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EX PARTE OR LATE FILED

SEP 02 1999

August 24, 1999

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Ex Parte Letter Re: Cases WT 99-217; CC 96-98

Dear Secretary Salas:

Enclosed are two (2) copies of an ex parte presentation in the above-referenced proceeding.

Very truly yours,

Lori De Luca  
Mayor

No. of Copies rec'd 0  
List ~~EX PARTE~~ OR LATE FILED

Access to Buildings/Roofs Rights of Way: The FCC's proposed rule would allow any cable or phone company to extend their wires to any tenant of a building and to place their antennas on the building roof. The goal is to allow any tenant of a building to be physically reached by any phone or cable company the tenant chooses and allow all phone and cable companies to place wires in buildings and antennas on their roofs necessary for this to occur. Building owners (including units of government) would not be allowed to prohibit this from occurring. Municipal concerns include the following:

- The rule may create major problems where municipalities are landlords, such as for housing projects. In some states seventy (70) new telephone companies have been approved to provide service. Each tenant could have a different wire, antenna and phone company.
- The rule would preempt building codes, zoning codes, safety and environmental laws that would impair placing multiple antennas of unlimited size on the roof of buildings. Private restrictions (deeds, condominiums, by-laws, homeowner association restrictions) on these antennas would be prohibited as well.
- Such preemption ignores the safety and other concerns which these items address. For example, by allowing multiple antennas of unlimited size on buildings (without screening) it invites structural problems, collapses and encourages urban blight.
- The FCC's rule in part is based upon its broad interpretation of a statutory provision allowing cable and phone companies to use "rights of way" "owned or controlled by a utility." If the FCC broadly interprets this provision to include the roofs and interiors of buildings, it may well apply it next to streets and highways to achieve the FCC's apparent goal of preempting all local telephone franchising, permitting and fees.
- It is unclear whether or how the rule will apply or be extended to municipalities that have allowed cellular antennas on their buildings or water towers. If a municipality allows one cellular antenna does the FCC contend that all types of antennas must be allowed, over the municipality's objection and without compensation?
- The FCC did not publish the proposed rule, making it much harder to provide detailed comments on it.
- The rule violates principles of Federalism where zoning and local safety concerns are exclusively reserved to municipalities. It violates constitutional property rights by taking public and private property without compensation. Congress has not given the FCC authority to take these actions.

Right of Way/Franchising Preemption: The case starts a Notice of Inquiry to compile a record on claims by phone companies that “many state and local governments continue to engage in rights-of-way management and compensation practices that the carriers believe are unreasonable, anti-competitive, and contrary to Federal law.” The FCC made new claims that it has jurisdiction over local rights of way because municipalities “regulate the entry” of cellular phone companies into the communications business (by requiring franchises or permits where cellular companies build lines in the rights-of-way to connect their cell towers); cited recent cases overturning certain aspects of municipal control over the rights of way fees and compensation; and ignored cases upholding municipal rights in this area. The FCC asked for comments regarding right-of-way management and compensation as it affects phone companies and on state legislation restricting municipal authority in this area. Municipal concerns include the following:

- Congress removed FCC authority over rights of way in 1996. The FCC is attempting to assert jurisdiction in defiance of Congressional wishes.
- Phone company claims to the FCC about municipal conduct have often been overstated or untrue. The FCC should require specific information (name of municipality, date and place) on allegations of municipal misconduct and serve such allegations on the affected municipality so it may respond. It has not done so.
- Local control of rights of way is essential for the public health, safety and welfare. Compensation by phone companies for their use is required to compensate the public for the large sums spent on highways and to prevent subsidies to telephone companies.
- Under principles of Federalism and constitutional protections against taking private or government property the FCC may not intrude in this area.

Property Taxes: The FCC similarly instituted a Notice of Inquiry on whether the assessment and collection of taxes and “other fees” are “unfair” to new telephone providers or “impede competition.” The FCC inquiry goes not only to tax structure but to whether the resulting “tax burden” on new phone companies is unreasonable or discriminatory. Cellular companies paid more than \$24 billion to the FCC in auctions for the rights to provide cellular service—the FCC appears particularly concerned by ad valorem taxes which use these auction prices to set the market value of the property to be taxed.

Municipal concerns include the following:

- Municipal taxes in this area are appropriate and fair. This is simply another attempt to reduce local tax revenues, similar to the Federal prohibition on taxes on Internet sales.
- The FCC lacks statutory or constitutional authority to intrude on state and local taxation of telephone companies.

- If the FCC believes local fees are excessive it should consider refunding a portion of the \$24 billion it raised in its auction of cellular telephone rights.

Letter to FCC: Attached is a suggested letter to the FCC opposing the proposed rule. If it meets with your approval, we ask that you send it to the FCC. Send a copy to Chairman Kennard with copies as indicated, including two copies to FCC Secretary Salas.

Filing/Contribution: We plan to file with the FCC opposing the proposed rule and supporting municipal interests on the two Notices of Inquiry. A purpose of this memo is to ask for your municipality's participation in and a \$300 contribution toward the filings. The filings will track and expand on the points set forth above and may include filings to require preparation by the FCC of an environmental impact statement and compliance with other environmentally related laws.

Please respond as promptly as possible on your communities participation. We will bill municipalities once the filings have been made. The extent of our effort, in part, will depend on the number of municipalities participating. All participating municipalities will receive copies of the filings.

We have made similar filings on behalf of many municipalities and municipal organization in the past--the cover page from comments we filed in a past FCC preemption rulemaking is attached.

Timing: To participate in comments please respond at an early date and no later than September 2 (please respond by returning the attached form).

The Firm: Varnum, Riddering, Schmidt & Howlett<sup>LLP</sup> is one of Michigan's largest law firms and is more than 100 years old. It has a substantial municipal practice and is City attorney, County attorney or Township attorney for several municipalities. It represents many municipalities as special cable and telecommunications counsel, labor counsel, bond counsel, environmental counsel and the like.

Municipal Cable/Telecommunications Practice: The firm has a national practice representing municipalities on cable and telecommunications matters. It has represented more than 200 municipalities on such matters. It has represented entities such as the National League of Cities, National Association of Telecommunications Officers and Advisors, U.S. Conference of Mayors, National Association of Counties, Michigan Municipal League and Ohio Municipal League in comments to the FCC opposing preemption of local authority in various proceedings. You may wish to check the firm's web page at [www.vrsh.com](http://www.vrsh.com).

Questions/Further Information: If you would like a copy of the FCC's notice in this case or have questions on substantive matters contact Patrick Miles or John Pestle at 616-336-6000. Logistical and administrative questions can be addressed to Ms. Kim Van Dyke at 616-336-6743.

Access to Buildings/Roofs Rights of Way: The FCC's proposed rule would allow any cable or phone company to extend their wires to any tenant of a building and to place their antennas on the building roof. The goal is to allow any tenant of a building to be physically reached by any phone or cable company the tenant chooses and allow all phone and cable companies to place wires in buildings and antennas on their roofs necessary for this to occur. Building owners (including units of government) would not be allowed to prohibit this from occurring. Municipal concerns include the following:

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August 24, 1999

Chairman William Kennard  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

RE: *Ex Parte Filing* in cases WT 99-217; CC 96-98

Dear Chairman Kennard:

Please do not adopt the rule proposed in these cases allowing any phone company to serve any tenant of a building and to place their antenna on the building roof. In some states, 70 or more new phone companies have been certificated to provide service. Add in the wireless phone companies, and under your rule you may have 100 companies allowed to place their wires in a building, and their antennas on the roof – all without the landlord's permission.

The FCC lacks the authority to do this. It would violate basic property rights – a landlord, city or condominium has the right to control who comes on their property. Congress did not give the FCC the authority to condemn space for 100 phone companies in every building in the country. The FCC cannot preempt state and local building codes, zoning ordinances, environmental legislation and other laws affecting antennas on roofs. Zoning and building codes are purely matters of state and local jurisdiction, which under Federalism and the Tenth Amendment you may not preempt.

For example, building codes are imposed in part, for engineering related safety reasons. These vary by region, weather patterns and building type; such as the likelihood of earthquakes, hurricanes, and large amounts of snow and ice. If antennas are too heavy or too high, roofs collapse. If they are not properly secured, they will blow over and damage the building, its inhabitants, or passers-by.

Similarly, zoning laws are matters of local concern which protect and promote the public health, safety, and welfare; ensure compatibility of uses; and preserve property values and the character of our communities. We may restrict the numbers, types, locations, size, and aesthetics of antennas on buildings (such as requiring them to be properly screened) to achieve these legitimate goals, yet see that needed services are provided. This requires us to balance competing concerns, which we do every day, with

success. Everyone wants garbage picked up, but no one wants a landfill. Everyone wants electricity, but no one wants a substation near his or her home.

The application of zoning principles is highly dependent on local conditions. These vary greatly state by state, from municipality and within municipalities. We have successfully applied these principles and balanced competing concerns for eighty years. Zoning has not unnecessarily impeded technology or the development of our economy, nor will it here. There is simply no basis to conclude that for a brand-new technology (wireless fixed telephones) with a minuscule track record, that there are problems on such a massive scale with the 38,000 units of local government in the U.S. as to warrant Federal action.

On rights-of-way, local management of them is essential to protect the public health, safety, and welfare. Congress has specifically prohibited you from acting in this area. We believe the telephone providers' complaints about rights-of-way management and fees are overblown, as shown by the small number of court cases (only about a dozen nationwide in the three years since the 1996 Act). With 38,000 municipalities nationwide and thousands of phone companies, this number of cases indicates that the system is working, not that it is broken.

Finally, we are surprised that you suggest that the combined Federal, State, and Local tax burden on new phone companies is too high. The FCC has no authority to affect state or local taxes any more than it can affect Federal taxes.

For these reasons, please reject the proposed rule and take no action on rights-of-way and taxes.

Sincerely,



Lori DeLuca  
Mayor

C: Commissioner Harold Furchtgott-Roth  
Commissioner Michael Powell  
Commissioner Gloria Tristani  
Commissioner Susan Ness  
Ms. Magalie Roman Salas, Secretary, FCC  
Mr. Jeffrey Steinberg, Wireless Telecommunications Bureau  
Mr. Joel Tauenblatt, Wireless Telecommunications Bureau  
International Transcription Services  
Mr. Kevin McCarty, U.S. Conference of Mayors

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Ms. Barrie Tabin, National League of Cities  
Mr. Robert Fogel, National Association of Counties  
Mr. Lee Ruck, NATOA  
Mr. Thomas Frost, BOCA International