

November 9, 2017

VIA ECFS

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

Re: Restoring Internet Freedom, WC Docket No. 17-108; and other proceedings

Dear Secretary Dortch,

As the Commission contemplates policies that should help unleash the potential of the internet, ensure everyone has access to broadband, and postulates on what the future of connectivity may look like, it is imperative that it consider both broad and specific regulatory frameworks. With respect to the broad, the Commission understands the internet is not a local commodity, but an international resource. Yet, many federal, state, and local policies treat the services providing access as if providers act in a vacuum.

This letter seeks to explain some of the primary cost drivers impacting broadband deployment, along with provide the Commission a few resources to help it in its effort to spur broadband deployment.

On behalf of the Communications and Technology Task Force of the American Legislative Exchange Council (ALEC), please find two documents attached to this cover letter. The first is a copy of an op-ed that ran on November 6, 2017 in the Washington Examiner. The second is a copy of a model resolution passed by the ALEC's Communication and Technology Task Force encouraging state and local governments to cooperate with respect to small cell, or 5G, deployment.

ALEC is the nation's largest voluntary membership association for state legislators. Roughly 25 percent of all state legislators are members. ALEC, and its members, are dedicated to the principles of federalism, free markets and limited government. ALEC members recognize that the development and deployment of the next generation of wireless services represents an incredible opportunity for this country. Allowed to develop efficiently, these services will bolster connectivity, provide for increased bandwidth, and decrease latency. All these components are necessary for an expanding Internet of Things, the creation of Smart Cities, and the integration of autonomous (and connected) vehicles.

Through the Restoring Internet Freedom and other proceedings,¹ the Commission has looked at barriers to broadband deployment. Without a doubt, people reside in areas without access to broadband. Some of the greatest barriers these people face, though, are unreasonable ordinances,

¹ E.g. Restoring Internet Freedom, WC Docket No. 17-108; In the Matter of Streamlining Deployment of Small Cell Infrastructure, WT Docket No. 16-421; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79.

fees, zoning conditions, and other such restrictions local governments place on broadband companies just to access rights of way and municipally owned utility poles.²

As explained in the op-ed, and just one example of the imposed barriers, these unreasonable fees and conditions often operate to inhibit broadband deployment both in the locality and across the country. A number of localities view broadband companies as sources of revenue rather than as benefits to their residents. In some cases, cities seek unreasonable rates for broadband providers to attach wireless small cell antennas or the fiber that supports them to city infrastructure. In addition to the examples cited in the op-ed, a recent report³ highlights two additional examples—one where a city “set a \$30,000 application fee for each utility pole and another locality imposed a \$45,000 fee regardless of the amount of [right of way] use.”⁴

Localities charging unreasonable fees or placing unreasonable conditions on broadband providers fail fully to comprehend the consequences of their actions on the broadband environment as a whole. Localities do not act in a vacuum, nor is each locality the only one seeking to charge unreasonable fees. They seem to fail to understand the aggregate consequences of their actions. At least one comment previously filed with the FCC estimates that complying with unreasonable local right of way fees, pole attachment fees, and other conditions adds between 20 percent and 100 percent to the cost of construction.⁵ These are funds broadband companies would likely devote to further expanding their networks, including to rural and other underserved areas.

Local actions, including unreasonable fees and conditions, have an impact nationally. Unreasonable fees divert critical capital expenditures from rural and underserved areas to compliance costs.⁶ Because of the nature of broadband deployment, local fees and ordinances necessarily implicate the Commerce Clause, as recognized by the courts; the internet (and the networks enabling connectivity to it) is an interstate concern.⁷

By demanding that broadband companies pay unreasonable fees and meet unreasonable conditions, one, or more, localities or states may be able to dictate prices, conditions, and even impact the

² It is worth emphasizing the qualifier *unreasonable*. It is acknowledged that some fees charged are reasonable, reflecting the actual cost to a city for processing requests. Broadly speaking, unreasonable refers to fees charged in excess of those rates needed for the locality to recoup its cost and which represent an attempt to obtain substantial revenue.

³ *The Economic and Consumer Benefits from 5G*, The American Consumer Institute Center for Citizen Research, November 2017, available at <http://thelosteconomy.com/wp-content/uploads/2017/07/ACI-5G-Report-11117-2.pdf>.

⁴ *Id.*

⁵ Reply Comments of the National Telecommunications Cooperative Association, 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 Citing Facilities, WC Docket No. 11-59. Available at <https://ecfsapi.fcc.gov/file/7021712146.pdf>.

⁶ See broadly *The Economic and Consumer Benefits of 5G*, cited above.

⁷ E.g. *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (“Taken together, these tools constitute a unique medium known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”)

overall ability to deploy broadband in other states and localities. That is to say, if one state or locality places unreasonable fees or conditions prior to permitting access to city or state owned assets, those costs may be passed on to consumers in all other states and even negatively impact individuals residing in underserved areas in other states. The practical effect of laws demanding the payment of unreasonable fees, or compliance with unreasonable conditions, is to control broadband deployment beyond the boundaries of the locality or state exacting it.⁸

The unreasonable fees, conditions, and a potential patchwork of state laws could threaten deployment and affordable access. As the Commission considers ways to close the digital divide, restoring internet freedom, and other ways of ensuring quality broadband access to all Americans, it is important to highlight that it may have authority to preempt local and state laws that “prohibit or have the effect of prohibiting the ability of any entity to provide” broadband services.⁹

As the Commission considers proposals to unleash the economic power of the internet, expand broadband deployment to all residents, and looks to the future of connectivity, it should ensure that any regulatory framework it applies to broadband internet access services recognizes that these services are inherently interstate—broadband is not now, and cannot ever be, confined to just one state or locality, since users freely access content from multiple states, localities, or even countries in a matter of seconds. The Commission likely has the ability to preempt local and state regulations representing barriers to broadband deployment, and should consider exercising such authority unless states and localities streamline their processes and reduce barriers to permit deployment.

Respectfully,

/s/
Jonathon Paul Hauenschild, J.D.
American Legislative Exchange Council

⁸ See *American Libraries Ass’n*, 969 F.Supp. 160, 177 (S.D.N.Y. 1997), (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 774 (1945)).

⁹ 47 U.S.C. § 253(a), (d).

Exhibit 1



Thursday, November 09, 2017

OPINION Contributors

Universal access to broadband isn't free if regulations keep driving up the expense

by Jonathon Hauenschild | Nov 6, 2017, 5:29 PM

Universal access to broadband is a laudable and achievable goal. Republicans, Democrats, independents, and everyone else seems to be working toward solutions that will ensure everyone has access to affordable, quality broadband. Unfortunately, not everyone right now lives in an area where broadband is affordable. The lack of affordability in these areas, though, is more often driven by local politics than by big corporations trying to extract every last bit of profit from consumers.

Local politicians, rather than recognize the interstate nature of broadband, tend to view the companies building the backbone of universal broadband as sources of endless revenue rather than as partners providing access to all residents. Local politicians, additionally, end up selecting winners and losers in the broadband company, favoring the multi-billion dollar technology companies who promise to help turn the locality into a "smart city" in return for carte blanche access to the city's infrastructure.

This perspective of broadband companies as sources of revenue was abundantly clear in a recent *New York Times* op-ed authored by the mayor of San Jose, Calif. In the article, he suggested that big telecommunications companies are using their influence to avoid providing affordable services, obtain access to municipally-owned utility poles, and persuade states to pre-empt local regulation of those poles. Such arguments miss the mark, may result in the Federal Communications Commission pre-empting local ordinances, and may be disingenuous based on what the city is doing to help Facebook develop a wireless network infrastructure.

The next generation of wireless services is known as "small cell" but colloquially referred to as "5G." The benefits of 5G will include greater connectivity, lower latency, and increased bandwidth. The technology will further enable development of the Internet of Things, which will allow cars to communicate with one another, homes to grow smarter, and so on. 5G technology utilizes antennas roughly the size of pizza boxes. The antennas can be placed on utility poles, street lights, and other similar structures. Because of their size, the public will hardly notice the deployment. As the technology progresses, its enabling devices will become even more ubiquitous.

The cost of deployment will not be cheap. Industry experts predict that wireless companies will spend between **\$150 billion** and **\$275 billion** over the next few years. Laying fiber, for example, may cost between \$10,000 - 100,000 per mile, depending on the local topography, according to Department of Transportation **reports**. Complying with local fees, ordinances, or other conditions across the country **significantly adds** to the cost of deployment. These are funds that companies would otherwise invest in further infrastructure deployment, jobs-deploying networks, or other positions within the companies.

San Jose is not the only city, or state, demanding excessive fees or unreasonable conditions. **Tennessee**, for example, as late as 2016 had the nation's highest pole attachment rates, costing at least one broadband company an estimated \$3 million more per year for access to utility poles throughout the state. The same report estimates that each broadband provider pays an estimated \$7 million per year per state just to access those utility poles, and in Tennessee that the providers must negotiate agreements with 85 different utilities. This isn't just a state problem — large cities also nickel-and-dime companies such as Verizon, AT&T, and T-Mobile.

Congress and the FCC have both expressed a desire for light-touch regulation of broadband companies, which in turn would increase access to all. The plethora of local ordinances frustrates both deployment and the federal policies promoting minimal regulation.

A deeper dive into San Jose's policies reveal what could be an ulterior motive for the mayor's op-ed. While **publicly stating** that he will not cut any special deal for Amazon, the mayor and San Jose are **working** with Facebook to provide the social media giant access to publicly-owned assets for the purpose of establishing a city-wide wireless network. Once the network is live, Facebook will offer its services free of charge to the city's residents. The city's efforts to help Facebook include providing access to city assets, such as street lights and other "related infrastructure needed to build out the network," at low or no cost to Facebook. The city is not stopping at providing Facebook free access to city properties, though; it **will also** "pay for some staff time needed to provide... access to the existing city Wi-Fi system."

While arguing for the right to charge broadband companies a king's ransom for access to publicly-owned assets, the City of San Jose is actively working to help Facebook establish a network that will directly compete with broadband companies. In so doing, San Jose is selecting winners and losers in the broadband access marketplace. But it is clearly setting its proverbial thumb on the scale as much as possible to ensure that Facebook's network will both be successful and, arguably, harm traditional service providers. Facebook, of course, cannot be faulted for taking advantage of the city's assistance. San Jose may be faulted for extreme self-dealing, essentially guaranteeing that it and Facebook will have a monopoly regarding broadband services.

If local governments fail to recognize that they are significant contributors to broadband deployment costs, both states and the FCC have the authority to pre-empt local regulations.

Broadband companies want to serve customers. To increase their customer bases, the companies need to deploy the latest technologies in ways that will provide access for the greatest number of people. One of the greatest costs associated with deployment is complying with a panoply of local conditions, ordinances, and fees.

If localities such as San Jose truly want broadband companies to serve all residents, rather than selecting winners and losers in the broadband space, and if they want to avoid state or federal pre-emption of their authority, they will streamline their process, reduce barriers, and look at broadband companies as partners of revenue, not sources.

Jonathon Hauenschield is director of the Task Force on Communications and Technology at the American Legislative Exchange Council.

If you would like to write an op-ed for the Washington Examiner, please read our [guidelines on submissions here](#).

Exhibit 2



www.alec.org

RESOLUTION ENCOURAGING THE SUPPORT OF INFRASTRUCTURE BUILDOUT TO PAVE THE PATHWAY FOR NEXT GENERATION NETWORKS

Policy Status

Type: **Model Resolution** Status: **Final** Date Introduced: **December 1, 2016** Date Finalized: **January 12, 2017**

Issues

- Innovation
- Broadband

Task Forces

- Communications and Technology

Tags

- 5G
- Broadband
- Deployment
- Municipalities
- Small Cell
- SNPS 2016

Summary

Americans have unprecedented access to mobile broadband services. The future of mobile broadband is small antenna, or small cell, technology. This resolution recognizes the revolution that small antenna technology represents, offering to connect people, businesses, and devices in a much more efficient manner than current 4G LTE services. The resolution encourages state governments to provide regulatory certainty for the deployment of small cell infrastructure and encourages states to work with local governments and businesses to streamline local jurisdiction application processes.

RESOLUTION ENCOURAGING THE SUPPORT OF INFRASTRUCTURE BUILDOUT TO PAVE THE PATHWAY FOR NEXT GENERATION NETWORKS

WHEREAS, mobile broadband access is critical in creating economically sustainable communities; and

WHEREAS, the U.S. leads the world in 4G LTE services – of which 99.6 percent of Americans have access to – providing broad coverage and wireless connectivity that offers unmatched consumer benefits in areas such as education and health; and

WHEREAS, the next generation of mobile connectivity, which promises more capable, efficient and intelligent capabilities, increases network reliability, reduces latency, provides consumers and businesses with higher speeds, and is capable of serving a greater number of wireless devices than current technology; and

WHEREAS, to ensure the success of next generation technology and the United States' leadership in this next generation of wireless, wireless providers will have to deploy small antenna infrastructure connected via wireline fiber facilities; and

WHEREAS, next generation signals cover shorter distances thus requiring several times as many smaller cells than traditional cell towers and that next generation networks work only if deployed intensively; and

WHEREAS, in order for next generation networks to have maximum impact for consumers, wireless providers, state and local governments must work together to encourage deployment of this technology.

THEREFORE, BE IT RESOLVED that the American Legislative Exchange Council (ALEC) encourages states to provide regulatory certainty for the deployment of small cell infrastructure, by streamlining local jurisdiction application processes, allowing access to public rights-of-ways and adopting a predictable and fair fee structure; and

BE IT FURTHER RESOLVED that ALEC encourages local governments to work with businesses to modernize laws and regulations in order to facilitate the deployment and timely placement of wireless facilities.