

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Acceleration of Broadband Deployment:)
Expanding the Reach and Reducing the Cost) WC Docket No. 11-59
of Broadband Deployment by Improving)
Policies Regarding Public Rights of Way)
and Wireless Facilities Siting)
)

To: The Commission

**COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”), by counsel, hereby provides its Comments in response to the Notice of Inquiry (“*NOI*”) in the above-captioned proceeding¹ in which the Commission requests comment regarding ways that it can help accelerate broadband deployment by improving policies governing rights-of-way and wireless facilities siting requirements. WISPA urges the Commission to consider the important roles that wireless Internet service providers (“WISPs”) play in delivering affordable fixed wireless broadband services to consumers in rural, unserved and underserved areas of the country. Current rules deny WISPs regulatory parity with other broadband providers, thus hindering infrastructure access, investments and deployments, particularly to rural areas. Consistent with recommendations in the National Broadband Plan, the Commission should amend its rules to promote competitive entry, fair access and efficient use of pole attachments and rights of way.

¹ *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, FCC 11-51, WC Docket No 11-59 (rel. Apr. 7, 2011).

Introduction

Founded in 2004, WISPA is a trade association of more than 500 WISPs, vendors and others dedicated to promoting, improving and expanding fixed wireless broadband service nationwide. WISPs serve more than two million residential and business customers and operate in every state. Most WISPs operate using the license-exempt bands (*e.g.* 900 MHz, 2.4 GHz and 5 GHz) and in the 3650-3700 MHz “licensed-lite” band to serve rural communities and other areas that would otherwise be unserved, and where few if any broadband alternatives exist. The majority of WISPs are “small businesses,” as defined in the Small Business Act.

Congress has declared that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”² Despite this mandate, WISPs continue to face many hurdles in deploying fixed wireless broadband infrastructure – hurdles that federal, state and local regulations often perpetuate. Broadband infrastructure requires access to a variety of, among other things, antennas, towers, poles and rights of way, both public and private. The Commission is charged with removing barriers to infrastructure investment and promoting competition.³

While the Commission has taken laudable steps to remove barriers to spectrum access – for example through adopting rules for TV white spaces and other spectrum – such efforts are only a half measure if deployments are frustrated or delayed by statutes and regulations that encourage bottlenecks and regulatory limbo in approvals for specific wireless tower sites or rights of way. It is time for the Commission to address this

² 47 U.S.C. §1302(a).

³ *Id.*

competitive imbalance through modifications to policies affecting rights of way and wireless facilities siting.

Discussion

In the *NOI*, the Commission asks “interested persons to identify and describe any other rights of way or wireless facilities siting issues that have an impact on broadband deployment and adoption.”⁴ In prior Commission proceedings, WISPA has consistently supported rules to enable WISPs, communities and others to deliver fixed wireless broadband services to areas of the country that are not being served by other technologies. These efforts, and those of the Commission to make broadband ubiquitous pursuant to its statutory mandate, cannot succeed without removal of barriers to infrastructure investments – investments that are sorely lacking in rural areas, where the public still faces few opportunities for meaningful and reliable fixed wireless broadband service in their homes and small businesses.

In many situations, pole attachments and rights of way represent critical requirements for the deployment of the necessary infrastructure to support local broadband service. Existing rules favor some service providers to the detriment of competition and result in the lack of broadband service to rural areas. In addition, state and local government policies with respect to public rights of way or siting permits have resulted in requirements that have hindered the ability of competitive WISPs to deploy services. WISPA urges the Commission to use the full extent of its regulatory authority to introduce regulatory parity and new competition.

⁴ *NOI* at ¶29.

I. THE COMMISSION MUST REFORM ITS POLICIES GOVERNING RIGHTS OF WAY AND WIRELESS FACILITIES SITING TO PROMOTE COMPETITIVE ACCESS

Federal law hinders WISPs' ability to gain competitive access to critical facilities, rights of way and poles, creating barriers to WISP infrastructure investment and to broadband deployment. The Communications Act of 1934, as amended (the "Act"),⁵ applies different rules to different categories of "telecommunications services,"⁶ "cable services,"⁷ and "information services."⁸ Under current law,⁹ the Commission classifies the fixed wireless broadband services that WISPs provide as "information services," not as cable services or as telecommunications services.¹⁰

By classifying broadband access services as "information services," the Commission generally has advanced the deployment of broadband through a

⁵ 47 U.S.C. §151 *et seq.*

⁶ The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." "Telecommunications," in turn, refers to "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153 (46, 43).

⁷ "Cable Service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. §521(6).

⁸ The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. §153 (20).

⁹ See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53 (rel. Mar. 23, 2007) (finding that under the Act, terrestrial wireless broadband Internet access service is an "information service," that the transmission component of such service is "telecommunications," but that the offering of the telecommunications transmission component as part of a functionally integrated Internet access service offering is not "telecommunications service").

¹⁰ This classification is consistent with other services. In 2002, the Commission determined that *cable modem Internet service* is neither a "telecommunications service" nor a "cable service." Instead, the FCC has classified it as an "information service" with a telecommunications component. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4802 at ¶ 7 (2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). In 2005, the Commission concluded that *wireline broadband Internet access service* (including DSL), like cable modem service, is also an information service that does not include a separate telecommunications service. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005), *aff'd Time Warner Telecom, Inc., et al. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

comparatively deregulatory approach. In contrast to the Commission’s goals, other federal rules that purport to promote competitive access to rights of way, utility poles and other critical infrastructure leave fixed wireless broadband providers such as WISPs out in the cold, unless the WISP also happens to provide cable service or telecommunications service which, in most cases, is not the case. Consider:

- ***Public Rights of Way.*** The Act prohibits state and local authorities from creating by statute or regulation “barriers to entry” by entities that seek to provide interstate or intrastate telecommunications services,¹¹ subject to a state or locality’s authority to “manage the public rights of way” and to require “fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis.”¹² Because the FCC has determined that fixed wireless broadband service is not a “telecommunications service,” WISPs are deprived of the protections of Section 253.
- ***Personal Wireless Service Facilities.*** The Act provides that the “regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not unreasonably discriminate among providers of functionally equivalent services [and] shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”¹³ The Act defines “personal wireless service facilities” as “facilities for the provision of personal wireless services,” which in turn the Act defines as “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” In this context, “unlicensed wireless services” is the “offering of telecommunications services using duly authorized devices which do not require individual licenses.”¹⁴ WISPs provide services that are fixed, not mobile, that are not “unlicensed wireless services” (which require the offering of a “telecommunications service”)¹⁵ and that are not provided on a “common carrier” basis. As a result, Section 332(c)(7) does not benefit WISPs.

¹¹ Section 253 of the Act provides that “[n]o 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) (emphasis added). By statute, the Commission may preempt inconsistent state or local regulations. 47 U.S.C. §253(d).

¹² Section 253(c) of the Act states 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 from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.” 47 U.S.C. §253(c).

¹³ 47 U.S.C. §332(c)(7)(B)(i-ii).

¹⁴ 47 U.S.C. §332(c)(7)(C)(i-ii).

¹⁵ 47 U.S.C. §332(c)(7)(C)(iii).

- **Pole Attachments.** Where a utility controls a pole attachment or right of way, the Act provides that the 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.”¹⁶ Once again, a WISP is deemed to be providing an information service, and is neither a cable television system¹⁷ nor a telecommunications carrier entitled to the benefits conferred by the Act.

These statutory directives result in competitive imbalance and unduly burden WISPs that seek access to poles, rights of way, towers and other infrastructure. The Act and the Commission simply have not kept pace with the realities of emerging broadband infrastructure. It would turn logic on its head if WISPs were required to expend the time and expense to become competitive local exchange carriers or cable operators merely to qualify for benefits that its wired broadband and mobile wireless telecommunications competitors take for granted.

II. THE COMMISSION SHOULD EXTEND TO INFORMATION SERVICES POLICIES DESIGNED TO ENCOURAGE ACCESS TO RIGHTS OF WAY AND WIRELESS SITES

To address this imbalance, WISPA urges the Commission to adopt rules to extend Sections 253, 224 and 332(c)(7) to terrestrial fixed wireless broadband services that provide “information services.” The Commission has broad rulemaking authority

¹⁶ The Act defines “pole attachment” as “[a]ny attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility.” 224(a)(4), 47 C.F.R. §1.1402(b).

¹⁷ Section 522 of the Act defines “*cable system*” as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of [Chapter 5, Subchapter II of the Act], except that such facility shall be considered a cable system (other than for purposes of section 541(c) of [the Act]) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of [the Act]; or (E) any facilities of any electric utility used solely for operating its electric utility system.”

grounded in several provisions of the Act,¹⁸ and WISPA agrees that the Commission “has authority to engage in educational activities to foster broadband deployment through improved policies regarding public rights of way and wireless facilities siting.”¹⁹

More specifically the “Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [this chapter], as may be necessary in the execution of its functions.”²⁰ The Commission repeatedly has cited this “ancillary authority” as its basis for adopting regulations applicable to Internet services such as VoIP. The U.S. Court of Appeals stated that the Commission may exercise its “ancillary” authority only if the Commission demonstrates that its action is “reasonably ancillary to the effective performance of its statutorily mandated responsibilities.”²¹ Such statutorily mandated responsibilities apply here.

Section 706 of the Act states that the Commission:

shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, *regulatory forbearance*, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²²

Similarly, Section 706(b) provides that if the Commission finds advanced telecommunications capability is not being deployed in a reasonable and timely fashion, the Commission “shall take immediate action” to accelerate deployment of such

¹⁸ See, e.g., 47 U.S.C. §§201(b), 303(r), 4(i).

¹⁹ NOI at ¶51.

²⁰ 47 U.S.C. §154(i)

²¹ *Comcast v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (“Comcast”).

²² See 47 C.F.R. § 1302(a) (emphasis added).

capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.²³

While the Commission has stated that Section 706(a) does not constitute an independent grant of regulatory authority, the fact remains that this provision confers statutorily mandated responsibilities on the Commission, requiring that the Commission “shall” encourage deployment of advanced telecommunications capability and “shall” accelerate deployment of such capability through removing barriers to infrastructure investment. Other language of mandate appears in Section 253²⁴ and 224,²⁵ while Section 332(c)(7) carves out a role for the Commission to hear certain petitions by persons adversely affected by an act or failure to act by a State or local government.²⁶

The Commission may assert ancillary authority to “support its exercise of a specifically

²³ In 1998, the Commission stated its conclusion that “in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority.” *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd 24012, 24047 ¶ 77 (1998). In *Comcast*, the Court rejected the FCC’s claim that it had authority solely under Section 706 to regulate an Internet Service Provider’s network management practices, finding that the FCC’s 1998 interpretation is “still binding” and that agencies “may not ... depart from a prior policy” by silence. *Comcast* at 645-646. WISPA believes that if necessary the Commission has latitude to revisit this conclusion provided it does so in a manner consistent with “the public interest, convenience and necessity” and the Administrative Procedure Act.

²⁴ See, e.g., 47 U.S.C. §253(d) (“If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission *shall preempt* the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency”) (emphasis added)

²⁵ See, e.g., 47 U.S.C. §224(b)(1-2) (“(1) Subject to [assertion of state jurisdiction], the Commission *shall regulate* the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and *shall adopt* procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission *shall take* such action as it deems appropriate and necessary, including issuing cease and desist orders. ... (2)The Commission *shall prescribe* by rule regulations to carry out the provisions of this section) (emphases added).

²⁶ See 47 U.S.C. §332(c)(7)(B)(v) (“Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.”)

delegated power,”²⁷ and such power rests in Section 706 and other provisions. For this reason, the Commission should rely on its ancillary authority to extend the protections of Sections 253, 224 and 332(c)(7) – all of which address broadband infrastructure investment and barriers to entry – to terrestrial fixed wireless broadband services, either through the exercise of regulatory forbearance or through some other method.

III. ALTERNATIVELY, IF THE COMMISSION DETERMINES THAT IT LACKS STATUTORY AUTHORITY TO IMPLEMENT THESE RULE CHANGES, IT SHOULD SEEK ASSISTANCE FROM CONGRESS

If the Commission declines to revisit its conclusion about the basis for Section 706 authority or finds that an exercise of ancillary authority is not appropriate, the Commission should seek the proper authority from Congress to modify Sections 224, 253 and 332, or other appropriate provisions of the Act, to include terrestrial fixed wireless broadband services within the scope of services eligible to take advantage of rights of way policies and wireless facilities siting requirements. Simply put, if the Commission’s hands are tied and it cannot do its job, the Commission should request the appropriate statutory authority to carry out its other statutorily mandated responsibilities to encourage deployment of advanced telecommunications capability and to accelerate deployment of such capability through removing barriers to infrastructure investment.

Conclusion

For the foregoing reasons, WISPA urges the Commission to fulfill its statutory responsibilities to advance broadband deployment by removing those barriers that prevent fixed wireless broadband operators from having the same rights of access as their more established wireline, cable and mobile wireless competitors. Given the importance

²⁷ *Comcast* at 659.

of broadband as a strategic priority and a driver of our economy, such steps would help advance deployment, particularly to rural and underserved areas, by reducing significant bottlenecks and promoting competition in the provision of broadband services.

Respectfully submitted,

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**WIRELESS INTERNET SERVICE
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