BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
ACCELERATING WIRELINE	)	
BROADBAND DEPLOYMENT BY	)	
REMOVING BARRIERS TO	)	WC Docket No. 17-84
INFRASTRUCTURE INVESTMENT	)	

COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

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SUMMARY OF COMMENTS OF THE SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

The Smart Communities and Special Districts Coalition ("Smart Communities") is comprised of individual localities, special districts, and local government associations which collectively represent over 31 million residents in 11 states and the District of Columbia

Smart Communities understand the importance of deployment of advanced wireline and wireless communications technologies and are actively engaged in significant efforts to encourage broadband deployment, particularly to underserved areas.

Smart Communities files in this docket to respond to questions posed by the Commission in Part III.A of the Notice of Inquiry.

Smart Communities understand the importance of deployment of advanced wireline and wireless communications technologies; many of them are engaged in significant efforts to encourage broadband deployment, particularly to underserved areas.[1] Based on our experience, Smart Communities believe that no additional federal regulations are required at this time, and the Commission need not, should not and cannot pursue most of the proposals in Part III.A of the NOI.

As we explain below:

1. As a matter of policy, the Commission should not regulate the regulatory fees associated with applications to place wireline facilities, nor should the Commission seek to regulate the rents charged for use of public property. A federal policy that allows providers to obtain permits without paying the full costs of those permits, or to use public property without

[1] Smart Communities celebrates that our efforts permit Chairman Pai in a February 28, 2017 keynote address to the Mobile World Congress that "….98% of Americans now have access to three or more facilities-based [wireless] providers. And the United States has led the world in the deployment of 4G LTE." Those successes are local governments' as much as they are the industry's. Keynote address available at https://www.fcc.gov/document/chairman-pais-keynote-mobile-world-congress-barcelona.

paying fair market value will encourage inefficient, intrusive deployments, deter innovation and could impose billions of dollars in costs on local communities and their citizens. Moreover, studies have shown there is no correlation between fees paid and deployment.[2] This is not surprising, as the permitting costs associated with management of the public rights-of-way and rents paid for municipal property represent a very small part of wireline deployment costs.[3] Therefore, any Commission mandate will at best have marginal benefits, while presenting Constitutional questions. Moreover, it will not lead to deployment in areas that are not served today.

2. As a matter of law, Section 253 does not give the Commission the authority to adopt rules to regulate local public agencies in the manners suggested in the NOI. In particular, the Commission cannot regulate or dictate rents charged for use of public rights-of-way or other government property or limit recovery to marginal costs. The Commission lacks a legal foundation for adopting any such rules. The Commission has limited authority to regulate charges for access to property or facilities that may be useful for placement of communications facilities, no authority to regulate rates for access to public property, and certainly no authority to limit charges to certain marginal costs.

Section 253 does not generally apply to proprietary property such as water towers, street lights, or utility poles, much less charges for those properties. Even where it may be applicable with respect to rights of way, Section 253 at most permits a court (and not the Commission), to

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[2] *See* Reply Comments of the City of Portland, Oregon, *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 September 30, 2011) attached hereto as Exhibit 1(referred to herein as the Portland Reply Comments), Pearce Report.

[3] An Engineering Analysis of Public Rights-of-Way Processes in the Context of Wireline Network Design and Construction, Columbia Telecommunications Corporation (July 13, 2011), attached hereto as Exhibit 2 (referred to herein as the CTC Report) at pp. 12-14.

intervene if a company shows that is effectively prohibited or prohibited from providing a *telecommunications* service – at which point the court may consider whether the compensation for use of the rights of way is competitively neutral, non-discriminatory and "fair and reasonable." Charging fair market value for use of public property inherently passes those tests.

3. The Commission should vigorously pursue intergovernmental and public-private collaboration and cooperation on strategies for incentivizing broadband deployment. Rather than dictate one-size-fits-all rules of questionable legality, the Commission could do more benefit by allowing innovative models and strategies to be tried out at the local level, and help collect and disseminate best practices and lessons learned from such trials.

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COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

I. INTRODUCTION

The Smart Communities and Special Districts Coalition ("Smart Communities")[4] is comprised of local governments, and associations that represent them, as well as special districts responsible for water services and fire protection services. Collectively, the individual members and associations which collectively represent over 31 million residents in 11 states and the District of Columbia.[5]

[4] The Smart Communities and Special Districts Coalition is comprised of certain members of the Smart Communities Siting Coalition which was originally formed to participate in the Mobilitie Petition docket (WT Docket No. 16-421), plus communities and special districts who have joined to participate in this proceeding and the Commission's companion wireless proceeding (WT Docket No. 17-79). The full membership of the Smart Communities and Special Districts Coalition is listed in FN 2 below.

[5] Individual members:
Ann Arbor, MI; Atlanta, GA; Berlin, MD; Berwyn Heights, MD; Boston, MA; Capitol Heights, MD; Cary, NC; Chesapeake Beach, MD; College Park, MD; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Montgomery County, MD; Myrtle Beach, SC; New Carrollton, MD; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Perryville, MD; Pocomoke City, MD; Poolesville, MD; Portland, OR; Rockville, MD; Rye, NY; Santa Clara, CA; Santa Margarita Water District (CA); Sweetwater Authority (CA); Takoma Park, MD; University Park, MD; Valley Center Municipal Water District (CA); Westminster, MD and Yuma, AZ.

Organizations Representing Local Governments :
Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of Michigan cities that focuses

Collectively, Smart Communities have significant experience in addressing the placement of wireline and wireless facilities. As importantly, many of the members have devoted significant resources to undergrounding utilities or to other redevelopment projects whose job-creating success depends on balancing the needs of local businesses, utilities, residents, consumers and tourists – all while maintaining the safety and integrity of infrastructure communications and other private and public infrastructure located in their public rights-of-way. As owners of public rights-of-way and other proprietary infrastructure routinely used by the for placement of wireless and wireline facilities, Smart Communities interact on a daily basis with telecommunications industry participants. Smart Communities thus have a good understanding of the challenges presented, or that will be presented, by new generations of deployments.

The stated goal of this proceeding is "to better enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike."[6] Smart Communities strongly supports the policy goal of achieving more affordable and available Internet access and

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on protection of their citizens' governance and control over public rights-of-way. The Michigan Townships Association ("MTA") promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed in this Brief is that of the Public Corporation Law Section only. The State Bar of Michigan takes no position. The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government. Its membership includes 524 Michigan local governments, of which 478 are members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent MML member local governments in litigation of statewide significance. The Kitch Firm represents PROTEC, MML, MTA and Public Corporation Law Section of the State Bar of Michigan. Best Best & Krieger represents the others in the Smart Communities coalition.

[6] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, WT Docket No. 17-84, ("NPRM/NOI") at ¶ 2.

other broadband services for consumers and businesses. We also support efforts at intergovernmental and public-private collaboration to achieve this goal. For these reasons, Smart Communities are concerned that some of the proposed actions discussed in the NOI and directed at local public agencies are misguided, beyond the Commission's authority, and will undercut achievement of that shared policy goal, and jeopardize the delivery of other public services and benefits.

In addition to these comments, Smart Communities are also filing comments in the Commission's companion wireless proceeding (WT Docket No. 17-79).

II. SUMMARY

Smart Communities understand the importance of deployment of advanced wireline and wireless communications technologies; many of them are engaged in significant efforts to encourage broadband deployment, particularly to underserved areas.[7] Based on our experience, Smart Communities believe that no additional federal regulations are required at this time, and the Commission need not, should not and cannot pursue most of the proposals in Part III.A of the NOI.

As we explain below:

1. As a matter of policy, the Commission should not regulate the regulatory fees associated with applications to place wireline facilities, nor should the Commission seek to regulate the rents charged for use of public property. A federal policy that allows providers to obtain permits without paying the full costs of those permits, or to use public property without paying fair market value will encourage inefficient, intrusive deployments, deter innovation and

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could impose billions of dollars in costs on local communities and their citizens. Moreover, studies have shown there is no correlation between fees paid and deployment.[8] This is not surprising, as the permitting costs associated with management of the public rights-of-way and rents paid for municipal property represent a very small part of wireline deployment costs.[9] Therefore, any Commission mandate will at best have marginal benefits, while presenting Constitutional questions. Moreover, it will not lead to deployment in areas that are not served today.

2. As a matter of law, Section 253 does not give the Commission the authority to adopt rules to regulate local public agencies in the manners suggested in the NOI. In particular, the Commission cannot regulate or dictate rents charged for use of public rights-of-way or other government property or limit recovery to marginal costs. The Commission lacks a legal foundation for adopting any such rules. The Commission has limited authority to regulate charges for access to property or facilities that may be useful for placement of communications facilities, no authority to regulate rates for access to public property, and certainly no authority to limit charges to certain marginal costs.

Section 253 does not generally apply to proprietary property such as water towers, street lights, or utility poles, much less charges for those properties. Even where it may be applicable with respect to rights of way, Section 253 at most permits a court (and not the Commission), to intervene if a company shows that is effectively prohibited or prohibited from providing a *telecommunications* service – at which point the court may consider whether the compensation for use of the rights of way is competitively neutral, non-discriminatory and "fair and reasonable." Charging fair market value for use of public property inherently passes those tests.

[8] *See* Pearce Report.

[9] CTC Report at pp. 12-14.

3. The Commission should vigorously pursue intergovernmental and public-private collaboration and cooperation on strategies for incentivizing broadband deployment. Rather than dictate one-size-fits-all rules of questionable legality, the Commission could do more benefit by allowing innovative models and strategies to be tried out at the local level, and help collect and disseminate best practices and lessons learned from such trials.

III. THE COMMISSION LACKS AUTHORITY TO ADOPT MEASURES DISCUSSED IN PART III.A OF THE NOI

In Part III.A of the NOI, the Commission seeks comments on Commission authority to enact rules to preempt local laws that inhibit broadband deployment.[10] We believe this effort is misguided for the reasons discussed below, but we begin by noting that Section 253 does not allow the Commission to address "inhibitions." It addresses prohibitions. These terms have ordinary meanings, the former including any activity that may "impede, hinder, hamper, hold back," or discourage an action, while the latter is something that "prevent, stop, rule out, preclude," or make impossible. Any rule or policy based on the former necessarily fails; the NOI is notable because it does fail to distinguish clearly between the two concepts. That flaw has been found fatal in other contexts.[11]

A. The Commission Does Not Have Authority to Regulate Local Public Agencies As Suggested in the NOI.

1. *Neither Section 253 nor Section 201 Apply to Broadband as an Information Service*

As a preliminary matter, while the Commission premises its NOI on the use of Section 253 to address barriers to broadband deployment, the Commission is proposing to reclassify broadband Internet access service (currently a telecommunications service) as an information

[10] NPRM/NOI at ¶ 100.

[11] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

service in the Internet Freedom docket.[12] Therefore its reliance on Sections 253 and 201(b) for rulemaking authority is incongruous. Section 253 and 201, by their terms, apply to telecommunications service; they do not apply to information services. They would not apply to broadband Internet access service if the Commission were to reclassify the service. Presumably, in order to address this legal limitation, the Commission posits that "restrictions on broadband deployment may effectively prohibit the provision of telecommunications service."[13] However, this approach has already been invalidated by the DC Circuit in *Comcast Corp. v. FCC*,[14] where the Commission attempted to justify regulation of broadband when it was classified as an information service because of its impact on both common carriers and video programming. The DC Circuit rejected both.[15] Quoting *NARUC II*, the D.C. Circuit reiterated the limits of the Commission's ancillary authority: "[T]he allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority."[16]

2. *Section 253 Lays Out Limited and Precise Preemption Authority*

Regardless of whether the Commission reclassifies broadband Internet access service, Congress addresses the power of the Commission to preempt "barriers to entry" very narrowly.

[12] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (rel. May 23, 2017) at ¶¶ 24-43.

[13] NPRM/NOI ¶ 101.

[14] *Comcast Corp. v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010).

[15] The D.C. Circuit has articulated a two-part test to cabin the Commission's use of ancillary authority. The Commission . . . may exercise ancillary jurisdiction only when: "(1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Comcast Corp. v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010) (quoting *American Library Ass'n v. FCC*, 406 F.3d 689 at 691-92 (D.C. Cir. 2005)).

[16] In the *NOI*, the Commission never articulates the connection between a "prohibition" of broadband deployment and a prohibition of a telecommunications service, and none is obvious *unless* broadband is itself a telecommunications service in all cases. *Comcast Corp. v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010) (quoting *National Assoc. of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 618) (D.C. Cir. 1976)).

It did not authorize a wide-ranging Commission effort to block local moratoria, regulate the management of and charges for use of the public right-of-way, negotiations and procedures. Congress preempted local requirements that cause a specific effect: the effect of "prohibiting" the ability to provide telecommunications services. In addition, Congress adopted a safe harbor to preserve certain local right-of-way requirements even if they were to run afoul of this requirement, and developed a specific review process for addressing actions that prohibit or effectively prohibit.

Section 253's only preemptive language appears in subsection (a):

> **(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.

If a local requirement were to violate subsection (a), it would still be lawful if it qualified under the safe harbors provided by subsections (b) or (c), (as the Commission appears to acknowledge):[17]

> **(b) 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 254 of this title, 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) State and local government authority**
>
> 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

[17] NPRM/NOI at ¶ 100.

> public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Subsection (d) then clarifies the Commission's role by providing that the Commission may only address issues under subsection (a) and (b), not subsection (c):

> **(d) Preemption**
>
> 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) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Subsections (b) and (c) have been clearly recognized as exceptions to (a) by the courts.[18] Subsection (a) "is the only portion of section 253 that broadly limits the ability of states to regulate. All of the remaining subsections . . . carve out defined areas in which states may regulate."[19]

The focus of Section 253 is narrow: it seeks to preempt State and local regulatory systems that grant or have the effect of granting telephone monopolies:

> Congress apparently feared that some states and municipalities might prefer to maintain monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. Section 253(a) takes that choice away from them, thus preventing state and local governments from standing in the way of Congress' new free market vision.[20]

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[18] *BellSouth Telecomns., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001) (quoting *In re Missouri Municipal League*, 16 FCC Rcd. 1157, 2001 (2001) ("it is clear that (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a)."); *In re Minnesota*, 14 FCC Rcd. 21,697, 21,730 (1999); *In re American Communications Servs., Inc.*, 14 FCC Rcd. 21,579, 21,587-88 (1999); *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,203 (1997).

[19] Brief for the United States as *Amicus Curiae, Level 3 Comms. LLC v. City of St. Louis*, (Nos. 08-626, 08-759) (May 2009) (quoting *In the Public Utilities Commission of Texas, "Texas PUC Order*," 13 FCC Rcd. 3460 at 3481 ¶ 44.).

[20] *Cablevision, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97-98 (1st Cir. 1999).

The statute is designed to "end[ ] the States' longstanding practice of granting and maintaining local exchange monopolies."[21] As one court recognized, Section 253(a) is not concerned with franchise fees, but with local government actions that keep entities out of the market: "[A] municipality's assessment of a fee for franchise rights, and the franchisee's rights being conditioned on the payment of this fee 'cannot 'be described as a prohibition within the meaning of section 253(a) . . . ."[22] Thus, Section 253 does not grant the Commission broad-ranging authority to address any perceived deficiency or irregularity in regulation at the state or local level. Under Section 253, the only measure of preemption is whether the requirement has a particular "effect"—the effect of "prohibiting the ability to provide service." The Commission must focus its analysis on this particular "result."[23] It cannot, therefore, regulate rights-of-way, or right-of-way compensation merely because it wishes to make it simpler and cheaper for broadband providers to enter the market.[24]

Moreover, while the Commission is *not* permitted to regulate generally, if the Commission were to conclude otherwise, it is still bound by the "carve-outs" identified in Sections 253(b) and 253(c) and, as such, any rules should recognize these statutory safe harbors.[25] Adopting rules that govern the matters explicitly reserved to states and localities

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[21] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part).

[22] *City of New Orleans v. Bellsouth Telecomms. Inc.*, 2011 U.S. Dist. LEXIS 60925 at *20 (E.D. La. 2011) (quoting *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000)).

[23] *Texas PUC Order*, 13 FCC Rcd. at 3480 ¶ 41 (noting that the "goal of opening local markets to competition" can be frustrated "[by] express restrictions on entry," and "[by] restrictions that indirectly produce *that result*") (emphasis added).

[24] *Iowa Utilities Board*, 525 U.S. at 389-390 (Commission cannot interpret "impair" to allow it to intercede whenever it believes doing so would encourage competition).

[25] NPRM/NOI at ¶ 109 (asking whether safe harbors should be explicitly recognized in any adopted rules).

would obviously violate 253(b) and (c). Even as to matters it may address, the Commission may only preempt; it may not regulate.

3. *The Commission's Authority to Preempt Local Rules Is Limited Under Section 253 to the Procedures Outlined in the Statute.*

The Commission asks whether Section 253(d) is "a non-mandatory procedural vehicle."[26] The statutory process is mandatory. As the Commission recognizes in the same breath, Section 253(d) "directs the Commission to preempt the enforcement of particular State or local statutes, regulations, or legal requirements 'to the extent necessary to correct such violation or inconsistency'"[27] and also "to preempt such particular requirements 'after notice and an opportunity for public comment.'"[28] Section 253 thus plainly requires individual notice and comment on particular statutes, regulations or legal requirements, and upon finding a violation, allows preemption *only* to the extent necessary to correct the violation. Broad ranging rules of general applicability would not meet this standard. That Section 201(b) grants the Commission general rulemaking authority is of no import.

Section 253(d) envisions a case-by-case, tailored determination. In a 1997 decision, the Commission explicitly rejected an argument that Section 253 preempts on a *per se* basis, and correctly ruled that the statute requires a factual showing:

> We cannot agree that the City's exercise of its contracting authority as a location provider constitutes, *per se*, a situation proscribed by section 253(a). The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to *actually prohibit or effectively prohibit* the ability of a payphone

[26] NPRM/NOI at ¶110.

[27] NPRM/NOI at ¶110.

[28] NPRM/NOI at ¶ 110.

> service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City's contracting conduct has caused such results. If we are presented in the future with additional record evidence indicating that the City may be exercising its contracting authority in a manner that arguably 'prohibits or has the effect of prohibiting' the ability of payphone service providers other than Pacific Bell to install payphones outdoors on the public rights-of-way in the Central Business District, we will revisit the issue at that time.[29]

The Commission later reinforced the point:

> With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement such as the Troy Telecommunications Ordinance must supply us with *credible and probative evidence* that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[30]

The procedure laid out in Section 253(d) is not optional, and the Commission cannot preempt by the imposition of general rules.

4. *Smart Communities Challenges the Premise of "Excessive" Fees and Costs; The Commission Does Not Have Authority to Regulate or Prescribe Rates for Use of the Public Right-of-Way or Other Public Property.*

The Commission asks a series of questions on the prevalence of excessive fees and costs and related matters with the ostensible goal of developing rules to preempt those that "may" have the effect of prohibiting the provision of telecommunications service.[31] Of course, the test under the law is not whether a legal requirement "may" prohibit" but whether it prohibits or effectively prohibits – there is no conflict among the Circuits on this point, which rests on a plain reading of

[29] *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14191, 14209 (July 17, 1997) at ¶ 38 (emphasis added).

[30] *In the Matter of TCI Cablevision of Oakland County, Inc.*, FCC 97-331, 12 FCC Rcd. 21,396, 21440 (Sept. 19, 1997) at ¶101 (emphasis added).

[31] NPRM/NOI ¶¶ 104-105.

the statute.[32] Setting that aside, the whole inquiry is divorced from the reality of the Commission's limited authority in this sphere and the reality of the marketplace. Notably, the Telecommunications Act limits the Commission's authority to regulate industry access to property or facilities. There is an important distinction between a legitimate and factual based plea to eliminate regulatory barriers versus a "candid demand to invade" the recognized property rights of another.[33] Under Section 253(c) the Commission has no given authority to set prices or formulae for regulatory fees, or for the use of proprietary property.

That omission is important, and the power cannot be implied. It is notable that Section 253(d) prevents the Commission from resolving cases that require resolution of issues that arise under Section 253(c). Section 253(b) and (c) specifically preserve local authority to manage the public rights-of-way and to recover fair and reasonable right-of-way compensation.

With respect to compensation, Congress recognized that "[t]he right-of-way is the most valuable of real estate the public owns,"[34] and it made an affirmative decision to clarify that nothing in Section 253 would limit State and local governments' ability to recover this value. In the first place, the Commission lacks authority to determine what is fair and reasonable compensation, given the limits on its jurisdiction reinforced by Section 253(d) discussed above. But in any event, it is clear that Congress intended to give local governments broad authority to set prices, and that it intended to allow local governments to recover more than its out-of-pocket costs from private profit-seeking corporations.

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[32] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577-579 (9th Cir. 2008); cert. den. *Sprint Telephony PCS, L.P. v. San Diego County*, 557 U.S. 935 (2009).

[33] Frederick Ellrod III & Nicholas P. Miller, Property Rights, Federalism, and the Public Rights-of-Way, 26 Seattle U.L. Rev. 475, 505 (2003).

[34] 141 Cong. Rec. S8134, *S8170 (1995) (statement of Sen. Feinstein).

For example, courts have recognized that the safe harbor does not require precise parity of treatment.[35] Every difference in treatment does not rise to the level of discrimination.[36] 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."[37] Local governments can take into account the scale of the use of public rights-of-way by different providers and they retain the flexibility to adopt mutually beneficial agreements for in-kind compensation. Neutrally applied most-favored-vendee provisions that require service providers to offer their best rates and requirements that service providers allow the free use of conduit space are at least potentially permissible.[38] And "a city 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."[39]

Nor does the Commission have the authority to establish rules with respect to public right-of-way management. Congress clarified that the Commission cannot address right-of-way practices. The operative language in Section 253(c)—"Nothing in this section affects the authority of a State or local government to manage the public rights-of-way"—is absolute; all

[35] *TCG N.Y. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002).

[36] The FCC has clearly recognized this principle in carrier discrimination cases. *In re Development of Operational, Technical and Spectrum Requirements*, Second Report and Order, 15 FCC Rcd. 16,720, 16,731 at ¶ 23 (2000) (recognizing it is not unlawful discrimination to "differentiate among users so long as there is a valid reason for doing so"); *see also Competitive Telecommunications Ass'n v. F.C.C.*, 998 F.2d 1058, 1064 (D.C. Cir. 1993).

[37] *New Jersey Payphone Ass'n v. Town of W. N.Y.*, 299 F.3d 235, 247 (3d Cir. 2002).

[38] *TCG N.Y. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002).

[39] *TCG N.Y. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002).

right-of-way management is protected from preemption.[40] Congress understood that local public servants, not the Commission, should make the factual determinations of when and how public rights-of-way should be managed and accessed.

Moreover, Section 253 does not extend to regulation of rates for use of public property located in the public rights-of-way or elsewhere. The Commission's authority is fundamentally limited under the Communications Act.[41]

5. *Authority to set Specific Prices was Left with Local Agencies, a Result Consistent with the Basic Structure of the Telecommunications Act and the Constitution.*

The Commission was created fundamentally for the purpose of "regulating interstate and foreign commerce in communication by wire and radio."[42] As a general matter, the Commission regulates communications; it does not have authority to regulate rates for access to public or private property or facilities that may be useful for communications, except where specifically granted.

An example of a specific and limited grant to regulate certain private property is in the Pole Attachment Act of 1978, codified as 47 U.S.C. section 224. The legislative history of the Pole Attachment Act of 1978 provides an insightful and pertinent reminder of the limitations of Commission authority over any property or facilities that may be useful for placement of communications facilities. The reason Congress adopted the Pole Attachment Act of 1978 was because the Commission itself clearly recognized its fundamental jurisdictional limitations. As the legislative history explains:

> … the Federal Communications Commission has recently decided that it has no jurisdiction under the Communications Act of 1934,

[40] By definition, the safe harbor protects provisions from preemption regardless of their effect.

[41] *See* discussion *infra* on Section 224 and the Commission's limited authority over property.

[42] 47 U.S.C., § 151.

> as amended, to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities. (*California Water and Telephone Co., et al.,* 40 R.R. 2d 419 (1977).) This decision was the result of over 10 years of proceedings in which the Commission examined the extent and nature of its jurisdiction over CATV pole attachments. The Commission's decision noted that, while the Communications Act conferred upon it expansive powers to regulate all forms of electrical communication, whether by telephone, telegraph, cable or radio, CATV pole attachment arrangements do not constitute 'communication by wire or radio,' and are thus beyond the scope of FCC authority. The Commission reasoned:
>
> The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites.[43]

This Commission reasoning remains as valid today as it did nearly 40 years ago and provides further support for maintaining a clear distinction between state and local governments' regulatory roles versus their proprietary roles as "owners" of public property and resources. While legislative amendments have been adopted since that time, none has granted Commission authority to regulate access and charges for use of public and private roads and public right-of-ways. It is incumbent upon the Commission to stay within the confines of its delineated authority. Here, it is noteworthy that several state constitutions require that localities obtain fair market value in return for providing access to public property.[44]

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[43] *See* Sen. Rep. No. 95-580 (95th Cong. (1st Session) November 2, 1977) at p. 14 (*emphasis added*).

[44] For example, Michigan local communities have a Constitutional right and obligation to their taxpayer residents to seek and obtain franchise support for the substantial cost of public right-of-way development, preservation and maintenance from those who wish to utilize this precious and limited resource for the purpose of doing business with its residents. Mich. Const. art. VII §. 21 prohibits localities from using tax revenues for non-public purposes (such as subsidizing Mobilitie) and even public utilities must obtain consents and accede to appropriate conditions as a condition of public right-of-way use. (Mich. Const. art. VII §29) *See* also Tex. Const. art. III, §52; *Comments Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Comments of Arlington, Texas, WT

If the federal government were to require a local government to place a wire on its property without compensation, it would constitute an unlawful taking under the Fifth Amendment.[45] The Supreme Court has clearly recognized a local government's "right to exact compensation" for such property uses:

> [W]hile permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it 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.[46]

And the Court has also held that like private property owners, local governments have the same right to fair market value compensation for the federal government's taking of property as private property owners.[47] It matters not that the intrusion may be relatively slight:

> [P]ermanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.[48]

Reading the Communications Act to permit local governments to set rates avoids most Fifth Amendment concerns. But reading the Act to both compel the government to provide

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Docket No. 16-421 (filed Mar. 7, 2017); *Comments Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Comments of Texas Municipal League, WT Docket No. 16-421 (filed Mar. 8, 2017) (Texas Constitution prohibits a municipality from granting any public funds or thing of value to an individual, association or corporation.).

[45] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 421, 433 (1982) (state law requiring property owner to permit access to cable company to install lines on private property constituted a taking).

[46] *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 99 (1893), *op. on rehrg.*, 149 U.S. 465 (1893); *see also Cities of Dallas and Laredo v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) ("Franchise fees are . . . essentially a form of rent: the price paid to rent use of the public right-of-ways.").

[47] *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

[48] *Loretto*, 458 U.S. at 430.

access and to allow the Commission to limit compensation would create significant takings issues.[49]

The Supreme Court has construed the Fifth Amendment's Takings Clause to protect the property of State and local governments from uncompensated taking under federal law,[50] and held that it "requires that the United States pay 'just compensation' normally measured by fair market value."[51]

Moreover, courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is."[52] Because the Communications Act is subject to this maxim, it "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[53] Thus, when local governments enter into contracts for use of property they own, Section 253 does not apply. For example, complaints about charges for access to light poles are not cognizable, because such contracts clearly fall outside of Section 253(a).

The preemption of local right-of-way practices and compensation would also offend the Tenth Amendment and the Guarantee Clause of the Constitution. Under the Tenth Amendment,

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[49] *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

[50] *United States v. 50 Acres,* 469 U.S. 24, 31 (1984).

[51] *Id. at* 25.

[52] *American Airlines v. Dept. of Transp.,* 202 F.3d 788, 810 (5th Cir. 2000).

[53] *Sprint Spectrum v. Mills,* 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland,* 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors,* 507 U.S. 218, 219 (1993) ("[P]re-emption doctrines apply only to state regulation").

"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[54] As part of the system of "dual sovereignty," the federal government "may not compel the States to enact or administer a federal regulatory program."[55] Even in areas where the federal government has authority to act, the Constitution only authorizes the federal government to regulate individuals, not States.[56] If the Commission were to assert control over right-of-way practices or compel local governments to provide access to public rights-of-way on federally-prescribed terms, the Commission would unconstitutionally commandeer the local administration of public property in service of a federal regulatory program. The suggestion that the locality may abandon management of the right of way altogether means, effectively, that the locality *must* give up control of its property to the federal government – an equally offensive and untenable result.[57]

The preemption of local discretion regarding how to charge for use of its property also raises concerns under the Guarantee Clause.[58] The Guarantee Clause precludes the federal government from interfering with a State's distribution of power among the various levels of government.[59] Local governments have a fiduciary duty, as landlord and trustee of public rights-of-way, to protect the public welfare and safety of their residents as well as the welfare of others who might occupy the public rights-of-way. Where a State has decided to allow local governments to obtain certain fees, the Commission may not undermine the State's decision by

[54] U.S. Const. amend. X.

[55] *Printz v. United States*, 521 U.S. 898, 918-19, 933 (1997) (*quoting New York v. United States*, 505 U.S. 144, 188 (1992)).

[56] *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

[57] *Nat'l Fed'n of Indep. Bus*. v. *Sebelius*, 567 U.S. 519, 577 (2012).

[58] U.S. Const., art. IV, § 4.

[59] *City of Abilene v. FCC*, 164 F.3d 49, 52 (DC Cir. 1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty").

leaving the local government without a means to recover that compensation. While the Federal government may use its Commerce Clause authority to limit certain actions of State and local officers, it may not—consistent with the unqualified *guarantee* to the people of the States of "a Republican Form of Government"—curtail the fundamental powers or property rights of local governments as local governments.

The Commission also may not limit local governments to only recovering their costs in exchange for telecommunications providers' use of their public rights-of-way. Moreover, it would defy Congress's intent if Section 253(c)'s reference to "fair and reasonable compensation" only reaches to "costs of managing the public rights-of-way incurred as a direct result of a carrier deploying facilities."

For well over a century, it has been understood that when telecommunications providers occupy their property, local governments are entitled to "compensation, which is in the nature of rental."[60] Section 253(c) simply builds upon this understanding, as the legislative history overwhelmingly shows. As Representative Joe Barton (Texas) put it: "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."[61]

Section 253(c)'s sweep is not limited to cases where a local government charges a "fair and reasonable" fee that is preferred by the Commission, or a "fair and reasonable" charge that is established using a particular methodology. Section 253 does not contain provisions comparable to Section 205 that would permit the Commission to "prescribe" particular rates.[62] It has long

60 *City of St. Louis v. W. Un. Tel. Co.*, 148 U.S. 92, 99 (1893), opinion on rehearing, 149 U.S. 465 (1893).

61 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995).

62 47 U.S.C. § 205.

been recognized that a wide range of prices are "reasonable" and that there are a variety of ways in which reasonable prices can be set.[63] As long as the compensation is "reasonable" in this sense, it falls within the Section 253(c) safe harbor. A local government can set a reasonable rate based on its costs (should it wish to do so) or by using any number of different methods.[64] By definition, charging fair market value for use of property is "fair and reasonable" compensation, a conclusion long-established by the precedent cited above.[65] Indeed, the Cable Act is replete with provisions that effectively abandon regulation in favor of market pricing, precisely because such pricing *is* reasonable and leads to better results than regulation.[66] Thus, even under the most liberal reading of Section 253, the Commission is given no authority to decide what rate a

[63] *See FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir.1987), quoting, *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C.Cir.1950), cert. denied, 340 U.S. 952 (1951). *See also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("it is the result reached not the method employed which is controlling").

[64] For example, the Commission asks whether gross revenues based rates are fair and reasonable. A gross revenues based rate reflects the value of the right of way, and hence can be a reasonable way to charge for use of the rights of way, particularly since many wireline providers seek a right to occupy *all* the rights of way within a community. There is a direct connection between revenues and use. Communities may adopt different models where a provider only seeks to "pass through" a community, or where use of rights of way is more limited. Gross revenues is not the only method that is used, but it is certainly a valid method. (*See* Report of Ed Whitelaw at pp. 7-8 (referred to herein as Whitelaw Report), Appendix 12 of Comments of the National Association of Telecommunications Officers and Advisors (NATOA), National League of Cities (NLC), United States Conference of Mayors (USCM), and National Association of Counties (NACo), NPB Public Notice # 7, GN Docket Nos. 09-47, 09-51, 09-137 (filed November 6, 2009), referred to herein as NATOA Comments.

[65] Moreover, the Supreme Court has construed the Fifth Amendment's Takings Clause to protect the property of State and local governments from uncompensated taking under federal law, and held that it "requires that the United States pay 'just compensation' normally measured by fair market value." (*United States v. 50 Acres*, 469 U.S. 24, 31 (1984).)

[66] *See, e.g.*, 47 U.S.C. § 543. This is so even where prices are higher than would result in a perfectly competitive market. In the 2016 *Report on Cable Industry Prices*, the Media Bureau Chief reported: "the price of expanded basic service averaged across effective competition communities was higher than the price of expanded basic service averaged across communities without such a finding. The difference is statistically significant. The four previous surveys also found that the price of expanded basic service in effective competition communities was higher than the price of expanded basic in communities without such a finding." (DA 16-1166, para. 6).

local government may charge, and it certainly cannot limit rates to incremental costs.[67] Indeed, one of Congress's principal purposes in adopting Section 253(c) was to ensure that Section 253 did not constitute an unfunded mandate.[68] Reading Section 253 as the NOI proposes would directly defy this intent.

Nor can the Commission prevent a locality from charging for use of the public rights-of-way merely because a particular entity may pay a different fee for a different use. Hence, cable operators may be charged for use of the public rights-of-way to provide telecommunications service in addition to the cable franchise fee – as is specifically recognized by Section 542.[69]

6. *The Commission Cannot Adopt Time Limits on Rights-of-Way Negotiation and Approval Processes Under Section 253.*

The Commission seeks comment on the factors influencing the length of time taken to

[67] Even where the Commission bases rate on costs, it has recognized that cost-based rates are reasonable as long as those costs fall between incremental costs and fully allocated costs, including opportunity costs. *In re Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240 at ¶ 141 (2011). By definition then, a rate based on a full cost allocation would be reasonable and protected by Section 253(c). The Commission has itself set fees based on gross revenues, and thus cannot argue that there is something inherently unfair or unreasonable about such fees. *In re Telephone Number Portability*, 13 FCC Rcd. 11701 ¶ 109 n.354 (1998).

[68] 141 Cong. Rec. H8460 (daily ed. August 4, 1995) (statement of Rep. Stupak) ("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.").

[69] In the case of *City of Eugene v. Comcast of Oregon II, Inc.*, the court considered whether the license fee imposed by the City of Eugene on Comcast for use of the public rights-of-way to provide telecommunications service was a tax barred by the Internet Tax Freedom of Act (which bars state and local governments from imposing taxes on Internet access), or a franchise fee barred by the Cable Act (which caps the relevant fee imposed to 5% of revenue). The Oregon Supreme Court held that (1) the fee was not a tax because it was imposed for access to the public rights-of-way and that neither the franchise agreement nor the Communications Act of 1934 gave Comcast a preexisting right to provide cable modem services over the public rights-of-way; and (2) the fee was not a franchise fee because it was not imposed on Comcast *solely* because of its status as a cable operator. (*City of Eugene v. Comcast of Or. II, Inc.*, 359 Ore. 528 (2016))

negotiate and approve private use of public rights of way.[70] Specifically, the Commission seeks comment on whether it should adopt time limits similar to those for cable franchise applications and whether, if a shot clock were adopted, whether it should ignore local moratoria as the Commission did in setting out limits on wireless siting negotiations.[71]

The legal framework available under Section 253 is very different from the framework which regulates cable services, therefore the Commission has no legal foothold to justify time limits pursuant to Section 253. The Commission's rules adopting time limits for the consideration of cable franchises is based in Section 621 of the Cable Act, which dictates that a franchising authority "may not unreasonably refuse to award an additional competitive franchise."[72] The Commission specifically cited the ambiguity in the term "unreasonably refuse" as its justification, under *Chevron*, for adopting time limits pursuant to Section 621.[73] And the Sixth Circuit similarly relied upon that statutory language to affirm the Commission's decision.[74] As explained above, Section 253 entails a very different framework with a limited role assigned to the Commission. Thus, the Commission has no authority to adopt a shot clock or other time limits and the issue of whether to take moratoria into account is moot.

7. *"Unreasonable Conditions and Requirements" Is the Wrong Inquiry; the Commission Can Only Preempt Effective Prohibitions Under Section 253.*

The Commission seeks comment on adopting rules prohibiting unreasonable conditions or requirements in the context of granting access to public rights-of-way, permitting,

[70] NPRM/NOI ¶ 103.

[71] NPRM/NOI ¶ 103 (citing 47 CFR § 76.41(d)-(g) and *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, WT Docket Nos. 13-238, 11-59, and 13-32, Report and Order, 29 FCC Rcd 12865, 12971, ¶ 265 (2014)).

[72] 47 U.S.C. § 541(a)(1).

[73] *In re Implementation of Section 621(a)(1) of the Cable Communs. Policy Act of 1984 As Amended by the Cable TV Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd 5101, 5120 (2006).

[74] *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 777-78 (6th Cir. 2008).

construction, or licensure related to the provision of telecommunications services, and asks: "Should the Commission place limitations on requirements that compel the telecommunications service provider to furnish service or products to the right-of-way or franchise authority for free or at a discount such as building out service where it is not demanded by consumers, donating equipment, or delivering free broadband to government buildings?"[75] This inquiry is misguided. As discussed earlier, factually, the problem with this line of inquiry is it ignores that localities who have pursued such conditions and requirements have encouraged deployment in ways that would not have occurred otherwise.

An example of a local government understanding its community's needs and leveraging use of its public assets as a means to meet those needs can be found in Boston.[76] Boston has a residential wireline broadband provider in Comcast,[77] but the city was unique among the nation's larger cities in that it lacked a wireline broadband competitor for the majority of its citizens.[78] The City sought a fiber based broadband choice for its residents.

In April 2016, after more than two years of active negotiations, Mayor Martin J. Walsh announced a partnership with Verizon to address these needs. Verizon will invest no less than $300 million in a fiber upgrade in the City of Boston over six years. This investment will bring increased competition and choice for broadband internet and cable TV services and to support Verizon's 5G rollout to Boston residents and businesses. Boston, by marshalling its assets found

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[75] NPRM/NOI ¶ 106.

[76] Jon Chesto, *Why Verizon is finally offering cable TV competition in Boston*, BOSTON GLOBE, Apr. 15, 2016, https://www.bostonglobe.com/business/2016/04/15/here-are-five-reasons-why-verizon-finally-offering-cable-competition-boston/jUL3pk8N5iFFNGHO775ERI/story.html (last visited June 15, 2017).

[77] RCN offers a competitive wireline broadband choice to under 15% of Boston's residents and provides service to approximately seven percent (7%) of Bostonians.

[78] Hiawatha Bray, *As Fios comes to Boston, Comcast holds its fire*, BOSTON GLOBE, Dec. 29, 2016 at https://www.bostonglobe.com/business/2016/12/28/fios-comes-boston-comcast-holds-its-fire/oMvpkilTHBviXleKX9N9TO/story.html (last visited June 15, 2017).

a common ground to make Verizon's investment a sound business decision. It did this by providing expedited access to public property, offering regulatory streamlining for which Verizon provided a stipend to offset additional costs, and a positive partnership environment.[79]

The new network is already offering Bostonians enormous bandwidth and speeds from Verizon, but it is also generating a healthy competitive response from other wireline and wireless broadband providers in the community.[80] Absent the city's ability to package and partner with providers using public assets and process as the city's contribution to the partnership, such a benefit could not be achieved.

The City of Portland is another example of a local government understanding its community's needs and leveraging use of its public assets as a means to meet those needs. In response to these growing unmet needs - and limited resources - the City launched the Integrated Regional Network Enterprise (IRNE) in 2002. IRNE is a collaborative effort that capitalizes on the City's varied telecommunications projects by bringing together municipal, county and State ITS fiber investments to create a redundant loop fiber system around the City.[81]

In this way, the IRNE system solved some of the City's broadband needs, but there nevertheless remained some public institutions such as the public schools and libraries which were not part of IRNE. These institutions were on an I-Net owned and operated by Comcast

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[79] Jon Chesto, *Why Verizon is finally offering cable TV competition in Boston*, BOSTON GLOBE, Apr. 15, 2016, https://www.bostonglobe.com/business/2016/04/15/here-are-five-reasons-why-verizon-finally-offering-cable-competition-boston/jUL3pk8N5iFFNGHO775ERI/story.html (last visited June 15, 2017).

[80] Hiawatha Bray, *As Fios comes to Boston, Comcast holds its fire*, BOSTON GLOBE, Dec. 29, 2016 at https://www.bostonglobe.com/business/2016/12/28/fios-comes-boston-comcast-holds-its-fire/oMvpkilTHBviXleKX9N9TO/story.html (last visited June 15, 2017).

[81] Comments of the City of Portland, Oregon, *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) (referred to herein as Portland Comments), at pp. 19-20.

Corporation pursuant to its local cable franchise.[82] To enhance service to all users of IRNE and the I-Net, Comcast and the City agreed to interconnect the two networks, which allows transmissions to originate on one network and terminate on another, thereby extending the reach of both.[83] IRNE actually increases competitive alternatives because it allows customers to reach providers who do not have the resources to build out the entire community.[84]

Relatedly, local government anchor institution networks include extensive private involvement, ranging from design, construction and deployment to procurement of equipment and operations of facilities and services. Some local government networks are publicly owned and operated, some are operated by public entities over privately leased facilities, and some are privately operated under contract for services to the local government.[85] Thus, localities have encouraged and fostered deployment in ways that would not have occurred otherwise and have used infrastructure to promote and leverage competition in their communities.

IV. AS A POLICY MATTER LOCAL RIGHT-OF-WAY PRACTICES AND CHARGES HAVE NOT DETERRED BROADBAND DEPLOYMENT OR ADOPTION; COMPENSATION FOR USE OF PUBLIC PROPERTY SHOULD BE PRICED AT FAIR MARKET VALUE

The Commission seeks comment on whether it should "enact rules, consistent with [its] authority under Section 253 of the Act, to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment."[86] In response to the

[82] Portland Comments at p. 20. The I-Net provided communications for local governmental and educational institutions, but only connected I-Net users (i.e., it only connected one school to another school or one governmental office to another governmental office).

[83] Portland Comments at p. 20.

[84] *See* Portland Reply Comments at p. 7.

[85] NATOA Comments at p. 17.

[86] NPRM/NOI ¶ 100.

Mobilitie Petition, and in prior Commission proceedings considering similar issues in 2011,[87] expert reports were submitted to address the policy questions related to pricing of public property, and to determine whether pricing or permitting discourage deployment. As discussed below, these reports demonstrate that it is best, as a policy matter, to allow market forces to dictate pricing of use of public property by telecommunications providers.

A. In a Broadband Provider's Deployment Calculus, Right-of-Way Practices Are a Minimal Factor.

Right-of-way practices are generally not a significant factor in a broadband provider's deployment calculus.[88] Local right-of-way practices add little to overall construction costs, and can reduce costs to the extent that these practices ease coordination or prevent property damage. The practices also generally do not significantly delay deployment.[89] Claims to the contrary appear to lack a sound basis. For example, in the Commission's 2011 Right-of-Way Notice of Inquiry, some providers pointed to the National Broadband Plan's statement that "[c]ollectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment."[90] This 20% figure grossly overstates reality.[91] Even taken on its own, the figure combines the costs of obtaining local government permits with the costs associated with obtaining access to utility poles (including the make-ready work, which is

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[87] *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*, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59 (Apr. 7, 2011).

[88] CTC Report; *see* also Effect on Broadband Deployment of Local Government Right of Way Fees and Practices (referred to herein as the ECONorthwest Report), Bryce Ward (July 18, 2011) attached hereto as Exhibit 3.

[89] By their nature, some issues require additional time to resolve, such as a case in which a provider seeks to place facilities in an environmentally sensitive area that requires clearances from State or federal agencies. CTC Report at p. 4.

[90] Connecting America: The National Broadband Plan, p. 109 (https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf).

[91] CTC Report at p. 14.

properly treated as an ordinary cost of construction).[92] In addition, it includes operational, post-construction costs such as pole rental fees and franchise fees. These are not deployment costs, but ordinary operating expenses.[93] Moreover, the 20% figure is not consistent with general field experience.[94]

B. There Is No Correlation Between Public Right-of-Way Fees and Broadband Deployment

Right-of-way fees do not hinder broadband deployment. In the City of Portland, for example, there was no evidence that Portland's fees have deterred, and substantial evidence that the fee structure has increased, the vitality of the communications marketplace.

Economist Alan Pearce, Ph.D., analyzed Portland's telecommunications market against the markets in various other similarly situated cities, including Charlotte, NC; Cleveland, OH; Denver, CO; and Kansas City, MO. Portland charged providers for the use of its rights-of-way, and required carriers to make "in-kind" contributions. Many of the other cities that Dr. Pearce analyzed did not impose any such right-of-way compensation requirements. Yet Dr. Pearce concluded: "An examination of the relative numbers of competitive telecommunications service providers in the comparable cities clearly demonstrates that the city of Portland has a relatively large number of competitive providers. . . . ."[95] In other words, there is no evidence that charging fees discourages deployment. A more likely explanation for the varying deployment

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[92] CTC Report at pp. 13-14.

[93] *Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997). To evaluate the relevance of these operating expenses, one would have to examine the basic operating expenses that other businesses incur in connection with their operations. A McDonalds franchisee, for example, may pay its corporate parent both a 4% of gross revenues as a service fee, and a rental charge for property is uses that may be a percentage of gross revenues. (http://www.aboutmcdonalds.com/mcd/franchising/us_franchising/purchasing_your_franchise/new_restaurants.html)

[94] CTC Report at p. 12.

[95] *See* Pearce Report.

levels is that there is simply no correlation between public right-of-way fees and broadband deployment.

C. Local Right-of-Way Practices Prevent Problems That Would Undermine Deployment and Adoption.

Local right-of-way practices also prevent problems that would otherwise undermine broadband deployment and adoption efforts. The public right-of-way is a finite resource. Because of this, if the rights-of-way were opened to all without responsible management, ultimately no one could use them effectively. The public rights-of-way are a classic example of what economists refer to this effect as a "tragedy of the commons."[96] Without local oversight, companies acting in their self-interest would deplete this limited, shared resource for their own benefit, even though this would not be in anyone's long-term interest. Accordingly, sustaining the rights-of-way as a resource for the *entire* community is a major local government responsibility.[97] Through local right-of-way practices, broadband providers can deploy their networks without disruptions; it also avoids upsetting potential broadband "adopters" in the community during the deployment process.[98]

Right-of-way pricing is also an important vehicle for ensuring that public property is used in a manner that promotes, rather than discourages deployment. While the industry would surely prefer to have free access to local property, Congress's decision not to regulate these fees reflects sound policy. Federal regulation would be disruptive and counterproductive. As the ECONorthwest Report explains, the rights-of-way are a scarce resource.[99] Today's scarcity

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[96] "The Tragedy of the Commons," Garrett Hardin, Science, 162(1968):1243-1248.

[97] *Sustainability of Our Right-of-Way,* APWA Reporter at 74 (Aug. 2010).

[98] *Verizon's Aim Gets Better*, Tampa Tribune, Feb 6, 2006, at 1 (noting that "[h]ow thousands of homeowners react to Verizon's drilling could have a powerful effect on the company's ability to sign up paying customers.").

99 ECONorthwest Report at pp. 15-18.

manifests itself in the many locations in which one service's right-of-way use inhibits the use of the rights-of-way or other properties by the same or other users. That scarcity and the associated negative spillover effects will persist into the future. Such effects may include increased excavation or construction costs, increased costs associated with design and planning, costs associated with loss-of-service attributed to construction accidents or other damage to services in the rights-of-way, increased travel time for vehicular traffic on the rights-of-way, and lost revenues for businesses whose customers are inconvenienced by right-of-way construction.

In an economy based on competition, producers and owners of goods and services with economic value typically do not give them away free. It would also subsidize providers that place facilities in the rights-of-way, creating distortions in the market. In economic markets, prices serve as signals that help society put its resources to efficient use. The Commission need only look in the mirror and its own embrace of spectrum auctions to see that rate should be at market value, for in using market value, the government agency can be assured that the government property is used for it best and highest purpose.[100] Not charging for use of a local government's rights-of-way would treat it as if it were a free good with no economic value.

Charging fees less than the value granted to the right-of-way user sends the signal that the resource is worth less than its true value. This will lead both to inefficient use of the rights-of-way and to a subsidy to the user, which will manifest itself in the form of additional burdens on the community and other right-of-way users.[101] Those additional burdens will adversely affect broadband deployment. By contrast, providing local governments flexibility in pricing—the

[100] The Commission devotes a section of its website to the most recent auction, the Broadcast Incentive Auction. https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions.

[101] ECONorthwest Report at p. 17.

flexibility envisioned and required by Section 253(c)—can encourage cooperative and efficient right-of-way uses and ultimately encourage deployment.

D. As A Basic Economic Principle, Pricing To Reflect The Value And Impacts Will Lead To Innovation, And Reward Companies That Devote Research To New Technology And Means Of Deployment.

As a basic economic principle, pricing property at less than fair market value encourages users to overuse that resource, and effectively requires others (whether taxpayers or neighboring property owners) to subsidize that use. As ECONorthwest explains:

> if a municipality is forced to sell access to its ROW at a below-market rate, then users will not fully consider the cost of accessing the ROW and will over utilize it. One form in which this overutilization could manifest itself is that existing ROW could become overcrowded, and be unable to accommodate new, innovative technologies.[102]

Indeed, one would expect that if a locality can charge fair value for use of the public rights-of-way, entrepreneurs will be incentivized to minimize unnecessary use – and will not shift a facility from one location to another for the sole purpose of avoiding rent.

E. As A Basic Economic Principle, Underpricing Property Will Not Lead To Deployment In Underserved Areas; It Will Exacerbate Existing Marketplace Inequities.

As local governments explained in response to the Commission's 2011 Right-of-Way

[102] "The Economics of Government Right of Way Fees" (referred to herein as the ECONorthwest Declaration), Dr. Kevin Cahill, Ph.D, at p. 5, Exhibit G of Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management 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 Facilities Siting*, WC Docket 11-59 (filed July 17, 2011).

Notice of Inquiry,[103] many underserved areas (not surprisingly) seek to attract providers by charging nothing for use of public property or public rights-of-way. As they also pointed out, consumers often have more choice, and better services, in areas which do charge for use of the public rights-of-way. The same factors that make property valuable in those areas also make the areas more profitable to serve. As a basic economic principle, firms will first deploy in the areas that are most profitable. Further, the areas that are most profitable under a system with market-based prices will, when public rights-of-way are underpriced, likely remain among the most profitable areas (albeit more profitable due to lower costs). Underpricing public rights-of-way, therefore, is *unlikely* to lead to increased deployment in underserved areas.

This is not a case where the Commission need step in because providers face monopolistic pricing. Communities can and do compete with one another for businesses and services, and have in fact vigorously competed for deployment of advanced infrastructure.[104] Nor is this a case where a subsidy would be consistent with the purposes of the Communications Act specifically or generally; while the goal of the Communications Act is to promote competition, it is focused on doing so through adherence to market principles, which include requiring market participants to pay market rates for resources used. Those rates, as ECONorthwest explains, are not limited to out-of-pocket costs.[105] Fair market value is the proper standard for pricing access to public right-of-way and other public property.

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[103] 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*, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59 (Apr. 7, 2011).

[104] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*; Mobilitie, LLC Petition for Declaratory Ruling, WT Docket No. 16-421, Comments of Smart Communities Siting Coalition (March 8, 2017), Exhibit 1, "Report and Declaration of Andrew Afflerbach [of CTC Technology & Energy] For the Smart Communities Siting Coalition" at p. 19.

[105] ECONorthwest Declaration at pp. 7-12.

F. Permitting Costs and Costs Associated with the Application Process are Typically Cost-Based

It is important here to distinguish between rental fees and regulatory fees.[106] A regulatory fee is typically cost-based and charged in connection with an applicant's voluntary decision to engage in a particular activity: the decision to build a bar, for example, may lead to the requirement to obtain certain licenses, require certain ongoing inspections, and may require certain actions on business termination. Generally, a locality may charge a reasonable regulatory fee to cover the cost of the regulation.[107]

The idea that a cost-based fee may be excessive and the Commission might want to step in to regulate cost-based fees, allowing certain classes of private companies to escape their full

[106] Localities may charge rents, license fees, or occupancy fees, for access to publicly-owned property, including public rights-of-way. Those rents include, for example, franchise fees for use of public rights-of-way by cable systems, *City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997), but can also include rents for the use or occupancy of rooftops, traffic lights or other structures owned by a municipality (or a municipally-owned utility). Rents may of course include provisions that recover costs, but are not limited to cost recovery. *See, e.g., St. Louis v. Western Union Tel.*, 148 U.S. 92, 99 (1892), *reh'g in City of St. Louis v. Western Union Tel.*, 149 U.S. 465 (1893).(establishing as a constitutional principle that the public may exact rents for use of public spaces); *Alpert v. Boise Water Corp.*, 795 P.2d 298, 306 (*Id*. 1990) ("the charge imposed was not a tax but was contract consideration for the franchise granted."); *City of Plant City v. Mayo*, 337 So.2d 966, 973 (Fla. 1976)("we have absolutely no difficulty in holding that the franchise fees payable by Tampa Electric are not 'taxes.…[They] are bargained for in exchange for specific property rights relinquished by the cities."); *Philadelphia v. Holmes Elec. Protective Co.*, 6 A.2d 884, 887 (Pa. 1939); *Berea College Utilities v. City of Berea*, 691 S.W.2d 235, 237 (Ky. Ct. App. 1985) ("But the consideration exacted in the ordinance is neither a tax nor a license fee; it is in the nature of an annual rental to be paid for the privilege of the use of space under the streets"); a franchise fee such as that involved is not a tax, but is instead a charge bargained for in exchange for a specific property right, i.e., rental or compensation for use of public streets.")

[107] Cost-based fees, it should be emphasized, do not need to be based on the incremental cost of regulating a particular business, or reviewing a particular application. Inspecting a restaurant for compliance with food safety laws requires that the locality have an inspector, that the inspector have the tools required to conduct the inspection, and that the inspector have the "back room" support required to submit reports, track inspections and so on. All of those are properly recoverable, although the particular method for recovery may vary from place to place. *See, e.g., City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997); *City of Paris v. Paris-Henry County Public Unity District*, 207 Tenn. 388, 340 S.W.2d 885 (Tenn. 1960) (discussing difference between fees imposed in regulatory capacity and proprietary capacity).

costs responsibilities amounts to a subsidy.[108] Moreover, the suggestion runs afoul of the statute and Constitution (which provide the Commission no authority to dictate how fees are recovered). The Commission is in any case not in a position to manage or oversee the manner in which localities account for or recover costs; any effort to do so would simply bog down the permitting system, and require adoption of a system of accounts far more burdensome than the system established for common carriers.

V. THE COMMISSION SHOULD PURSUE COLLABORATION WITH STATES AND LOCALITIES, NOT PREEMPTION

In Part III.A of the NOI, the Commission seeks comments on actions the Commission can take "to work with states and localities to remove the barriers to broadband deployment."[109] Smart Communities applauds this request. The Commission asks: "To what extent should we rely on collaborative processes to remove barriers to broadband deployment before resorting to preemption?" Our answer is simple – to the fullest extent possible. The Constitutional balance of jurisdictional interests and authorities should be respected. Federal preemption is an extraordinary and intrusive action, and it should be exercised judiciously and with the utmost restraint.

The Commission notes that its Broadband Deployment Advisory Committee (BDAC) includes members from states and localities, and it has been charged with working to develop model codes for municipalities and states, as well as considering additional steps that can be taken to remove state and local regulatory barriers.[110] The recent robust response of local elected and appointed officials to Chairman Pai's call to serve on BDAC is evidence that we understand

[108] ECONorthwest Declaration at p. 8.

[109] NPRM/NOI ¶ 111.

[110] NPRM/NOI ¶¶ 111, 112.

the need for such non-regulatory responses.[111] While Smart Communities joins with others in local government in expressing our disappointment at the composition of the BDAC,[112] we remain as committed to cooperative solutions.

VI. CONCLUSION

For the reasons discussed above, and in the expert declarations, the Commission should not continue to pursue the preemptive and regulatory measures discussed in Part III.A of this NOI, but should fully embrace cooperative efforts at promoting broadband deployment and removing barriers. In that endeavor, Smart Communities stand ready to participate.

Respectfully submitted,

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June 15, 2017

[111] Smart Communities nominated no less than five official and appointed officials and supported the nominations of several others to serve on the BDAC. We are proud that Smart Communities Member Kevin Pagan, the City Attorney of McAllen, Texas is a non-voting member of BDAC. In addition, Smart Communities are represented on the FCC Intergovernmental Advisory Council.

[112] Adam Bender and Howard Buskirk, "Local Officials Worry About BDAC Composition" Communications Daily, Vol. 37, No. 106, p. 1.