Federal Communications Commission

FCC 13-122

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	)	WT Docket No. 13-238
	)	
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	)	WT Docket No. 11-59
	)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	)	RM-11688 (terminated)
	)	
2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

COMMENTS OF THE CITY OF MINNEAPOLIS, MINNESOTA

I. Introduction

The City of Minneapolis files these comments in response to the Notice of Proposed Rulemaking, adopted September 26, 2013.

Minneapolis urges the Commission not to interfere with the management of public property including public rights of way and not to interfere with siting of telecommunications uses on public rights of way and public property. Additionally, as described herein, the City urges the Commission to exercise restraint in restricting the role of local governments, in exercising their customary land use powers, environmental powers and historic preservation powers. The City of Minneapolis has developed considerable expertise over many years in applying its policies to protect and further public safety, economic development and other community interests. Important among these

community interests is encouraging and facilitating efficient and state of the art communication systems. Managing public rights of way is a key part of the governmental policy and operations of the City of Minneapolis and of most local governments. Under Minnesota law, the management of public rights of way by the City is a long standing local responsibility and a matter of public trust that cannot be delegated. *State Ex Rel City of St. Paul v. Great Northern Railway Company*, 134 Minn. 249, 158 N.W. 972 (1916), *State Ex Rel City of St. Paul v. Minnesota Transfer Railway Company*, 80 Minn. 108, 83 N.W. 32, 35 (1900). Management of the public right of way is a subject area that involves extensive planning and extensive investments in planning as the City considers the best policies to implement in structuring public right of ways and in determining a mix of various modes of transportation. The City of Minneapolis is actively working on developing extensive transportation networks for various modes of transportation. The includes networks for bicycles, pedestrian precincts, light rail transit zones, possible implementation of street cars and various other transportation components that may involve electrical and wireless components along with various other infrastructure. As the City conducts these studies and then acts upon them, they are required to make policy decisions as to what can go in the public right of way and where. These policy decisions require the weighing of various interests in determining how various elements of City infrastructure will be managed. The City needs the freedom, to the extent possible, to make these determinations.

It is clear that the City of Minneapolis has every interest in expanding broadband deployment and making available every possible opportunity for the full development of various telecommunications networks. The City of Minneapolis has worked hard on this issue and prides itself on being a leader in both communications and transportation. The City also prides itself on its municipal planning. The City has been repeatedly named as a "high-tech city" or "tech friendly city" and intends to keep this reputation through practices that will reasonably permit advanced

communication systems. The City is also committed to an even playing field for all entrants into this field. It will help the City grow if reasonably managed along with other priorities.

II. City of Right of Way Management

Broadband service is available to an extremely high percentage of households and businesses in the City of Minneapolis. Our community welcomes broadband deployment, and our policies allow us to work with companies willing to provide service. No company that we are aware of has cited our policies to us as a reason that it will not provide service. We believe our policies have helped to avoid problems and delays in broadband deployment by ensuring that broadband deployment goes smoothly for both the providers and the larger community. For example, the City of Minneapolis cooperated with USI Wireless to place broadband on City light and traffic poles every two blocks throughout the entire City. We believe Minneapolis is an example of a city that is broadband friendly. We have worked hard, however, to make sure that the broadband deployed facilities are consistent with the many other interests and plans of the City of Minneapolis.

We note that the State of Minnesota has an extensive regulatory regime in place under Minn. Stat. § 237.162, and Minnesota Rules Part 7819. Minneapolis also provides some regulation of communications towers that are not in the public right of way. Communications facilities that are not in the right of way are regulated under the Minneapolis zoning code. Communications towers require a conditional use permit in Minneapolis, which requires approval of the Minneapolis Planning Commission. There are specific criteria for these towers, and a specific process for review and appeal of the determinations. The zoning staff member who works in this area recalled only one denial in the last ten (10) years. Telecommunication usage in the public right of way that does not require a tower, requires only a permit from the Minneapolis Department of Public Works. If it is a commercial use on private property, the use would require an administrative permit under the zoning code. Most permits are granted in a fairly short period of time.

If the Commission adopts further rules in this area, the Commission could disrupt an already effective process at substantial cost to taxpayers.

III. The Commission should not regulate State and Local rights of way

Under Minnesota law, and pursuant to Article 12, Section 3 of the Minnesota Constitution, cities are created by the legislature, and the legislature alone determines their organization, administration and functions. Under Minnesota Supreme Court precedent, Minnesota cities are a subdivision of the state for the convenient exercise of such powers as may be entrusted to them. *Monaghan v. Armatage*, 218 Minn. 108 15 N.W.2d 241 (1944), appeal dismissed, 323 U.S. 681, 65 S. Ct. 436. In governing telecommunications users and using public right of way, the City of Minneapolis, in addition to acting as a subdivision of the State is acting pursuant to a comprehensive state regulatory regime. While under *Monaghan v. Armatage*, Supra, and following cases and under the Minnesota State Constitution, the State is said to have the right to control or even seize municipal property, the federal government has no such right. The federal government is a separate sovereign. The federal government would be interfering with the management of sovereign state property. As was said in P*rintz v. United States*, 521 U.S. 898, 928, 117 S. Ct. 2365, 2381, 138 LEd. 2d 914 (1997): "It is an essential attribute of the States retained sovereignty that they remain independent and autonomous within their proper sphere of authority."

Regulating public rights of way and making policy decisions about the management of the public infrastructure represented by those public rights of way is the proper sphere of authority for the City of Minneapolis acting as a subdivision of the State of Minnesota and acting pursuant to State and Local procedures for siting telecommunication uses in the public right of way or on public property. Public property for these purposes includes property owned in fee title, easements for roadway purposes owned by the City, and various other real property interests. The Commission is not in an appropriate position as a part of a separate sovereign to make these policy decisions for the

State of Minnesota. Additionally, they are not in the position to make the balancing of various sovereign interests in determining the details of siting various uses on public property or within public infrastructure owned by state entities. In *New York v. United States*, 505 U.S. 144, 163, 112 S. Ct. 2408, 2421, the U.S. Supreme Court quoted *Texas v. White*, 7 Wall. 700, 725 (1869) saying: "[N]either government may destroy the other nor curtail in any such substantial manner the exercise of its powers".

Local government property management under Minnesota law is an exercise of sovereign state governmental power. This is particularly true in the light of extensive State regulation in this area, and in light of the State's statutory right to designate local roads as state trunk highways without compensation. See Minn. Stat. § 161.16. As a result, under Minnesota law, local roadways are subject to being transferred to the direct jurisdiction of the state, upon the order of the Minnesota Commissioner of Transportation. In Nixon v. Missouri Municipal League, 541 U.S. 125, 140, 124 S. Ct. 1555, 1565, 158 LEd. 2d, 291 (2004), the U.S. Supreme Court was discussing a preemption argument and the relationship and a State and its municipal subdivisions, the Court said:

> "But the liberating preemption would come only by interposing federal authority between a state and its municipal subdivisions, which are precedents teach, "are created as convenient agencies for exercising such of the government powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Public Intervener v. Mortier*, 501 U.S. 597, 607-608, 111 S. Ct. 2476, 115 LEd. 2d 532 (1991)...Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424, 433, 122 S. Ct., 2226, 153 LEd. 2d 430 (1991)...Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own government should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement Gregory requires *[Gregory v. Ashcroft,* 501 U.S. 452, 111 S. Ct. 2395, 115 LEd. 2d 410 (1991)."

As a result, the Supreme Court has made it clear that federal statutes are not to be read in a way that assumes that legislation intends to authorize interference in their relationship between the state and its subdivisions. States are allowed to use their municipal subdivisions to govern right of way to serve their sovereign interests. *Printz v. United States*, 521 U.S. 898, 925, 117 S. Ct. 2365, 2380, 138

LEd. 2d, 914 (1997) makes clear that the federal government may not compel the States to implement federal regulatory programs. The City requests that the FCC choose an approach to accelerating broadband deployment that does not include asserting authority to control state and local governments in their fundamental responsibility of managing their property and their public rights of way vis-à-vis the rights of third parties.

The City gratefully acknowledges the Commission's statement at the bottom of Paragraph 124 of the Notice of Proposed Rulemaking that says: "We also propose to find that the requirement that states and localities "may not deny and shall approve" covered requests in any case, applies only to state and local governments acting in their role as land use regulators; and does not apply such entities acting in their capacities as property owners." We agree that this is the right result. We want to point out that such capacity includes the State and its subdivisions in their capacity as property owners of easements for roadway purposes. Any proposed rule should explicitly make this exception. It is our belief that any interpretation that results in the federal government telling the state sovereign how to use its property is bad policy and violates the principles of dual sovereignty found in our long standing governmental traditions and in our federal constitution.

IV. Local Policy Objectives

Local governments as they manage public rights of way and public property, typically are not interested in just one objective or one set of objectives. The Federal Communications Commission, on the other hand, has very targeted objectives within the communications field. Local governments are simultaneously managing their rights of way for many purposes. These include accommodating sewer, water, electric and gas utilities. These include managing and improving storm water, including flood control. Minneapolis city streets are being managed not only for automobile and truck traffic, but also to create a pedestrian friendly environment, bicycle friendly environment, and an environment friendly to various types of public transit including buses, light rail transit and

possibly in the foreseeable future for street cars. As a result, there are many different factors to balance in managing the public right of way. The right of way fits into a larger urban plan and a larger vision. This management and this balancing is the type of thing that can only be done by the local community. Safeguards against unfair treatment for any particular element of the urban mix are often appropriate. In Minneapolis we have such safeguards already in place. There are comprehensive procedures for locating facilities in the public right of way pursuant to both state and local law. These procedures have appeal processes within the municipal environment. Additionally, under Minnesota law, municipal decisions can be reviewed by certiorari in the Minnesota Court of Appeals. See *City of Minneapolis v. Meldahl*, 607 N.W.2d 168 (Minn. Ct. App. 2000), or in specific cases as determined by specific statutes, in the Minnesota District Court. See Minn. Stat. § 462.361, for example. This is in addition to any remedies that an applicant may have under various other laws.

V. Possible Commission Actions

The City of Minneapolis strongly urges the FCC to refrain from regulating local right of way management and facility placement processes as they apply to City owned property, and as they apply to City owned and operated roadways and roadway easements. The City also asks that the FCC refrain, to the extent possible, from interfering with the City's planning processes, including regulation of structures and other facilities pursuant to state and local zoning ordinances, heritage preservation ordinances and environmental review provisions. The proper application of these laws requires the balancing of many policy considerations, and specific facts that are not amenable to broad brush nationwide regulation. We do not believe that national policies could fairly account for some of the unique features of various communities. In our community, that includes an extensive system of bikeways, various transit options and various best management practices relating to management of rights of way to handle storm water and local flooding. We also have to act to

control local snow and ice conditions, including conceivably thinking about snow and ice on communications towers and equipment. If the Commission nonetheless determines that it must act in this area, it should limit itself to responding to municipal action based upon a written record so that the municipality has an opportunity up front to articulate the reasons for its actions.

In paragraph 129 of the Proposed Rulemaking, the FCC notes that the IAC argues that the mandate of § 6409(a) applies only to state and local governments acting in their role as land use regulators, and does not apply to such entities acting in their capacities as property owners. The IAC asserts that it does not apply to a governmental unit acting as a landlord. The FCC proposes to adopt that interpretation. The City of Minneapolis agrees with that interpretation and again points out that it would extend to its management of roadways and various other real property interests that are less than fee simple title. The City agrees that § 6409(a) would impose no limits on a government landlord's ability to refuse or delay action on a collocation request. It would be inconsistent with the dual sovereignty doctrine of *Printz v. United States* and of the Federal Constitution to have the federal government ordering a state government entity to use its own property to meet a federal purpose for the benefit of third parties. The management of state and local government property is a particular attribute of state sovereignty. As a matter both of good policy and law the authority to impair that attribute of state sovereignty should not be inferred.

VI. Some Specific Comments on the Notice of Proposed Rulemaking

1. Concerns of local governmental units should be addressed before new rules regarding collocations are made. Similar to other types of infrastructure, an effective wireless network extends far beyond the boundaries of any governmental unit. Land use decisions are most often delegated to local governmental units because the decisions are so heavily influenced by local context. Ubiquitous regulations governing the collocation of antennas and base units cannot adequately address the

unique circumstances encountered by each municipality. We believe that such regulations have to start with the municipality or other local government.

2. Wireless carriers have very little at stake when considering heritage preservation. The FCC, on the other hand, is not in the business of protecting landmarks and does not have expertise in providing that protection. As a result, it is logically and necessarily appropriate to have local governments determine what actions are reasonable and permissible in historic districts. Local governments have the authority and duty to take more than just a "hard look" at the potential impacts of a project. In the City of Minneapolis, antenna arrays are often designed to minimize visual impact when placed in historic districts. They are placed out of view of the public right of way, they are not allowed to be located on character defining features, and are designed to blend in with their surroundings. Eliminating the ability of local governments to use their land use powers to ensure that collocations meet historic district standards opens the door for the implementation of wireless facilities that are grossly out of character and scale for the historic districts in which they are located. Section 106 review should continue to be undertaken for collocations in historic districts.

3. The City is concerned about the impacts DAS could have on Historic Preservation Districts or on historically designated buildings. Without any local control, the options appear to be wide open. A single DAS antenna placed in an appropriate location in a historic district and appropriately disguised or shielded probably will not, in most cases, detract from the historical character of the area. However, a hundred DAS antennas placed in appropriate locations may have a much more significant impact. It is important to consider the cumulative impact of a DAS system over the impact of a single antenna or base unit. The interdependence of DAS antennas necessitates a system-wide approach. Evaluating DAS implementation from a cumulative "system" perspective rather than from an individual unit perspective should be more efficient for the wireless carrier as well as the governmental unit. Besides the obvious advantage of less redundancy (and less

paperwork), an iterative system-wide process guarantees that the carrier will have a seamless network without compromising the integrity of the historic district. Often those making the decisions on placement of wireless facilities in historic districts are not familiar with these historic locations. The failure to properly supervise and permit the installation of DAS and related facilities in historic districts or on historic properties could have a negative impact on the essential character and view sheds of valued historic properties and districts. These problems would be compounded later on, if the rules categorically required approvals of expansions in the future.

4. Concern for public input and participation was addressed throughout the Notice of Proposed Rulemaking. However, if local authority regarding collocations is placed in the hands of wireless carriers and the FCC, then the public will have no legitimate chance to address the placement issues which will undoubtedly arise. The FCC and the major wireless carriers, despite their best efforts, cannot effectively and efficiently respond to local land use concerns. If concerns arise, public opinion will either get steamrolled by a corporate/bureaucratic megalith or result in a drawn out and impersonal comment period. In contrast, local governments can be directly accountable to all that have a stake in the process, including the wireless providers and customers. Decisions that affect local land use should be handled by the party that can respond to them most effectively. The range of urban, suburban, rural, developing, developed, and desolate landscapes is far too diverse to be governed by one specific set of regulations. It is therefore essential that localities regulate wireless facilities in the manner that best fits their specific situations.

5. Imposing numerical values or national standards on the definition of a "substantial increase" may produce a myriad of unintended consequences from both wireless carriers and local governments. In general, any physical description of size limitations will either be too vague or too detailed. An overly vague description is open to too many unintended interpretations while an overly detailed description may only be applicable in a handful of settings. "Substantial increase" is a

relative term that depends entirely upon the specific factual context of a facility placement. It's reasonable meaning varies from one unique fact pattern to the next. It should be the responsibility of local units of government in the first instance to determine what best constitutes how to reasonably apply the "substantial increase" test based upon the circumstances that are unique to not only the municipality but also to the specific collocation setting. The Minneapolis Zoning Ordinances often cannot be specific enough to capture the range of collocation and siting possibilities for even a single municipality, so it would be entirely inappropriate to create a presumptive national standard on how to apply the "substantial increase" test to the huge universe of different factual circumstances that will present themselves.

6. As mentioned to in the Notice of Proposed Rulemaking, expanding "categorical exemptions" and removing barriers to existing facilities upgrades might force localities to place a moratorium on or increase developmental barriers for new facilities. These measures may be necessary to safeguard against unregulated or undesirable collocations. One of the negative consequences that will undoubtedly arise if the rule change occurs is non-stealth collocations on stealth sites. Not only will the categorical exclusion defeat the purpose of existing stealth sites, it will de-incentivize their creation in the future.

7. Collocation of wireless infrastructure must take design and visual impact into account, not just height. Only local governments are positioned to effectively regulate such issues. We strongly agree with the Intergovernmental Advisory Committee's argument that "[t]he question of substantiality... cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions" (NPRM Paragraph #122). In some instances, such as modifications to certain large, uncamouflaged cell towers, a 10% or 20' height increase could conceivably be determined to not "substantially change

the physical dimensions" of the tower. However, such a height increase would be judged by any reasonable person to be a substantial change if, for example, it took the form of an uncamouflaged antenna array upon an architecturally distinguished building, a "stealth" church steeple, a "stealth" monopole, or even an existing uncamouflaged tower that is obscured to a certain height by surrounding foliage, but becomes readily visible and/or blocks locally significant views due to the height increase (#s 116-9). Even if the definition for "wireless tower or base station" were more narrowly tailored than proposed, there is no way to effectively predict the "substantiality" of a modification based on nationwide numerical rules because of the wide range of potential contexts throughout the country. Therefore, we strongly suggest that the definition of what "substantially change(s) the physical dimensions" of a tower or base station be left to local governments for interpretation based upon the individual facts of an application.

8. If the suggestion to leave the question of "substantial change" to local governments is not accepted, as we urge herein, we propose several approaches to limit the potential negative effects. First, the definition of "existing wireless tower or base station" should be limited to structures built for the sole or primary purpose of supporting communications antennas. It should not include other structures (like buildings or streetlights) built for purposes other than just supporting communications antennas. As noted above, requiring collocations of a certain height upon buildings without regard to locally regulated context concerns could have a particularly negative effect on legitimate local land use interests. We suggest that the term "base station" could either be interpreted as being broad enough to encompass future, unforeseeable antenna support infrastructure that does not resemble a "tower", or alternatively that the phrase "tower or base station" forms a duplicative legal pairing in order to capture mild differences of interpretation (along the lines of "intents and purposes"), such as wiring or shelters that may not explicitly be part of a "tower" in popular interpretation (#s 108, 111). Second, any modification to a "stealth" structure that would be

inconsistent with its stealth characteristics should be considered to "substantially change the physical dimensions" (#121). Third, local governments should not be compelled to approve facilities modifications that do not comply with local building codes and land use laws, such as those imposing maximum heights or load-bearing limits. Similarly, local governments should not be compelled to approve facilities modifications that would not conform to conditions or restrictions applied to previous approvals, such as "stealth" characteristics or color restrictions (#s 124, 125, 127). Fourth, while we re-iterate our strong objection to any federal mandates that could even arguably be applied to locally owned roadway easement areas, we stress that any approval of "ground equipment" or other accessory facilities to be located at grade in the public right of way or within sight lines at corners or curves on private property that is required by state statute or local ordinance must be approved by the state or local authorities as provided by state or local law. This is a critical matter of public safety. We must protect the safety of pedestrians, motor vehicles, bicycles and others using the public right of way. We must protect the use of the right of way by the blind and the disabled. We must also provide for reasonably convenient use of the public right of way. We also have special issues here in the "snow belt" where there are unique problems related to plowing and other means of snow removal. Also, in our environment, the actual places used for driving and parking can change for months at a time as a result of snow and ice conditions. Only the local authorities understand these dynamics. What would be the impact of 6 foot snowbanks on both sides of the street, streets two thirds of normal width, and a ban on all parking on one side of the street until the end of winter? That could happen here. It has happened. What would be the impact of the need to store hundreds of thousands of tons of snow along the right of way? That happens here. Only the local authorities understand how various factors influence where in the right of way obstructions can reasonably be located, how roadway sight lines need to be protected and how that interacts with their plans for handling various contingencies.

9. Section 106 reviews should continue to be required for DAS and small cell facilities. DAS and small cells are certainly "undertakings" that "have the potential to cause effects on historic properties" (#55). Even DAS infrastructure, with its small size, can have significant impacts on historic properties depending particularly on placement (#59). For instance, a thin, 3' high antenna could have a negative impact on a historic building if it were placed upon a distinguishing architectural detail, if its finish starkly contrasted from its surroundings, or if it were attached directly into the historic stone rather than the mortar joints. A Section 106 review is necessary to address such issues.

10. Utility poles, street lamps, and water towers should not be excluded from Section 106 review because of the potential that some could receive historic designation (#61), even if the structures are part of a collection of similarly sized infrastructure (#62). Though it is likely that most such structures will not be recognized as historically significant, that is a process whose outcome cannot be predetermined. Such structures could conceivably be contributing elements to historic districts or be separately designated. These concerns are also present for replacement utility poles (#63).

11. To facilitate DAS and small cell facilities, we support the concept of grouping a multi-site DAS deployment into a single "undertaking" for Section 106 review (#64). This would streamline the review process for both the applicant and city staff. We would emphasize that this does not dismiss the need for sufficient detail to conduct the review, the level of which could vary by site. A catalog picture and a map generally does not suffice.

12. Minneapolis has had small cell facilities come through for review. It was not part of a larger grouping of these as it was being located in an area where it would "talk" to other existing cell sites. We don't think it is beneficial to allow a grouping of these to come through for zoning approval under one application as each site could have very different characteristics.

13. We have some concerns about temporary towers. We have had carriers ask to locate a temporary tower on the public street for up to 6 months. Most of these requests have been in low-density residential areas where parking is at a premium. In these cases, the towers would not only take up a parking space in front of someone's house but they would most likely be much taller than anything else in the area. In these cases, 6 months is too long.

14. The enforcement and penalties for temporary tower violations must be effective. Though it makes sense to grant an exemption from the environmental notification process for temporary towers, effective enforcement and penalties must be in place to ensure that this is not used as a loophole to provide longer-term service or as a "bridge" to the eventual establishment of permanent facilities. It should not be routine to allow time extensions for temporary towers.

15. Local application procedures should continue to be followed for collocation applications. It would be unnecessary and inconsistent with the principles of federalism to prescribe or restrict local application fees, required application materials, or specify which officials may or may not review an application. Also, it would be inconsistent with public involvement and due process best practices to further restrict the maximum review period.

16. In paragraph 132 of the Notice of Proposed Rulemaking, the FCC appears to be suggesting that the FCC should consider telling local governments who in the local government can make a decision as to whether or not an application complies with the requirements of §6409(a) and appears to be specifically suggesting that the Commission should require that administrative staff must make the decision rather than have it submitted to an elected body. The Commission asks, "Would it be consistent with principles of federalism to constrain state and local government procedures in this manner, as a condition for continuing to review covered requests?" In our view, it is not consistent with the principles of federalism to have a federal agency specify who in state and local government must review a request from a third party applicant. Such a specification would be a

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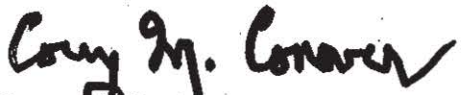
violation of *Printz v. United States*, and would violate the Doctrine of Dual Sovereignty. It would seem to be an attempt to tell a sovereign body how it must exercise its sovereign powers. It might also appear unseemly to presumptively mandate that democracy be taken out of the decision in favor of a local administrative official. It would also be bad policy to mandate a nationwide rule over such a diverse universe of government entities. In some small communities that local administrative official may be a part-time town clerk trained to perform only basic administrative functions.

Dated: January 31, 2014

Respectfully submitted,



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