

Indian Wells
(760) 568-2611

Irvine
(949) 263-2600

Los Angeles
(213) 617-8100

Ontario
(909) 989-8584



BEST BEST & KRIEGER
ATTORNEYS AT LAW

2000 Pennsylvania Avenue, N.W., Suite 5300, Washington, DC 20006
Phone: (202) 785-0600 | Fax: (202) 785-1234 | www.bbklaw.com

Riverside
(951) 686-1450

Sacramento
(916) 325-4000

San Diego
(619) 525-1300

Walnut Creek
(925) 977-3300

Gerard Lavery Lederer
(202) 370-5304
gerard.lederer@bbklaw.com

December 20, 2017

Via ECFS

Elizabeth Bowles
Chair
Broadband Deployment Advisory Committee
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Comments in BDAC Work Efforts; GN Docket No. 17-83

Dear Chairperson Bowles:

I write on behalf of the Smart Communities and Special Districts Coalition (“Smart Communities”) to thank you for your service as chair of the Broadband Deployment Advisory Committee (“BDAC”).¹ Smart Communities is comprised of individual localities, special

¹ 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 joined to participate in the Wireless and Wireline (WT Docket No. 17-79 and WC Docket No. 17-84, respectively). The full membership of the Smart Communities and Special Districts Coalition include:

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

Elizabeth Bowles
Broadband Deployment Advisory Committee
December 20, 2017
Page 2

districts, and local government associations which collectively represent over 31 million residents in 11 states and the District of Columbia. I write to share with you and the members of the BDAC numerous filings Smart Communities made in the following proceedings:

- Mobilitie (WT Docket No. 16-421)
- Wireless Infrastructure (WT Docket No. 17-79) and
- Wireline Infrastructure (WC Docket No. 17-84)

While we are aware that the BDAC and its working groups examined these dockets in its work, little or no acknowledgement, consideration, or analysis of the substantive legal and economic issues presented appears in any BDAC work product this far. Smart Communities is especially troubled that the legal limitations on Commission actions and the engineering and economic issues outlined in Smart Communities' filings are absent from the documents released by the BDAC at its November 9th meeting. We hope that will not be the case with respect to the BDAC's final work product following your January meeting.

I. Legal Limitations

As reflected in the Smart Communities' filings attached hereto, the Commission lacks a legal foundation for adopting rules to take local government property or to establish national uniform rates for such property. As a matter of law, the Commission cannot regulate or dictate rents

Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of Michigan cities that focuses 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 represented PROTEC, MML, MTA and Public Corporation Law Section. Best Best & Krieger represented the others in the Smart Communities coalition.

Elizabeth Bowles
Broadband Deployment Advisory Committee
December 20, 2017
Page 3

charged for use of public rights-of-way or other government property or limit recovery to marginal costs as requested by many in the industry:

- Wireless services are governed exclusively by Section 332(c)(7) of the Communications Act, which grants to the courts alone the authority for determining whether a state or local government has violated its terms. Section 332's plain language makes clear it is the only provision which applies to placement of personal wireless facilities, as does the statute's legislative history. Therefore, Section 253 plays no role in wireless deployments and provides no avenue for relief where resolution of an issue would "limit or affect" local authority over decisions regarding the placement, construction, and modification of personal wireless service—as regulation of fees and rents would.
- Even were Section 253 to apply, 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. Under Section 253, a court must uphold any charge that is competitively neutral, non-discriminatory and "fair and reasonable" and charging fair market value for use of public property inherently passes those tests.
- 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.² The Supreme Court has clearly recognized a local government's "right to exact compensation" for such property uses: "permission to a telegraph company to occupy the streets.... for which the giver has a right to exact compensation, which is in the nature of rental."³ It matters not that the intrusion may be relatively slight

It is clear that the Commission is prohibited by the U.S. Constitution and not empowered by statute to regulate the value at which state and local government grant access to the property they control. Charging fair market value for access is per se reasonable, and often mandated by state and federal laws. And the Commission may certainly not limit the rate charged to cost. 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

² *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).

³ *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.").

Elizabeth Bowles
Broadband Deployment Advisory Committee
December 20, 2017
Page 4

communications, except where specifically granted. These important considerations fundamentally conflict with or render illegal many recommendations and topics addressed by the BDAC, but their consideration does not seem to have been included in BDAC discussions.

II. Engineering, Real Estate Valuation, Economic Implications of Planned Actions

Smart Communities filings called on the Commission to refrain from adopting rules that have the effect of requiring states or local governments to subsidize the business plans of service and facilities providers, or to assume risks that flow from their business plans. We made that assertion as the placement of small cells, particularly in the rights-of-way, presents significant challenges and risks to communities including:

- Increased safety risks,
- Negative impacts on adjoining property, local businesses, other utilities, and on redevelopment projects,
- Increased costs to localities for maintenance, expansion and modernization of the public right-of-way, and
- Limitations on access by pedestrians and persons with disabilities.

In an effort to assist the Commission with its data driven mandate, Smart Communities not only made the above assertions, we retained experts to provide insights into the issues and challenges posed by siting wireless devices in communities' rights-of-way. (We would also note that none of these studies was refuted by industry, despite having no less than three opportunities to do so.)

- **Andrew Afflerbach of CTC Technology & Energy:** (CTC's work has been cited by the Commission and its leaders have regularly appeared before the Commission.) The CTC Declaration reports on small cells and the challenges they present to communities. Perhaps the most important message of the CTC Declaration is that the small in small cell refers to the area served, not the size of the equipment. The CTC Declaration is attached as Exhibit 1 in Smart Communities' Mobilitie Comments (WT Docket No. 16-421).
- **Dr. Kevin Cahill, Ph.D of ECONorthwest** filed a report entitled: *The Economics of Government Right of Way Fees* (referred to herein as the ECONorthwest Declaration) ECONorthwest is a nationally recognized economics firm that has been cited in prior Commission proceedings. The ECONorthwest Declaration contains an economic analysis of the effect of limiting the amounts that may be charged for use of the public rights-of-way and concludes that the rulings sought by Mobilitie will not promote economically efficient deployment of public rights-of-way and will discourage innovation. More

B&K
BEST BEST & KRIEGER
ATTORNEYS AT LAW

Elizabeth Bowles
Broadband Deployment Advisory Committee
December 20, 2017
Page 5

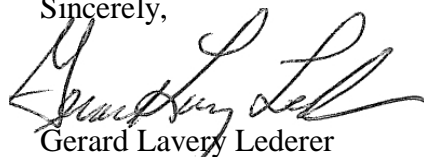
information about ECONorthwest may be found at <http://www.econw.com/>. The ECONorthwest Declaration is attached as Exhibit 2 in Smart Communities' Mobilitie Comments (WT Docket No. 16-421).

- **David Burgoyne of Burgoyne Appraisal** prepared a Report and Declaration of David E Burgoyne for Smart Communities to highlight for the Commission the potential impacts of wireless facilities on adjoining property values. The Burgoyne Declaration concludes many deployments of small cells could affect property values, with significant potential effects. Mr. Burgoyne is a licensed appraiser in Ann Arbor, Michigan. More information about Burgoyne Appraisal may be found at <https://burgoyneappraisal.com/appraisal-litigation-support/>. The Burgoyne Declaration is attached as Exhibit 3 in Smart Communities' Mobilitie Comments (WT Docket No. 16-421).
- **Steve Puuri, P.E., of Puuri Engineering, LLC**, prepared a Report and Declaration for Smart Communities regarding the impacts of placement of wireless structures in the public rights-of-way. Mr. Puuri been involved in roadway design for 25 years. The Puuri Declaration is attached as Exhibit 4 in Smart Communities' Mobilitie Comments (WT Docket No. 16-421).

III. Conclusion

A BDAC proposal that calls for Commission actions for which it lacks legal authority, or a proposal that calls on the Commission to gloss over the engineering and economic challenges posed by deployments within the rights of way, will result in litigation, not the accelerated deployment of broadband services. We continue to hope that BDAC will capture the shared interests of all levels of government in advanced wireless and wireline broadband infrastructure and offer constructive means to reach this mutually shared goal.

Sincerely,



Gerard Lavery Lederer
of BEST BEST & KRIEGER LLP

Attachments