

**Before the
Federal Communications Commission
Washington, DC 20556**

In the Matter of

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

WC Docket No. 11-59

REPLY COMMENTS OF NEXTG NETWORKS, INC.

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SUMMARY

As highlighted in the Commission’s *Notice of Inquiry*, advancing the deployment of broadband technologies is critical to this country’s economic success. It is a driving factor in promoting local and national economic growth, as well as an important component in improving education, healthcare, and energy efficiency. The deployment of broadband technology, however, is dependent upon the deployment of broadband infrastructure—which is currently hampered by a number of costly and time-consuming barriers.

NextG supports the Commission’s efforts to expand and accelerate the deployment of broadband technology. NextG provides telecommunications services via distributed antenna system (“DAS”) networks. As the Commission has recognized, DAS networks already play an important role in the deployment of wireless broadband services. In particular, DAS plays a critical role in deploying broadband wireless services to hard to reach areas and in strengthening network capacity.

However, as NextG and several other commenting parties explain, broadband deployment is currently hindered by a number of obstacles that slow, and in some cases outright inhibit, the installation of necessary broadband infrastructure. A critical issue facing the deployment of DAS and other broadband infrastructure is the widespread differential treatment exhibited by municipalities and local governments. Broadband deployment is also frequently constrained by excessive fees and uncertain procedures for accessing the public rights-of-way.

For the reasons discussed in these Reply Comments, NextG urges the Commission to address these barriers through the following recommendations:

- **Clarifying the “effective prohibition” standard of Section 253.** Section 253 was designed to keep local regulations in check and to prevent local authorities

from becoming a barrier to deployment through a patchwork quilt of inconsistent and burdensome parochial requirements. The Commission should confirm the *California Payphone* standard and clarify that an actual and complete prohibition is not needed to show that a local requirements violates Section 253(a).

- **Clarifying that Section 253 Limits Local Regulation.** NextG generally supports a series of clarifications recommended by PCIA – The Wireless Infrastructure Association and The DAS Forum with regard to limits on local regulation. These include defining and confirming the need for “non-discriminatory” access to the public rights-of-way, defining “fair and reasonable” charges, defining the limitations and scope of the rights-of-way management exception, declaring that the Commission has authority to preempt local requirements through this proceeding if they violate other provisions of Section 253, and providing provisions for administrative relief for violations of these rules.
- **Rejecting Local Governments’ Assertion that They Are Entitled to Recover Monopoly Rent for Access to the Public Rights-of-Way.** The Commission has already recognized that there is no competitive market for the public rights-of-way. The Commission should instead clarify that cost-based fees allow for a more efficient permitting process, which in turn gives providers a greater degree of financial clarity that is needed for ready deployment of broadband infrastructure.

The Commission has recently taken critical steps to ensure continued and more efficient deployment of wireless broadband facilities, including adopting the *Shot Clock Ruling* in 2009 and the *Pole Attachment Order* in 2011. NextG hopes that the Commission continues to promote broadband deployment by taking action based upon the comments filed in this proceeding and adopting the recommendations outlined in these Reply Comments.

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. COMMENTS BY OTHER PROVIDERS SUPPORT NEED FOR COMMISSION ACTION	3
A. Excessive Fees Inhibit Deployment	4
B. Disparate Treatment Inhibits Deployment.....	9
C. The Commission Should Clarify Section 253	12
III. RESPONSE TO COMMENTS BY MUNICIPALITIES AND LOCAL GOVERNMENTS	16
A. The Commission Should Reject Local Governments’ Assertion That They Are Entitled to Recover Monopoly Rent for Access to PROW.....	16
B. Municipal Claims That Delays Are Caused by Incomplete Applications Are Inaccurate	19
C. The Commission Has The Authority To Apply And Interpret Section 253.	21
D. Municipal Views of Wireless Siting Demonstrate The Cause of Delays and Excessive Cost of Deployment.	24
IV. CONCLUSION	27

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NextG Networks, Inc., on behalf of itself and its operating subsidiaries, NextG Networks of NY, Inc., NextG Networks of California, Inc., NextG Networks Atlantic, Inc., and NextG Networks of Illinois, Inc., (collectively “NextG”), respectfully submits these reply comments in response to the initial comments filed pursuant to the Notice of Inquiry (“NOI”) released April 7, 2011, in the above-captioned proceeding.¹

I. INTRODUCTION

As NextG explained in its Initial Comments in this proceeding, it is at the cutting edge of deployment of innovative technologies that promote the deployment of broadband services. Moreover, because its Distributed Antenna System (“DAS”) networks incorporate both wireline and wireless equipment, NextG has unique experience dealing with local governments’ regulatory impositions and the impediments to deployment of broadband that result.

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*, Notice of Inquiry, 26 FCC Rcd. 5384 (2011) (“Broadband Acceleration NOI”).

A review of the initial comments in this docket makes clear that the obstacles, roadblocks and delays to accessing municipal public rights of way (“PROW”) that NextG faces on a daily basis are by no means unique. Several consistent themes emerged in the comments of other parties seeking access to the PROW:

- **Excessive Fees Inhibit Deployment.** Consistent with NextG’s experience, other parties installing facilities in the PROW cited patently unreasonable charges used as a deterrent to deploying facilities but disguised as either application fees or annual franchise-type fees.
- **Disparate Treatment Inhibits Deployment.** NextG and other commenting service and infrastructure providers detailed their experiences with both discriminatory and differential treatment and the adverse effects that result when local governments treat some providers unfairly.
- **Clarification of Section 253 Is Necessary.** The lack of clarity regarding the scope and protections afforded by Section 253 has resulted in inconsistent application of the law and uncertain treatment of certain service providers who must install facilities in the PROW.

Most of the municipalities and local governments that filed comments in this proceeding gloss over these issues and instead attempt to lead the Commission to believe that there are no existing impediments to broadband deployment. Their comments seek to deter the Commission from acting, and cite lofty, albeit misplaced, tenets such as “a basic respect for federalism, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commission’s limited expertise on local land use matters. . . .”² Moreover, several commenting jurisdictions paint rosy pictures of widespread broadband deployment and local regulatory regimes for PROW access that are fair and efficient. Unfortunately, the reality faced by many service and infrastructure providers is starkly different and more accurately characterized by

² See, e.g., Comments of the City of Portland, WC Docket 11-59 (July 18, 2011) at 1-2 (“Portland Comments”); Comments of the Town of Herndon, Virginia, WC Docket 11-59 (July 18, 2011) at 1 (“Herndon Comments”); Comments of the City of Mesa, WC Docket 11-59 (July 18, 2011) at 1 (“Mesa Comments”); Comments of Montgomery County, Maryland, WC Docket 11-59 (July 18, 2011) at ii (“Montgomery County Comments”).

regulatory uncertainty, exorbitant and unpredictable fees, and disparate treatment at the hands of municipal and local government authorities.

In response to the comments filed by municipalities and local governments, NextG submits the following:

- The Commission should reject local governments' assertion that they are entitled to monopoly profits for access to the PROW.
- The Commission should require local governments to treat all infrastructure providers in the PROW equally and stop placing discriminatory and disparate processes and fees on wired or wireless broadband infrastructure providers.
- Municipal claims that delays are caused by incomplete applications are inaccurate.
- The Commission has the authority to and should apply and interpret Section 253.
- Municipal views of wireless siting demonstrate the cause of the delays and excessive cost of deployment.

The Commission has before it substantial record evidence upon which to act, and this record will be further supplemented with these reply comments.

II. COMMENTS BY OTHER PROVIDERS SUPPORT NEED FOR COMMISSION ACTION

In its Initial Comments, NextG explained that it faces serious obstacles and roadblocks when working with municipalities and local governments as it attempts to install its facilities in the PROW (and it has faced such obstacles on a daily basis for many years). The Comments filed by NextG and by other providers in this proceeding illustrate indisputably that these roadblocks exist despite assertions by local governments that the procedures for wireless facilities siting and PROW access are fair and working properly. NextG explained that on a regular basis it encounters lengthy delays, uncertain and poorly defined application procedures,

demands for exorbitant application and rental fees, and a host of other egregious requirements for accessing the PROW.

The record in this proceeding substantiates that NextG is not alone in its problems securing reasonable access to the PROW. Numerous other entities that install wireless and wireline facilities provided the Commission real-world examples of some of the egregious and unfair practices employed by municipalities and local governments. These comments further support NextG's overarching message to the Commission in its Initial Comments that the status quo is not working and there is an immediate need for the Commission to act.

Several commenting parties claim that there is no evidence that a city's policies or charges with regard to facilities installation have discouraged broadband deployment. Indeed, some have alluded to a "misperception promoted by the industry" that local practices concerning wireless siting and charges for use of public property inhibit broadband deployment and adoption.³ NextG strongly disagrees with these assertions, and believes that the experiences of NextG and other providers that are discussed below clearly illustrate that the concerns of service providers are well-founded and merit action by the Commission.

A. Excessive Fees Inhibit Deployment

Unpredictable and unreasonable fees charged for access to the PROW are a powerful deterrent to parties seeking to invest in broadband infrastructure. As noted by NextG in its Initial Comments, these fees may come in the form of both application fees and annual demands for payment. Whatever the form of the fee, accounting for these excessive costs is a major budgetary constraint that diverts funding from deploying facilities in new locations and making important network upgrades.

³ Portland Comments at 2.

In their initial comments, various local governments repeatedly claim that there is “no evidence” that the “policies or charges” associated with placing facilities in the PROW inhibits the deployment of broadband.⁴ The comments from service providers, however, very clearly indicate otherwise. Indeed, NextG believes that its own experiences, as well as those shared by other service and infrastructure providers, are concrete evidence that excessive fees inhibit deployment.

NextG’s Initial Comments contained examples of both application fees and franchise-type fees that total tens or hundreds of thousands of dollars.⁵ In some circumstances, NextG has limited its deployment in locations where it deems the fees are excessive. New York City is a prime example. Only a small percentage of NextG’s New York City network was deployed in Manhattan due to the high pricing associated with this zone. It is ironic that in its comments the City of New York cites actual deployment as an indicator of a “best practice.”⁶ Perhaps if New York City’s fees were indeed a best practice, then NextG would be “actually deploying” more of its facilities there. As Verizon succinctly explained, if “local actions make it more expensive to deploy broadband facilities, they make it less likely that providers will build such facilities in that area.”⁷

New York City is not the only location in New York where excessive fees are a problem. Level 3 has encountered unwarranted charges when deploying facilities along state highways. The company aptly summarizes the situation in its initial comments, noting that fees imposed by

⁴ Portland Comments at 5; Mesa Comments at 2.

⁵ Comments of NextG Networks, Inc., WC Docket 11-59 (July 18, 2011) at 13-16 (“NextG Initial Comments”).

⁶ Comments of the City of New York, WC Docket 11-59 (July 18, 2011) at 3 (“New York Comments”).

⁷ Comments of Verizon and Verizon Wireless, WC Docket 11-59 (July 18, 2011) at 16 (“Verizon Comments”).

the New York State Thruway Authority (“NYSTA”) in the form of annual rents “are so exorbitant and divorced from prevailing rates as to prevent Level 3 from providing telecommunications service—including middle-mile broadband transport—to communities in New York State.”⁸ Verizon also reported excessive fees charged by the NYSTA. In 2002, the NYSTA required Verizon to pay \$24,000 to occupy a mere 19 feet of the PROW.⁹ Adjusted for inflation, the annual fee now exceeds \$33,000.¹⁰

CenturyLink also cites excessive fees as a primary roadblock to broadband deployment. In its initial comments, CenturyLink reported that it “has experienced too many instances in which local governments have imposed excessive, discriminatory, and/or unbalanced fees in terms of access for use of the PROW that have little or no relationship to the actual cost of managing the PROW.... These fees have diverted and continue to divert funds from the deployment of broadband infrastructure.”¹¹ CenturyLink further notes that excessive fees inhibit deployment regardless of whether they come in the form of annual revenue-based fees, annual linear-foot fees, or excessive one-time permit fees. These costs generally cannot be passed through to consumers and must be accounted for in the budgeting process before planning for development and upgrades of broadband facilities.¹² Even if these fees could be passed through to consumers, they would still act as a deterrent to broadband deployment because higher prices

⁸ Comments of Level 3 Communications, LLC, WC Docket 11-59 (July 18, 2011) at 18 (“Level 3 Comments”).

⁹ Verizon Comments at 18.

¹⁰ *Id.*

¹¹ Comments of CenturyLink, WC Docket 11-59 (July 18, 2011) at 2 (“CenturyLink Comments”).

¹² CenturyLink Comments at 9.

would likely discourage many customers from subscribing to broadband services in the first place.¹³

Other providers have voiced similar concerns. Excessive PROW fees have also been a significant deterrent in Verizon’s decision whether or not to deploy facilities. As noted in its initial comments, “[i]n recent years, Verizon has been forced to make difficult decisions about whether to deploy facilities in light of localities’ right-of-way requirements. In certain circumstances, Verizon has declined to pursue deployment plans.”¹⁴ The cities of Eugene, Oregon and Leesburg, Virginia are two of these locations.¹⁵ In Eugene, Verizon reported that it would have had to pay an excessive franchise fee of seven percent of its revenue, plus a two percent registration fee.¹⁶ In Leesburg, the local government instead demanded an in-kind contribution of the form of two conduits—despite the fact that such demands are prohibited under Virginia law.¹⁷

Verizon reports that PROW fees have only continued to increase, particularly as many communities face budgetary shortfalls in the wake of the current economic recession.¹⁸ Verizon notes that within the last year, some communities have sought to increase their PROW fees by *five times*.¹⁹ Verizon raises an interesting paradox with regard to the timing of PROW costs. It notes that, theoretically, costs should *decrease* after the permitting and construction phases of a

¹³ *Id.*

¹⁴ Verizon Comments at 24.

¹⁵ Verizon Comments at 24-25.

¹⁶ Verizon Comments at 24; Va. Code § 56-486.1.

¹⁷ Verizon Comments at 25.

¹⁸ Verizon Comments at 17.

¹⁹ Verizon Comments at 17.

project.²⁰ During the permitting phase, a locality must undertake tasks such as reviewing applications and plans. During the construction phase, it may be necessary for the locality to monitor construction impacts and restoration of the PROW. However, once these two phases are complete, there is very little – or even no – management and oversight needed. Paradoxically, in spite of the foregoing, fees regularly increase post-construction. Frequently, the reasons cited for these fee increases are for activities unrelated to a provider’s occupancy of the PROW, which the locality would have to do anyway, such as mowing grass and removing debris.

Many of the municipal commenters explicitly concede that they want to set up toll booths to profit from the deployment of broadband. For example, the Comments of National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association (“National League of Cities”) seems to take the position that local governments have “property rights” in the PROW and may negotiate “rents” for their use.²¹ Yet, the PROW is held in trust for use by the public and utilities (*i.e.*, electricity, water, gas, and telecommunications) and should not be confused with publicly “owned” proprietary property interests, such as government buildings. Moreover, there is no “market” for the PROW, since it is a monopoly under the exclusive control of local jurisdictions. Companies have no reasonable alternative to using or crossing the PROW

²⁰ Verizon Comments at 17-18.

²¹ Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association, WC Docket 11-59 (July 18, 2011) at 23–25 (“National League of Cities Comments”)

to deploy broadband networks. Thus, it is inappropriate for local governments to look for “private” “comparables” for the use of the PROW.²²

Because local governments are attempting to use broadband infrastructure as a source of revenue by exerting monopolistic pricing for access to the PROW, NextG urges the Commission to reject their assertion that they are entitled to profits and clarify that they may only charge justifiable cost-recovery fees. Such a reasonable restriction would allow broadband infrastructure providers to deploy networks without the fear of encountering excessive and unreasonable fees.

B. Disparate Treatment Inhibits Deployment

In its Initial Comments, NextG outlined multiple scenarios in which it was adversely affected by both discriminatory behavior and differential treatment at the hands of municipalities and local governments.²³ NextG maintains that under no circumstance is either form of behavior reasonable and that any form of disparate treatment results in diminished competition, diminished investment, and slowed deployment to consumers.

As NextG explained, local officials too commonly, and increasingly, impose requirements on NextG’s installation of wireless antennas in the PROW that the local officials do not impose on other occupants of the same poles in the same PROW. In particular, cities often impose on NextG and other DAS providers full-blown discretionary zoning requirements despite the fact that all of the other equipment installed on the same utility poles – and indeed, the poles

²² *Id.* at 25.

²³ NextG Initial Comments at 18-22. As NextG explained in its initial comments, the company has suffered from *discriminatory* behavior when NextG’s direct competitors are treated differently despite the fact that both companies offer the same services. NextG has been subjected to *differential* treatment where parties operating facilities in the PROW are subject to less stringent requirements, despite the fact that both NextG and the other parties attach similarly sized facilities to the same utility poles.

themselves – were not and are not subject to the same discretionary zoning review. The sole reason many localities impose such discriminatory and disparate treatment is the mere fact that the antennas involved emit radio frequencies (“RF”). Such discriminatory and disparate treatment is unjustified, unreasonable, and unlawful. NextG’s DAS equipment is typically the same size as – and frequently smaller than – the equipment installed by other occupants of the PROW, such as fiber and equipment boxes installed by ILECs, CLECs, and cable operators, or the transformer barrels installed by electric utilities. Frequently, NextG is installing on poles that have cross arms, fiber splice cables, and multiple lines. None of those other installations are subject to such discretionary zoning review. Yet, municipalities and local governments claim that NextG’s installations must undergo burdensome review, frequently including public hearings and may ultimately be denied based on purely subjective grounds. It cannot validly be asserted that NextG’s antennas are materially different so as to justify aesthetic review where other users’ attachments do not. If these local officials were genuinely interested in aesthetics, they would apply the same review requirements to the poles themselves and similarly sized equipment on the poles used by other “non-wireless” utilities.

The comments in this proceeding convincingly illustrate that a number of other parties are also gravely concerned about disparate treatment and view it as a serious impediment to broadband deployment. Verizon, for example, commented that “[l]ocalities may also abuse their control over public rights of way by favoring some providers over their competitors. Discriminatory fees make fair competition impossible and interfere with the Commission’s goal of encouraging competitors to deploy facilities.”²⁴ Indeed, Verizon cited disparate treatment as the reason the company decided not to deploy physical networks in Birmingham and Mobile,

²⁴ Verizon Comments at 21.

Alabama.²⁵ Unlike the incumbent provider in those locations, which had the benefit of a statewide franchise and was not subject to the same fees, Verizon would have had to pay a percentage of its gross revenue for the right to occupy the PROW.²⁶

In some cases, disparate treatment has forced service and infrastructure providers to resort to costly and time-consuming litigation. In 2005, CenturyLink sued the City of New York after the City threatened to evict CenturyLink for balking at payment of a 5% franchise fee, while the incumbent carrier enjoyed a perpetual grant of use without payment of any kind.²⁷ As noted in its Initial Comments, NextG has been forced to resort to litigation with the City of Huntington Beach, California, where the City imposed on NextG a discretionary and burdensome zoning process on NextG that the City has not imposed on incumbent occupants of the same poles in the same PROW.²⁸

CenturyLink also points out that although the burden imposed on the PROW may vary significantly according to the use and type of carrier or utility occupying the PROW, in many cases the occupancy fees are nonetheless the same.²⁹ For example, a water utility burying a 30-inch pipe may be charged the same amount as a broadband provider that is merely collocating its facilities in an existing 8-inch conduit.³⁰ Level 3 furthers this point, and underscores in its initial comments that the NYSTA charges access rates for fiber connections that are hundreds of times

²⁵ Verizon Comments at 25.

²⁶ Verizon Comments at 25.

²⁷ CenturyLink Comments at 9-10; *Qwest Comm'ns Corp. v. City of New York*, 387 F. Supp. 2d 191, 194 (E.D.N.Y. 2005).

²⁸ NextG Initial Comments at 21.

²⁹ CenturyLink Comments at 5.

³⁰ *Id.*

higher than the rates charged to a gas utility with facilities in the same PROW.³¹ Such disparate treatment, Level 3 argues, is not an attempt to recover costs, but instead constitutes an “opportunistic use of monopoly power” with a view to maximize revenue.³²

NextG agrees with Level 3. When local governments use their monopoly control over the PROW to impose discriminatory processes and/or fees for access to the PROW for certain types of infrastructure, they inhibit and delay deployment of wired and wireless broadband infrastructure. NextG urges the Commission to mandate that local governments treat all infrastructure providers in the PROW as equally as possible.

C. The Commission Should Clarify Section 253

Nearly all of the commenting service and infrastructure providers requested that the Commission clarify Section 253 of the Communications Act. The reasons they cited as to why clarification of Section 253 is necessary are equally numerous. While some of the requests asked the Commission to clarify that the provisions of the law apply to particular services, other requested clarifications seek to confirm and emphasize the protections of Section 253 that many providers feel are being ignored by local and municipal governments.

1. Section 253 Has Been Inconsistently Applied

Section 253 of the Communications Act, 47 U.S.C. § 253, was designed to keep local regulations in check and to prevent local authorities from becoming a barrier to deployment through the imposition of a patchwork quilt of inconsistent and burdensome parochial requirements. Specifically, Section 253(a) preempts state and local requirements that “may prohibit or have the effect of prohibiting” the provision of telecommunications services. Under

³¹ Level 3 Comments at 18.

³² Level 3 Comments at 18.

Section 253(c), management of the PROW and any associated fees must be “fair and reasonable compensation on a competitively neutral and nondiscriminatory basis.”

Unfortunately, as noted by CenturyLink in its initial comments, Section 253 has been inconsistently applied by the courts.³³ In 1997, the Commission established a test for “effective prohibition” under 253(a) by stating that a local regulation effectively prohibits the provision of a telecommunications service if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”³⁴ Courts in early cases followed the Commission’s standard.³⁵ Recent decisions by the Eighth and Ninth Circuits, however, have applied a near-impossible standard that requires an “actual prohibition” before the court will hold that a local ordinance or regulation is unlawful.³⁶ NextG believes that clarification of this standard is critical to robust broadband deployment, and that codification of the *California Payphone* standard would provide much needed clarity to the local and municipal provisions governing deployment of facilities in the PROW.

2. The Commission Should Clarify That Section 253 Limits Local Regulation

PCIA – The Wireless Infrastructure Association (“PCIA”) and The DAS Forum outlines a series of clarifications to Section 253 that are specific to providers such as NextG that offer services via DAS networks. First, PCIA and the DAS Forum recommend that the Commission

³³ CenturyLink Comments at 2-4.

³⁴ *In re California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d)*, Memorandum Opinion and Order, 12 FCC Rcd. 14191, at ¶ 31 (1997) (“California Payphone Order”).

³⁵ See, e.g., *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006).

³⁶ See, e.g., *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir.2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); see also CenturyLink Comments at 3.

“adopt a rule making it explicit that Section 253’s protections (e.g. against charging telecommunications providers unreasonable fees and treating them in a discriminatory manner) apply to DAS providers that elect to operate as telecommunications carriers and obtain competitive local exchange carrier (“CLEC”) status.”³⁷ Second, in addition to making clear the applicability of Section 253 to DAS providers operating as telecommunications carriers, PCIA and The DAS Forum recommend that the Commission clarify by rule the scope of a number of provisions of Section 253 as they relate to DAS deployments in PROW.³⁸ These clarifications include the following:

- Defining the limitations and scope of the rights-of-way management exception;
- Defining “non-discriminatory” to require access to the PROW without distinction between wireline and wireless facilities;
- Defining “fair and reasonable” charges to be those that are based on a cost recovery structure rather than “market rates”;
- Declaring that if an ordinance, statute, regulation or other requirement violates these rules, then the offending requirement may be preempted by the FCC under Section 253(d) after notice and comment;
- Providing provisions for efficient, expedited administrative relief for violations of these rules.³⁹

Because Section 253 unequivocally applies to NextG and similar DAS providers, as has been recognized by numerous federal courts, it is not required that the FCC confirm that point.⁴⁰ However, the FCC’s confirmation would be helpful to the extent that some communities still refuse to accept that Section 253 applies to NextG and other DAS providers, whether out of

³⁷ Comments of PCIA – The Wireless Infrastructure Association and The DAS Forum (A Membership Section of PCIA), WC Docket 11-59, (July 18, 2011) at 48 (“PCIA Comments”).

³⁸ PCIA Comments at 49.

³⁹ PCIA Comments at 49-50.

⁴⁰ *See, e.g., NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49 (2d Cir. 2008).

ignorance or as a strategic position. Moreover, NextG generally supports the other clarifications recommended by PCIA and The DAS Forum and believes that they are a useful step to promote robust wireless broadband deployment.

As explained in its Initial Comments, NextG frequently suffers disparate treatment when compared to similarly-situated entities simply on the basis that NextG provides services via a DAS network that incorporates wireless equipment elements.⁴¹ However, NextG's networks do not provide a wireless service. A DAS network provides a wireline transport service, and thus it is subjected to traditional regulation by state public utilities commissions.⁴² Moreover, the facilities NextG installs are the same basic size and shape as the many other telecommunications and public utility facilities that are also installed on utility poles in the PROW. Yet jurisdictions frequently subject NextG to radically different, more time consuming, expensive, and discretionary processes (typically under the guise of "zoning") than are imposed on other PROW occupants. In its initial comments, the National League of Cities cites specific examples of local governments subjecting "wireless facilities" in the PROW to zoning processes, which highlights the disparate and more burdensome treatment of companies with wireless elements of their broadband networks because such requirements are generally not imposed on other occupants of the same PROW, even occupants of the same pole (indeed, the pole itself was likely not subject

⁴¹ NextG Initial Comments at 2.

⁴² The City of Scottsdale ("Scottsdale") early-filed Reply Comments in which it makes numerous misstatements and mischaracterizes NextG's service. As NextG explained in its Initial Comments, it has been forced to initiate litigation against Scottsdale and that litigation remains pending. Scottsdale's Reply Comments are nothing more than attempt to litigate its case before the Commission and should be ignored. Scottsdale's Reply Comments, however, do emphasize how cities are discriminating among providers. As the comments reveal, Scottsdale charges the ILEC no fee for its extensive occupation of the PROW. Yet, at issue in the litigation is Scottsdale's attempt to impose on NextG a fee in excess of what is permitted by Arizona law simply as the result of the inclusion of an antenna in the PROW.

to any zoning requirement).⁴³ For example, the League of Minnesota Cities asserts that the placement of antennas in the PROW may trigger zoning review, which is inconsistent with the “ROW Rules” promulgated by the Minnesota Public Utilities Commission in 1999, codified as Minn. Rules Part 7819.0050 *et seq.* and the “ROW Act,” Minn. Stat. §237.162 & 237.163, which provides that rights, duties, and obligations for use of the PROW imposed must be applied to all users of the PROW. This really goes to the heart of the matter for NextG, which is, are the municipalities treating NextG differently from other utilities merely because of the presence of a wireless component in NextG’s DAS network?

NextG believes that the clarifications recommended by PCIA and The DAS Forum regarding Section 253 would help to eliminate such disparate treatment and place DAS providers such as NextG on more equal footing with their competitors.

III. RESPONSE TO COMMENTS BY MUNICIPALITIES AND LOCAL GOVERNMENTS

A number of commenting municipalities and local governments diminish the importance of timely and efficient broadband deployment and assert that “this is no place for federal regulation.”⁴⁴ Indeed, they assert that “Federal regulatory intrusion” will instead deter innovation and deployment.

A. The Commission Should Reject Local Governments’ Assertion That They Are Entitled to Recover Monopoly Rent for Access to PROW.

It is clear from the comments filed by and on behalf of the municipal and local authorities that many of them view the fees they charge to access the PROW as a windfall they can use to pad government coffers or reduce budget shortfalls. The National Cable and Telecommunications Association (“NCTA”) takes note of the issue and reports that its members

⁴³ National League of Cities Comments at 27.

⁴⁴ Mesa Comments at 1; Herndon Comments at 1.

are greatly concerned with these fees. “Some members reported that the rights of way are seen by local jurisdictions as a means of raising revenue unrelated to the costs associated with the permitting process. . . .”⁴⁵

In its initial comments, New York City touts its franchise system as a fair selection process where all must pay to play, and that due to the fees invested, only serious providers participate. Yet, in order to gain “higher priority” in the PROW deployment process in New York City, companies are “invited to submit bids as to how much they are willing to pay per pole....”⁴⁶ New York City also likens itself to a private property owner charging market rate rents, hypothesizing that if the city did not charge such high fees, service providers would merely seek to “game the system” and shift their facilities to lower cost locations on government property and the PROW.

New York City’s arguments are unconvincing, economically unsound, and should be rejected by the Commission for two reasons. First, as discussed earlier in these Reply Comments and in the initial comments of several other providers, these exorbitant fees are not an incentive but rather are a significant deterrent to deploying facilities. Second, contrary to New York City’s assertion, NextG cannot simply shift its network to a cheaper location in an attempt to “game the system.” A DAS network, as deployed by NextG, depends on access to the PROW. So the decision is simply whether to deploy or not. Unfortunately, it is the broadband-seeking public that suffers if, as the outgrowth of excessive and unfair fees, the decision is not to deploy.

Similarly, the City of Portland asserts that it has achieved a high rate of broadband deployment *because* it charges for use of the ROW and because it “substantially regulates” the

⁴⁵ Comments of the National Cable & Telecommunications Association, WC Docket 11-59 (July 18, 2011) at 3 (“NCTA Comments”).

⁴⁶ New York Comments at 8.

ROW and placement of wireless facilities. On top of application fees, which already stretch into the thousands of dollars, the City of Portland requires providers to “compensate” the city for use of its ROW in the amount of \$10,000 or \$5,000 per pole per year, whichever is higher.⁴⁷ Indeed, the City of Portland openly admits that PROW fees collected from communications providers constitute approximately 15% of the \$68 million collected in franchise fees.⁴⁸ These fees do not go to cover costs associated with the use and occupancy of the PROW, but rather go “into the General Fund to support all the City’s budgeted operations and services.”⁴⁹

The Commission must reject the assertions of local governments that they are entitled to exorbitant, monopoly-based fees for PROW access. Indeed, the Commission itself already has recognized that there does not appear to be a competitive market for the PROW.⁵⁰ Moreover, in many cases, recovery of “rents” for PROW access runs afoul of state law.⁵¹ It is generally well-established that municipalities hold the public rights of way in trust for the public and are prohibited from profiting from the PROW. Numerous states have laws in place that limit the fees that a city may charge for access to the PROW to the costs reasonably incurred in issuing permits and maintaining the PROW.⁵² These cost-based fees allow for a more efficient

⁴⁷ Portland Comments at 18.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Broadband Acceleration NOI, 26 FCC Rcd. at 5391 ¶ 16.

⁵¹ Given that there is no competitive alternative to the PROW, it is inappropriate to invoke the concept of “market” rents. The charges are monopoly impositions by a government entity with sole control over a necessary element of market entry.

⁵² For example, Arizona (Ariz. Rev. Stat. §§ 9-582 and 9-583); California (Cal. Gov’t Code § 50030); Colorado (Colo. Rev. Stat. § 38-5.5-107(1)(b)); Florida (Fl. Stat. Ann. § 337.401); Georgia (O.C.G.A. § 46-5-1); Iowa (Iowa Code § 480A3); Michigan (MCL § 484.3115); Minnesota (Minn. Stat. § 237.163); Virginia (Va. Code § 56-486.1) and Washington (Wash. Rev. Code § 35.21.860(1)).

permitting process, which in turn gives providers a greater degree of financial clarity that is needed for ready deployment of infrastructure.

Unfortunately, even despite state limits, fee disputes still exist. For example, in California, some cities have demanded exorbitant fees despite the fact that California Government Code Section 50030 clearly prohibits cities from charging fees for use of the PROW that exceed the cities' actual management costs, and others resort to the expedient of claiming that NextG is not a telecommunications service provider in order to evade the limitations. Even if they do not currently charge such fees, the municipalities make clear that they want to do so and will wherever possible.

B. Municipal Claims That Delays Are Caused by Incomplete Applications Are Inaccurate

As NextG has described, many cities force NextG and similarly-situated providers to go through zoning-type approval processes with complex applications in order to access the PROW. In their initial comments, the National League of Cities and several other parties attempt to shift the blame for application processing delays onto the PROW applicants themselves.⁵³ They claim that delays are attributable to applicants that do not familiarize themselves with the required processes,⁵⁴ applicants that submit incomplete applications,⁵⁵ or where applications are submitted by third-party contractors instead of the carrier itself.⁵⁶

⁵³ *See, e.g.*, National League of Cities Comments at 34.

⁵⁴ National League of Cities Comments at 34. Regarding application processes, NextG takes this opportunity to respond to the District of Columbia's early-filed Reply Comments in which the District notes that it is unaware of any application filed by NextG, and that to the best of its knowledge, NextG has never approached the State Historic Preservation Office with any request for assistance with the application process. NextG believes that the District misinterpreted NextG's point. In its Initial Comments, NextG merely sought to point out that the approval process in the District of Columbia involves coordination with multiple government agencies—a process that is extremely time-consuming and labor intensive. While NextG has not initiated the

What the cities fail to mention, however, is that “incomplete” applications are more often than not the result of misleading, incomplete, ambiguous, or wholly discretionary city procedures. The vast majority of jurisdictions do not have application “checklists,” so entities seeking to install facilities are left to guess the steps and information required to complete the paperwork. Likewise, cities frequently use open-ended language in their codes as grounds to demand more information as a mechanism to delay and force more concessions or changes that are not supported by law. Indeed, some application procedures are so ambiguous that they may require a few enumerated items, plus “any other information” the city may demand. With no further details or limiting parameters, submitting a complete application is nearly an impossible task, and pinning the delay on the applicant is far from accurate or fair.

The Village of Northport, New York is a prime example. As noted by NextG in its Initial Comments, the Village submitted to NextG a 10 page spreadsheet of alleged deficiencies in NextG’s application—none of which were an established part of the application process when NextG submitted its initial application. Moreover, the Village appears unwilling to work with NextG to discuss NextG’s application.

Some cities will also reject applications as “incomplete” simply because other government departments have not yet reviewed the application. For example, the City of San Francisco usually sends out incomplete notices as soon as an application is submitted because it requires the Department of Public Health to review the radio frequency report. From NextG’s

process of installing any facilities in the District’s PROW, it stands by its initial assertion that the application process in the District is indeed a complicated one.

⁵⁵ Montgomery County Comments at 20.

⁵⁶ Portland Comments at 15.

perspective, it is unreasonable to deem an application incomplete because the government itself has not completed all of its required departmental reviews.

C. The Commission Has The Authority To Apply And Interpret Section 253.

NextG submits that the Commission has ample authority to issue clarification of Section 253 and the associated issues raised in this proceeding. As discussed below, this authority flows from the text and policy objectives of the Telecommunications Act and the Commission's pre-existing authority under the Communications Act.

The Telecommunications Act of 1996 tasks the Commission with the responsibility to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”⁵⁷ Indeed, the promotion of competition and technological advancement has been and continues to be a key element in the Commission's regulation of the communications industry as a whole. In drafting the 1996 Act, the U.S. House of Representatives' Committee on Commerce issued a report concluding that “current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network.”⁵⁸ Thus, the continued advancement and development of wireless infrastructure is critical to the nation's economy and must not be impeded through excess local regulation, fees and delays.

⁵⁷ 47 U.S.C. § 706.

⁵⁸ H.R. Rep. No. 104-204, pt. 1, at 94 (1995).

Local governments would lead the Commission to believe otherwise.⁵⁹ They assert that the Commission should not take action regarding access to local rights of way because (1) the Commission lacks jurisdiction to do so; (2) changes would result in higher costs to taxpayers; and (3) local governments are better positioned to regulate local issues. None of these arguments has merit in view of the plain language of Section 253 and the overarching goals of the Communications Act.

The argument by some local authorities that the FCC has no jurisdiction over any action that involves a public right of way is meritless. Read as a whole, Section 253 shows that Congress' intent was to prohibit unreasonable and discriminatory fees to access the PROW and to empower the FCC to preempt barriers to entry. Section 253(d) grants the Commission authority to preempt local requirements that prohibit or may have the effect prohibiting the ability of any company to provide telecommunications service in violation of Section 253(a). Section 253(d) provides that “[i]f . . . 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.”

The Commission's authority under Section 253(d) includes the power to prevent the enforcement of local impediments to competition, including requirements that purport to govern the use of the public rights of way. Based on the comments filed in this proceeding, it is crystal clear that PROW requirements and fees are among the local actions restricted by Section 253(a),

⁵⁹ See, e.g., City of Portland Comments at 1. The City of Portland suggests that Commission regulation in this area would be “counterproductive or harmful.”

as such fees *can* “materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁶⁰

Arguments that the Commission lacks authority whenever the challenged provision involves PROW management are meritless. Because the Commission has the authority under Section 253(d) to preempt the enforcement of any requirement that violates Section 253(a), the absence of any reference to Section 253(c) does not affect the scope of the Commission’s authority to preempt local regulations. Courts have held that Section 253(c) is a savings clause, not a prohibition. The Commission is empowered to determine whether a local requirement violates Section 253(a), and an inherent part of that authority is the ability to determine whether the local requirement is “saved” by Section 253(c). Accordingly, the fact that Section 253(d) does not state that the Commission shall prevent the enforcement of a local requirement that “violates” Section 253(c) is unsurprising and has no effect on the Commission’s authority to prevent the enforcement of any local requirement. Put differently, it would make no sense and effectively eviscerate Section 253(d) if a local government could deprive the Commission of jurisdiction by raising as a defense that a requirement was a reasonable right of way management measure permitted by Section 253(c).

The legislative history supports the common-sense reading of section 253(d) to permit the Commission to review and preempt municipal telecommunications regulation. On June 14, 1995, the Senate considered two amendments to the preemption language of the section that became Section 253. One amendment, proposed by Senators Feinstein and Kempthorne, would have stricken “the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications

⁶⁰ California Payphone Order at ¶31.

services."⁶¹ The other amendment, proposed by Senator Gorton, simply would have removed from the FCC's jurisdiction the power to adjudicate violations of subsection (c) (at that time, Section 253(c) was a stand-alone section that itself could be "violated," not a defensive savings clause).⁶² The Gorton amendment was adopted and the Feinstein/Kempthorne amendment rejected.

The cities' interpretation of the Commission's jurisdiction, which tracks the rejected Feinstein/Kempthorne amendment, must be rejected, and so too must their overbroad interpretation of their "management" powers.

D. Municipal Views of Wireless Siting Demonstrate The Cause of Delays and Excessive Cost of Deployment.

NextG submits that the comments filed in this proceeding provide ample illustration as to why Commission action is necessary to ensure robust deployment of broadband facilities. Some local governments have adopted what could almost be characterized as a flippant attitude toward regulating parties seeking access to the PROW. For example, the City of Portland believes that federal regulation would inhibit the ability of cities to "experiment with different models" of regulation.⁶³ It instead contends that providing localities with "broad flexibility to try new arrangements – and to abandon them if they do not work" -- may be critical to the development of successful deployment and adoption strategies."⁶⁴ NextG believes that this type of uncertainty goes straight to the heart of the problem. It would be extremely risky to invest limited resources in a jurisdiction where the regulatory regime is viewed as nothing more than an "experiment."

⁶¹ 141 Cong. Rec. S8305 (daily ed. June 14, 1995).

⁶² *Id.*

⁶³ City of Portland Comments at 4 (emphasis added).

⁶⁴ City of Portland Comments at 4 (emphasis added).

While local governments may be perfectly willing to “experiment” with regulations, companies seeking to deploy their facilities in these locations in turn stand to lose millions of dollars of their investment if the local government decides to change that experiment.

Moreover, local government and municipal treatment of collocations and deployment in the PROW raise an important issue of competitive neutrality. While NextG’s ability (and the ability of any other provider that incorporates antennas into its network) to attach its facilities to utility poles in the PROW, an essential requirement of its business, is subject to extensive delays and occupancy costs only because of the antenna component, purely wireline telecommunications providers can run identical fiber lines and attach equipment boxes that are at least as large as DAS equipment throughout a community without being subject to inquiry by local zoning boards into the need or appropriateness of the technology they employ.

This discrimination is not legitimate, and if left unchecked it will continue to inhibit the deployment of wireless broadband. The only reason for the different treatment of NextG’s, and others’ similar, facilities in the PROW as compared to other providers with whom they compete is the presence of RF emitting antennas, regulation of which is the sole province of the Commission.⁶⁵ Local ordinances typically trigger zoning obligations not based on the size of

⁶⁵ 47 U.S.C. § 332(C)(7)(B)(iv). Despite the fact that Section 332(c)(7)(B)(iv) clearly prohibits local governments from regulating wireless siting based on fears about RF emissions, and the well-established orders from the Commission and courts, denials based on RF emissions concerns are still pervasive. Frequently, public opposition to a wireless installation will be based almost exclusively on residents’ fears regarding RF emissions. However, as NextG discussed in its Initial Comments, municipal attorneys know that a denial order cannot admit that it is based on RF concerns, so the orders cite pretextual grounds, such as aesthetics. Although carriers have had some success overturning such cases in the courts, the cost and delay of litigation is contrary to the goal of rapid and widespread deployment. This is an area where the Commission should significantly increase its outreach to educate the public that wireless facilities deployed within the Commission’s guidelines are safe. Indeed, NextG’s DAS nodes operate at such a low power that they emit between 100 and 1000 times *less* than the Commission’s maximum public exposure limit when measured from the ground directly below the pole.

equipment, but rather, based solely on the fact that the equipment is “wireless.”

Telecommunications and utility equipment of the same size or larger does not trigger the same scrutiny because it does not radiate RF.

The differential treatment of NextG and other companies that incorporate an antenna into their PROW deployment is not competitively neutral and nondiscriminatory; rather, it materially inhibits and limits their ability to compete in a fair and neutral regulatory environment in violation of Section 253.⁶⁶ In order for wireless-based broadband to compete effectively, it must receive the same opportunities for rapid deployment as its purely wireline competitors. Otherwise, municipalities will effectively be allowed to favor and dictate technology choices in violation of federal law and policy.

⁶⁶ See California Payphone Order at ¶ 31.

IV. CONCLUSION

Given the substantial record evidence put forth by NextG and by other installers of facilities in this proceeding, NextG respectfully submits that the Commission should take action to help promote prompt deployment of broadband facilities in public rights of way, including the recommendations made above.

Respectfully submitted,

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