Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

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

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SUMMARY

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

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

TABLE OF CONTENTS

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

[7] NOI at ¶ 4.

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

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

As a reminder, the text of § 253 provides:

> (a) In general
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

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

The simplified statutory language:

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

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

The simplified statutory language, with the correct meaning substituted:

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

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

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

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

Alternatively:

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

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

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

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

The same substitutions from above result in the following:

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

Alternatively,

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

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

[9] NOI at ¶4.

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

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

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

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

Section 253(c) provides that

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

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

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

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

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

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

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

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

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

II. "FAIR AND REASONABLE COMPENSATION" INCLUDES RENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RADIOFREQUENCY EXPOSURE CONCERNS

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

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

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

IV. COPPER RETIREMENT

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

V. COLLABORATIVE EFFORTS BETWEEN STATE AND LOCAL GOVERNMENTS AND INDUSTRY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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