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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND THE NEW JERSEY DIVISION OF RATE COUNSEL

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SUMMARY

Federal Communications Commission ("Commission") regulations and adjudication regarding local governments' right-of-way and wireless siting practices are a solution in search of a problem. NASUCA and Rate Counsel support the goal of universal broadband access because of the benefits it can bring to consumers, but the regulation foreshadowed by the notice of inquiry ("NOI") in the above-captioned proceeding is unnecessary, would be ineffective at furthering this goal, and most likely exceeds the Commission's statutory and constitutional authority.

The evidence in the record suggests that local right-of-way and wireless siting practices are not impediments to physical broadband deployment either generally or specifically in unserved regions. Broadband deployment is not greater in regions where local governments are more restrictive in their right-of-way compensation and practices. In unserved rural areas, local right-of-way and wireless siting regulations are minimal if they exist at all. Most local governments actively promote broadband deployment rather than hinder it. Delays in the application and permitting process are often attributable to the providers' failure to provide information needed by local governments. Finally, in cases where local governments truly *are* unreasonable in their practices, broadband providers already have and use federal judicial remedies. In light of this, NASUCA and Rate Counsel agree with several commenters that federal right-of-way and wireless siting regulations and adjudication cannot lower this barrier to broadband deployment because there simply is no substantial barrier to lower.

Even though the action contemplated by the NOI will not advance broadband deployment, NASUCA and Rate Counsel believe that it does have the potential to harm both local governments and consumers, their citizens and taxpayers. Local governments rely on their

right-of-way and wireless siting practices both to advance legitimate state interests and for revenue to support public services. Additionally, the adjudication proposed in the NOI would raise local governments' costs by moving litigation regarding rights-of-way and wireless siting to Washington instead of a local federal court, a change which favors providers, which already have legal presences in Washington. The results of the *Shot Clock Ruling* presented in the record serve as a forewarning; the *Ruling* has done little, if anything, to promote broadband deployment but has burdened local governments with the costs of ensuring compliance and limited their flexibility to respond to local conditions. In light of these consequences and the lack of any potential benefit, NASUCA and Rate Counsel believe the Commission should avoid rulemaking or adjudication in this field.

The comments in the record also bring to light several infirmities in the Commission's reasoning that it has the statutory authority to promulgate such rules or to adjudicate right-of-way or wireless siting disputes. Furthermore, federal regulation of local right-of-way management and wireless siting policies likely impinges on states' authority as protected by the Tenth Amendment and, as such regulation would limit the compensation municipalities receive for access to their property, would also constitute a taking in violation of the Due Process Clause. If the Commission proceeds with the action envisioned in the NOI, substantial litigation will likely ensure over whether those actions are both statutorily authorized and constitutional, at a substantial cost to local governments and taxpayers.

For these reasons, NASUCA and Rate Counsel believe the best course of action for the Commission would be to refrain from regulating these local practices or from adjudicating disputes under § 253(c) and § 332(a)(7). The record shows that such Commission action would be unnecessary, imprudent, and ineffective at encouraging faster deployment of broadband to

unserved areas, and also likely illegal. Instead, the Commission should focus on addressing the actual impediments to further broadband deployment, most notably the lack of financial incentives for providers to deploy in high-cost rural areas.

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I. INTRODUCTION

On April 7, 2011, the Federal Communications Commission ("Commission") released a notice of inquiry seeking information regarding local governments' policies for public right-of-way access and wireless facility siting.[1] Pursuant to the Commission's comment cycle,[2] the National Association of State Utility Consumer Advocates ("NASUCA") as an organization[3] and

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[1]/ Notice of Inquiry, *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*, 26 FCC Rcd. 5384 (2011) ("NOI").

[2]/ "Comment Deadlines set for Notice of Inquiry on Accelerating Broadband Deployments by Improving Public Rights of Way and Wireless Facilities Siting Policies," WC Docket No. 11-59, DA 11-1047 (rel. June 10, 2011).

[3]/ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

the New Jersey Division of Rate Counsel ("Rate Counsel") as an agency representing all of New Jersey's utility customers and as a member of NASUCA[4] hereby reply to the comments of other parties[5] in the above-captioned proceeding.

In the NOI, the Commission cites its statutory charge to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[6] Both NASUCA and Rate Counsel support this goal. America's ratepayers can only benefit from increased access to broadband internet services. Broadband services provide increasingly essential access to new commercial, educational, and healthcare opportunities. However, the evidence in the record shows that Commission regulations or adjudication regarding local right-of-way and wireless siting practices are an imprudent, ineffective, and likely illegal way of attempting to achieve universal broadband access. Because the record shows these practices are not a systemic barrier to broadband deployment in unserved areas, these proposals would not

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[4]/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division in, but not of, the Department of the Treasury. N.J. Stat. Ann. §§ 52:27EE-46 to -55.

[5]/ NASUCA and Rate Counsel have reviewed and respond to a limited number of comments, including those of the following parties: AT&T; CenturyLink; The City of Alexandria, Va. ("Alexandria"); The City of Arlington, Tex. ("Arlington") The City of Detroit, Michigan Municipal League, Michigan Townships Ass'n, and PROTEC ("Detroit"); The City of Dublin, Oh. ("Dublin"); The City of New York ("New York City"); The City of Ontario ("Ontario"); The City of Tempe, Ariz. ("Tempe"); FiberTower Corp. ("FiberTower"); The Greater Metro Telecommunications Consortium, The Rainier Communications Comm'n, The Cities of Tacoma and Seattle, and King County Washington, and the Colorado Municipal League ("GMTC"); The League of Kansas Municipalities ("LKM"); Level 3 Communications, LLC ("Level 3"); Middletown Township, Pa. ("Middletown Twp."); Montgomery County, Md. ("Montgomery Cnty."); The National Cable & Telecommunications Association ("NCTA"); The Nat'l League of Cities, the Nat'l Ass'n of Counties, The U.S. Conference of Mayors, the Int'l Municipal Lawyers Ass'n, the Nat'l Ass'n of Telecommunications Officers and Advisors, the Gov't Finance Officers Ass'n, the American Public Works Ass'n, and the Int'l City/County Management Ass'n ("National Associations"); NextG Networks, Inc. ("NextG"); Sunesys, LLC ("Sunesys"); Town of Herndon, Va. ("Herndon"); the Town of Westlake, Tex. ("Westlake"); Verizon and Verizon Wireless ("Verizon"). In omitting other parties' comments, NASUCA and Rate Counsel do not intend to imply that their relevance to the Commission in this proceeding is at all diminished.

[6]/ NOI, at ¶ 2.

actually advance the goal of promoting broadband ability. However, they would impose significant burdens on local governments and consumers, their citizens and taxpayers, by limiting their policy flexibility and revenue sources and by imposing new, higher compliance and litigation costs. Furthermore, the record raises serious questions regarding whether the Commission can legally or constitutionally regulate or adjudicate in this field. NASUCA and Rate Counsel believe that, in light of the evidence in the record, the Commission should avoid these problems by refraining from the action contemplated in the NOI.

II. FEDERAL RIGHT-OF-WAY AND WIRELESS SITING REGULATIONS ARE A SOLUTION IN SEARCH OF A PROBLEM.

NASUCA and Rate Counsel believe that the rulemaking and adjudication are a solution in search of a problem that does not exist. The evidence in the record suggests that local right-of-way and wireless siting practices are not impediments to physical broadband deployment either generally or specifically in unserved regions. Broadband deployment is *not* greater in regions where local governments are more restrictive in their right-of-way compensation and practices. In unserved rural areas, local right-of-way and wireless siting regulations are minimal if they exist at all. Most local governments actively promote broadband deployment rather than hinder it. Delays in the application and permitting process are often attributable to the providers' failure to provide information needed by local governments. Finally, in cases where local governments truly *are* unreasonable in their practices, broadband providers already have and use federal judicial remedies. In light of this, NASUCA and Rate Counsel agree with several commenters that federal right-of-way and wireless siting regulations and adjudication cannot lower this barrier to broadband deployment because there simply is no substantial barrier to lower.

A. The Evidence in the Record Shows that Broadband Deployment is Generally not Greater in Regions With Fewer Local Regulations.

The record indicates that there is no substantial link between broadband availability and local right-of-way practices. The National Associations cite an economic study by ECONorthwest ("ECONorthwest Report") that compares the local practices and level of deployment in states with laws limiting right-of-way compensation to a cost-based figure and states that allow municipalities to charge a percentage of revenue as a franchise fee.[7] ECONorthwest found, controlling for various demographic factors including population density and rural population share, that states that allow revenue-based franchising actually have a slightly *higher* level of deployment of 3Mbps/768kbps broadband service than do states that limit local governments to cost-based fees.[8] The lead of the revenue-based franchising states increases for faster broadband speeds, but this is not statistically significantly related to local franchising practices.[9] NASUCA and Rate Counsel agree with ECONorthwest and the National Associations that this data is inconsistent with the premise that local right-of-way and wireless siting practices are a systemic barrier to physical broadband deployment.[10] The experience of local governments corroborates this conclusion. For example, in 2010, Cherry Hills Village, Colorado, amended its wireless siting regulations, loosening them in the hopes that carriers would address coverage gaps within the Village.[11] In spite of this revision, at least one carrier has indicated that it does not intend to build new facilities to address the gap regardless of the new,

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[7]/ National Associations, at 10-11.

[8]/ ECONorthwest Report, at 7.

[9]/ *Id.*

[10]/ *Id.*, at 8; National Associations, at 12-13.

[11]/ GMTC, at 41.

streamlined process.[12] NASUCA and Rate Counsel believe that both the statistical and anecdotal evidence in the record belies the need for new Commission regulations over local right-of-way management or wireless siting practices.

B. The Record Shows That Broadband Deployment is Most Lacking In Rural Areas Where Local Right-of-Way and Wireless Siting Practices are Least Burdensome.

NASUCA and Rate Counsel believe that the biggest obstacle to universal broadband availability is the lack of physical deployment in rural, high-cost areas. The record shows that local right-of-way and wireless siting practices are not impediments to broadband deployment in these areas. The Commission cites its congressionally mandated goal of "encourage[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" as its purpose for issuing the NOI.[13] Both NASUCA and Rate Counsel support this goal. The promotion of broadband access will benefit consumers by bringing them access to new opportunities in e-commerce, distance learning, healthcare, and other areas. Unlike any other factor, physical deployment is a necessary condition for broadband availability.[14] In both the National Broadband Plan and the Seventh Broadband Report, the Commission found that most of the areas unserved by broadband are rural.[15] NASUCA and Rate Counsel agree with the National Associations that the lack of physical deployment to these regions is the greatest barrier to

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[12]/ *Id*., at 41-42.

[13]/ NOI ¶ 2 n.1 (citing section 706(a) of the Telecommunications Act of 1996, Pub L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (codified as amended at 47 U.S.C. § 1302 (2011)).

[14]/ Seventh Broadband Progress Report and Order on Reconsideration, *Inquiry Concerning the Deployment of Advanced Telecommunications Capacity 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*, 26 FCC Rcd. 8008 ¶ 66 (2011) ("Seventh Broadband Report").

[15]/ *See* National Broadband Plan § 8.1; Seventh Broadband Report, at ¶ 38.

universal broadband access.[16] The data in the record corroborates this finding. For example, the League of Kansas Municipalities notes that while over 99% of non-rural Kansans have access to 3Mbps/768kbps broadband, only 71.9% of rural Kansans do.[17] The evidence in the record also indicates that in such unserved, rural areas, if there are any local restrictions on right-of-way access or wireless siting, they are minimal. In Exhibit F to the National Associations' Comments ("CTC Report"), the Columbia Telecommunications Corporation finds that in its experience, "it is in the most unserved and underserved rural areas where local fees are most minimal or non-existent."[18] As an example, GMTC cites the Town of Dinosaur, Colorado, an area of two square miles with 339 inhabitants.[19] Dinosaur's local regulations are limited to a few very permissive rules regarding the placement of wireless facilities.[20] In light of this evidence, NASUCA and Rate Counsel do not believe that local right-of-way and wireless siting practice are a significant barrier to broadband deployment in the most underserved, rural areas.

C. The Record Shows That Many Municipalities *Encourage* Broadband and Actively Seek to Improve Their Practices and Lower Burdens on Broadband Providers.

The Commission asks whether information regarding local practices and the requirements local governments place on providers seeking to deploy infrastructure is readily available.[21] NASUCA and Rate Counsel believe that the clear answer in the record is yes. The evidence in

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16/ National Associations, at 9.

17/ LKM, at 8.

18/ CTC Report, at 3.

19/ GMTC, at 37.

20/ *Id.*

21/ NOI, at ¶ 14.

the record indicates that the vast majority of American local governments are constructive partners for broadband providers. Some of the providers that submitted comments acknowledge this.[22] The record is replete with examples of local governments that are eager to facilitate broadband deployment and to assist infrastructure providers as much as possible. For example, many of the municipalities that have commented invited providers to participate actively in the development of their right-of-way management and wireless siting practices.[23] Many local governments also make their relevant ordinances, regulations, and forms available online.[24] Many of the municipalities have adopted the practice of encouraging staff to work with providers either before or during the application process to ensure that applicants understand municipal requirements, forms, and procedures and get everything right the first time. For example, Dublin, Ohio, has hired a consultant at its own expense to assist wireless providers seeking to construct new facilities.[25] Arlington, Texas, holds regularly scheduled meetings with applicants to discuss their applications and often approves permits on the spot.[26] Some local governments have developed their own infrastructure to facilitate deployment by broadband providers. For example, Westlake, Texas, and Dublin, Ohio, have installed town-wide duct banks accessible to all providers seeking to deploy new fiber, allowing faster, easier installation with less threat of disruption to other services.[27] Other municipalities proactively send providers renewal forms

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[22]/ *See*, *e.g.*, Verizon, at 16.

[23]/ *See*, *e.g.*, Arlington, at 6, 11-12; Detroit, at 6-7; Ontario, at 4.

[24]/ *See*, *e.g.*, Alexandria, at 2; Arlington, at 6; Detroit, at 8 n. 21; Dublin, at 4; GMTC, at 5-12; Herndon, at 3; Ontario, at 3-4; Tempe, at 3; Westlake, at 3.

[25]/ Dublin, at 5.

[26]/ Arlington, at 12.

[27]/ Dublin, at 4; Westlake, at 2.

when existing authorization is nearing expiration.[28] The record confirms the success of these municipal practices as the vast majority of commenting municipalities cannot cite a single provider who was deterred from ultimately deploying broadband facilities by the local right-of-way or wireless siting practices.[29] This evidence supports NASUCA's and Rate Counsel's belief that local right-of-way and wireless siting practices are not a systemic or widespread barrier to broadband deployment.

D. The Delays Identified Are Caused by Providers' Failure to Provide Relevant Information or Cooperate with Municipal Processes.

The Commission requests information regarding the sources of delays in processing right-of-way access and wireless siting applications.[30] NASCUA and Rate Counsel agree with several commenters that the broadband providers themselves, and not local practices, are often responsible application processing delays. The record contains several examples. Herndon, Virginia, reports telecommunications applications often submit incomplete, informal, or inappropriate boilerplate documents that do not provide the information needed for review.[31] Tempe, Arizona, and Arlington, Texas, note that they frequently need to request multiple corrections from telecommunications carriers to address information omitted from applications.[32] Montgomery County, Maryland, cites instances where providers submit a large block of applications at once, preventing timely processing, or have failed to submit required drawings,

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[28]/ *See, e.g.*, Tempe, at 4.

[29]/ *See, e.g.*, Alexandria, at 2; Dublin, at 2; Herndon, at 2; Ontario, at 2; Tempe, at 2; Westlake, at 2.

[30]/ NOI, at ¶ 14.

[31]/ Herndon, at 2.

[32]/ Arlington, at 9; Tempe, at 4.

traffic control plans, proof that a landowner has agreed to the placement of a wireless site on its land, or an application which incorrectly lists the proposed site.[33] Furthermore, the evidence in the record comparing applications by telecommunications providers to those of other utilities confirms municipalities' assertions that applicants are often to blame for delays. For example, Montgomery County notes that "[g]enerally speaking, the County sees better quality more complete applications from civil engineering firms than from telecommunications engineering firms."[34] NASUCA and Rate Counsel believe that if non-telecommunications providers are able to work successfully within existing right-of-way policies, there is no reason to believe that the same policies are a barrier to broadband deployment. This evidence suggests that provider diligence, not Commission action, can speed processing times and broadband deployment.

E. Broadband Providers Currently Have an Adequate Remedy in Both Federal and Often State Courts.

The Commission asks whether it should adjudicate disputes regarding local rights-of-way practices.[35] Although NASUCA and Rate Counsel believe such adjudication will not significantly advance broadband deployment because such practices generally are not an obstruction to it, such adjudication is also unnecessary because providers already have a sufficient remedy against unreasonable local practices in the judiciary.[36] In instances where local governments truly are being unreasonable in their practices, the record indicates that carriers are using effectively using these remedies to promote broadband deployment. For example, AT&T

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[33]/ Montgomery Cnty., at 21, 27-30.

[34]/ *Id*., at 21.

[35]/ NOI, at ¶ 49.

[36]/ *See* 47 U.S.C. §§ 253(d), 332(c)(7)(B)(v) (2011).

lists multiple instances where it has successfully defeated of unreasonable practices in the courts.[37] Similarly, NextG has filed lawsuits against several local governments pursuant to § 253 in order to contest what it argues are unreasonable practices.[38] Furthermore, some of the examples broadband providers use to detail allegedly unreasonable local practices are examples where the provider has a state-level remedy as well. Verizon points to its experience in the Town of Leesburg, Virginia.[39] In 2010, Verizon forwent its plan to deploy new physical infrastructure in Leesburg when the Town required an in-kind contribution in violation of Virginia law. Rather than pursue its legal rights, Verizon decided to refrain from deployment.[40] Verizon failure to enforce its rights and remedies undercuts its support for additional remedies. The evidence in the record show, providers can and do use the courts to overcome unreasonable local practices that illegally block broadband deployment, NASUCA and Rate Counsel do not believe Commission adjudication of these disputes would be necessary even if such practices were a systemic barrier to broadband deployment in unserved areas.

III. FEDERAL REGULATION OF LOCAL RIGHT-OF-WAY AND WIRELESS SITING PRACTICES WOULD HARM LOCAL GOVERNMENTS AND CONSUMERS WITHOUT SIGNIFICANT PUBLIC BENEFIT.

Even though the action contemplated by the NOI will not advance broadband deployment, NASUCA and Rate Counsel believe that it does have the potential to harm both local governments and consumers, their citizens and taxpayers. Local governments rely on their right-of-way and wireless siting practices both to advance legitimate state interests and for

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[37]/ AT&T, at 5-6.

[38]/ NextG, at 6-11. New York City describes and defends its practices in light of the highly congested nature of its rights-of-way, in its comments. It is noteworthy in light of its practices that New York City residents *each* have access to at least two wireline broadband providers. New York City, at 3-4.

[39]/ *See* Verizon, at 25.

[40]/ *Id*.

revenue to support public services. Additionally, the adjudication proposed in the NOI would raise local governments' costs by moving litigation regarding rights-of-way and wireless siting to Washington D.C. instead of a local federal court, a change which favors providers, which already have legal presences in Washington. The results of the *Shot Clock Ruling* presented in the record serve as a forewarning; the *Ruling* has done little, if anything, to promote broadband deployment but has burdened local governments with the costs of ensuring compliance and limited their flexibility to respond to local conditions. In light of these consequences and the lack of any potential benefit, NASUCA and Rate Counsel believe the Commission should avoid rulemaking or adjudication in this field.

A. Federal Regulation of Local Right-of-Way and Wireless Siting Practices Would Harm Local Governments and Citizens by Limiting Their Ability to Protect Local Interests.

The Commission asks how local right-of-way management and wireless siting practices relate to local policy interests.[41] The record shows the local governments use regulations on broadband providers' access to rights-of-way and on wireless siting to exercise their police power and further important public health and safety goals. NASUCA and Rate Counsel agree with several commenters that federal limits on these local practices would unduly burden local governments' abilities to exercise their police power function adequately and to protect consumers, their citizens, from harm. The National Associations cite multiple instances where providers have demonstrated the need for local regulations to protect the public interest. For example, over the course of its FiOS deployment, Verizon managed to interrupt other utilities' service substantially by damaging electric and telecommunications lines and water, sewer, and

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[41]/ NOI, at ¶ 22.

gas pipes.[42] This led to gas explosions in consumer homes, raw sewage leaks on consumers' property, the need for several consumers to boil water, and 911 service interruptions in multiple instances.[43] Pierce County, Washington, reports over 120 instances where utilities have created public health or safety hazards in the right of way, including improperly installed or maintained infrastructure.[44] Concerns about the impact of utility work in rights-of-way on traffic both during work and after installation are widespread among municipalities and necessitate local regulation to protect the public convenience and safety.[45] Several commenting local governments also note that Federal Aviation Administration regulations rely on local wireless siting practices to keep flight paths near airports clear of obstructions.[46] Finally, local governments also cite their important, legitimate interests in aesthetic and historic preservation goals. Several governments use their local practices to ensure that broadband deployment does not come at the cost of respect for their past.[47] For example, Arvada, Colorado, used its wireless siting practices to negotiate an agreement with Cricket to allow visually unobtrusive panel antennae onto its historic water tower.[48] NASUCA and Rate Counsel believe that these local interests are best pursued with flexible local policy that is able to adapt to varying facts. Federal regulations regarding right-of-way and wireless siting practices would needlessly limit that flexibility and thereby harm local governments and consumers.

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[42]/ National Associations, at 19-20.

[43]/ *Id.*

[44]/ GMTC, at 39-49.

[45]/ *See*, *e.g.*, Alexandria, at 5-6; Arlington, at 6; Dublin, at 7; Tempe, at 7.

[46]/ Montgomery Cnty., at 23; Ontario, at 6.

[47]/ *See*, *e.g.*, GMTC, at 22; Ontario, at 6.

[48]/ GMTC, at 22.

B. The Record Shows That the Limitations on Local Right-of-Way Compensation Would Significantly Harm Local Budgets, Necessitate Public Spending Cuts, and Harm Consumers and Taxpayers.

NASUCA and Rate Counsel agree with most of the commenting local governments that federal regulations limiting right-of-way compensation would unnecessarily harm local government's budgets and, by extension, consumers as taxpayers. Rights-of-way are among local governments' most important and valuable assets. As Middletown Twp., Pennsylvania, notes, "proper management of the Township's rights of way includes both the *physical* management of the rights of way and the *fiscal* management of the rights of way."[49] By making them available to utilities, local governments offer utilities a valuable opportunity to deploy their services without needing to negotiate with individual landowners. Many states require local governments to receive fair-market-value rents in exchange for access and view anything less as private misappropriation of public property.[50] Local governments rely on these rents to fund valuable public programs. NASUCA and Rate Counsel are concerned that, if this source of revenue is limited consumers, as taxpayers, will be harmed. For example, LKM notes that several Kansas local governments rely on franchise fees to fund their emergency services, public infrastructure, and public libraries.[51] Without this revenue, LKM members would either have to fire public employees, delay crucial infrastructure maintenance, or raise taxes to the detriment of consumers as Kansas citizens and taxpayers.[52] Furthermore, as LKM argues, franchise fees, unlike many

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[49]/ Middletown Twp., at 13 (emphasis in original).

[50]/ *See, e.g.*, LKM, at 5; Middletown Twp., at 14.

[51]/ LKM, at 6.

[52]/ *Id*.

other sources of local government revenue (e.g. sales taxes), are recession-resistant.[53] Because of this, they are increasingly important to municipalities as a source of financial stability in the current economic climate. Finally, NASUCA and Rate Counsel reiterate their observation above that, where the rent demanded by local governments is truly not "fair and reasonable compensation," providers already have and do use a judicial remedy.[54] Because of this, NASUCA and Rate Counsel believe that Commission rules limiting right-of-way compensation beyond the current judicial remedies would harm local governments and consumers, their taxpayers.

C. The Record Indicates that Subjecting Local Governments to § 253 Adjudication Before the Commission Would Pose a Substantial Burden on Them and Harm Taxpayers.

The Commission asks whether adjudication under § 253(c) would be "well suited" to addressing the isolated instances where right-of-way practices might obstruct broadband deployment.[55] NASUCA and Rate Counsel believe that the evidence in the record indicates that such adjudication would increase the burdens of litigation on local governments. As discussed above, providers seeking to challenge the reasonableness of a local practice already have a remedy in local federal courts. This guarantees local governments the ability to defend their practices in a convenient forum should a provider choose to litigate. As Detroit notes, allowing the Commission to adjudicate such disputes would force local governments to send attorneys to Washington—at greater cost—to defend local practices.[56] Unlike local governments, which are

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[53]/ *Id.*, at 5.

[54]/ 47 U.S.C. § 253(c).

[55]/ NOI, at ¶ 49.

[56]/ Detroit, at 5.

often limited in the size and scope of their litigation capabilities, infrastructure providers tend to be larger corporations that operate at least on an interstate scale. As their comments indicate, many of these providers have established legal presences in Washington.[57] In contrast, no municipality commenting in the above-captioned proceeding lists a Washington office. However, each infrastructure provider necessarily has some physical presence (or at least desires a physical presence) in the judicial district where a dispute occurs. Because both parties have a presence in the local judicial district where a dispute occurs but, generally, only one has a presence in Washington, D.C. it is less burdensome overall, and especially to local governments and consumers, as taxapayers, to resolve § 253(c) disputes in local federal district courts.

D. The Evidence of the Failure of the *Shot Clock Ruling* to Promote Broadband Deployment Foreshadows the Outcomes of the Proposed Right-of-Way and Wireless Siting Rules.

NASUCA and Rate Counsel believe the results of the *Shot Clock Ruling* detailed in the record suggest the probable outcome of any further Commission regulation of local right-of-way and wireless siting practices. Pursuant to the Commission's request,[58] the record contains an abundance of evidence that show that the *Shot Clock Ruling* has served only to burden local governments with the costs of ensuring their compliance without achieving any significant changes in processing times or broadband availability. GMTC's comments on behalf hundreds of local governments in Colorado and Washington confirm the insignificance of the *Shot Clock*

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[57]/ *See, e.g.*, AT&T, at 24; CenturyLink, at 20; FiberTower, at 4; Level 3, at 33; Verizon, at 42. The signature blocks in each of these comments indicate that each of these corporations has an office within the District of Columbia.

[58]/ NOI ¶ 13 (citing Declaratory Ruling, *Petition for Declaratory Ruling To Clarify Provisions of Section 332(c)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, 24 FCC Rcd. 13994 (2009) ("*Shot Clock Ruling*"); *Order on Reconsideration*, 25 FCC Rcd. 11157 (2010), *appeal pending*).

Ruling on local broadband deployment.[59] These local governments generally have not substantially changed their wireless siting practices in the wake of the *Shot Clock Ruling*, yet none of them has faced legal challenges to their practices in court or even threats of litigation.[60] Since none of these governments made significant policy changes because of the *Shot Clock Ruling*, it cannot have had a substantial effect on broadband deployment to unserved areas. Furthermore, problems in the application of the *Shot Clock Ruling* exemplify the dangers of one-size-fits-all federal regulation over traditionally local issues. Some local governments complain of difficulties in complying with the *Shot Clock Ruling* in the face of submissions of large numbers of applications at once. For example, Montgomery County has needed to hire additional staff to handle wireless siting applications when carriers file a glut of requests simultaneously.[61] Additionally, the *Shot Clock Ruling* has forced local governments to discriminate against applicants by moving wireless siting applications to the front of the line, raising average processing times for other parties' zoning applications and harming them.[62] This evidence shows that the *Shot Clock Ruling* has only served to increased the burdens, financial and otherwise, on local governments processing wireless siting applications and has not brought about an increase in broadband deployment. Because, as detailed above, new right-of-way and wireless siting regulations would burden local governments and consumers without significantly promoting broadband deployment, they would be like the *Shot Clock Ruling* in their outcome. For this reason, NASUCA and Rate Counsel believe the Commission should avoid new such regulations.

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[59]/ GMTC., at 12.

[60]/ *Id*., at 12-16.

[61]/ Montgomery Cnty., at 39.

[62]/ *See*, *e.g.*, GMTC, at 53; Montgomery Cnty., at 39.

IV. THE RECORD RAISES SUBSTANTIAL QUESTIONS REGARDING WHETHER THE COMMISSION HAS AUTHORITY TO REGULATE LOCAL RIGHT-OF-WAY AND WIRELESS SITING PRACTICES.

A. The Communications Act Prohibits the Commission from Regulating or Adjudicating Local Right-of-Way and Wireless Siting Practices.

NASUCA and Rate Counsel agree with several commenters that, based on a fair reading of their texts, the Communications Act and the Telecommunications Act of 1996 bar the rulemaking and adjudication the Commission is contemplating. In the NOI, the Commission suggests that § 253(c) authorizes both rulemaking and adjudication with respect to local right-of-way management practices.[63] NASUCA and Rate Counsel disagree. First, as the League of Kansas Municipalities argues, § 253 does not apply to broadband services at all because it only applies to telecommunications services.[64] The Commission has consistently classified broadband services as information services, thus placing them outside the scope of § 253(a).[65] Even if § 253 does apply to broadband services, NASUCA and Rate Counsel agree with the National Associations that § 253(d) prevents the Commission from regulating or adjudicating local government management of rights-of-way and local governments' ability to require fair compensation from federal intrusion.[66] Section 253(d) specifically excludes the practices in question from the Commission's jurisdiction, leaving disputes over whether local practices or

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[63]/ NOI, at ¶¶ 56-57.

[64]/ LKM, at 11. Section 253(a) is only concerned with practices that "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).

[65]/ LKM, at 11-12, *see also, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); Final Rule, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 70 Fed. Reg. 60222, 60223 ¶ 6 (Oct. 17, 2005).

[66]/ 47 U.S.C. § 253(d); LKM, at 13; National Associations, at 57-60.

charges are unreasonable in the courts and precluding any Commission rulemaking on the matter.[67]

The Commission relies on § 332 of the Communications Act to support its claimed authority over the wireless siting practices of local governments.[68] NASUCA and Rate Counsel agree with the National Associations that it does not.[69] The National Associations note that § 332 explicitly allows an aggrieved provider to petition the Commission for relief only with respect to RF-emissions concerns.[70] Otherwise, § 332(c)(7)(B)(v) clearly places jurisdiction over wireless siting disputes between providers and local governments in the courts.[71] For the Commission to assume adjudicatory authority over such disputes would be in direct violation of § 332. As the National Associations note, the question of whether § 332(c)(7) authorizes Commission rulemaking is currently under consideration by the Fifth Circuit.[72] NASUCA and Rate Counsel agree with the National Associations that the Commission should not engage in further rulemaking under § 332(c)(7) at least until the issue is settled in the pending litigation.[73]

Finally, § 706(a) of the Telecommunications Act of 1996 does nothing to enhance the Commission's authority beyond that which it already possesses.[74] The National Associations

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[67]/ National Associations, at 57.

[68]/ 47 U.S.C. § 332(c)(7); NOI, at ¶ 55.

[69]/ National Associations, at 63.

[70]/ § 332(c)(7)(B)(v); National Associations, at 63.

[71]/ § 332(c)(7)(B)(v); National Associations, at 63.

[72]/ National Associations, at 63 (citing *City of Arlington et al. v. FCC et al.*, No. 10-60039 (5th Cir.) (submitted for decision June 8, 2011)).

[73]/ National Associations, at 63.

[74]/ National Associations, at 63-64.

note the Commission's prior determination that "[its] authority under Section 706(a) does not . . . extend beyond [its] subject matter jurisdiction under the Communications Act."[75] Because, as outlined above, the Commission's subject matter jurisdiction over local right-of-way management and wireless siting practices is limited by §§ 253(d) and 332(c)(7)(B)(v), respectively, the Commission cannot rely on § 706(a) to expand its authority into the areas contemplated in the NOI.[76]

B. Commission Regulations Regarding Local Right-of-Way and Wireless Siting Practices Implicate Important Fifth and Tenth Amendment Concerns.

NASUCA and Rate Counsel believe that the Constitution may also prevent the action the NOI contemplates. Several Commenters also point to the Constitution to show that the action suggested in the NOI would exceed not only the statutory authority of the Commission but also the constitutional bounds on the federal government. Local governments have a long- and clearly established Fifth Amendment "right to exact compensation" for the use of their real estate.[77] A rule requiring municipalities to allow infrastructure providers access to their property without compensation would clearly constitute a taking.[78] At the very least, new Commission rules limiting the compensation local government may require in exchange for effectively renting their rights-of-way will certainly lead to protracted, and likely fact-specific, takings litigation as municipalities seek to vindicate their constitutional rights. In light of the precedent highlighted

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[75]/ Report and Order, *In re Preserving the Open Internet*, 25 FCC Rcd. 17905, 17970 ¶ 121 (2010); National Associations, at 63.

[76]/ National Associations, at 63-64.

[77]/ National Associations, at 64 (quoting *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 99 (1893), *aff'd on rehearing*, 149 U.S. 465 (1893)).

[78]/ National Associations, at 65 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982)).

by the National Associations, the merits of local governments' cases in that instance will be strong. At the very least, such litigation will be costly, for both local governments and consumers as well as for providers.

Commenters also argue that the Tenth Amendment precludes Commission action to regulate local right-of-way management and wireless siting practices. Under the Tenth Amendment, "the federal government may not compel the States to enact or administer a federal regulatory program."[79] The federal government does not have the authority to regulate states, only individuals and corporations.[80] As the National Associations argue, to limit local right-of-way and wireless siting practices for the sake of furthering federal broadband deployment goals would be to "unconstitutionally commandeer the local administration of public property."[81] Furthermore, as Middletown Twp., Pennsylvania, argues, the management of local-government-owned property is at the core of the powers the Tenth Amendment reserves to the states.[82] Middletown Twp., and several other local governments, have been exercising complete control over their rights-of-way since long before the adoption of the Constitution.[83] Because the Constitution does not delegate local land use management to the federal government, the Tenth Amendment protects its exercise by state and local governments from federal interference.[84]

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[79]/ National Associations, at 65 (citing *Printz v. United States*, 521 U.S. 898, 918-19, 993 (1997)) (internal quotations omitted).

[80]/ National Associations, at 65 (citing *Alden v. Maine*, 527 U.S. 706, 714 (1999)).

[81]/ National Associations, at 65.

[82]/ Middletown Twp., at 18 (citing U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")).

[83]/ Middletown Twp., at 18-19.

[84]/ *Id*.

These statutory and Constitutional questions present the Commission with a legal can of worms. Even if the Commission does have the authority to undertake the actions the NOI contemplates, NASUCA and Rate Counsel do not believe the Commission should exercise it. The evidence in the record shows that local right-of-way and wireless siting policies are not an impediment to universal broadband deployment, so the rulemaking and adjudication the NOI envisions are not necessary.

V. CONCLUSION

For these reasons, NASUCA and Rate Counsel believe the best course of action for the Commission would be to refrain from regulating these local practices or from adjudicating disputes under § 253(c) and § 332(a)(7). The record shows that such Commission action would be unnecessary, imprudent, and ineffective at encouraging faster deployment of broadband to unserved areas, and also likely illegal. Instead, the Commission should focus on addressing the actual impediments to further broadband deployment, most notably the lack of financial incentives for providers to deploy in high-cost unserved areas.

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