Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act	)	GN Docket No. 09-47
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act	)	GN Docket No. 09-137

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January 27, 2010

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SUMMARY

Some broadband providers hope to use the Broadband Plan to obtain a financial windfall. They are attempting to grab taxpayer property at little or no cost to the companies or their stockholders. These same companies are also seeking “first among all” regulatory privileges to intrude on public rights-of-way to the disadvantage of all other right-of-way users. The Commission must resist these efforts and the related temptations to decide what states and local governments may charge for use of local taxpayer property, including rights-of-way; and to impose, as some companies urge, an artificial restraint on fees tied to some ill-defined and arbitrary concept of the “cost of managing” the rights-of-way.

There is no evidence that limiting fees for use of public property will make broadband more available or affordable for consumers. However, if the Commission issues any pronouncement that fees for rights-of-way or other public resources must be limited to “costs of management” or must be “cost-based;” or if it opines on what is “fair and reasonable compensation” for use of rights-of-way; local governments anticipate immediate and scorching damage to their budgets and to our ailing economy. We expect the broadband providers, consistent with their historic behavior, to immediately stop paying any fees that they unilaterally decide are not within the Commission’s formulation. State and local government will face the immediate loss of these revenues and the additional expense of extended and expensive litigation to recoup the non-payments in multiple courts. Hundred of millions of dollars will instantly disappear from state and local budgets, and thousands of state and local jobs – teachers, police, firefighters and others – will be lost. The entire state of Texas, for example, charges right-of-way fees to telecommunications providers based on a state law-mandated per-line charge that is not cost-based. Those charges replaced traditional telephone franchise fees. In Dallas alone, using the Obama administration’s stimulus metrics, more than 300 public service jobs, and more

than 250 other jobs in the private sector could be lost. In addition to the massive revenue and employment losses, establishing a federal requirement that right-of-way fees be tied to some calculation of costs would also impose an unfunded mandate to direct scarce state and local government resources to comply with the new regulatory regime, diverting funds from job creation and job maintenance. There is no guarantee that this would add one broadband subscriber or cause one additional mile of construction of broadband facilities. There is considerable evidence it would not. Indeed, funding that state and local governments use to provide broadband to schools, fire stations, police stations, and community centers will disappear: the result is likely to be less, not more broadband.

Many national publications have recently recognized that weaknesses in local and state budgets threaten the entire economic recovery. If the Commission were to embark on anything like this course (and there are many legal and policy reasons why it should not), the Commission must acknowledge the disruption that would be caused and the financial impact that would follow from setting a national standard, and demonstrate that it is willing to impose obligations on the providers that generate benefits which outweigh the costs to the individual public servants that will be asked to sacrifice their jobs in the name of the National Broadband Plan. The FCC does not have evidence of either the costs or the benefits. And it has not even sought comment on what the quid pro quo should be for establishment of the federal conditions, or what the conditions themselves should be.

There is no credible or reliable evidence before the FCC that local fees for rights-of-way or other property, or right-of-way management practices, present a significant barrier to broadband deployment. Even more compellingly, assuming cost-based fees would reduce costs to providers, there is no evidence that the reduced costs would actually result in additional deployment. The data and economic theory suggest the reverse. Reducing costs to broadband providers may result in increased executive bonuses, increased stockholder dividends, additional mergers and other passive investments. It will not result in more broadband deployment in underserved areas – at least, not unless the FCC were to attach stringent buildout requirements on providers as a quid pro quo. The very existence of the need for a National Broadband Plan is driven by the unwillingness of the commercial providers to deploy the new broadband networks in underserved areas. The industry shows no inclination, absent federal or local buildout requirements, to engage in such projects. Attempting to toss money at corporations without clear conditions and a clear quid pro quo is a recipe for enriching the rich at the expense of the ordinary taxpayer. If the goal is to artificially reduce corporate costs in the hope that the corporations may expand broadband deployment, it is a foolish goal, unsupported by experience or sound economics, and in today's state and local government economic environment, a formula for disaster.

Broadband policy has thus far pursued a "trickle down" approach: utilities have obtained significant benefits in the form of increased and rapid depreciation deductions that reduce effective tax rates or justify higher rates to consumers, reduced regulation, and other incentives. But there have been few social or regulatory obligations enforced to require deployment of broadband. The current proceeding puts the lie to the plaintive argument that deployment will happen if providers are given enough benefits. The experiment has been tried, and has not succeeded.

There are alternatives. If the FCC concludes that cost is a barrier to deployment in some areas, the economically sound course would be for the federal government to provide directed subsidies in return, and only in return, for actual enforceable promises of deployment. Dollars spent must lead to results. As importantly, the nation's local governments have worked, and continue to work, to encourage broadband deployment and adoption; they are enthusiastic partners in the Commission's efforts to ensure that this nation is served by a modern, high bandwidth system that supports innovative applications and spurs development of new business. By encouraging and providing a forum for local governments to develop and exchange best practices, the Commission could create a pool of shared knowledge that will result in more and faster broadband deployment. Broadband deployment can be spurred if local governments are encouraged to act as market participants, to freely exchange assets, and to consolidate "anchor tenants" in return for enforceable promises by broadband providers to deploy.

These are the courses the Commission ought to pursue. The Commission need not and should not in this proceeding, or any other, impose risky and costly federal standards on local governments for management and compensation for use of public property.

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REPLY COMMENTS ON NBP PUBLIC NOTICE #30 OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS ("NATOA"); TEXAS COALITION OF CITIES FOR UTILITY ISSUES ("TCCFUI"); MONTGOMERY COUNTY, MARYLAND; CITY OF CHARLOTTE, NORTH CAROLINA; CITY OF DUBUQUE, IOWA; TOWN OF PALM BEACH, FLORIDA; CITY OF HOUSTON, TEXAS; ANNE ARUNDEL COUNTY, MARYLAND; CITY OF LOS ANGELES, CALIFORNIA; PRINCE GEORGE'S COUNTY, MARYLAND; CITY OF BOSTON, MASSACHUSETTS; CITY OF SEATTLE, WASHINGTON; CITY OF DALLAS, TEXAS; AND CITY OF PORTLAND, OREGON

INTRODUCTION

The National Association of Telecommunications Officers and Advisors ("NATOA"); Texas Coalition of Cities For Utility Issues ("TCCFUI"); Montgomery County, Maryland; City of Charlotte, North Carolina; City of Dubuque, Iowa; Town of Palm Beach, Florida; City of Houston, Texas; Anne Arundel County, Maryland; City of Los Angeles, California; Prince George's County, Maryland; City of Boston, Massachusetts; City of Seattle, Washington; City of Dallas, Texas; and City of Portland, Oregon ("the Parties"), through their undersigned counsel, respectfully submit these comments in response to the Commission's Public Notice, DA 10-61, released Jan. 13, 2010.[**/]

The Parties have closely monitored and actively participated in many of the activities undertaken by the Commission since it initiated this proceeding by Notice of Inquiry dated April 8, 2009. They welcome the opportunity to make this final set of reply comments to address several important matters raised in this proceeding, and to address comments made by others parties during the course of these proceedings. While the proceeding raises many issues of concern to local governments – many of which have been addressed in prior filings - these comments will focus on issues raised in this proceeding with respect to the use and management of publicly-owned property, including public rights-of-way, and also facilities and structures such as conduits, light poles, rooftops and the like.

There is no credible evidence in this proceeding that broadband deployment is being deterred in any significant way by local right-of-way management policies, or by fees for use of rights-of-way or other public property. Nevertheless, several commenters have asked the FCC to establish a major new federal regulatory regime with unfunded mandates aimed not at providers of services and facilities but at local governments.[1] These commenters generally argue that the

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[**/] These reply comments are filed in response to: A National Broadband Plan For Our Future, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009); Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan For Our Future, GN Docket Nos. 09-157, 09-51, Notice of Inquiry, FCC 09-66 (rel. Aug. 27, 2009); NBP Public Notice # 7, Comment Sought On The Contribution Of Federal, State, Tribal, And Local Government To Broadband, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2122 (rel. Sept. 25, 2009); NBP Public Notice # 11, Comment Sought On Impact Of Middle And Second Mile Access On Broadband Availability And Deployment, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2186 (rel. Oct. 8, 2009); NBP Public Notice # 12, Comment Sought On Cost Estimates For Connecting Anchor Institutions To Fiber, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2194 (rel. Oct. 8, 2009); NBP Public Notice # 25, Transition from Circuit-Switched Network to All-IP Network, GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2517 (rel. Dec. 1, 2009).

[1] Qwest makes the inaccurate claim that Section 253 was enacted because: "[e]xperience shows that municipal monopoly control, when not carefully circumscribed, leads to burdensome right-

Commission has authority under 47 U.S.C. § 253 to regulate directly local and state management of rights-of-way and other property, and to regulate charges for use of rights-of-

of-way regulations and fees, which frustrate and undermine the development and advancement of a nationwide broadband infrastructure." Comments of Qwest Communications International Inc., GN Docket No. 09-51 at 27 (June 8, 2009), *see infra*, Part I. Qwest refers to suits it has filed against local governments over right-of-way issues in New Mexico, Maryland and St. Louis. *Id*. at 29-31. While Qwest has been an active litigant, it is perhaps more accurate to say that it has demanded that public property be provided to it for the cost of permits, and is here asking the Commission to essentially create a permanent federal subsidy for itself. It is notable that in the case in which Qwest had the opportunity to show that local right-of-way fees or management practices had a prohibitory effect on deployment, it was unable to identify any service it had been prevented or even deterred from providing. *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1256 (D. Or. 2002); *see also Time Warner Telecom of Oregon, LLC v. City of Portland*, 322 Fed. App. 496 (9th Cir. 2009). Level 3 references "unreasonable franchise fees" and "lengthy negotiations" without any verifiable examples. Comments of Level 3 Communications, LLC, GN Docket No. 09-51 at 19 (June 8, 2009). Level 3 has filed a separate petition in regard to the right-of-way rents charged by the New York State Thruway Authority (Public Notice, *Wireline Competition Bureau Seeks Comment on Level 3 Communications' Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253*, DA 09-1878, WC Docket No. 09-153 (Released Aug. 25, 2009)), but even if Level 3's claims with respect to that authority were accurate, Level 3 is the successor in interest to a prior operator that was ready, willing and able to enter into the contract and provided services successfully under the freely negotiated contract with NYSTA. These facts hardly indicate a significant or serious problem. USTA claims that "there is a large and diverse body of record evidence in numerous proceedings that details how exorbitant costs associated with access to essential infrastructure, such as rights-of-way, have a negative impact on broadband deployment." Comments of the United States Telecom Association, GN Docket No. 09-51 at 4 (Sept. 24, 2009). However, USTA's examples of this "large and diverse body of record evidence" concerning *rights-of-way* were all but absent – just one citation to a Commission report (*Rural America, Report on a Rural Broadband Strategy*, May 22, 2009) that concluded that "[t]imely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas." *Id*. at 2, 4-5. In a November 2009 filing, Sunesys made claims that the Commission urgently needed to act to "clarify the standards related to timely and reasonably priced access to necessary governmental rights-of-way" without offering any evidence of its own as to the alleged problems, but instead relying on the Level 3 petition and comments made by others in that proceeding. Comments of Sunesys, LLC-NPB Public Notice #7, GN Docket No. 09-51, at 4 (Nov. 6, 2009). The Massachusetts Broadband Institute claims, also without offering evidence, that "[t]he difficulties involved in negotiating and gaining access to the rights-of-way often prove to be the greatest impediment to the efficient, cost-effective, and timely deployment of broadband." Massachusetts Broadband Institute, *ex parte* at 2 (Jan. 8, 2010).

way and other local property.[2] Others have asked the Commission to make Section 253 rulings affecting local right-of-way management and fees related to deployment of specific technologies.[3] The Section 253 arguments are not only misguided as a matter of law, but are

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[2] Sunesys urges the Commission to issue rulings and clarifications to resolve a number of alleged areas of disagreement or uncertainty regarding Section 253. Comments of Sunesys, LLC-NBP Public Notice #7, GN Docket No. 09-51 at 5-11 (Nov. 6, 2009). Qwest asks the Commission to issue authoritative rulings on Section 253 issues and to "reassert" its authority in the wake of recent "dangerous" Circuit court holdings in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2009) and *Level 3 Comm., LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007). Comments of Qwest Communications International, Inc., GN Docket 09-51 at 26-33 (June 8, 2009). The claims Qwest makes here are very similar to those it made without success in asking the Supreme Court to review those "dangerous" rulings, *viz,* that the rulings sharply depart from other precedents and reflect a massive confusion in the courts. But as the Supreme Court's rejection of the requests suggests – and as filings by the Solicitor General indicate – these claims are based on a gross distortion of the case law. *Time Warner Telecom v. City of Portland*, No. 06-36023, slip. op. at 4, 2009 WL 965816 ¶ 1 (9th Cir. Apr. 8, 2009). *Level 3 Communications, LLC v. City of St. Louis* and *Sprint Telephony PCS v. San Diego County*, U.S. S.Ct. Docket Nos. 08-626 and 08-759, Brief for the United States as Amicus Curiae ("St. Louis Amicus Brief") at 8. Level 3 seeks a ruling on permit issuance. Comments of Level 3 Communications LLC, GN Docket No. 09-51 at 20 (June 8, 2009). ("In order to avoid delays, the Commission should issue a rule that requires states and municipal governments to issue permits for the construction of broadband networks before a franchise agreement is in place. The important objective is to deploy broadband networks as quickly as possible and the Plan should not allow unreasonable compensation demands to thwart that goal.") Level 3 does not provide specific examples of the problem it claims must be addressed. What is clear is that on more than one occasion, Level 3 was allowed into the market, and then refused to pay the rents it agreed to pay, often years after the relevant contracts were filed. *Level 3 Comm., LLC v. City of St. Louis*, 473 F.3d 528 (8th Cir. 2007). The effect of allowing entry first and then allowing for compensation to be resolved later is to give providers an incentive to litigate – since it would delay payment obligations.

[3] While a number of distributed antenna system ("DAS") providers (*for e.g.*, NextG at 9-11 (Sept. 3, 2009); Comments of NewPath at 6-9 (Sept. 30, 2009); Comments of ExteNet at 6-7 (Sept. 30, 2009)) claim municipalities are a deterrent to distributed antenna system deployment, and provide some limited anecdotal evidence of apparent disputes with municipalities, it appears the perceived problems identified may stem from the fact that DAS providers contend that neither they nor their technology are covered by existing right-of-way and zoning rules. But if DAS providers refuse to follow local rules, or claim that rules do not apply, they can hardly complain when the result is that local communities must take the time to examine the technology to determine whether different rules *should* apply, and what those rules should be (the technology used by DAS can be highly intrusive, aesthetically disruptive, and in some cases unsafe because of the substantial additional obstructions and overhead extensions required to existing structures in the rights-of-way). Nor do the claimed differences in the technology justify the Commission establishing uniform national standards for right-of-way engineering,

based on errors of fact as shown by three studies attached to these comments. The first by Drs Ed Whitelaw and Bryce Ward of ECONorthwest ("ECONW") explains that charging fair market value for property encourages effective broadband deployment, and that setting prices based on operating or management costs (as some providers propose) would result in a subsidy, at the expense of the public, and is inconsistent with sound economics. Attachment A, "Economic Principles of Charging Fees To Access Government Trust Properties." Dr. Connie Book prepared a second study, which examines the effect of state laws that were designed to reduce alleged barriers to entry caused by broadband deployment. She finds that those laws have not resulted in significant deployment to underserved areas, while local involvement has promoted broadband deployment. Attachment B, "Effects Of Reducing Local Control On The Availability And Affordabilty Of Broadband." Finally, Garth Ashpaugh of Ashpaugh & Sculco describes the work that can be involved in developing cost-based rates, and shows that requiring rates to be based on costs will impose significant unfunded mandates on local government, and result in significant litigation and pricing confusion. That is, it will create problems, not solve them. Attachment C, "Issues Associated With Developing Cost-Based Prices For Use Of Public Rights Of Way And Other Property."

Taken together, the information presented in these comments and the reports demonstrate:

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construction, use or other specific regulations restricting the local community's ability to manage the deployment of DAS technology in their rights-of-way. Comments of NewPath at 11-12 (Sept. 30, 2009); Comments of NextG at 11-16 (Sept. 30, 2009); Comments of ExteNet at 9 (Sept. 30, 2009). In fact, given that the Commission has not a single civil engineer position designated on its staff, nor any practical experience in right-of-way management, it is precisely in such circumstances that the Commission ought to ensure that those who *do* have the experience can examine the technology and its interaction with other right-of-way requirements, and bring that experience to bear. The Commission does that not by supplanting local government, or by adopting federal rules; it does that by partnering with other entities in our federal system of government *see infra*, Part II.

- There is no evidence that local or state permitting practices, or local or state requirements for compensation, are prohibiting or creating significant barriers to broadband deployment. The evidence instead demonstrates that localities have spurred broadband deployment by using their police power authorities and contract rights related to use of public property to require reasonable build-out. Indeed, markets where local governments license the use of right-of-way, charge fair market value to all users for use of the rights-of-way, and adopt permitting procedures applicable to a wide range of providers are among the most competitive and well-served markets in the country.

- Establishing federal standards for right-of-way permitting or compensation – even if lawful (and we do not believe it is) – will not increase broadband deployment (providers will simply cherry pick high revenue areas), but there is an immediate risk that it will shift costs to other right-of-way users and local taxpayers, and reduce revenues for local governments. The effect will be lost jobs and declining public services, with no commensurate increase in broadband service – thousands of lost jobs, and of course, less money for government to spend for any purpose, including, broadband services, or installing broadband facilities. The potential deterrent effect on deployment by local governments is significant, because materials presented to the Commission demonstrates that local governments play a significant role, and can play an even greater role in making broadband available to communities, and to key institutions like schools, community centers and police and fire stations, *see n. 4, infra.*

- Basic economics teaches that allowing local governments to obtain fair market value for use of local resources is the most efficient way to allocate the limited right-of-way resource. Pricing right-of-way and other property in a manner that forces broadband providers to internalize their costs of deployment is the most effective and sustainable policy to further broadband deployment. There is no reason to subsidize providers using right-of-way to the disadvantage of providers using wireless technologies. Factually, there is no reason to fear that governments will use alleged "monopoly control" over rights-of-way to discourage broadband entry. The contrary is true: as explained in the ECONW Report local governments have substantial incentives to encourage local development and to ensure good services are available to the public. They have no incentives to price facilities to discourage deployment. Further, limiting local governments' ability to obtain fair market value for property used will subsidize and encourage entry into markets where property is most valuable – that is, the high density urban markets – and make it even less likely that broadband will be deployed in the rural markets.

- Many local governments are using their assets – property, poles, conduit and fiber – in creative ways to bring services to local anchor institutions and to introduce a measure of competition in the market. The FCC can best encourage this continued activity by affirming that this local and state government activity is a valuable contribution to the broadband plan – and by making it clear that it will not interpret federal law in a manner that discourages these activities – which would be the result of reading Section 253 as urged by some of the commenters.[4]

Finally, the FCC must also recognize that, setting aside the questionable legality of the Section 253 interpretations advocated by some, any regime that is aimed at regulating local and state governments and establishing a single, national standard for permitting or compensation will necessarily add significantly to the regulatory costs of entry. Both providers and local jurisdictions will be hurt by this unnecessary cost. Such a scheme would ignore new conditions, and instead lock localities into Washington D.C.'s 2010 view of public property management and compensation – until Washington gets around to changing its approach. The DAS industry petition, cited above in n.3, is a perfect illustration of the problem with this approach: if Washington establishes permitting standards, those standards will control regardless of whether they are appropriate in particular circumstances. Every deviation would either expose a locality to litigation, or require a petition to the FCC. That is a formula for stultification and delay, not deployment.

I. ESTABLISHING FEDERAL COMPENSATION AND PERMITTING STANDARDS IS UNLAWFUL, WOULD DETER BROADBAND DEPLOYMENT, AND INCREASE UNEMPLOYMENT.

A. The FCC Has No Authority to Establish National Permitting or Compensation Standards To Encourage Broadband Deployment.

1. The FCC Has Previously Recognized That It Does Not Have Jurisdiction Generally Over Public Property.

As the D.C. Circuit recently reminded the Commission:

> The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." The Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it

[4] *See* Comments of NATOA, *et al.*, GN Docket Nos. 09-47, 09-51, 09-137 (Nov. 6, 2009); Comments of the City and County of San Francisco on National Broadband Plan Public Notice #7, GN Docket Nos. 09-47, 09-51, 09-137 (Nov. 6, 2009).

> by Congress." Hence, the FCC's power to promulgate legislative regulations is limited to the scope of authority Congress has delegated to it.

American Library Ass'n. v. FCC, 406 F.3d 689, 698 (D.C. Cir. 2005) (citations omitted). Courts have long held that an agency exceeds its authority when, acting through an entity that is subject to the agency's jurisdiction, it attempts to regulate a third party or that third party's property – even when the regulation might advance salutary regulatory goals.[5]

The Commission recognized this principle in *California Water & Tel. Co.*, 40 R.R.2d 419 (1977), a case decided before the adoption of the Pole Attachment Act,[6] whose provisions, as amended, now appear at 47 U.S.C. § 224:

> 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*.

Id. at ¶ 15 (emphasis added). The Commission recognized that the Communications Act of 1934 applied to "communication by wire or radio" and to "all persons engaged . . . in such communication or such transmission . . . ." 47 U.S.C. § 152(a). Thus, absent a specific authorization, the Commission would not have authority to regulate property merely because the property is useful in the delivery of communications services.[7] Congress agreed with the Commission's view, and in 1978, Congress enacted the Pole Attachment Act, "to establish jurisdiction within the [Commission] to regulate the provision by utilities to cable television

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[5] *See, e.g., Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945); *New England Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 173-74 (1st Cir. 1989).

[6] 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.

[7] Of course, the FCC may exercise ancillary jurisdiction over various communications by wire. However, as the court in *American Library Association* noted, 406 F.3d at 700, when the matter the agency seeks to regulate is not encompassed by the agency's general jurisdictional grant, it creates an "insurmountable hurdle" to the assertion of ancillary jurisdiction. That is certainly the case with respect to regulation of public property.

systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities."[8] Certain utilities – including state and local utilities – are not subject to regulation under the Pole Attachment Act, and the Commission has no authority, and has never exercised authority with respect to such utilities, their poles, their conduits, or their rights-of-way. The conclusions of the Commission in *California Water & Telephone* apply with equal force now. If the Commission needed express authority from Congress to regulate property controlled by municipally-owned utilities, it likewise must have explicit authority to regulate other municipally-owned property.[9]

2. Section 253 does not supply that authority.

Section 253 does not supply the authority that is otherwise clearly absent in the Act, particularly here, where commenters are urging the Commission to take actions to encourage broadband deployment.

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[8] S. REP. 95-580, 95th Cong., 1st Sess. at p. 1.

[9] In the legislative history to the Pole Attachment Act, Congress was careful to point out that it was not expanding the Commission's general jurisdictional grant:

S. 1547, as reported, would not require the Commission . . . '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.' The communications space must already have been established, meaning that FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC catv pole attachment jurisdiction.

S. REP. No. 580, 95th Cong., 1st Sess. at 124. Only in 1996 did Congress expand Section 224 to include a right of nondiscriminatory access, and even that right does not extend beyond privately-owned "utilities."

(a) Section 253 does not apply to broadband.

Section 253(a) is narrowly focused on statutes, regulations, or legal requirements similar to statutes and regulations that "prohibit" or "have the effect of prohibiting" the ability to provide telecommunications service:

> 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.

47 U.S.C. § 253(a). Congress enacted Section 253 to uproot state and local regulatory systems that preserved *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. § 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.

Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88, 97-98 (1st Cir. 1999); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part) ("Congress ended the States' longstanding practice of granting and maintaining local exchange monopolies.").[10] In other words, Section 253 scope is limited: it reaches statutory and regulatory prohibitions on the ability to provide telecommunications services, and nothing else. The Telecommunications Act of 1996, at Section 601(c), 47 U.S.C. § 152 nt., cements this narrow interpretation by providing that nothing in the Act or the amendments to the Act shall be construed to "modify, impair or supersede" state or local law unless expressly so provided in the Act.[11]

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[10] Qwest's claim that Section 253 was concerned with right-of-way pricing is not supported and is actually contradicted by this legislative history, as further explained *infra*.

[11] Congressional intent to preempt must be "absolutely certain" and "unmistakably clear." *Gregory v. Ashcroft*, 501 US 452, 464, 476 (1991). Statutes that preempt must be read narrowly.

This proceeding does not simply involve telecommunications services. Its focus is on broadband facilities and on broadband services – including, primarily, services that the Commission has broadly classified as "information services." In *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002), *aff'd.*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005), the FCC rejected the notion that such services were telecommunications services. Under those decisions, many broadband providers avoided obligations that would otherwise apply to telecommunications service providers under Title II. These providers cannot now claim that they are entitled to the benefits of Section 253. [12]

(b) Even where Section 253 does apply, it does not give the agency authority to set national permitting standards, or to set national compensation standards.

Section 253(a) does one thing: it preempts local laws that prohibit the ability of a person to provide telecommunications services. The section imposes no affirmative duty on the part of a state, a local government, or a private party to contribute property to providers to make it easier to provide telecommunications services, or to afford them any special treatment. *Cablevision of Boston, supra*. Section 253(d) confines the Commission's authority with respect to issues arising

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Cipollone v. Liggett Group, Inc., 505 US 504, 516 (1992); *Medtronic, Inc. v. Lohr*, 518 US 470, 485 (1996). There is a duty "to accept the reading that disfavors preemption." *Bates v. Dow Agrosciences, LLC*, 125 S. Ct. 1788, 1801 (2005); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). In this case it is absolutely clear that Congress did not mean to preempt.

[12] Of course, the Commission may, at some point, revisit the *Brand X* decision and subsequent decisions, but until and unless it does so, Section 253 has no application to "information services." Level 3 dances around the issue by referencing Section 253's prohibition language – no local legal requirement "may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service." – and then stating: "Insofar as broadband services are acknowledged to be interstate in nature, it is critical that the Commission remove barriers that exist to the deployment of broadband services by virtue of unbalanced rights of way statutes or ordinances." Comments of Level 3 Communications LLC, GN Docket No. 09-51, at 18 (June 8, 2009).

under Section 253: the Commission is permitted to "preempt the enforcement" of a particular offending statute "after notice and comment" and then only where a case involves only Sections 253(a) and Section 253(b). The Commission thus has no authority to set rates for access to, or to establish the terms and conditions for access to public property, generally – its authority in that respect remains exactly what it has been.

Further, most of the issues raised in the comments relate to management of the public rights-of-way and charges for use of the rights-of-way. Section 253(c) makes it clear that *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" for use of the public rights-of-way, even where doing so would have a prohibitory effect. Section 253(d), when discussing the scope of the Commission's authority, mentions Sections 253(a) and (b), but explicitly excludes Section 253(c), leading the three circuit courts that have discussed the issue to conclude that Congress deliberately and expressly stripped the Commission of jurisdiction to decide issues arising under Section 253(c). *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1177 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *see also Sw. Bell Tel., L.P. v. City of Houston*, 529 F.3d 257 (5th Cir. 2008).

Those decisions are supported by clear legislative history. As Senator Feinstein explained, an earlier version of Section 253(d) would have empowered the Commission to resolve disputes under all subsections of the statute:

> The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC. That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist at the FCC, on what may be very broad questions of State or local government rights. . . . If the preemption provision remains, a city would be forced to challenge the FCC ruling to gain a fair hearing in Federal court. This is important because presently they can go directly to their local Federal court. Under the preemption, a city, State, or

> county government would have to come to the Federal court in Washington after an appeal to the FCC…

141 Cong. Rec. S8170-71 (daily ed. June 12, 1995). Accordingly, Senator Feinstein proposed striking subsection (d) in its entirety. *Id.* As a compromise, Senator Gorton offered a second-degree amendment that removed subsection (c) from Section 253(d), revising subsection (d), so that FCC jurisdiction extended only to subsections (a) and (b), not subsection (c). *Id*. at S8306. He indicated he agreed with Senator Feinstein and Senator Kempthorne regarding "control by cities and other local communities over their own rights-of-way, an area in which their authority should clearly be preserved." 141 Cong. Rec. S8212 (daily ed. June 13, 1995). Senator Gorton also clearly explained the effect of his amendment:

> There is no preemption . . . for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition from [Senator Feinstein and Senator Kempthorne] that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.

Id. at S8213. Senator Gorton's amendment was adopted by unanimous consent. *Id*. at S8308.

Interestingly, Senator Feinstein and Senator Kempthorne were not merely concerned about the burdens local governments must endure to defend their actions in Washington, DC. They were also concerned about whether the Commission or the local government would be entitled to deference when a court reviews local right-of-way decisions:

> A city appealing an adverse ruling by the FCC would appear before the D.C. Federal Appeals Court rather than in the Federal district court of the locality involved. *Further, the Federal court will evaluate a very different legal question—whether the FCC abused their discretion in reaching its determination.* The preemption will force small cities to defend themselves in Washington, and many will be just unable to afford the cost. By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review *whether the city or State acted reasonably* under the circumstances.

141 Cong. Rec. S8171 (daily ed. June 12, 1995) (statement of Sen. Feinstein) (emphasis added). When industry commenters argue that the FCC should adopt national compensation or permitting standards, *precisely because (they claim) those standards would be entitled to deference*, they are, in effect asking the Commission to do what Congress said it did not want the Commission to do. Moreover, the Commission is not being asked to preempt on a case-by-case basis, as permitted when it may hear a case under Section 253(d); it is being asked to affirmatively establish the terms and conditions for access to property and for management of that property, something it specifically *cannot* do under Section 253, and which it is not empowered to do under any other provision of the Act.

Congress might have attempted to draft Section 253 to mandate access to all state or local government property and to dictate federal rental terms for its use. But Congress did no such thing. Section 253 neither mandates access to all State and local property, nor gives the FCC the power to regulate price terms. The legislative history reflects this:

> [W]e should be with out local city mayors, our local city councils, because we are for true Federalism, we are for returning power as close to the people as possible, and that is what the Stupak-Barton amendment does. It explicitly guarantees that cities and local governments have to right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way. It does not let the city governments prohibit entry of telecommunications services providers for pass through or for providing service to their communities. [but]. . . 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.

141 Cong Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Barton).[13] Structurally, Section 253(c) does not authorize the Commission to take any action. It protects "fair and reasonable" compensation from preemption by the courts, even if that compensation is established by a statute that otherwise prohibits or effectively prohibits the ability to provide

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[13] Congress adopted the Stupak-Barton amendment by a lopsided 338-86 margin. 141 Cong. Rec. H8477.

telecommunications services within the meaning of Section 253(a). The Commission is not authorized, as it is under Section 201, to set rates or review them; the authority to set rates is thus left to states and localities. It follows that the Commission cannot dictate the method that must be used to set fair and reasonable rates. Such and action necessarily assumes that there is only one formula, or one means by which rates may be set at reasonable levels. But in a variety of regulatory situations, the Supreme Court has repeatedly rejected that argument, *Mobil Oil Corp. v. Fed. Power Comm'n*, 417 U.S. 283, 316 (1974); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (noting that the entity responsible for setting rates is was "not bound to the use of any single formula or combination of formulae in determining rates").[14] Commenters are asking the Commission to extend its jurisdiction in a manner that is inconsistent with the Communications Act.

The limits on Section 253 are underscored by Section 224 of the Act, 47 U.S.C. § 224. The statute empowers the FCC to regulate the prices for pole attachments: "[T]he Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable. . . ". 47 U.S.C. § 224(b)(1). Section 224 also affirmatively opens utility property to third parties: "A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). But, critically,

[14] It is hard to imagine how the Commission could rule that it "unfair and unreasonable" for a locality to charge fees that are similar to fees charged for similar property. As the ECONW Report shows, economists recognize that reasonable rates can be and are set using a variety of methods, and may take the form of fees based on gross revenues, per foot charges, or some other measure.

Section 224 does *not* apply to state or local governments. 47 U.S.C. § 224(a)(1) (defining "utility" to exclude any person owned by the federal government or any state).[15]

This limitation reflects an important respect for Federalism, and the limits on the federal government's power. To allow the FCC to dictate terms for right-of-way management would essentially be to transfer to it police power over the streets and roads for a select class of users. But it is highly questionable whether the federal government may exercise such authority, or regulate its exercise by the states consistent with the Constitution and the Tenth Amendment. Likewise, to ask the FCC to limit localities to recovering out-of-pocket costs for use of the rights-of-way raises significant Fifth Amendment issues. *United States v. 50 Acres of Land,* 469 U.S. 24, 31 (1984). Congress' choice, reflecting as it does fundamental constitutional values,

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[15] A few commenters suggest that the Commission should take this opportunity to encourage Congress to revisit the exemption of electric cooperatives and municipalities from the application of the Pole Attachment Act. They offer no verifiable evidence that justifies upsetting this longstanding exemption. For example, NCTA, p. 36, simply states: "Currently, broadband providers are subject to excessive, unjustified rates and other onerous terms and conditions in areas where poles are not subject to regulated rates." This accusation is not supported.

In our view, the Commission should not heed these calls to recommend to Congress that the current exemptions in the Pole Attachment Act be removed. There is simply no reason to adopt such a course, which would affect not only pole utilities, but water utilities, sewage utilities and other critical municipal utilities. The National Rural Electric Cooperative Association has provided a thorough response defending the cooperatives exemption. We add here a few comments on the rationale for the municipal/cooperative exemption. The reason Congress chose not to regulate the fees for attaching to municipal poles is that approach is consistent with the general exemptions for pricing for municipally-owned property, that is, the prices are subject to a built-in check at the ballot box to prevent abuses ("…the pole rates charged by municipally owned and cooperative utilities are already subject to a decisionmaking process based upon constituent needs and interests." S. Rep. No. 95-580, at 18 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 109, 126). In addition, many municipal utilities are relatively small – including, for example, many in the rural areas about which NCTA complains. Adding to the burdens already facing these utilities – when rates are already subject to substantial checks – will cause harm, without obvious benefit.

must be respected: the FCC has no authority to set national standards for permitting or compensation to encourage broadband deployment.[16]

B. There is No Reason for the Commission To Use This Proceeding To Expound Upon Section 253, In Any Case.

The purpose of this proceeding is to meet the Congressional mandate to develop a National Broadband Plan. The American Recovery and Reinvestment Act of 2009 (Recovery Act) directs the Commission to create a National Broadband Plan that seeks to ensure that every American has access to broadband capability and establishes clear benchmarks for meeting that goal. Despite some commenters suggestions to the contrary, it is not necessary to address Section 253-related matters as part of the development of the National Broadband Plan.

1. The courts are not in disarray as to the meaning of Section 253.

Commenters argue that courts are in disarray as to how to interpret section 253.[17] The Courts are in fact coalescing around a standard for Section 253(a) that is consistent with the Commission's own standards for analyzing Section 253 claims, as announced in *In re Classic Telephone*, FCC Rcd. 13082, 13110 (1996) and *In re Cal. Payphone Assn.*, 12 FCC Rcd. 14191 (1993).

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[16] The Commission's pre-Cable Act adoption of franchise fee limits on cable service does not provide a precedent for direct Commission regulation of public rights-of-way or fees charged for use of public rights-of-way. Prior to the Cable Act, the Commission reserved the authority to license cable systems, and a cable system could not operate without a license from the Commission; the Commission refused to license cable systems where the system would be subject to a fee that exceeded federal minimums. The FCC's pre-Cable Act rules did not require local governments to authorize cable systems to use their streets, but if cable service was desired (as it was), the effect of the FCC rule was to require the cable operator and the community to hew to the FCC limits. However, what the FCC was regulating was not the locality, but the federal law requirements that a cable operator had to satisfy to enter the market. What commenters are proposing here, in contrast, is direct Commission regulation of states and localities without authorization.

[17] Comments of Qwest Communications International, Inc., GN Docket No. 09-51, at 28 (June 8, 2009); Comments of Blooston Rural Carriers NPB Public Notice #7, GN Docket No. 09-51, at 5-6 (Nov. 6, 2009); Comments of Sunesys, GN Docket No. 09-51, at 5-10 (Nov. 6, 2009).

The Commission itself recently recognized there is no significant interpretive confusion:

> Nor is there a clear conflict among the circuits on the standard for preemption under Section 253(a). The courts of appeals uniformly recognize that the FCC's California Payphone Order, 12 F.C.C.R. 14,191 (1997), prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service. Although some circuits have interpreted the Commission's standard through the lens of Auburn's more-preemptive "may" standard—contrary to the approach of the Eighth and Ninth Circuits' decisions here—the conflict is not sufficiently settled or stark to warrant this Court's resolution at this time.
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> The Eighth and Ninth Circuits' interpretation of Section 253(a) appears to be consistent with that of the FCC. In determining whether a state or local requirement has "the effect of prohibiting the ability" of an entity to provide telecommunications services, the Commission has looked to the "practical effect" of the requirement on the entity. Public Util. Comm'n of Tex., 13 F.C.C.R. 3460, 3470 ¶ 22 (1997) (Texas PUC Order). [footnote omitted]. The mere possibility that a state or local requirement might prevent a telecommunications carrier from providing service is not sufficient to violate Section 253(a).

Brief for the United States as *Amicus Curiae* at 9, 11, *Level 3 Communications v. City of St. Louis*, Nos. 08-626 and 08-759 (U.S. filed May 28, 2009).

Sunesys argues that the Ninth Circuit has "added to the confusion" because it determined that a plaintiff cannot succeed on a Section 253(a) claim unless it is completely barred from providing service. Comments of Sunesys, LLC NBP Public Notice #7, GN Docket No. 09-51, at 6 (Nov. 6, 2009). The decision referred to is *Time Warner Telecom of Oregon, LLC v. City of Portland*, 2009 WL 965816 (9th Cir. 2009), an unpublished opinion that had already been issued and of which the Commission and Solicitor General were aware at the time the amicus brief quoted above was submitted to the Supreme Court. Sunesys's argument is based on one sentence in the opinion, taken out of context. All the Ninth Circuit did was affirm a district court decision in *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1084 (D. Or. 2006). In that case, the district court found, based on ample evidence, that Time Warner had failed to even show that challenged City requirements raised the *possibility* of a prohibition under the since-rejected "may prohibit" test announced in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), *overruled in Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008). Having found Time Warner failed to meet even *Auburn's* overruled "may prohibit" standard, the court properly concluded that Time Warner had failed to show that it had been prohibited or effectively prohibited from providing any service under the stricter *California Payphone* standard. That is all the decision means, and that is why the Ninth Circuit was able to support its conclusion with a citation to the FCC's *California Payphone* standard. There is no indication that the Ninth Circuit, or any other circuit, is interpreting Section 253(a) inconsistently with *California Payphone*.

By contrast, such providers appear to ask the Commission to find prohibitions based on speculation. The Commission has not adopted that approach. Instead, as the Commission explained in *Cal. Payphone*, to show a prohibition of effective prohibition, it is not enough to show that a regulation imposes costs a provider would prefer to avoid; nor is it enough to show a provider would be enriched and arguably in a better position to provide service, without the requirement. 12 FCC Rcd. 14,191, 14,206 ¶ 31 (1997). Rather, it is necessary to show that the local government actions make provision of service "impractical and uneconomic." *Id.* at ¶ 41. A lesser standard would not be consistent with the plain meaning of the term "prohibit." *See, e.g., AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999) (finding the word "impair" in Sec. 252 requires more than a showing of an increase in costs).

2. There is not substantial confusion regarding management of the rights-of-way.

Nor is there confusion as to the interpretation of the right-of-way management provisions of Section 253(c). The courts have simply distinguished between regulations that relate to the management of the rights-of-way and those that relate to regulation of services. Thus, for example, in *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), the court drew a line between regulations "relevant only for regulating telecommunications" and those which may be relevant for "regulating use of the rights-of-way," striking the former and permitting the latter. And once it is determined that a regulation may be relevant to regulating the use of the rights-of-way, it is upheld, as it must be consistent with Section 253(c). There is no room for Commission intrusion in this area.

3. The courts are recognizing, as they must, that compensation is not restricted to costs.

While some district courts have come to differing conclusions as to whether the "compensation" provision of Section 253(c) restricts a locality to recovering costs, the courts of appeals that have actually addressed the issue have uniformly come to the conclusion that the "compensation" provisions of Section 253(c) do not limit a locality to recovering out-of-pocket costs,[18] and permit recovery of the value of the property. *See, e.g., Dearborn, supra; St. Louis, supra; Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272 (10th Cir. 2004).[19] That result is compelled by the language of the Act, its legislative history, and Fifth Amendment concerns.

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[18] Generally, providers like Qwest have argued in courts that fees should be limited to incremental costs, such as the cost of processing a permit, and should not include an apportioned share of costs associated with the rights-of-way, or opportunity costs. Here, more obliquely, Qwest argues that compensation must be related to "management" costs. This is the same argument in a slightly different form.

[19] It is sometimes claimed that in *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006), the First Circuit ruled that compensation for rights-of-way, while not *limited* to cost, had to be somehow related to cost. Textually, as explained in more detail above and *infra*, such a ruling could not be squared with the Act. Section 253(c) protects both *management* rights and *compensation* rights. Sen. Feinstein, in discussing *management* rights under Section 253, made it clear that those rights include the right to recover management costs. But that right is separate and apart from the right to compensation. Hence, when Qwest suggests that compensation must be somehow related to management costs, it is truncating the Act, as well as creating significant Fifth Amendment issues. No such result is contemplated by the First Circuit's *Guayanilla* discussion. The First Circuit's discussion is best understood in context: Guayanilla was seeking to charge both rents and cost-based fees. It failed to make any showing that its rents were reasonable (the First Circuit emphasized that there was no evidence anyone was willing to pay the rents), and thus its fees necessarily had to be justified based on costs – which the City failed to do. That does not mean that it makes any sense to require that rates must

The common and ordinary meaning of "fair and reasonable compensation" does not connote mere reimbursement of costs. *Black's Law Dictionary* at 283 (6th ed. 1991), for instance, defines the term "compensation" to mean "payment of damages; making amends; making whole; giving an equivalent or substitute of equal value . . . . Consideration or price of a privilege purchased . . . giving back an equivalent in either money which is but the measure of value . . . recompense in value." And *Black's Law Dictionary* at 277 (7th ed. 1999), defines the terms "just compensation" and "adequate compensation" for use of property as "the property's fair market value."

In common parlance, "fair and reasonable compensation," means more than mere cost recovery.[20] It is difficult to believe, for example, that if a municipal government were selling a parcel of land or a vehicle, or leasing office space in a municipal building, any "compensation" the municipality receives for that property would have to be limited to, or demonstrably related to, cost recovery, rather than fair market value. Likewise, we seriously doubt that industry commenters would contend that they are entitled only to cost recovery, rather than the prices they charge, as "fair and reasonable compensation" for the services they render.

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be based on costs in order to be reasonable. As the report of ECONW shows, it is widely recognized that there are any number of ways to establish a fair rental value. *Requiring* rates to be set on costs, by contrast, is likely to be cumbersome, and runs a serious risk of forcing localities to subsidize providers.

[20] Although the Second Circuit suggested that the "statutory language is not dispositive," that court also observed that "payment of rent as 'compensation' for the use of property does not strain the ordinary meanings of any of the words," "commercial rental agreements commonly use gross revenue fees as part of the price term," and "Congress's choice of the term 'compensation' may suggest that gross revenue fees are permissible" under § 253(c). *TCG New York v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002). Moreover, the only example that White Plains gave for "compensation" being synonymous with costs – "'compensatory' damages in tort are designed to precisely offset the costs . . . inflicted by the tort," *id.* – actually supports our reading of "compensation," since compensatory damages clearly can include lost profits. *See, e.g., Humetrix v. Gemplus*, 268 F.3d 910, 918-19 (9th Cir. 2001); *Silver Sage Partners v. City of Desert Hot Springs*, 251 F.3d 814, 821 & n.6 (9th Cir. 2001); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001).

Section 253(c) was enacted against a backdrop of abundant precedent establishing that the "compensation" to which municipalities have historically been entitled from private businesses, like telecommunications providers, that place permanent, extensive facilities in the right-of-way is the fair market value of the property. Fair market value rents have often been based on the franchisee's gross revenues. In the context of cable television franchise fees, for example, the Fifth Circuit held that the 5% franchise fee permitted by 47 U.S.C. § 542 is "essentially a form of rent: the price paid to rent use of rights-of-way." *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997). More generally, other courts across the nation, including the Supreme Court, have consistently reached the same conclusion for over one hundred years, in the context of both local telephone and local cable television franchises.[21] Indeed, the proposition that fees can be limited to costs is flatly inconsistent with the Supreme Court's *St. Louis* decision, 148 U.S. at 98, which emphasizes that "[n]o one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation . . . And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under

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[21] *E.g., City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98 (1893) (franchise fee is rent for use of local rights-of-way); *City of Plano v. Public Utilities Commission*, 953 S.W.2d 416, 420 (Tex. Civ. App. 1997) (gross receipts-based franchise fee is rent for use of local rights-of-way); *City of Albuquerque v. New Mexico Public Service Commission*, 115 N.M. 521, 854 P.2d 348, 360 (1993) (same); *City of Montrose v. Public Utility Commission*, 629 P.2d 619, 624 (Colo. 1981), *later proceeding*, 732 P.2d 1181 (Colo. 1987) (same); *City of Richmond v. Chesapeake & Potomac Tel. Co.*, 205 Va. 919, 140 S.E.2d 683, 687 (1965) (same); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272, 283, 282 P.2d 36, 43 (1955) (same); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), *further proceedings* 679 F. Supp. 977, 979 (1988) (same); *Erie Telecommunications v. City of Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) (same).

a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, *without paying the value of the property thus appropriated*."[22]

This, of course, does not mean that fees must be based on gross revenues. Charges for local property may vary depending on a wide variety of circumstances. The central point is that the Section 253(c) compensation provision must be interpreted in light of the plain meaning of "compensation" and the historical backdrop of gross revenue-based franchise fees as a permissible form of "compensation" for use of local rights-of-way. There is simply nothing in the language of Section 253(c) (or elsewhere in the Communications Act, for that matter) remotely suggesting that Congress intended for Section 253(c) to alter historical right-of-way compensation methods radically, to limit compensation to "management"costs, or to upset preexisting state laws authorizing (and in some cases, requiring) fair market rents for use of public property.[23]

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[22] In both the public and private sectors, rent charges based on a percentage of the tenant's gross revenues have long been an accepted and widely used method of calculating rent because gross revenue-based rent provides a reliable measure of the economic value of the leased property. *White Plains,* 305 F.3d at 77; *see also* ECONW Report. For examples of gross receipts-based franchise fees, *see, e.g.,* cases cited in n. 20, *supra. See also* 12 *McQuillin Mun. Corp.* § 34.37 at 130 (3d ed. 1995). For examples of private commercial leases where rent is based on the tenant's gross receipts, *see, e.g., Scot Properties, Ltd. v. Wal-Mart Stores, Inc.*, 138 F.3d 571, 572 (5th Cir. 1998) (construing commercial retail lease where rent is based on a percentage of lessee's gross sales); *State of Texas v. Ralph Watson Oil Co.*, 738 S.W. 2d 25, 27 (Tex. Civ. App. 1987) (evidence of sales volume can be used as a factor in determining value of land upon which business sits); *In re Peaches Records and Tapes, Inc.,* 51 B.R. 583, 590 (Bankr. 9th Cir. 1985) (percentage of gross sales is one of the means adopted by the parties to measure the rental value of the property). Likewise, a per foot charge for linear facilities is another means of charging a rents for use of public and private property. *See also* ECONW Report at Attachment A.

[23] If the FCC were to construe "fair and reasonable [right-of-way] compensation" as compelling state and local governments to accept anything less than fair market value for the right-of-way used by telecom/broadband providers, or as rejecting the principle that right-of-way compensation is to be treated rent for use of right-of-way, that would not only run counter to Sec. 253(c)'s language & legislative history, but would also preempt longstanding state constitutional and statutory provisions prohibiting both state legislatures and local governments from granting

In fact, the legislative history unequivocally confirms that Congress specifically intended Section 253(c) to give states and localities substantial latitude to set charges for use of public property, including based on gross revenues. The legislative history of the Barton-Stupak amendment in the House of Representatives is the key to understanding the meaning of "fair and reasonable compensation" in Section 253(c).[24] And if there is one conclusion on which both the proponents and the unsuccessful opponents of the Barton-Stupak amendment agreed, it was that gross revenue-based fees were a permissible form of "compensation" under what is now Section 253(c). The debate began with Rep. Barton, one of the amendment's sponsors, who made clear that one of the primary purposes of the amendment was to prevent just what industry urges here – having the federal government tell local governments how to set compensation for local rights-of-way:

> [The Barton-Stupak amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way . . . . The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way.[25]

Rep. Fields then rose in opposition to the amendment, complaining that it would allow municipalities to impose on telecommunications providers what he felt were excessive gross

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gifts of public money, property or anything of value to private persons or corporations. *See, e.g.*, Tex. Const. Art. III, §§ 51 & 52, & Art. XI, Sec. 3. Based on such state constitutional anti-gifting provisions, states have enacted statutes prohibiting local governments from permitting telephone companies from using local rights-of-way without paying compensation. *See, e.g.*, Tex. Civ. Code § 1175. And courts have construed the required compensation to be "rent" for use of the rights-of-way, permitting, for example, gross revenue-based franchise fees. *See, e.g.*, *Fleming v. Houston Light & Power*, 138 S.W. 2d 520, 522, *rehearing denied*, 143 S.W. 2d 923, 924 (Tex. 1940) (*citing St. Louis v. Western Union Tele. Co.*, 148 U.S. 92 (1893)).

[24] *See New Jersey Payphone v. Town of West New York*, 299 F.3d 235, 246-47 n.7 (3d Cir. 2002) (relying on the Barton-Stupak floor debate to interpret § 253(c)); *White Plains*, 305 F.3d at 80 (relying on Barton-Stupak amendment's elimination of "parity" provision to construe § 253(c)).

[25] 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton) (emphasis added).

revenue-based fees in the range of "up to 11% percent." *Id*. at H8461 (remarks of Rep. Fields).

The amendment's other sponsor, Rep. Stupak, replied, defending gross revenue-based fees:

> Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it . . . . This is a local control amendment, supported by mayors, State legislatures, counties, Governors.[26]

Tellingly, some of those who unsuccessfully opposed the Barton-Stupak amendment also argued the amendment was unnecessary because the bill's language already permitted localities to charge gross revenue-based fees, unrelated to out-of-pocket costs.[27] The House overwhelmingly adopted the Barton-Stupak amendment by a 338 to 86 vote. *Id*. at H8477.[28]

In short, the legislative history on "fair and reasonable" compensation is unusually clear. It was intended to provide localities flexibility in pricing, and to allow states and localities to charge rents, including rents based on gross revenues. And so the courts are now concluding.

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[26] *ld.* at H846l (remarks of Rep. Stupak).

[27] *Id*. (remarks of Rep. Bliley). It is worth emphasizing that even if the Commission could find that charges for use of the rights-of-way that are not based on costs are outside the ambit of Section 253(c) "fair and reasonable" safe harbor, neither the courts nor the Commission could preempt unless those fees are also "prohibitory." It is hard to imagine how charges could be deemed "prohibitory" within the meaning of Section 253(a) if they reflect fair market value. It is also hard to imagine, for example, how one could deem a gross revenues-based fee prohibitory, when one has been specifically in place under the Cable Act for three decades, and the industry has flourished. *See,* Attachment B, Book Report. And of course, the FCC would also have to explain why fair market value fees commonly charged to land users are suddenly prohibitory in the context of broadband.

[28] In enacting Section 253(c), Congress is of course presumed to be aware of previous interpretations of similar language. *Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978). Precedent construing analogous terms supports construing "compensation" to permit recovery of more than costs. The Takings Clause of the Fifth Amendment, for instance, contains the very similar phrase "just compensation." And the law is clear that the "compensation" to which a person is entitled under the Takings Clause is not mere reimbursement of costs, but fair market value. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). The law is equally clear that local governments, no less than private parties, are entitled to fair market value as "compensation" under the Takings Clause. *Id.* at 31 & n. 15.

There is no reason for the FCC to use this proceeding to interpret Section 253, even if one assumes that it had authority to do so.

C. In Any Case, Federal Intervention Is Neither Warranted Nor Advisable.

Setting aside the legal limits on the Commission's authority, it is equally important for the Commission to recognize that any regulations it adopts that aim to regulate states and local governments will inevitably impose burdens on already-stressed local governments and taxpayers. A fundamental question, therefore, is whether there is any reason to suppose that the relief requested by commenters – federal regulation of permitting and compensation – will actually result in measurable, additional broadband deployment.

The arguments of those who ask the FCC to regulate permitting and regulate compensation essentially boil down to this: if costs of entry are reduced, more broadband will be deployed. The argument rests on three assumptions: *first*, if such costs of entry are reduced, companies will respond by deploying more broadband, rather than increasing executive compensation or otherwise disposing of the excess profits; *second*, that permitting localities charge fair value for property, or to manage the rights-of-way deters deployment; and *third*, that the replacement federal regime will be more effective and efficient, and simpler to administer than the current regime – that is, the benefits will outweigh the costs. We address each assumption below.

1. It is Not Necessary To Give Away Local Public Property to Telecommunications Companies, Nor Is A Giveaway Likely To Result in Significant Additional Deployment.

There is significant evidence that reducing costs alone – without clear and enforceable requirements for deployment – will not result in increased deployment. The attached report by Dr. Connie Book examines the effect of the change from local to state-level regulation on deployment. *See Attachment B.* Over the last six years, starting in roughly 2005, a number of states enacted laws that limited local franchising authority, in several cases restricting the fees that could be charged for use of rights-of-way, eliminating fees for public, educational and government access, and reducing the issuance of a franchise to a ministerial task that had to be completed within days of a request for a franchise. Yet this effort – which was designed in part to encourage deployment of competing systems by reducing the costs of entry – has had little positive effect, Dr. Book found. In North Carolina, local cable franchises were replaced with a state-issued cable franchise; fees for public, educational and governmental use were virtually eliminated; and localities may no longer require operators to construct institutional networks or to build out systems. Yet virtually no new additional deployment has occurred.

As Dr. Book notes, in the first state that adopted statewide regulation, Texas, independent researchers using zip code analysis and the 2000 census data found that new entry in Texas was only in wealthier neighborhoods with high home values and lower minority populations. These are obviously not the neighborhoods that suffer from the absence of broadband. Book and Meyers (2008) found roughly one year after the Texas legislation (SB5) went into effect, Verizon had launched FiOS in 13 communities in Texas. According to census data, households in these communities:

- Earned almost twice as much in annual income as the average Texan.
- Were 70% as likely to be White non-Hispanic.
- Had home values that are more than double that of the average Texas home.
- Had virtually non-existent poverty levels (500% lower than the State of Texas).
- Were twice as likely to have earned a college degree.

The Texas Public Utilities Commission, later confirmed, as Dr. Book notes, that “there are patterns of deployment of cable and video facilities by some companies in various areas in which rates of deployment of facilities positively correlate with household income or home value or negatively with the percentage of minorities in the area." (Book Report, Attachment B, at 2).[29]

A broadband policy that simply reduces costs, without specific, enforceable regulatory requirements that tie cost benefits to deployment results, is likely to exacerbate the digital divide, and likely to leave the United States far behind many countries in broadband deployment.[30]

2. Leaving local governments free to charge fair market value for use of the right- of-way, and to manage the use of the rights-of-way, does not discourage deployment – it encourages deployment.

In theory, providers *could* deploy more broadband if any of their input costs were reduced – e.g., if charges for electric utility poles attachments were limited to the cost of processing the pole application; or if charges for the use of railroad rights-of-way were limited to the out-of-pocket costs of issuing a permit; or if broadband providers were given free access to any private property they need; or if the federal government returned the fees obtained from wireless spectrum auctions.

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[29] There is other evidence that merely flowing money to broadband providers does not result in significant broadband deployment. Several states adopted regulatory schemes that permitted telephone companies to obtain substantially increased revenues, in an effort to spur deployment. The promised deployment has not appeared, even where returns increased substantially. *See* New Networks Institute, "The History, Financial Commitments and Outcomes of Fiber Optic Broadband Deployment in America: 1990-2004, The Wiring of Homes, Businesses, Schools, Libraries, Hospitals and Government Agencies," GN Docket Nos. 09-47, 09-51, 09-137, DA 09-2458 (filed December 4, 2009). Dr. Mark Cooper has submitted reports to this Commission in response to this Notice which emphasize that a "trickle down" approach to broadband does not work.

[30] This is hardly surprising as there is no evidence that fees for use of rights-of-way or permitting practices are a significant factor in broadband deployment. A September 29, 2009 powerpoint presentation by Commission staff and reports on rural broadband strategy are often cited to show that charges for rights-of-way may have a significant impact on fiber deployment. Comments of Sunesys, GN Docket No. 09-51, at 3-4 (Nov. 6, 2009). Comments of USTA, GN Docket No. 09-51, at 4-5 (Sept. 24, 2009). But the slide and the reports at most posit that total costs, including utility pole make-ready costs, "may" be a barrier to broadband deployment; the basis for that conclusion is itself unclear.

But this approach – which ultimately, in the case of rights-of-way charges, would require taxpayers to subsidize telecommunications providers by charging less than fair market value for the rights-of-way – has proven ineffective in experience. And it is inconsistent with sound economics on which the National Broadband Plan must be based. It is good economics to require any producer of a competitive product to pay fair market value for all the inputs of production. This includes the fair market value for the use of public resources The ECONW Report explains why it is economically efficient (and pro-competitive) for the City to charge a market-based price for use of its rights-of-way. As he put it:

> Charging a fee to access the City's ROW ensures efficient use of the ROW. The closer the fee approximates the relevant market price, the more likely the ROW will be used in an economically efficient manner, which is a fundamental criterion by which economists evaluate the performance of a market and overall social welfare.

ECONW Report, Att. A, at 2. In other words, contrary to the suggestion of industry commenters, allowing a fair market value charge *encourages* efficient deployment.

This is consistent with the FCC's own experience auctioning of spectrum, where the auctions led, or certainly did not deter, rapid cell phone deployment. In the case of the Commission auctions, the Commission carefully constructed the auctions to extract every penny of the full value of the spectrum. *In re FCC Report to Congress on Spectrum Auctions*, 1997 WL 629251, WT Docket No. 97-150, FCC 97-353 (1997) ("By requiring firms to use their own resources to compete for valuable spectrum, auctions encourage firms who value the spectrum the most to use it productively and in innovative ways."). It is consistent with other analyses. The City of Portland charges a rental fee to all entities that occupy the rights-of-way, including cable companies, telecommunications service providers, and information service providers. Economist Alan Pearce, Ph.D., analyzed the City of 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 found: "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. . . . ." Expert Report of Alan Pearce, Ph.D., *Time Warner Telecom of Oregon, LLC v. City of Portland*, CV 04-1393 (D. Or. 2005).

By contrast – and as experience suggests – reducing the costs of entry below market value will not encourage deployment of broadband to underserved areas. For example, requiring New York City to charge a rate unrelated to the value of property in New York is a policy that is likely – if it does anything – to divert deployment dollars to New York, and ensure that they are not invested in rural America.

As importantly, in this case the Commission must recognize that government itself is a critical provider of broadband services and facilities, and in many cases is providing facilities and services that other providers will not provide, or will not provide at an affordable price. The comments cited at n.4, provide examples of critical local government broadband initiatives. If the Commission diverts resources from local governments to private providers, by requiring localities to transfer property at less than fair market value, it is actually transferring wealth from one set of broadband providers to another. The stress on local budgets is described below, and the impact of that transfer on localities would be enormous. That transfer may leave local governments without the resources to expand or even maintain those broadband efforts – without any guarantee that they will be replaced. The effect is then of the federal regulatory scheme some commenters envision will be far less broadband, and broadband that is less available or affordable.

3. Federal intrusion could have significant, negative effects.

Aside from the critical effects on broadband deployment described above, a federal regime is likely to impose significant costs on both providers and on state and local governments without any comparable benefit. The arguments by Qwest and others – that to be reasonable, a fee must be related somehow to management costs – envision a national, cost-based rate regulation regime of the costs of state and local rights-of-way of precisely the sort that Congress intended Section 253(c) to avoid.

The Commission has plenty of experience with cost-based regulation – it used to set rates for interstate telecommunications services that way. And it should well understand that the process is anything but simple and smooth. To adopt a regulatory scheme under which local governments are the object of regulation administered by the FCC in order to lead to uniform results would also not be simple or smooth. The attached study by Garth Ashpaugh explains that it is extremely complex to identify right-of-way related costs and to allocate those costs to the various right-of-way users. As Mr. Ashpaugh further explains, if the Commission required that each provider bear the costs associated with its unique route (which cost would increase with every extension), an individual study, costing potentially thousands of dollars, would have to be performed for each provider. If the Commission allowed cost averaging, the problem may be mitigated somewhat, but costs change over time, and new studies would have to be regularly funded. The current approach – through which many communities charge a fee on a per foot basis or a percentage of gross revenues – is both cheaper to administer and avoids the inefficiencies and delays of cost studies.

D. Intruding on State and Local Right-of-Way Compensation and Right-of-Way Management Authority Will Cost Jobs and Create Lost Opportunities in Broadband.

Earlier sections of these comments have pointed out that the legal restrictions against federal intrusion upon state and local right-of-way compensation (FCC has no authority); demonstrated that a trickle-down approach will not increase deployment; demonstrated that local right-of-way compensation and management is not hindering broadband deployment; and that a Commission-managed right-of-way regulatory regime is likely to make matters worse, not better, without resulting in a single, measurable additional foot of broadband deployment.

In this section, we depart from the narrow world of broadband and consider the overall economic effect of adopting a policy of regulating states and local governments – particularly where there is no evidence that state and local governments are actually creating significant barriers to entry. If the Commission issues pronouncements as to what proper right-of-way compensation should be, or what management policies are reasonable, the effect will be predictable: providers will promptly stop paying anything the Commission has not authorized, and will stop doing anything the Commission has not endorsed. This is not supposition: it has happened in the past:

- Immediately after the FCC declared that cable operators were entitled to deduct the amount paid in franchise fees from gross revenues, cable operators started taking that deduction.

- The same thing happened when the FCC declared that cable modem revenues were not cable service revenues.

- Similarly, telecommunications providers responded to the Ninth Circuit's decision in *Auburn* by refusing to pay any fee owed that was not cost-based, even though *Auburn* did not even address the question as to whether compensation under Section 253(c) had to be cost-based.

- After the Commission issued its Section 621 franchising order, Time Warner unilaterally withheld close to $5 million in PEG fees it owed the City of Los Angeles, on the ground that the fees violated the Order –although the Order itself

> specifically indicated it was not intended to permit operators to unilaterally withhold fees. *In re Implementation of Section 621(a)(1) of the Cable Television Protection and Competition Act of 1992*, 22 FCC Rcd. 19633, 19642 ¶ 19 (2007).

Hence, a Commission statement as to what fees can be collected, or what management practices are permitted – unless the statement unequivocally endorses the local reservation of authority intended under Section 253 – could have significant, immediate economic consequences on local governments, and on the economy as a whole, setting aside the legal and regulatory costs associated with such a regime.[31]

Today, there is widespread recognition and discussion (outside of these proceedings at least) of State and local government budget pressures and the ongoing efforts being made to close growing budget gaps through a combination of job cuts and furloughs, and increases in user fees and taxes.[32] A December 2009 article in *Newsweek* titled "The Next Big Crisis: How the forthcoming state and local budget crises could slow down the American economy" cites this ongoing weakness in state and local budgets as a major threat to the entire nascent economic recovery. This is in part because the money spent by local governments translates directly into

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[31] Note that the impact does not depend on whether the formula for compensation adopted by the Commission, if properly applied, would yield more or less money than the compensation formula used by a locality now. It is possible that a cost-based rate that took into account all relevant costs would result in *higher* charges, *see* ECONW Report; Ashpaugh Report. But that would occur, years from now, after all studies had been performed, and after all issues of cost determination and allocation had been resolved; after states and localities had rewritten their laws; and after taxpayers had absorbed all the costs of going through that process. In the meantime, however, local revenue streams would be disrupted with disastrous effects on budgets and broadband.

[32] For some recent national coverage *see*: Conor Dougherty, "As Slump Hits Home, Cities Downsize Their Ambitions," Wall Street Journal, December 26, 2009, p. A-1; David A. Graham, "The Next Big Crisis: How the forthcoming state and local budget crises could slow down the American economy" Newsweek Web Exclusive, December 28, 2009 (http://www.newsweek.com/id/228468); Jennifer Steinhauer, "Despite Ray Bradbury's Efforts, a California Library Closes" New York Times, December 9, 2009, p. A28.

employment in the public and the private sector. Every $1 cut from the local government budget translates into an additional 88 cents of lost activity for the private sector.[33]

Recent news illustrates the severity of the cuts governments are already facing. Washington State just reported a jump in its unemployment rate to 9.5 percent, having lost 23,700 jobs in December 2009, which included a loss of 1500 government jobs, *1400 of which were in local government*.[34] In an effort to save jobs and services, Multnomah County (where the City of Portland is located) struck a deal with unions to preserve 100 jobs by freezing wages.[35] Due to anticipated drops in revenues from most revenue sources, the City of Portland cut ongoing general fund expenditures by $8.9 million (approximately 2.7 percent) in order to present a balanced budget for FY 2009-2010. The 2009-10 budget projects a decrease of 225 full and part-time positions from the prior fiscal year.

In this environment, a federal trickle-down regulatory policy – which is ultimately what is being proposed by many commenters -- will cause positive harm. In fiscal year 2008-09, the City of Portland generated right-of-way revenues (fees and utility taxes) from cable and telecommunications providers totaling approximately $12.2 million (Cable: $5.5 million; Telecom: $6.7 million). If those revenues are placed at risk, or are withheld, that would translate directly into significant service and employment cuts (approximately 139 police and firefighters, for example) on top of already significant cost cutting measures being taken due to the recession.[36] That impact would multiply through the Portland economy.

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[33] *See* Graham, *supra*.

[34] Associated Press Online, "Washington Jobless Rate Jumps to 9.5 Percent" New York Times, January 20, 2010 (http://www.nytimes.com/aponline/2010/01/20/business/AP-US-Wash-Jobless.html)

[35] Graham, i*d.*

[36] The problem becomes even more severe if the Commission's action is taken to establish a general principle that public property should be provided to utilities at cost. That would

Portland is not unique. Other localities around the country have similar reliance on revenues from cable and telecom companies who use their rights-of-way. In 2009, telephone revenues alone for Seattle were $32 million – equivalent to about 300 public sector jobs. The City of Dallas, Texas, receives approximately $6 million per year in cable franchise fees and approximately $31 million from telecommunications companies, based on access line fees. This is about 3.6% of the budget for this fiscal year, and – applying the test for job creation used in assessing the impact of the federal stimulus package – if lost would translate to a loss of more than 300 jobs in the City of Dallas alone (again ignoring the ripple effect through the economy). Similarly, the City of Arlington, Texas, receives approximately $2.1 million per year in cable franchise fees and approximately $6.7 million from telecommunications companies, based on access line fees. These fees accounted for approximately 4.6% of the City's FY 2009 Budget, and if lost would translate to dozens of lost jobs and a ripple effect on the local economy. It is worth emphasizing that the Texas fees on telecommunications service providers are imposed on a per line basis, pursuant to a state law that was adopted in conjunction with providers. It is not a cost-based model. So, were the Commission, for example, to decide that only fees based on costs were reasonable, it would have essentially forced these employment cuts in city after city through one of the largest states in the country.

And that impact could be replicated in community after community across the nation. All this would occur without any indication that the fees that are being charged now are actually prohibiting entry in any meaningful respect, and in direct derogation of Congress's will.

The industry's demand for federal relief from what are claimed to be excessive regulations and fees is not new. In its 2006 response to the industry call for the elimination of

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endanger millions of other dollars and hundreds of jobs funded through franchise fees on electric utilities, gas pipelines, and other private users of public resources.

"excess taxes," the local governments determined that, if industry proposals were implemented in 2006, it would have amounted to a projected $8 billion decrease in annual state and local revenues from telecommunications companies, which would be equal to the combined salaries of more than 150,000 teachers, police, and firefighters.[37] Nationally then, what the industry is demanding from the FCC is far from inconsequential for the economy as a whole, and would have reverberating negative effects on local communities and economies across the nation. It risks further prolonging the recession.

That should be enough, but it also bears emphasizing that budget cuts will also have an effect on the ability of local governments, schools and non-profit groups to spur broadband deployment and use of advanced communications technologies. Budget cuts are already endangering the ability of local governments to leverage assets and help spur universally available, low-cost broadband deployment. Public access centers, which provide an important antidote to national media concentration, are losing funding in the face of cuts in support caused by reductions in franchise fees and fees to support public educational and governmental access. For example, the City of Wausau, Wisconsin, may have to close its public access television station if it is not paid the more than $170,000 in PEG fees owed to it by Charter which has not paid since 2007.[38] These problems would only be exacerbated if the Commission decides that local governments should subsidize other broadband providers by providing access to resources for "management costs."

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[37] *Local Government Perspective On Telecommunications Taxes: A Response to Industry's 2004 COST Study*, Summer 2006, at 10, available at: www.gfoa.org/downloads/TelccomTaxBriefing_FullReport.pdf..

[38] Bryan Graff, "The Future of Wausau Public TV" WAOW News Line 9, January 21, 2010 (http://www.waow.com/Global/story.asp?S=11862748)

This potentially devastating economic disruption is advocated by industry without any *quid pro quo* – no guarantee that a single dollar taken from local governments and taxpayers would be spent in areas where broadband is required, or that there would be enforceable conditions that would protect consumers. The Commission's National Broadband Plan should, if anything, affirm basic regulatory principles:

- utilities should pay fair value for public resources used;
- where subsidies are required, they should be provided explicitly, and in return for enforceable promises to perform; and
- there are important roles for state and local governments to play in encouraging broadband, as participants in the marketplace, as managers of public resources, and as regulators.

Broadband deployment is important. But so too are the essential services localities provide their citizens, funded in important measure with revenues generated from the users of local rights-of-way. Now is not the time to make knee-jerk policy prescriptions -- based on flawed industry arguments -- that can have far reaching consequences for citizens, local governments, and the broader economy.

II. IF THE COMMISSION ESTABLISHES PARTNERSHIPS TO WORK WITH AND ENCOURAGE LOCAL GOVERNMENT INVOLVEMENT IN BROADBAND, LOCAL GOVERNMENT CAN HELP BROADBAND DEPLOYMENT.

The Commission can encourage broadband deployment without establishing national compensation or permitting standards if it is willing to recognize local interests in the rights-of-way and public property, and will work with local governments and empower them to assist in the deployment of broadband. To this end, in addition to mechanisms that local governments have proposed previously, it is worth emphasizing three elements that could be included in a National Broadband Plan.

A. The Commission Can Help Convene Forums for Sharing and Developing Best Practices in Rights-of-way Management to Facilitate Broadband Deployment.

Many local governments have devoted significant efforts to streamlining permitting processes inside and outside of the rights-of-way. Some efforts have also been undertaken at the federal level among federal agencies led by NTIA.[39] That process can be further advanced – and the Commission's own understanding of the permitting process enhanced – if the Commission establishes a mechanism (and perhaps funding) for state and local governments to collect and share, among themselves and with the Commission, "best practices" that appropriately balance the interests of the public and the permittees.

The Commission previously had such a mechanism in the form of the Local and State Government Advisory Committee, created in 1997. The Commission terminated the LSGAC and established its successor, the Intergovernmental Advisory Committee, with a different makeup of expertise and redefined mission. The Commission should consider creating a special task force of federal, state and local government experts on rights-of-way which could catalog federal, state, and local right-of-way practices and fees in an effort to identify and articulate existing best practices being employed by federal, state, and local authorities for different categories of public right-of-way and infrastructure. This could include right-of-way construction and maintenance practices that:

a. preserve and enhance the long term reliability and utility of rights-of-way;

b. reduce the overall maintenance and capital costs of property for federal, state and local governments and for users;

c. minimize disruption and externalized costs among right-of-way users; and

[39] See NTIA website re Federal Rights-of-Way For Telecommunications Projects (http://www.ntia.doc.gov/FROWsite/index.html)

d. avoid unnecessary and repetitive delays, actions, costs, and inefficiencies related to telecommunications facility construction and maintenance in the PROW; and

The task force could also examine and report to the Commission regarding the advantages and disadvantages of alternative forms of compensation for use of public rights-of-way, and other right-of-way related infrastructure, such as poles and conduits. The end result of the task force's work would not be a federal directive as to how the rights-of-way or other property must be managed or priced. Rather, the task force could:

- Identify best practices that are consistent with the goals and purposes of the National Broadband Plan as well as overall economic development.[40] These may include recommended and broadly applicable forms, applications and inspection protocols; and mechanisms for efficiently and quickly resolving industry questions and suggestions.

- Propose an on-going outreach and education of both industry and government officials to encourage understanding and adoption of the recommendations.

- Recommend a means to permanently institutionalize the process of modifying and updating the best practices in light of new engineering and technological advances.

The goal would not be to establish a forum for debate among the providers and other users of the rights-of-way, but to encourage public officials primarily responsible for actually managing the rights-of-way to share information . The task force would include, first and foremost, representatives from local government; representatives from the FCC and the NTIA; representatives from federal agencies responsible for leasing and managing federal property; and representatives of state government responsible for managing state property. The Commission's role would be to facilitate the work of the task force – providing necessary support so that it may function.

[40] The report could also alert the Commission to federal and state laws that reduce local latitude to adopt particular forms of compensation.

B. The Commission Can Encourage Broadband by Encouraging Localities To Leverage Their Resources.

Many local governments and other governmental and quasi-governmental agencies own facilities that can be used for broadband, and many are also consumers of a variety of broadband and telecommunications services. If local governments are able to consolidate purchasing power, such as by agreeing to take services as an anchor tenant in return for enforceable deployment promises; sharing and swapping facilities; and granting contractual rights in return for in-kind benefits that expand the broadband facilities in a community, deployment could explode and competition could actually increase.

NATOA has already submitted information on ways in which local governments have leveraged assets to increase broadband deployment. Comments of NATOA, *et al.*, GN Docket No. 09-51, NBP Pub. Notice #7, at 11-34 (Nov. 6, 2009). However, a key to encouraging deployment is to ensure that it is not conditioned in a manner that effectively prevents local governments from entering the market, or developing innovative solutions. Some states have prohibited or severely limited local participation in the market, while others have created burdens that essentially give the private sector a veto over deployment. In Pennsylvania, for example, localities must seek a private alternative before a public alternative can be developed. Other states claim to be creating a so-called “level playing field” but do so through counter-productive rules that prevent local governments from using their own assets to serve themselves, or other agencies, unless certain conditions are satisfied. These state requirements don’t level the playing field: they don’t impose comparable restrictions on private providers in the use of their property or prior to beginning a new project. Such limitations can preclude and have precluded innovative broadband deployment. In addition, several providers have attempted to use Section

253 to prevent local governments from using their own assets to compete, further dampening local government efforts at broadband deployment.[41]

Government entry into the market can actually encourage competition. In Portland, for example, the City provided a connection from various agencies to a "meet me" point where there were connections to various Internet service and telecommunications service providers. The effect was to break a "middle mile" bottleneck controlled by Qwest and to open the market to competition and improved services. That sort of active government involvement should be encouraged, and discouraged.

In addition, in furtherance of obligations under the American Reinvestment and Recovery Act, the second Notice of Funding Availability recently released by NTIA and RUS demonstrates a recognition of the benefits to broadband deployment from extensions and upgrades of governmental middle mile networks, coupled with open access to those networks by service providers. It would be ironic indeed if the Commission's National Broadband Plan failed to recognize and build upon the progressive steps taken by these federal agencies to promote local government creativity and leveraging of assets – of if, even worse, it undercut the NTIA and RUS by issuing decisions that had the effect of cutting revenues to local governments.

[41] *Time Warner Telecom, supra.* In the Portland case, for example, Qwest suggested that it was unfair for Portland to use franchise fee revenues to support construction of Portland's municipally-owned network, IRNE. But of course, Qwest uses revenues it obtains from CLECs use of its property to compete, and no one suggests that is unfair. Qwest separately argued that it was unfair under Section 253 for Portland to provide communications services to Portland schools via an institutional network provided by Comcast under the Communications Act; but holding that the City could not use an institutional network to provide services would prevent the City from using one of the central benefits accorded municipalities by the Cable Act. Indeed, the deployment of institutional networks has been critical in many cities to making Internet services available in schools and libraries.

C. The Commission Can Encourage Localities To Support Implementation of Federal Goals.

NCTA has broadly urged the Commission to preempt local conditions on use of rights-of-way to provide broadband services.[42] But nothing in federal law prevents localities from charging broadband providers fees for use of rights-of-way, or appropriate conditions on right-of-way user consistent with state and local law. *See e.g. In re Implementation of Section 621(a)(1) of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd. 19633 at ¶ 11 (2007) (nothing in Cable Act prevents locality from imposing otherwise lawful fees on users of rights-of-way)

The Communications Act has traditionally recognized that the local property rights are not eliminated and cannot be ignored merely because there is a federal interest in deployment of modern communications systems. Indeed, federal law has traditionally protected and those interests and carved out "dual regulatory regimes" where those interests intersect, allowing state and local property and community interests to control in some cases, and federal policies in others. But the NCTA request is disingenuous as the association complains about local regulation interfering with federal policies, at the same time it contends the FCC is without authority to engage in basic regulation of broadband deployment under Title I. NCTA's position essentially seeks to enlist the Commission's support to require all levels of government to ignore the public interest in the future of the Internet. There is a better choice: without settling the issue finally, the Commission could actually promote its broadband policies by stating that, in addition to exercising long-recognized authority over property, local governments are free to pursue local policies subsidizing or contracting with providers to encourage deployment and subscription to services under conditions consistent with the Commission's broadband policies

[42] Comments of NCTA, GN Docket No. 09-51 (June 8, 2009).

(including those designed to protect consumers and users from abuse by the owner of the facility). This is not a startling step. As AT&T's recent comments in this matter suggest,[43] traditionally, access to the rights of way has been conditioned on providers accepting certain

[43] On December 21, 2009 AT&T filed comments in this docket on the transition from the legacy switched network to broadband, AT&T, Comments – NBP Public Notice #25, "Comments of AT&T Inc. on the Transition from the Legacy Circuit-Switched Network to Broadband." AT&T is correct that the telecommunications universe is not the same as it was in 1920 and 1930s, when, in return for agreeing to price, service, interconnection, and deployment obligations, carriers were granted certificates and provided access to right-of-way. It may be sensible to revisit those issues – albeit in a different proceeding. The dominant providers have accepted special privileges (in some cases including reduced costs of right-of-way and the rights of eminent domain) in the expectation they would address serious social obligations (non-discriminatory, universal service at reasonable rates). Now is not the time to relieve them of those obligations and leave them with the privileges, such as legacy rights to use right-of-way at no charge or reduced charges. To the extent that the burdens are changing, the Commission should also recognize that it is not consistent to maintain the benefits either – and that a new social contract will need to be created.

social responsibilities – including responsibilities akin to those established by the Commission in its network neutrality rules. Preserving the social contract is still important today, and critical to real and universal broadband deployment.

Respectfully submitted,

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January 27, 2010

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Comments, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

January 27, 2010

Joseph Van Eaton

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