bill with 19 cosponsors, this same language:

* * * the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this subsection, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

It did not come late in the process. We have been working with mayors and we have several former mayors who were cosponsors. That was S. 1822. So this is S. 652, which is, of course, over a year subsequent thereto.

Is it the language that is inconsistent with this subsection? Is that the bothersome part? It sort of bothers this Senator. I think if you are going to violate your authority with respect to being neutral and nondiscriminatory and you have to have somewhere this authority, in the entity of the FCC, to do it rather than the courts, each with a plethora of different interpretations and law, I would think if we could take that, maybe that would satisfy the distinguished Senator from California and the Senator from Idaho.

I yield the floor. I make that as a suggestion.

Mr. KEMPTHORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I appreciate the good efforts of the Senator from South Carolina, because I have always found him to be a gentleman whom I can work with and we can find areas on which we can see some common ground.

With regard to my comment that it came late in the process, this may be a concept that had been discussed quite a bit, but the mayors that the Senator from South Carolina referenced, it was local officials who told me that this particular language of (d) was not in the draft bill's language, it was not part of the draft bill when it came out. And it was really after Senator HUTCHISON from Texas, who raised this issue, had section (c) added that (d) then came back.

I do not know, it may have been something that has been discussed for some months, but as far as putting it in the bill, it was not there.

The other point then about how do we deal with this, again, Senator FEINSTEIN and I are in absolute agreement that with respect to this whole issue of removal of barriers to entry, if there are problems, if a cable company is getting a bad deal and being put off by a local government, they can go to court, but they go to court in that area, they do not have to come to Washington, DC.

The avenue for remedy already exists, so why do we then say, again, everyone must come to Washington, DC? That is expensive. I think it is unnecessary and these cable companies, if there had been particular problems and there is a trend, they can establish a precedence in the court, and I think the local communities are going to realize if there is something wrong, they will not do it again because they will lose in court. I think the spirit in which Senator FEINSTEIN and I have joined in this is on behalf of State and local governments, that they are going to own up to their responsibilities. Let us not make them come to Washington, DC, and not make every one of them subject to the FCC in Washington, DC.

I yield the floor.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I wanted to speak very briefly on this. I know our whip is here with some business.

First of all, I think we have to put this in context. As Senator HOLLINGS has pointed out, this section has been the result of hours and days of negotiations with city officials. It was in S. 1822 last year, and it is here. I think we have to take a step back and look at some of the cable deals and problems that have occurred in our cities. The cities have granted exclusive franchises in some cases and are not allowing competition. They have required certain programming be put on and other requirements on those companies.

Our States have granted, in the telephone area, certain exclusive franchises, not allowing competition. And the point is, if we are having deregulation here, removal of barriers to entry, we have to take this step. I think that is very important for us to considerate this point.

Now, section 254 goes to the very heart of this bill, because removal of barriers to entry is what we are trying to accomplish with this bill. We preempt any State or local regulation or statute or State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The authority granted to the FCC in subsection (d) is critical if we are going to open those markets, because a lot of States and cities and local governments may well engage in certain practices that encourage a monopoly or that demand certain things from the business trying to do business. That would not be in the public interest.

At the same time, make no mistake about it, Mr. President, the authority granted in subsection (b) and (c) to the State and local authorities, respectively, are more than sufficient to deal in a fairhanded and balanced manner with legitimate concerns of State and local authority. These were negotiated out with State and local authorities.

We have worked closely with Senator HUTCHISON and the city, county, and State officials to strike a balance. We have gone to great pains and length to deal with concerns of the cities, counties, and State governments that are legitimately raised. We dealt with the concerns in subsection (b) and (c), while at the same time setting up a procedure to preempt where local and State officials act in an anticompetitive way, by taking action which prohibits, or the effect of prohibiting, entry by new firms in providing telecommunications services.

Now, the real problem created by the amendment offered by my friends, Senators FEINSTEIN and KEMPTHORNE, is that the very certainty which we are trying to establish with this legislation is put at risk. Certainty. A company has to go out and wonder if that local city or State will put some requirement on it to provide some kind of programming, or even to do something in

the city to provide some service, or if it will grant an exclusive monopoly. What we are trying to get are barriers to entry, and we are reserving to the State and local governments certain authorities. So the certainty we are looking for we have taken away—no guarantee that entry barriers will be toppled and no guarantee of uniformity across the country.

The committee has dealt with federalism concerns throughout this legislation. Let me say that this debate goes to the heart of a technical detail of federalism and the Federal Government's relationship to State and local government. It is one of the most complicated areas of this bill. Believe me, it is hard to strike a balance. But if we strike this out, it gives every city in the country the right to put up barriers to entry. It lets every State have the right to have a monopoly unless they can extract something for the State in one way or another. I would not blame cities and States. If we do that, it goes to the very heart of this bill.

Now, I take a back seat to no one in advocating federalism principles. I like much power in the State and local government. It must be balanced with our other goal—removing the anticompetitive restrictions at the local level which restrict competition. Exclusive franchising in the cable and telephone markets is the very way that established monopolies in the past.

So, to conclude my statements on this, I understand that there may be a possible second-degree amendment to this tomorrow that would deal with the language on line 8 on page 55, "preemption," which would deal with the words, or is consistent with. But I am not certain that that second degree will be offered.

In any event, to conclude, this particular section of the bill goes to the heart of dealing with the federalism issue. Are we going to allow the cities and the State to put up barriers of entry to telecommunications firms? In the past, we have done so, with cable television. We have allowed cities not only to add a franchise fee, but also to require certain programming, and sometimes the companies do something else for the city as an incentive.

In telephones, we have allowed our States to set up a monopoly in the State and sometimes to collect certain things or to put certain requirements on. In this bill, S. 652, we are trying to deregulate, open up markets, and we are trying to let that fresh air of competition come forward. If our companies and our investors have the uncertainty of not knowing what every city will do, of not knowing what every State will do and each State legislature and each city council may change, the companies will be in the position of having to endlessly lobby city officials and State officials on these issues—not only that, at any time certainty is taken out.

This bill, S. 652—if we pass it—will provide a clear roadmap with certainty for competition. It will create an explosion of a new investment in telecommunications and new jobs and new techniques. And it will help consumers with lower telephone rates and lower cable rates. It has been carefully crafted and worked out in close to 90 nights of meetings, and on Saturdays and Sundays, plus last year, a whole year, plus a lot of Senators' input. I know it sounds good to give the power to the city and the State, and I am usually for that. In this case, we reserve powers to the city and State, but we very firmly say that the barrier to entry must be removed.

Mr. President, I wish to point out that I think there may be a second-degree amendment to this tomorrow at some point. I want to give Senators notice of that. There may not be. But I rise in opposition to the amendment.

Mr. LOTT. Mr. President, I do have some business to conduct, including the closing statement. At this juncture, I would like to do a couple of things, and if the Senator from Nebraska wants to make a statement, I will withhold on the closing unanimous consent.

CLOTURE MOTION

Mr. LOTT. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on S. 652, the Telecommunications Competition and Deregulation Act:

Trent Lott, Larry Pressler, Judd Gregg, Don Nickles, Rod Grams, Rick Santorum, Craig Thomas, Spencer Abraham, J. James Exon, Bob Dole, Ted Stevens, Larry E. Craig, Mike DeWine, John Ashcroft, Robert F. Bennett, Hank Brown, Conrad R. Burns.

The PRESIDING OFFICER. The acting majority leader.

REMOVAL OF INJUNCTION OF SECRECY—EXTRADITION TREATY WITH BELGIUM (TREATY DOCUMENT NO. 104–7); SUPPLEMENTARY EXTRADITION TREATY WITH BELGIUM TO PROMOTE THE REPRESSION OF TERRORISM (TREATY DOCUMENT NO. 104–8); AND EXTRADITION TREATY WITH SWITZERLAND (TREATY DOCUMENT NO. 104–9)

Mr. LOTT. Mr. President on behalf of the leader, as in executive session. I ask unanimous consent that the injunction of secrecy be removed from the following three treaties transmitted to the Senate on June 9, 1995, by the President of the United States:

Extradition Treaty with Belgium (Treaty Document No. 104–7);

Supplementary Extradition Treaty with Belgium to Promote the Repression of Terrorism (Treaty Document No. 104–8); and

Extradition Treaty with Switzerland (Treaty Document No. 104–9).

I further ask that the treaties be considered as having been read the first time; that they be referred, with accompanying papers, to the Committee on Foreign Relations and ordered to be printed; and that the President's messages be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The messages of the President are as follows:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Extradition Treaty Between the United States of America and the Kingdom of Belgium signed at Brussels on April 27, 1987. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Treaty.

This Treaty is designed to update and standardize the conditions and procedures for extradition between the United States and Belgium. Most significantly, it substitutes a dual-criminality clause for the current list of extraditable offenses, thereby expanding the number of crimes for which extradition can be granted. The Treaty also provides a legal basis for temporarily surrendering prisoners to stand trial for crimes against the laws of the Requesting State.

The provisions in this Treaty follow generally the form and content of extradition treaties recently concluded by the United States. Upon entry into force, it will supersede the Treaty for the Mutual Extradition of Fugitives from Justice Between the United States and the Kingdom of Belgium, signed at Washington on October 26, 1901, and the Supplementary Extradition Conventions to the Extradition Convention of October 26, 1901, signed at Washington on June 20, 1935, and at Brussels on November 14, 1963.

This Treaty will make a significant contribution to international cooperation in law enforcement. I recommend that the Senate give early and favorable consideration to the Treaty and give its advice and consent to ratification.

WILLIAM J. CLINTON.

THE WHITE HOUSE,

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium to Promote the Repression of Terrorism, signed at Brussels on April 27, 1987 (the "Supplementary Treaty"). Also transmitted for the information of the Senate is the report of the Department of State with respect to the Supplementary Treaty.

Exhibit B to NATOA's Reply Comments in WT Docket No. 16-421

Watts (OK)	Wyden	Zeliff
Wolf	Yates	Zimmer

NOT VOTING—29

Andrews	Maloney	Spratt
Bateman	McDade	Thurman
Collins (MI)	McIntosh	Towns
Condit	Moakley	Tucker
Cooley	Ortiz	Waxman
de la Garza	Owens	Williams
Filner	Rangel	Wilson
Hayes	Reynolds	Young (AK)
Herger	Rose	Young (FL)
Kaptur	Scarborough	

□ 0910

The Clerk announced the following pair:

On this vote:

Mr. Scarborough for, with Mr. Filner against.

Mr. GILMAN, Mr. STOKES, and Ms. FURSE changed their vote from "aye" to "no."

Messrs. JONES, KIM, MFUME, BARCIA, HEFNER, and JEFFERSON, Ms. WOOLSEY, Mrs. KELLY, and Ms. MCKINNEY changed their vote from "no" to "aye."

So the amendment was agreed to.

The result of the vote was announced as above recorded.

PERSONAL EXPLANATION

Mrs. MALONEY. Mr. Speaker, I inadvertently missed rollcall vote 627. Had I been present, I would have voted "yes."

The CHAIRMAN. It is now in order to consider amendment No. 2–1 printed in part 2 of House Report 104–223.

AMENDMENT NO. 2–1 OFFERED BY MR. STUPAK

Mr. STUPAK. Mr. Chairman, I offer an amendment, numbered 2–1.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment No. 2–1 offered by Mr. STUPAK: Page 14, beginning on line 8, strike section 243 through page 16, line 9, and insert the following (and conform the table of contents accordingly):

SEC. 243. REMOVAL OF BARRIERS TO ENTRY.

(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 interstate or intrastate telecommunications services.

(b) STATE AND LOCAL AUTHORITY.—Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 247 (relating to universal service), requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) LOCAL GOVERNMENT AUTHORITY.—Nothing in this Act affects the authority of a 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 the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) EXCEPTION.—In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

The CHAIRMAN. Pursuant to the rule, the gentleman from Michigan [Mr. STUPAK] will be recognized for 5 minutes, and a Member opposed will be recognized for 5 minutes.

Does the gentleman from Virginia rise to claim the time?

Mr. BLILEY. Mr. Chairman, I do.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] will be recognized for 5 minutes.

The Chair recognizes the gentleman from Michigan [Mr. STUPAK].

Mr. STUPAK. Mr. Chairman, I am offering this amendment with the gentleman from Texas [Mr. BARTON] to protect the authority of local governments to control public rights-of-way and to be fairly compensated for the use of public property. I have a chart here which shows the investment that our cities have made in our rights-of-way.

□ 0915

Mr. Chairman, as this chart shows, the city spent about $100 billion a year on rights-of-way, and get back only about 3 percent, or $3 billion, from the users of the right-of-way, the gas companies, the electric company, the private water companies, the telephone companies, and the cable companies.

You heard that the manage's amendment takes care of local government and local control. Well, it does not. Local governments must be able to distinguish between different telecommunication providers. The way the manager's amendment is right now, they cannot make that distinction.

For example, if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings.

The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Stupak-Barton amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it simply is not fair to ask the taxpayers to continue to subsidize telecommunication companies.

In our free market society, the companies should have to pay a fair and reasonable rate to use public property. It is ironic that one of the first bills we passed in this House was to end unfunded Federal mandates. But this bill, with the management's amendment, mandates that local units of government make public property available to whoever wants it without a fair and reasonable compensation.

The manager's amendment is a $100 billion mandate, an unfunded Federal mandate. Our amendment is supported by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures and the National Governors Association. The Senator from Texas on the Senate side has placed our language exactly as written in the Senate bill.

Say no to unfunded mandates, say no to the idea that Washington knows best. Support the Stupak-Barton amendment.

Mr. Chairman, I yield 2 minutes to the distinguished gentleman from Texas [Mr. BARTON], the coauthor of this amendment.

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Chairman, first I want to thank the gentleman from Virginia [Mr. BLILEY], the gentleman from Texas [Mr. FIELDS], and the gentleman from Colorado [Mr. SCHAEFER], for trying to work out an agreement on this amendment. We have been in negotiations right up until this morning, and were very close to an agreement, but we have not quite been able to get there.

I thank the gentleman from Michigan [Mr. STUPAK] for his leadership on this. This is something that the cities want desperately. As Republicans, we should be with our local city mayors, our local city councils, because we are for decentralizing, we are for true Federalism, we are for returning power as close to the people as possible, and that is what the Stupak-Barton amendment does.

It 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.

It does not let the city governments prohibit entry of telecommunications service providers for pass through or for providing service to their community. This has been strongly endorsed by the League of Cities, the Council of Mayors, the National Association of Counties. In the Senate it has been put into the bill by the junior Republican Senator from Texas [KAY BAILEY HUTCHISON].

The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way. We should vote for localism and vote against any kind of Federal price controls. We should vote for the Stupak-Barton amendment.

Mr. BLILEY. Mr. Chairman, I yield 1½ minutes to the gentleman from Colorado [Mr. SCHAEFER].

Mr. SCHAEFER. Mr. Chairman, I rise in strong opposition to this Stupak amendment because it is going to allow the local governments to slow down and even derail the movement to real competition in the local telephone

market. The Stupak amendment strikes a critical section of the legislation that was offered to prevent local governments from continuing their longstanding practice of discriminating against new competitors in favor of telephone monopolies.

The bill philosophy on this issue is simple: Cities may charge as much or as little as they wanted in franchise fees. As long as they charge all competitors equal, the amendment eliminates that yet critical requirement.

If the consumers are going to certainly be looked at under this, they are going to suffer, because the cities are going to say to the competitors that come in, we will charge you anything that we wish to.

The manager's amendment already takes care of the legitimate needs of the cities and manages the rights-of-way and the control of these. Therefore, the Stupak amendment is at best redundant. In fact, however, it goes far beyond the legitimate needs of the cities.

Last night, just last night, we had talked about this in the author's amendment and we thought we worked out a deal, and we tried to work out a deal. All of a sudden I find that the gentleman, the author of the amendment, reneged on that particular deal, and now all of a sudden is saying well, we want 8 percent of the gross, the gross, of the people who are coming in. This is a ridiculous amendment. It should not be allowed, and we should vote against it.

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from Texas [Mr. FIELDS], the chairman of the subcommittee.

(Mr. FIELDS of Texas asked and was given permission to revise and extend his remarks.)

Mr. FIELDS of Texas. Mr. Chairman, thanks to an amendment offered last year by the gentleman from Colorado [Mr. SCHAEFER], and adopted by the committee, the bill today requires local governments that choose to impose franchise fees to do so in a fair and equal way to tell all communication providers. We did this in response to mayors and other local officials.

The so-called Schaefer amendment, which the Stupak amendment seeks to change, does not affect the authority of local governments to manage public rights-of-way or collect fees for such usage. The Schaefer amendment is necessary to overcome historically based discrimination against new providers.

In many cities, the incumbent telephone company pays nothing, only because they hold a century-old charter, one which may even predate the incorporation of the city itself. In many cases, cities have made no effort to correct this unfairness.

If local governments continue to discriminate in the imposition of franchise fees, they threaten to Balkanize the development of our national telecommunication infrastructure.

For example, in one city, new competitors are assessed up to 11 percent of gross revenues as a condition for doing business there. When a percentage of revenue fee is imposed by a city on a telecommunication provider for use of rights-of-way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anticompetitive.

The cities argue that control of their rights-of-way are at stake, but what does control of right-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.

Such large gross revenue assessments bear no relation to the cost of using a right-of-way and clearly are arbitrary. It seems clear that the cities are really looking for new sources of revenue, and not merely compensation for right-of-way.

We should follow the example of States like Texas that have already moved ahead and now require cities like Dallas to treat all local telecommunications equally. We must defeat the Barton-Stupak amendment.

Mr. STUPAK. Mr. Chairman, I yield such time as she may consume to the gentlewoman from California [Ms. PELOSI].

(Ms. PELOSI asked and was given permission to revise and extend her remarks.)

Ms. PELOSI. Mr. Chairman, I rise in strong support of the Stupak-Barton amendment, which is a vote for local control over zoning in our communities.

Mr. STUPAK. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Texas [Ms. JACKSON-LEE].

(Ms. JACKSON-LEE asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE. Mr. Chairman, I rise in support of Stupak-Barton, that would ensure cities and counties obtain appropriate authority to manage local right-of-way.

Mr. STUPAK. Mr. Chairman, I yield such time as he may consume to the gentleman from Michigan [Mr. CONYERS].

(Mr. CONYERS asked and was given permission to revise and extend his remarks.)

Mr. CONYERS. Mr. Chairman, I congratulate my colleague from Michigan [Mr. STUPAK] on this very important amendment.

Mr. STUPAK. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it. You have been for control. This is a local control amendment, supported by mayors, State legislatures, counties, Governors. Vote yes on the Stupak-Barton amendment.

Mr. BLILEY. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, first of all, let me say that I was a former mayor and a city councilman. I served as president of the Virginia Municipal League, and I served on the board of directors of the National League of Cities. I know you have all heard from your mayors, you have heard from your councils, and they want this. But I want you to know what you are doing.

If you vote for this, you are voting for a tax increase on your cable users, because that is exactly what it is. I commend the gentleman from Texas [Mr. BARTON], I commend the gentleman from Michigan [Mr. STUPAK] who worked tirelessly to try to negotiate an agreement.

The cities came back and said 10 percent gross receipts tax. Finally they made a big concession, 8 percent gross receipts tax. What we say is charge what you will, but do not discriminate. If you charge the cable company 8 percent, charge the phone company 8 percent, but do not discriminate. That is what they do here, and that is wrong.

I would hope that Members would defeat the amendment.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from Michigan [Mr. STUPAK].

The question was taken; and the Chairman announced that the ayes appeared to have it.

Mr. BLILEY. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from Michigan [Mr. STUPAK] will be postponed until after the vote on amendment 2–4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider amendment No. 2–2 offered by the gentleman from Michigan [Mr. CONYERS].

PARLIAMENTARY INQUIRY

Mr. NADLER. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. NADLER. Mr. Chairman, can the Chair simply state if it plans to roll other votes? Some of us were waiting around for this vote.

The CHAIRMAN. It is the intention of the Chair to roll the next two votes on the next two amendments, 2–2 and 2–3, until after a vote on 2–4. We will debate the first Markey amendment.

Mr. NADLER. Could the Chair use names, please?

The CHAIRMAN. We will roll the next two amendments, the Conyers and Cox-Wyden amendments, until after the vote on the first Markey amendment.

AMENDMENT 2–2 AS MODIFIED OFFERED BY MR. CONYERS

Mr. CONYERS. Mr. Chairman, I offer a modified amendment.

Exhibit C to NATOA's Reply Comments in WT Docket No. 16-421

Summary of Conversations and Responses from Communities

City of Newport Beach, California responding to Crown Castle

The rates the City of Newport Beach requires for use of its publicly owned property represent the fair market rental value for the use of City property, and allow the City to act in the public's interest by recovering a fair market value return on the use of public property. The rates are consistent with federal statutes, case law, and City policy, and the City is acting within its rights as the legal owner and landlord in the rental of its property. To charge less than fair market value may constitute a regulatory taking, or constitute a prohibited gift of public resources, and provides favorable treatment to one industry. Further, the City engages with wireless broadband entities prior to application submittal to discuss any concerns over the installation of new infrastructure in the public right-of-way. These concerns not only include aesthetics, but also safety and access issues resulting from the construction of additional infrastructure in the public right-of-way. Such considerations are applied in a fair and consistent manner as to other applications discussed with, or submitted to, the City.

Prince William County, Virginia responding to Competitive Carriers Association

The Board of County Supervisors of Prince William County, which is the County's siting authority for the purposes of section 6409(a), has not and does not insert conditions into approvals requiring applicants to reduce applied-for structure heights by 10 percent or 20 feet as claimed by the Competitive Carriers Association in footnote 64 of their comments.

On October 13, 2015, our Board of County Supervisors held a public hearing on an application for a 145-foot stealth monopole submitted by Community Wireless Structures. Public comments at the hearing noted that with the extension permitted by 6409(a), the monopole height could eventually reach 165 feet. After concerns about the height were raised by members of the Board of County Supervisors (note: the discussion centered on visual impacts to Manassas National Battlefield Park), the applicant's representative, and not the Board, suggested the possibility of reducing the height by 20 feet to alleviate these concerns. The matter was deferred until November 17, 1015, at which time the Board of County Supervisors approved the special use permit for the monopole at the applied-for height of 145 feet. At no time in that application process, or in any other, have members of the Board inserted, or even attempted to insert, conditions requiring an applicant to reduce the applied-for height by 10 percent or 20 feet. Video of that public hearing is available as item 14-D here (the applicant makes the above-described suggestion just after the 5:10:00 mark):

http://pwcgov.granicus.com/MediaPlayer.php?view_id=23&clip_id=2032

City of Mercer Island, Washington responding to Crown Castle

The assertion in their comment is incorrect. Under the Crown Castle's franchise agreement with Mercer Island, they are required to obtain right-of-way (row) permits to install the small cell nodes. And under the row permit requirements, notices are given to surrounding properties. People can submit comments in response to the notices, which are reviewed, shared with Crown Castle and addressed to the extent feasible. No denial has been based on neighbor comments and neighbor consent is not required.