Before the

**FEDERAL COMUNICATIONS COMMISSION**

Washington, DC 20554

In the Matter of )

)

Implementation of State and Local Govenments’ ) WT Docket No. 19-250

Obligations to Approve Certain Wireless Facility )

Modification Requests Under section 6409(a) of the )

Spectrum Act of 2012 )

)

Accelerating Wireline Broadband Deployment by ) WC Docket No. 17-84

Removing Barriers to Infrastructure Investment )

**COMMENTS OF THE CITY OF NEWPORT NEWS, VIRGINIA**

The City of Newport News files these comments in response to the Public Notice released September 13, 2019 in the above-entitled proceeding. Through these comments, City of Newport News seeks to provide the Commission with basic information regarding its local right-of-way and facility management practices and charges.[[1]](#footnote-1) The Commission should not interfere with these local policies. The City of Newport News has developed considerable expertise applying its policies to protect and further public safety, economic development, and other community interests. By adopting rules in this area, the Commission could disrupt this process at substantial cost to local taxpayers and to the local economy. We believe that a basic respect for federalism, a fair reading of the Constitution, particularly Amendments 5 and 10 thereof, the Communications Act, the Spectrum Act of 2012, and an honest assessment of the Commission’s limited expertise on local land use matters all point to the same conclusion: this is no place for federal regulation.

City of Newport News has successfully managed its property to encourage deployment of several broadband networks to date. As a result, broadband service of up to 4G is available to all households and businesses in our jurisdiction, assuming that the user has a contract with a service provider. There is no evidence that the City’s policies or charges with respect to placement of facilities in the rights-of-way or on City property have discouraged broadband deployment. Our community *welcomes* broadband and 5G deployment, so long as we can do so in a way that protects the interests of our citizens. The City’s policies allow us to work with any company willing to provide service. No company has cited our policies as a reason that it will not provide service as to current cellular service. The City has worked with a number of providers to extend 5G service and have negotiated a form franchise agreement, which will shortly go to the City Council for approval. Two major carries have accepted. We believe our policies have helped to *avoid* problems and delays in broadband deployment by ensuring that broadband deployment goes smoothly for both the providers who follow the rules and the larger community. On the other hand, we also know that many entities, including for-profit companies, seeking access to our rights-of-way and facilities would prefer to live without rules or regulations, to the detriment of other users, abutting landowners, commuters, and the citizens of our city in general.

In response to the Public Notice and the Petition for Rule Making, the City of Newport

News comments as follow:

The Petition for Rule Making and the associated Petition for Declaratory Ruling are characterized as requesting removal of barriers to extension of infrastructure for broadband and 5G service. By and large, these barriers complained of are land use regulations which have been time and again determined by the Supreme Court as being within the bailiwick of state and local government, constitutionally protected property rights of municipal corporations, the state, and the taxpayers of both entities, and the rights of political subdivisions and states to operate their respective governments and control their property without federal interference with the means and methods by which they do so.

The Petition for Rule Making objects to states and localities regulating rates, terms, and conditions, even though “State” is defined in 47 U.S.C. §224(a)(3) to include political subdivisions. States and, by definition, political subdivisions of the State are allowed to regulate in this area so long as rules and regulations have been adopted. 47 U.S.C. §224(c).

The Petition for Rule Making takes issue with the terms of 47 U.S.C. §1455(a)(1), which allows a state or local government to deny an application for modification of an existing wireless tower if the modification substantially changes the physical dimensions of such tower or base station. The Petitioners demand that “substantial changes” include everything up to 30 feet beyond the established boundaries of the site. This will affect rights-of-way, other property owned by the City, and private property interests. This will be addressed further below.

THE FCC SHOULD NOT EXPAND RULES TO AID THE INDUSTRY THAT

EXTEND BEYOND CONSTITUTIONAL LIMITATIONS AND THE LANGUAGE

OF THE APPLICABLE STATUTES

Petitioner, in its Petition for Rule Making, states that the FCC has broad powers to streamline or modify its rules “if they no longer serve the public interest in their current form”. It then goes on to address 5G expansion. First, the City states that the rules to be adopted are contrary to constitutionally protected property rights. Property rights are defined by state law, and in Virginia, taking of property rights must be for a public use, not merely for public interest or purpose. In short, the benefit to the public as a whole must be given first consideration and the benefit to private industry or individuals must be no more than incidental. The rule change demanded by the industry would allow what amounts to a right of eminent domain by a private for-profit industry without the corresponding duty for just compensation. This is directly contrary to the requirements of the Fifth Amendment to the United States Constitution and contrary to article I, Section 11 and Article VII, Section 8 and 9 of the Virginia Constitution, which defines municipal property rights in Virginia.

In regard to the requirements of 47 U.S.C. §1455(a)(1), the City has the power to disapprove the site if there is a substantial change in the equipment. The current rule, as the Petitioner states, would allow only modification if the dimensions of the current site are not exceeded. Petitioner argues that the rule should be changed to allow excavation up to 30 feet beyond current site boundaries. Since most facilities are defined by the ownership, lease or franchise of the land upon which the wireless facility is located, this rule change would allow the telecommunications carrier to encroach upon land owned privately or by the municipal corporation, without any compensation. This would inevitably give way to further creep of boundaries, since once the facility is established, the carrier could determine it needs to expand to another 30 feet beyond legitimate boundaries. If such an unconstitutional rule is adopted, it should at least limit the number of times the boundaries can be expanded. This rule could result in an abundance of inverse condemnation cases against the government and suits against the carriers.

The fact that the demands of 5G cannot exist within the current 5G boundaries, is not a sufficient rationale for a federal administrative agency to ignore constitutional property rights to benefit a single profit-making private industry.

The necessity of colocation is attacked on the basis that it is insufficient to support 5G facilites, which the industry predicts will involve applications and attachments in the range of hundreds of millions. The petitioner further notes that higher frequency 5G signals will require “wireless network densification”. This will result in forests of antenna sites in the nation’s urban and suburban areas. Also, given the reliance on shot clock requirements the FCC imposes, which directly conflict with federalism and the Tenth Amendment to the United States constitution, the quantity of applications for hundreds of millions of 5G sites will so overwhelm local government employees that they will not be able to function. The carriers further insist that the costs be kept down and reflect no more than cost recoveries. Will the industry agree to cost recoveries for the huge number of additional employees that will have to be hired and the construction of facilities in which the employees will work.

The argument that this densification is being driven by public safety networks is specious at best. First responders are virtually always local government employees. First responders rely on radio networks and other forms of internal communication. The use of 5G for Public safety purposes will be a miniscule percentage of overall usage of 5G users. This argument is a classic red herring to toss the burden back on localities.

THE SYSTEM THAT THE DEPLOYERS SEEK TO AVOID “UNECESSARY”

REGULATORY HURDLES IS CONTRARY NOT ONLY TO PROPERTY RIGHTS

BUT ALSO TO THE RIGHTS OF STATE AND LOCAL GOVERNMENTS UNDER THE TENTH AMENDMENT TO THE CONSTITUTION.

The hurdles referred to are the inconveniences deployers must face as a result of a locality attempting to protect its property rights, rules regarding land use, costs accessed for what amounts to yet another federal unfunded mandate. That mandate is that the localities must quickly process applications in a time frame set by a federal administrative department. Such requirements seek to micromanage the means and methods by which a local government can carry out its governmental duties. The “deemed granted” rules is a direct regulation of the conduct of the locality’s legislative power. Also, the Tenth Amendment forbids the federal government from requiring states to enforce federal law. New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed2d 120 (1992). The City is aware of the Fourth Circuit’s apparent judicial repeal of the Tenth Amendment in Montgomery County, Maryland v. Federal Communication, 811 F3d. 121 (2015), whenthe court determined that the “deemed granted” was federal law which invalidated the legislative enactments of state and local governments. The City asserts that this decision, taken to its logical conclusion gives federal agencies the authority to run roughshod over duly enacted state and local legislative requirements. It is the City’s position that a federal agency does not have authority to nullify state and local law, as the agency acts by fiat, and the state and local governments have legislative authority.

The Petitioner argues that the current rules are outdated and that its need to expand services, and thereby profit from it, must override property rights and the concept of federalism. Since the current rule states that expansion of facilities beyond  *the current boundaries of the leased or owned property surrounding the tower and any access of utility easements currently related to the site is not allowed.* It should be apparent that this limitation follows the limitations imposed by property rights. The Petitioner’s argument is that deployers should be able to take land up to 30 feet beyond the boundaries, which is referred to as “compound expansion”. This would not modernize the language, so much as effectively allow a theft of public and private property rights. “Skyrocketing demand” for 5G does not excuse flagrant violation of constitutional rights by private profit-making entities, to the benefit of their private shareholders with increased profits.

ANY FEE FOR PERMITS SHOULD COVER COSTS AND PROVIDE

FOR PAYMENT OF FAIR MARKET VALUE FOR PROPERTY INTERESTS TAKEN

Petitioner complains that excessive fees are barring the way for further development of small cell and further threaten wide spread deployment. They claim that any application and review fees must be cost-based and non-discriminatory. Such fees for application and review fees and any fees charged for disturbance of the right of way by construction in the City of Newport News are based on the cost of reviewing applications by City employees and the costs of repair, inspection by City employees, and posting of necessary bond to cover damages to the right-of-way caused by construction of facilities in the right-of-way. This applies across all types of utilities and services constructing, operating and maintaining services in the rights-of-way and on City property. There is no discrimination as these requirements are universally applied.

The question is whether telecommunications companies will abide by a cost rule when the fees must rise to cover costs when hundreds of millions of applications begin coming in, remains unanswered. Such expansion will necessitate the hiring of many new employees to work in the permit review process and other expenses, such as building facilities to house the employees.

Moreover, since the rules sought would allow the taking of property, will the telecommunications companies be required to pay fair market value for the interests they have taken and damages to the remainder of the properties taken? Under eminent domain law, this is the standard for the valuation of taking of property.

The apparent demand is that private entities be allowed to take property and pay no more than bare administrative costs of processing an application. These are the standards by which governments and utilities with eminent domain powers are bound. Assuming that it is legal in the first place to give a private entity these powers, why should the entity taking the property be required to pay less?

OTHER AFFRIMATIVE DEFENSES

In City of Newport News, most applications for activities in the right of way, subdivision evaluations, zoning applications are processed very quickly. However, in some cases, when a utility is applying for a franchise, easement, lease, or other authority to use City right-of-way, Article VII of the Virginia Constitution and State Code, Va. Code §15.2-2100, et seq. require a bidding process and City Council Action to approve the franchise, easement, lease, etc., which adds approximately two months to the evaluation process.

The City currently requires permitting charges, which include all recurring and non-recurring charges, as well as any application, administrative, or processing fees:

* such charges are structured by the area of disturbance and type of installation (whether the utility is above ground or buried);
* the City is subject to comprehensive state franchising or rights-of way-laws;
* the charges are published in advance or capped on larger projects (e.g the installation of stormwater and sanitary sewers) based on cost recovery considerations, and accompanied by comprehensive terms, and conditions; and
* In-kind contributions only where allowed by state law.

Charges are related to impacts on the right-of-way, such as pavement restoration costs for projects that involve trenching in roadways and returning the area of disruption to safe parameters. These charges are important because they defray the costs of administering and site restoration (usually in the form of a performance bond).

In City of Newport News, our policies are designed to achieve the following: safety within the rights-of-way and other City-owned property, recouping costs of administration, and restoration of disruptions in the rights-of-way and other municipally-owned property.

As noted above, City of Newport News strongly urges the FCC to refrain from regulating local right-of-way management and facility placement processes. These are highly fact-specific matters, which turn on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances. These matters are managed by local staffs with considerable expertise. Imposing a federal regulatory regime would create unnecessary costs for our community, and it would have the potential to undermine important local policies. Likewise, Commission regulation of charges for use of the rights-of-way could have significant impacts on the community, and may actually make it infeasible to continue to maintain or provide important public services If the Commission feels compelled to act in this area at all, it should limit itself to voluntary programs and educational activities, and to implementing its own recommendations in the National Broadband Plan for working cooperatively with state and local governments.

**CONCLUSION**

City of Newport News urges the Commission to conclude that right-of-way and facility management and charges are not impeding broadband deployment. The City’s policies and procedures are designed to protect important local interests, and have done so for many years. There is no evidence that the policies have impaired any company from providing broadband service here, and there are many reasons to believe that federal regulations would prove costly and disruptive to our community.

As to 5G, there are unanswered questions as yet, and while the City embraces the expansion of 5G service, it should not be at the expense of the City’s constitutional and statutory rights.

Respectfully submitted,

City of Newport News

By: /s/Joseph M. DuRant

Deputy City Attorney

Office of the City Attorney

2400 Washington Ave.

Newport News, VA 23607

Phone: (757)926-8416

Fax: (757) 926-8549

[durantjm@nnva.gov](mailto:durantjm@nnva.gov)

CC: VML [RBullington@vml.org](mailto:RBullington@vml.org)

Jerri Wilson: [wilsonjg@nnva.gov](file:///\\27vs-appsrv01.nne.nngov.local\Amicus\CLIENT%20DOCS\FCC\wilsonjg@nnva.gov)

1. We use the term “charges” to include both any cost recovery that is part of right-of-way and facility management (such as permitting fees), as well as other compensation we may receive from communications companies for use and protection rights-of-way, other City property, and other facilities consistent with state and local law. [↑](#footnote-ref-1)