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

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 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, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE AMERICAN PLANNING ASSOCIATION

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TABLE OF CONTENTS

Page

SUMMARY i

I. INTRODUCTION 2

II. THE RECORD PROVIDES NO BASIS FOR COMMISSION REGULATION OF LOCAL RIGHT-OF-WAY AND WIRELESS FACILITY SITING PRACTICES. 4

A. The Record Provides No Basis for Federal Regulation of Local Practices. 5

B. The Industry's Comments Are Unsound As a Matter of Policy. 11

C. The Record Underscores That a Case-by-Case Approach Is Appropriate. 26

D. The Record Reveals Opportunities for Non-Regulatory Commission Action To Promote Our Shared Goals. 28

1. The Commission Can Promote Understanding Between Local Governments and Industry. 28

2. The Commission Should Play a More Active Role on RF-Emissions Matters. 29

3. The Commission Can Advocate for Municipal Broadband Networks. 29

III. THE COMMISSION LACKS AUTHORITY TO REGULATE LOCAL RIGHT-OF-WAY OR FACILITY SITING PRACTICES AS THE INDUSTRY PROPOSES. 29

A. Section 253 May Not Be Expanded To Allow the Commission To Regulate Local Right-of-Way Practices. 30

1. Section 253 Does Not Rate Regulate Local Governments. 30

2. Section 253 Sets a High Standard for Preemption That the Commission May Not Lower by Rule. 32

3. Section 253 Bars the Commission From Addressing Claims That Raise Section 253(c) Issues. 36

4. Even if the Commission Had Some Authority With Respect to Section 253(c), It Could Not Adopt a Permitting Shot Clock or Other Federal Right-of-Way Rules. 38

5. Even if the Commission Had Some Authority To Implement Section 253, It Could Not Use the Statute To Address Local Government Proprietary Actions. 41

TABLE OF CONTENTS
(continued)

Page

6. Even if the Commission Had Some Authority To Implement Section 253, It Could Not Use the Statute To Limit Compensation to Costs 42

7. Section 253 Cannot Impact Local Zoning Authority Under Section 332(c)(7). 45

8. Section 253(c) Does Not Mandate Precise Parity In Regulation or Fees. 45

B. Section 332(c)(7) Does Not Permit the Commission To Adopt the Rules That the Industry Proposes. 48

1. Section 332(c)(7) Does Not Permit the Commission To Regulate State and Local Siting Matters. 48

2. Section 332(c)(7) Preserves Local Authority Over Additions to Existing Structures. 49

3. Section 332(c)(7) Does Not Permit the Commission To Deem an Application Granted. 49

4. Section 332(c)(7) Permits Local Governments To Create Pre-Filing Requirements and To Reject Applications for Incompleteness. 50

5. The Commission Is Not in a Position To "Clarify" the Application of 332(c)(7) to DAS. 51

6. Section 332(c)(7) Does Not Permit the Commission To Treat Entirely New Facilities as Collocations. 51

7. Section 332(c)(7) Does Not Allow the Commission To Create Per Se Rules. 52

8. Section 332(c)(7) Does Not Permit a Shorter Collocation Shot Clock. 57

C. Section 706 of the Telecommunications Act of 1996 Does Not Expand the Commission's Authority Over State and Local Governments. 58

D. The Commission May Not Use Title VI To Impact Other Local Rights. 58

E. Many of the Industry's Proposed Rules Would Raise Serious Constitutional Concerns. 60

CONCLUSION 62

SUMMARY

The Commission's Notice of Inquiry ("NOI") asks three key questions: first, is there a need for the Commission to regulate State and local right-of-way and wireless facility siting practices and compensation requirements; second, does the Commission have legal authority to act in these areas; and third, *should* the Commission regulate, or help develop voluntary mechanisms that would foster "best practices." On all three questions, the Commission now has very clear answers.

First, the record reveals that regulating these local practices would be both unnecessary and disruptive. In their initial comments, 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 (the "National Associations") (here joined by the American Planning Association) submitted a technical analysis, an econometric study, and detailed information concerning local experiences, all confirming that local wireless siting and right-of-way management practices and compensation are not delaying broadband deployment, and that regulating them would discourage critical adoption efforts and cause other problems. The industry provided nothing comparable. It made accusations aplenty, generally without providing any substantive detail. Upon investigation, the accusations have proven to be riddled with errors. Many were outright falsehoods, others omitted pertinent information, and still others misread or misunderstood local ordinances. The Commission cannot rely on these undocumented, unserved claims to justify *any* further action in this proceeding, much less the adoption of regulations. The record here shows—and industry statements in other proceedings

confirm—that local right-of-way and wireless facility siting and compensation practices are not deterring or delaying broadband adoption or deployment at all.

Second, the Commission does not have the authority, or the resources, to do what industry has asked: to regulate right-of-way and permitting charges, permitting practices, and zoning and similar land use activities. The Commission long ago recognized that the Communications Act did not give it authority to regulate property merely because that property might be useful to telecommunications providers. Congress gave the Commission limited authority (through Section 224) to regulate access to certain utility property, but has never given it the authority to regulate terms and conditions for access to public property that is urged here. Section 253 does not supply the authority; it does not authorize the Commission to adopt any affirmative regulations. At most, it permits preemption, and does not permit the Commission to even adjudicate disputes regarding right-of-way management or pricing. Section 332(c)(7) also does not grant the Commission such authority. While the Commission's authority to take any action under Section 332(c)(7) is disputed, the Commission itself recognizes that its authority is, at most, limited and interpretive; it cannot adopt any limitations on local authority beyond those spelled out in Section 332(c)(7). Section 706 of the Telecommunications Act of 1996 cannot be used to alter rights that Section 253 and Section 332(c)(7) protect.

Third, the National Associations believe that the Commission can play a useful role in fostering best practices, and assisting local governments in their own efforts to promote deployment and adoption. As a first step, as the National Associations urged, the Commission must promptly convene the Intergovernmental Advisory Committee, and it should move forward with the right-of-way Task Force described in the National Broadband Plan. But the Commission can also assist by continuing to oppose efforts to block municipally-owned networks, and

through other educational efforts. There seems to be broad agreement that such efforts might be useful, but the comments also reveal a point that the Commission seems to have overlooked:. Many local governments reported that often, their own ability to act is delayed because those applying for permits fail to familiarize themselves with local rules. Many communities expend considerable effort educating industry, and the Commission should endorse and support those efforts.

Unfortunately, the NOI does not focus on forces that are impeding broadband deployment or adoption. It ignores industry practices that may be affecting deployment (pricing policies, affordability, quality of service, relevancy, and use restrictions, among them). Instead, it focuses on local practices that have been shown to have no effect on deployment, and fails to require industry accusers to take basic due process steps to allow the Commission to develop a reliable factual record. As a result, local governments have been forced to expend scarce resources in a tight economic climate, all to respond to undocumented and unfounded industry complaints about issues unrelated to our communities' true broadband needs. We urge the Commission to choose a different course.

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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 (the "National Associations")[1] submitted opening comments that presented a technical analysis, an econometric study, and local experiences all confirming that local wireless siting and right-of-way management practices are not delaying broadband deployment, and that regulating these practices would discourage critical adoption efforts and

[1] The American Planning Association joins these reply comments and supports and adopts the opening comments filed by its fellow national associations. The APA is an independent, not-for-profit educational organization that provides leadership in the development of vital communities. APA conducts regular educational seminars regarding the importance of sound planning on economic development. http://www.planning.org

cause other problems. The industry's comments—a scattered mix of unfounded, undocumented anecdotes and allegations—do not begin to change this analysis. Taken as a whole, the record fails to present any evidence or analysis that would justify the Commission's unauthorized regulation of these local practices.[2] Instead, it underscores that the Commission should partner with local governments and the industry to develop targeted, voluntary programs that may increase broadband deployment.[3]

I. INTRODUCTION

The National Associations find it curious that when the Commission examines local governments' role in broadband deployment and adoption, the industry is quick to argue that local right-of-way and wireless facility siting practices are slowing deployment and hindering infrastructure investment.[4] Yet, when the conversation turns to the industry's own broadband progress, and whether industry practices may be affecting deployment or adoption, the industry just as quickly asserts that deployment is widespread, investment is at historic levels, and that the market is competitive and vibrant. For example, CTIA asserts that in 2009, there were more than 285.6 million U.S. wireless subscriber connections[5]—approximately 91% of the total U.S. population. It notes that this figure increased to nearly 302.9 million connections in 2010,[6] covering approximately 96% of our country's population. In addition, in 2010, the cumulative

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[2] Reply Comments of New America Foundation, *et al*., WC Docket No. 11-59 (Sept. 29, 2011).

[3] *See, e.g.*, NATOA, Ex Parte Letter from Steve Traylor to Marlene H. Dortch, WC Docket No. 11-59 (Sept. 9, 2011) (discussing important role Commission can play in facilitating public educational forums).

[4] *See, e.g.,* Comments of AT&T Inc., *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket No. 11-121 (Sept. 6, 2011).

[5] Comments of CTIA-The Wireless Association, WC Docket No. 11-59, at 10 (July 18, 2011).

[6] *Id*.

capital investment by the U.S. wireless industry was nearly $25 billion,[7] more than the investments of France, Germany, Italy, Spain, and the U.K. combined.[8] And CTIA indicates that when countries are ranked by their total number of mobile Internet users, the United States ranks first.[9]

These numbers are impressive and important, and local governments are proud of their role in facilitating them. But lurking behind the numbers, a problem remains. Many of our communities—especially in rural America—still lack adequate, affordable broadband. To address this gap, local governments have repeatedly advocated for increased deployment. Unfortunately, the gap persists, not due to local governments' practices, but because of the economics of serving these areas, and the industry's own business models and legislative initiatives.[10] Indeed, the industry has demonstrated that even when a local government makes increased financial concessions, a company will not deploy advanced services where doing so would not satisfy its internal operating margin threshold.[11] Because of this, local governments in many communities have opted to build community-owned networks to provide services the industry is unwilling to provide, or to offer competitive middle and last mile options. Though the

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[7] CTIA Wireless Industry Overview, at 7, *available at*: http://blog.ctia.org/2011/08/30/the-u-s-wireless-industry-%E2%80%93-an-overview/.

[8] *Id.*

[9] *Id.* at 37.

[10] For example, in a letter AT&T submitted addressing its proposed merger with T-Mobile, the company rejected a proposal in January 2011 from its marketing organization that would have expanded the company's LTE coverage beyond the areas covered by its Plan of Record. Senior management rejected the idea, like numerous earlier proposals, because there was "no viable business case for the proposed expansion." Ex Parte, *In re Application of AT&T Inc. and Deutsche Telekum AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, at 3-4 (Aug. 8, 2011).

[11] Comments of the National Association of Telecommunications Officers and Advisors to the Eighth Broadband Progress Notice of Inquiry, GN Docket No. 11-121, at 21 (Sept. 6, 2011).

National Broadband Plan endorses this, the industry has consistently worked to preempt local authority to deploy such networks, and the Commission has paid far too little attention to these deployment barriers.

Unfortunately, the Notice of Inquiry ("NOI") continues this pattern: affordability, quality of service, relevancy, and the industry's own behavior in delaying increased deployment go unaddressed. Instead, the Commission focuses on local practices that have no proven effect on hindering deployment. As a result, local governments have been forced to expend scarce resources in a tight economic climate, all to respond to undocumented and unfounded industry complaints about issues unrelated to our communities' true broadband needs. We urge the Commission to choose a different course.

II. THE RECORD PROVIDES NO BASIS FOR COMMISSION REGULATION OF LOCAL RIGHT-OF-WAY AND WIRELESS FACILITY SITING PRACTICES.

In the NOI, the Commission sought to develop a record to determine "whether there is a need for coordinated national action to improve rights of way and wireless facilities siting policies."[12] The comments reveal no such need. Instead, the record underscores that Congress chose wisely—a case-by-case approach works better than a "one-size-fits-all" model.[13] The Commission should focus on working cooperatively with local governments to achieve our shared goals.

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[12] NOI ¶ 9.

[13] The Commission has recognized this, as well. See, e.g,, *In re Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 15 FCC Rcd. 22821 ¶ 20 (2000) (finding that "issues are best addressed through case-by-case adjudication").

A. The Record Provides No Basis for Federal Regulation of Local Practices.

The record shows exhaustive evidence indicating that local practices do not deter broadband deployment or adoption, and only anecdotal, highly questionable claims to suggest otherwise. As such, the record provides no basis for federal interference.

While the Commission generally requested "systemic practices rather than individual or anecdotal situations,"[14] only local governments heeded this call. To be sure, local governments' comments could have been purely anecdotal: they might have re-told the *thousands* of success stories about how local practices have facilitated broadband deployment and adoption. But our comments went a step further.[15] We supplemented these local experiences with econometric and technical analyses showing that the industry's unwillingness to expand broadband deployment is driven by factors *other* than local practices. Specifically, a technical analysis from Columbia Telecommunications Corporation and an econometric study from ECONorthwest show that local practices are a minimal factor in a provider's deployment decision. Our comments further show that these local practices serve critical community values that vary on a community-by-community basis, in a way that Commission rules could not match. And the comments establish that federal regulation of these practices would undermine—not facilitate—the Commission's goals.[16]

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[14] NOI ¶ 9.

[15] National Association Comments at 7-15.

[16] Our opening comments referred to Kansas as a State that "limit[s] right-of-way fees." National Associations Comments at 12. While the Kansas Association of Counties' comments indicate that "Kansas *counties* are not allowed by state law to charge a franchise fee (except for cable TV)," Comments of Kansas Association of Counties, WC Docket No. 11-59 (June 2, 2011) (emphasis added), Kansas *cities* can impose franchise fees based on a provider's gross revenues. Kan. Stat. Ann. § 17-1902(s); Kan. Stat. Ann. § 12-2001(b)(5). As our opening comments showed, broadband deployment is driven *not* by right-of-way fees, but by other factors. Kansas's deployment patterns emphasize the point. Broadband *is* widely deployed in parts of Kansas. *See*

In contrast, the industry's comments are a mesh of unfounded anecdotes and innuendo, lacking in veracity, documentation, and specificity. No industry commenter studies or analyzes these local practices' effects more broadly. Not a single allegation is supported by declaration or affidavit. None is served on the community that it criticizes. A number are anonymous.[17] PCIA's comments exemplify some of these problems. PCIA submitted an exhibit that lists hundreds of communities.[18] However, the exhibit provides virtually no relevant details. It fails to mention what provider is involved; the substance, let alone details, of the complaint; when the offending event allegedly occurred; or how the community specifically delayed or hindered deployment.[19]

To attempt to fill the gap created by the industry's failure to follow the Commission's direction, the National Associations conducted several outreach activities, albeit hampered by this proceeding's time limits. First, we attempted to contact communities by phone that were identified in the body of any industry comments. Not all communities could be reached. We also used other informal methods, including list-serves and association mailing lists, but it is clear that this only reached a portion of the named communities. These methods are certainly no substitute for direct notice.

As we conducted these efforts, we found that many responses were similar:

Comments of the League of Kansas Municipalities, WC Docket No. 11-59, at 6-7 (July 18, 2011). In fact, the broadband data map reveals that broadband deployment is higher in many Kansas cities (which charge gross revenue fees), than in its counties (which do not). This is consistent with the studies we submitted in our opening comments, which indicate that deployment and adoption are not meaningfully affected by local right-of-way management or compensation practices.

[17] *See, e.g.,* AT&T Comments at 12 n.13, 14 n.19; Comments of Verizon and Verizon Wireless at 17 n.21, 23.

[18] PCIA Comments, WC Docket No. 11-59 (July 18, 2011), at Exhibit B.

[19] The City of Bothell, Washington, calls PCIA's allegations regarding its use of consultants "baseless, inflammatory, and completely without merit." City of Bothell, Washington Reply Comments, WC Docket No. 11-59, at 1 (Sept. 20, 2011).

- Communities believed that they had good working relationships with the industry;[20]
- They believed that they are balancing their citizens' interest in maintaining safe and attractive communities with the industry's economic interests;[21] and
- They were genuinely surprised that rather than communicate with them directly, the industry filed with the Commission without even providing a copy of the complaints.[22]

Most disturbingly, and repeatedly, communities indicated that the industry's claims are inaccurate or untrue. For example, to support its claim that permitting requirements "drastically differ in jurisdictions located in the same general geographic area," NextG cites three California communities: Apple Valley, Chino Hills, and the City of Rialto. However, few would describe these cities as in the "same geographic area."[23] AT&T claims that it has been working with Chino Hills, California, for 18 months to have a cell site approved near a scenic highway.[24] But there is *no* scenic highway in the City, and the City is unaware of the application. Verizon states that the City of Portland, Oregon, has acted improperly by imposing in-kind requirements,[25] but

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[20] *See, e.g.*, Comments of the City of Wichita, Kansas, WC Docket No. 11-59 (Sept. 2, 2011).

[21] *See, e.g.*, Comments of the City of Scottsdale, Arizona, WC Docket No. 11-59 (Sept. 23, 2011).

[22] *See, e.g.*, Comments of the Town of Wytheville, Virginia, WC Docket No. 11-59 (Sept. 26, 2011).

[23] NextG Comments at 22. Rialto is approximately 35 miles from Chino Hills. Apple Valley is approximately 75 miles away. While all three cities are in San Bernardino County, the County is the largest in the lower 48 states. It is 20,105 square miles in area, and is larger than the states of New Jersey, Connecticut, Delaware, and Rhode Island combined. Chino Hills and Rialto are on opposite ends of the San Bernardino Valley, while Apple Valley is north through the Cajon Pass and adjacent to the Mojave Desert (and in a different valley - Victor Valley).

[24] AT&T Comments at 14 n.17.

[25] Verizon Comments at 23.

the courts have already ruled that the requirements do not run afoul of the Communications Act.[26] And AT&T criticizes a project in Liberty, Missouri, that it has previously publicly supported.[27] More examples are being filed with the Commission daily.

When the industry's comments attempt to tackle the issues more systemically, they are vague and often riddled with errors. PCIA's Exhibit B is, again, a prime example. PCIA lists a number of communities that it claims use consultants that are "obstructionist[ ] and problematic." However, many of these communities have *never* used consultants.[28] Also on this list, "Witchita, Kansas"—an apparent reference to Wichita, Kansas—does not use consultants to work on the siting process; it used a consultant only once, to develop a master plan that was shared with and approved by the industry.[29] Certain communities that PCIA describes as reviewing collocation applications through a full discretionary zoning hearing have no such requirements.[30] PCIA indicates that Maricopa County, Arizona, subjects collocations to full reviews, and entirely rules

[26] *Time Warner Telecom of Or., LLC v. City Of Portland*, 322 Fed. Appx. 496, 498 (9th Cir. 2009).

[27] Reply Comments of Liberty, Missouri, WC Docket No. 11-59 (Aug. 17, 2011).

[28] *See, e.g.*, Reply Comments of the City of Auburn, California, WC Docket No. 11-59 (Aug. 22, 2011); Comments of the City of Lake Forest, California, WC Docket No. 11-59 (Sept. 29, 2011); Reply Comments of York County, Virginia, WC Docket No. 11-59 (Sept. 26, 2011).

[29] Comments of City of Wichita, Kansas, WC Docket No. 11-59 (Sept. 1, 2011).

[30] *See, e.g.*, Letter from A. Henson to M. Dortch, Reply to PCIA Comments filed on July 18, 2011 (August 30, 2011) (noting that "Bend's regulations do NOT require a full zoning review and hearing for collocation applications.").

out certain areas for the siting of facilities.[31] Neither claim is true.[32] Another listed community, Augusta County, Maryland, *does not even exist*.[33]

When the industry does provide specific data, it supports local governments' showing that existing State and local siting processes do not deter broadband deployment. AT&T reports that one of its chief problems is that "localities are often already blanketed with cell sites" and that "89.6 percent of the U.S. population is served by five or more facilities-based carriers."[34] CTIA reports that under the existing siting regime, "carriers have made enormous investments in their networks, committing more than $310 billion in cumulative capital expenditures."[35] This is supported by data the industry has submitted in other proceedings.[36]

In sum, the industry's supposed justification for regulating local right-of-way and wireless facility siting practices has been exposed, and it amounts to a house of cards. It is built upon undocumented allegations that—to the extent the National Associations have been able to examine them (a necessary process that takes time and resources)[37]—are both confused and confusing. These claims provide no foundation for Commission rules. At the same time, the

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[31] PCIA Exhibit B.

[32] Letter from Wayne J. Peck to Marlene H. Dortch, WC Docket No. 11-59 (Sept. 8, 2011).

[33] If PCIA had served its comments on the communities it named, surely other errors would have been identified. Moreover, as described *infra*, there is nothing inherently unlawful or inappropriate about many of the practices that PCIA highlights.

[34] AT&T Comments at 7.

[35] CTIA Comments at 11.

[36] *See, e.g.*, Comments of the United States Telecom Association, *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket No. 11-21 (Sept. 6, 2011) (noting that broadband deployment and investment are a "resounding success story" and contending that the Commission can assist "the remaining small percentage of Americans" without broadband by reforming universal service and intercarrier compensation).

[37] Any Commission regulatory action in this area would require the Commission to expand this investigation much further.

overwhelming weight of the documented and serious evidence before the Commission shows that regulating State and local practices would not promote broadband deployment or adoption and would add significant cost to a system that works well. The best course here would be for the Commission to strike many of the industry's claims from the record because they fail to adhere to the Commission's admonition that commenters "describe the actions that are specifically cited as an example of a barrier to broadband deployment."[38] For example, PCIA's blatant failure to "identify[ ] with specificity particular examples or concerns" robs all affected parties of the opportunity to respond,[39] and fails to provide the Commission with a full and complete understanding of the issues. But in any case, to act on this record—one not only unverified and unserved, but now shown to be rooted in blatant errors and inconsistencies—would be arbitrary and capricious; the Commission is on notice that the record is seriously deficient.[40]

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[38] NOI ¶ 9.

[39] *Id.*

[40] The deficiencies extend not only to pure facts, but to the industry's economic claims. Level 3, for example, asserts that local governments have an effectively unlimited ability to charge prices to providers who have placed facilities in particular rights-of-way; have monopoly power; are exercising that power in an abusive way; and can be expected to increase prices to high levels (and are doing so). Level 3 Comments at 12-18. Not one of these claims is supported by facts or any economic analysis, and each was effectively rebutted by studies and analyses submitted by the National Associations. Other claims are rebutted by Level 3's own recitations: as the Commission is well aware, Level 3 acquired its facilities in the New York State Thruway through bankruptcy proceedings – it "sunk costs" with full knowledge of NYSTA's price, presumably because it thought it could do so profitably. No one compelled it to purchase the facilities. Further, under Level 3's theory, all right-of-way it now holds would be priced at the NYSTA rate – it does not claim that any is.

As ECONW explained, local governments and public agencies have no incentive to overcharge for rights-of-way, and certainly no incentive to overcharge with respect to incumbent facilities that are providing services to its citizens and local businesses. As proof that local governments will only increase prices, Level 3 simply asserts, again without any study or factual support, that it is not aware of any instance where local governments have dropped right-of-way fees. Level 3 Comments at 9. Actually, the National Associations and some other commenters pointed out that communities had charged no fees or charged less than the amounts permitted

B. The Industry's Comments Are Unsound As a Matter of Policy.

The industry's comments are also unsound as a matter of policy. Among other things, the comments address: the permitting process; local governments' use of consultants; collocation of new equipment on existing facilities; complaints about public participation; restrictive building codes; DAS deployment; and the adoption of a model permitting ordinance. But on each of these issues, the industry proposes a model that would undermine important public benefits that Congress rightly intended to protect by preserving local processes (and limiting federal involvement). Thus, even if the Commission had authority to adopt the industry's preferred model (it does not), it should not do so.

a. *The Local Permitting Process*

Many industry comments, which prefer a one-size-fits-all model, call for the Commission to standardize the local permitting process. This would undermine important components of the current system.

AT&T claims that the Commission should prohibit local governments from "establishing pre-filing requirements."[41] Local governments use pre-filing requirements to obtain a range of critical information, including environmental clearances, engineering reviews, and information about the viability of pre-existing siting locations. These requirements obligate an applicant to confront problems in advance, a practice that promotes efficiency. A federal rule deeming that an applicant need not satisfy these requirements before it files an application would delay the process, and create public safety risks. For example, the record shows that local governments

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under law in an effort to attract broadband providers, to no avail. That is, Level 3's arguments are based on unsupported economic theory resting on hypotheses belied by its own experiences.

[41] AT&T Comments at 20.

have relied on materials submitted with an application to determine that a proposed facility placement would be unsafe.[42]

PCIA proposes a model to standardize wireless facility siting,[43] and a number of providers complain that they must learn and comply with differing requirements on a community-by-community basis.[44] Again, this is a virtue, not a vice, of Congress's decision to preserve local authority over these issues. America's communities are not molded by cookie cutter; they vary on a range of factors including geography, topography, demographics, weather, and local needs and requirements. The National Associations' initial comments pointed out that differences in historical development patterns from community to community can drastically affect where and how facilities may be located. Local right-of-way and wireless facility siting policies reflect and accommodate these differences. For example, while public rights-of-way have been called "the visual fabric from which neighborhoods are made,"[45] a beachfront community may use such a platform differently than an industrial community. Likewise, communities adopt different approaches to public safety based on their unique circumstances. A North Carolina community may have specific hurricane-safety requirements, while a Michigan community may seek to ensure that facilities can adequately bear ice and snow. This is no place for one-size-fits-all rules. Congress wisely allowed each community to make its own choices—

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[42] Comments of Montgomery County, Maryland, WC Docket No. 11-59, at 34-35 (July 18, 2011).

[43] PCIA Comments at 52.

[44] NextG Comments at 22; PCIA Comments at 31 ("Inconsistency and absence of uniformity of regulations among neighboring jurisdictions is also a significant problem for large DAS deployments."); CTIA Comments at 20 ("[I]t is nearly inevitable that wireless operators will be faced with a daunting patchwork of inconsistent and restrictive requirements when they seek to locate a tower encompassing multiple jurisdictions located in or around an area needing better coverage or capacity.").

[45] *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 724 (9th Cir. 2009)

including choices that differ from its neighbor's—based on its own needs and local political judgments.

PCIA also complains that without a federal rule defining application completeness, local governments can "repeatedly seek information."[46] It is not clear *how* multiple requests could delay deployment. Local governments have no interest in requesting information unnecessarily, but they do have an interest in ensuring that they can determine whether an application satisfies local standards. A provider who believed a local government was failing to act on its application has always been able to seek court review. And, under the Commission's current rules, a local government specifies the information required for an application, and has only 30 days to notify the applicant if its application is incomplete. Under the rules, the local government cannot create new application requirements halfway through the approval process and defer action. A local government can only "repeatedly request" the information requested in its application and pre-application requirements. For example, if an application form requires information about pre-existing sites, this information can be requested until it is provided—and the application remains incomplete until that time. There is, then, no delay problem. The Commission cannot arbitrarily decree that an application is complete when it is not, and certainly should not encourage providers to submit incomplete applications.

Likewise, the Commission cannot adopt an "ask once" rule that limits local governments to receiving what is included in the initial application (or pre-application) form. Local information requests typically emerge as the local government gains an understanding of a project's scale and scope over time. Projects with the potential to be especially disruptive often require additional information. An "ask once" policy, however, would force local governments to

[46] PCIA Comments at 14.

require all information that *might* be relevant to the most disruptive of projects—and to require it from everyone. In many cases, this would be wasteful and inefficient.

The industry also complains about public participation in the permitting process. AT&T complains that the company looked at six potential tower sites in a Washington, DC suburb, but was unsuccessful because of the "very strong presence" from the Piedmont Environmental Council.[47] Another site, a museum in a DC neighborhood, had to be rejected after "nearby residents raised concerns."[48] In Turtle Rock/Newport Coast, California, AT&T proposed a DAS system that was met with "resistance" by local residents who subsequently filed a lawsuit to block its construction.[49] And in what AT&T characterizes as "one of the most extreme examples" of public participation in the permitting process, it cites its experience in Waltham, Massachusetts, where, among other things, a public hearing on the special permit application is required.[50] Of course, no one would seriously argue that telecommunications companies should ignore the advice and counsel of their shareholders. Yet the industry does not hesitate to assert that public input must be curtailed and that local communities' democratic processes must be limited. Further, commenters fail to acknowledge that local governments do approve applications even in the face of public resistance.[51] As importantly, local zoning processes—the processes that Section 332(c)(7) protects—are public proceedings. A local government is expected to follow procedures similar to those used with respect to other zoning projects, and to make decisions based on "substantial evidence," which includes evidence that the community presents.

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[47] AT&T Comments at 12 n.13.

[48] AT&T Comments at 12.

[49] AT&T Comments at 13 n.15.

[50] AT&T Comments at 16 n.23.

[51] *See, e.g.,* Reply Comments of the City of Scottsdale, Arizona, WC Docket No 11-59, at 7.

The Commission obviously cannot establish a rule that would require a special, non-public process that considers only industry-presented evidence.

Local governments also act reasonably by coordinating their review with other agencies. Verizon criticizes an unnamed California community for not granting it a right-of-way permit until Verizon obtained permits from a railroad and the California Department of Fish and Game.[52] While Verizon maintains that its project "just slightly" traversed railroad tracks and a creek, local governments act appropriately when they consider environmental and safety impacts in deciding whether to issue or condition permits, however "slight" the industry may claim them to be. Train safety, for example, is a significant issue, and the fact that Verizon may consider intrusion onto railway right-of-way unimportant if it is "slight" underscores the importance of this role.[53] Moreover, the permitting process requires local governments to expend employee time and resources, and is site-specific. Rather than spend staff time on projects that will never be built, for a project that requires review by several entities, it is reasonable for the local government to ensure that the project can go forward before it expends its limited resources.

b. *Avoiding Problematic and Disruptive Facility Placement, Including Collocations.*

A number of providers complain about local practices for evaluating facility placement. They cite the review of collocations, limits on placements in certain zones, treatment of facilities that are legal, but non-conforming, and local consideration of other impacts. All of these local policies reflect positive features of the existing scheme.

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[52] Verizon Comments at 23.

[53] Federal Railroad Administration data indicates that during the ten year period from 2001-2010, there have been over 4000 deaths caused by trespasses onto railway property at non-highway crossings, and nearly 4000 deaths at highway-rail crossings. Federal Railroad Administration, Office of Safety Analysis, *available at*: http://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/tenyr2a.aspx. A substantial portion of these deaths occurred in California.

To its credit, PCIA recognizes that local governments may properly consider not only health and safety issues, but also what it calls "welfare issues," including aesthetics and property values.[54] Indeed, consideration of aesthetics and property values are often a critical component of local siting practices. The two concepts are often inseparable, as standard real estate appraisal methods account for aesthetic variables.[55] Courts have relied on these appraisals, including their reflection of aesthetic nuisance, for example, to value property for purposes of eminent domain compensation.[56] More generally, a recent study found that "beauty and aesthetics are among the most important factors in perceived community satisfaction."[57] The widespread acceptance of aesthetics as a key driver of property values and economic vitality is reflected in the many local planning documents and ordinances stating the need to reduce and control visual clutter for precisely these reasons.[58] Local governments have recognized that "[c]ellular towers threaten to

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[54] PCIA Comments at 19.

[55] George P. Smith, II and Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 Harvard Envtl. L. Rev. 55, 76 (1991), citing an interview with Arnold S. Tesh, Chairman of the Capitol Region Chapter of the American Society of Real Estate Counselors, in Washington, D.C. (Sept. 17, 1990) (noting that there is "no lack of data for [assessing property value] based on aesthetic factors. View and proximity to a noxious use are just other variables in the marketplace the measurement of which is no more subjective than many other factors commonly valued.").

[56] *Id.* at 77-80.

[57] Richard Florida, Charlotta Mellander, and Kevin Stolarick, *Beautiful Places: The Role of Perceived Aesthetic Beauty in Community Satisfaction* (unpaginated) Martin Prosperity Institute (March, 2009).

[58] *See, e.g.*, EDAW/AECOM, Miami-Dade County Aesthetics Master Plan at i (May 2009) (indicating that "[t]he cultivation of community aesthetics has been particularly important to Miami-Dade County given the area's economic reliance on tourism. As the community matures and diversifies, aesthetics become equally important to the health of other economic sectors and to the overall quality of life of residents. The maintenance of community aesthetics is essential to the continued health and growth of Miami-Dade County's vibrant economy as well as to the daily quality of life of its 2.4 million residents.").

engulf orderly, pleasant street scenes with a new brand of visual clutter."[59] As one court recently put it:

> The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a [wireless communications facility], and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.[60]

Only local authorities are positioned to evaluate the areas of the community where facility siting would be most disruptive. The industry's comments seek to reduce or eliminate this local authority, but it should be protected.

(1) *Local Review of Collocations.*

While PCIA acknowledges the importance of these aesthetic considerations, it fails to recognize that collocations present aesthetic (and other) issues. It claims that a local collocation review should be limited because "the tower itself is essentially unchanged."[61] Verizon also claims that the Commission should rule that any addition or upgrade to antennas on existing towers or other structures that does not result in a material modification to the underlying structure is not subject to Section 332(c)(7).[62] The industry's comments fail to appreciate the significant impact that a collocation can have on a community. As the City of Albuquerque and the City of Yuma explain, a collocation whose design is inconsistent with the underlying facility

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[59] Advisory Commission on Intergovernmental Relations, The Impact of Aesthetics on the Economy and Quality of Life in Virginia and Its Localities 16 (2000).

[60] *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 723 (9th Cir. 2009).

[61] PCIA Comments at 19.

[62] Verizon Comments at 10.

could dramatically affect a community.[63] Montgomery County, Maryland, has explained that even small additions can affect safety.[64] An attachment could require replacement of a pole, or attachment of significant and intrusive ancillary facilities that could affect ADA accessibility. Moreover, a collocation is not a one-time event. As we showed, even if an underlying facility is "essentially" unchanged, it can bloom into one that is exponentially more disruptive to the community, as one antenna is added to another, is added to another, is added to another, *ad nauseam*.[65] Addressing these issues is not simple, and experimenting with different approaches ultimately leads to better-tailored models; a federal standard would not allow this.

Of course, as we have noted, many communities prefer and promote collocation.[66] But an essential virtue of the system Congress has preserved is that local governments are not bound by this model when it would be inappropriate. At a certain point, or in some locations, a better solution may be another pole or multiple, shorter poles.[67] Local governments are positioned to evaluate unique circumstances.

Nor can collocation be preplanned in all cases. Some communities approve facilities that are designed to host a certain number of collocated antennas, but this does not necessarily obviate the need for review later. Among other things, a proposed collocation may have a different design or characteristics than those assumed when the underlying facility was originally installed. Second, ordinary maintenance and equipment change-out—as well as activities around a site—may affect the underlying facility and its suitability for collocation. Third, someone must

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[63] Reply Comments of Albuquerque, New Mexico, WC Docket No. 11-59 at 6 (Sept. 30, 2011); Reply Comments of Yuma, Arizona, WC Docket No. 11-59 (Sept. 29, 2011).

[64] *See* Montgomery County, Maryland Comments at 33-35.

[65] National Associations Opening Comments at 46-47.

[66] National Associations Opening Comments at 32.

[67] This is one of the reasons that many local governments are interested in DAS technology.

pay for an engineering analysis of proposed collocations, and while it may be possible to do that to some degree as part of the initial application there are other cases where the study is properly performed later.

Local government oversight is therefore important, and preferable to federal rules. Overseeing such issues is critical to promoting economic development, including broadband deployment. Limiting especially problematic collocations also helps to maintain public support for wireless projects, and protects public safety. PCIA claims that it should be sufficient that the applicant has submitted a report "stamped by a licensed engineer,"[68] but local governments have found mistakes in such reports in the past. To assess a proposed collocation's aesthetic and other impacts, the "rubber-stamp" process that the industry would prefer is often inadequate. The degree to which these processes can be streamlined is a policy decision better made at the State and local level, and not by the federal government.[69]

(2) *Limits in Particular Areas*

The industry also criticizes local regulations that discourage placement of facilities in certain areas of the community, including residential areas.[70] But this, too, is a positive feature of the local process that Congress preserved. If facilities can be placed in areas where they will serve their purpose while causing the least amount of disruption, everyone benefits. Only local authorities are positioned to evaluate the areas of the community where facility siting would be most disruptive. Moreover, as we discuss in Part II, the industry comments generally overstate

[68] PCIA Comments at 19.

[69] *See, e.g.*, Comments of the City of Maiden, North Carolina, WC Docket No. 11-59 (Sep. 27, 2011).

[70] PCIA Comments at 32; NextG Comments at 23; CTIA Comments at 19.

the extent to which these local polices constitute a "blanket ban" and wrongly suggest that they violate the Communications Act.[71]

(3) *Assaults on grandfathering*

PCIA criticizes as a "new" development the designation of towers as "approved but non-conforming." It explains that in some cases, towers are approved, but then additional attachments or modifications are not permitted because of changes in code requirements, or in the character of a neighborhood.[72] The criticism is ill-founded, and the solution it proposes (effectively that once a tower is built, anything goes) is both dangerous and likely to create more problems than it solves.

What PCIA describes can be analogized to "grandfathering," a practice that is allowed with respect to many facilities. A homeowner may have electrical wiring in a house that can be maintained as long as a home is not changed, but which must be replaced in whole or in part if the home is altered. Likewise, a homeowner that seeks to construct an addition may face new setback requirements that would not apply if the home were left unaltered. A community may not be required to revamp or add sidewalks for handicapped access everywhere, but it may be obligated to do so for any street that it alters. Governments often must balance the value of requiring all entities to conform to new codes versus the impact on existing structures, and often resolve the issue by allowing "non-conforming structures" to remain in place as long as they are unchanged. PCIA is arguing is that its members should be able to live by a different rule, which would only magnify the compliance issues over time. The likely result is that local governments would be forced to eliminate grandfathering for public safety and other reasons.

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[71] *See, e.g.*, Comments of the City of Battle Creek, Michigan, WC Docket No. 11-59 (Aug. 31, 2011); Reply Comments of the City of Bend, Oregon, WC Docket No. 11-59 (Aug. 30, 2011).

[72] PCIA Comments at 20.

c. *Maximizing the Value of the Community's Property and Resources.*

Many industry comments criticize local government fees.[73] As we explained in our opening comments, local governments charge franchise fees for the use of governmental property, and permitting fees to cover the local government's costs of regulation and oversight.[74] But while the industry would surely prefer to have free access to State and local property, Congress's decision not to regulate these fees reflects sound policy. Federal regulation would be disruptive and counterproductive. It would require affected local governments to conduct cost studies that would cost billions of dollars,[75] and it would cut billions from local budgets at a time when these funds are most needed. Such a rule could force local governments to reduce the very staff and programs necessary to process providers' applications and to facilitate broadband adoption.[76] It would also subsidize providers that place facilities in the rights-of-way, creating distortions in the market. Not only did the industry fail to show local government fees cause any systematic problems, it failed to present any sound economic analysis that supported its proposed approach. The industry asserted that regulating local prices would be easy to administer (a claim never supported);[77] that local governments are exercising monopoly power (a claim never supported);[78] that prices for access to rights-of-way are increasing (also never supported);[79] and

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[73] PCIA Comments at 30; NextG Comments at 14; Level 3 Comments at 15; Verizon and Verizon Wireless Comments at 16; Century Link Comments at 5.

[74] National Associations Comments at 23-24, 29.

[75] National Association Comments, Exhibit E at ¶ 9.

[76] National Associations Comments at 44-46.

[77] Level 3 Comments at 10.

[78] Level 3 Comments at 11; PCIA Comments at 30; Verizon Comments at 33.

[79] Level 3 Comments at 9.

that local governments have incentives to discourage broadband deployment (a contention that also makes no sense).[80]

d. *Promoting the Efficient Use of Consultants and State and Local Staff*

A number of providers criticize local governments for using consultants to assist with the wireless facility siting process.[81] But using outside experts to assist a community can speed the permitting process and ensure that local governments have up-to-date information about new technologies. While many jurisdictions have expert in-house staff to handle the process, many lack the resources necessary to hire such experts. If all local governments had to do all work internally, additional delays could occur, especially in smaller communities. In addition, relying on industry experts alone—individuals motivated by interests other than the public's interest—can lead to misinformation. For example, PCIA criticizes Kansas City, Kansas, for prohibiting deployment of standalone antennas.[82] In public hearings on the ordinance, a T-Mobile expert—arguing in support of traditional wireless structures and against proposals that would have encouraged placement of facilities in the rights-of-way—suggested that DAS was less effective, and seemed to imply it was designed for indoor use.[83] Had the City relied on that "expertise" alone, it would have logically focused on placement of new towers outside the rights-of-way.

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[80] Level 3 Comments at 14.

[81] PCIA Comments at 21; AT&T Comments at 4; Verizon and Verizon Wireless Comments at 6; CTIA Comments at 18.

[82] PCIA Comments at 35. The City's efforts appear to be far from inappropriate. The City developed a draft ordinance; received comments on it; and then took steps to adjust it.

[83] Kansas City, KS Planning Commission, Minutes of City Planning Commisson, June 13, 2011, at 86, *available at:* http://www.wycokck.org/WorkArea/DownloadAsset.aspx?id=30966.

Other communities have found that reliance on industry "expertise" could create significant risks for the public.[84]

While the industry complains about the cost of these consultants, maintaining permanent civil engineers and experts on staff could be equally if not more costly. Especially since many of the industry's claims regarding consultant use are baseless, the Commission is in no position to dictate the most economical way for a local government to manage its staff. Any attempt to do so would prevent communities from making the most rational choices based on their circumstances and needs.

What the initial comments did identify was a potential issue with respect to the "consultants" used by the industry itself. Local governments obviously do not object to the use of consultants, or believe the Commission could effectively regulate them. Nonetheless, AT&T's comments suggest (and the experience of many communities indicates) that the siting process involves the hiring of real estate agents who locate properties within areas identified by the provider, and the retention of construction companies and others who are hired to build facilities and apply for permits. In some cases, local governments report that the persons responsible for these efforts do not familiarize themselves with local requirements, resulting in delays.[85]

e. *Restrictive Building Codes*

AT&T complains that fire codes can restrict the rooftop space available for new antennas. In particular, AT&T cites "relatively new fire code restrictions" adopted in New York City that the company believes can "significantly limit the location of antennas and equipment on

[84] Montgomery County Comments at 33-35.

[85] Reply Comments of City of Portland (September 30, 2011).

rooftops."[86] Similarly, AT&T lamented that it was unable to secure several cell sites on the Washington DC National Mall because of security issues.[87] But the telecommunications industry's needs do not and cannot trump critical public interests, including public safety. On the tenth anniversary of September 11th, 2001, to complain that a fire code should yield to AT&T's construction whims and convenience is the height of corporate arrogance. Most importantly, it is hard to imagine how this is proof of undue delay, or supports a shift from local to federal rules. Unless AT&T believes that the Commission would be willing to ignore security issues on the National Mall and fire risks on rooftops, shifting to a federal regime would merely replace practices that can be consistently enforced at the local level, with a regime that would task the Commission with policing these local matters. This is as infeasible as it is unwise.

Similarly, AT&T complains that the Village of Park Ridge, Illinois, enacted an ordinance that requires a "fall zone" equal to 125% of the height of any wireless telecommunications tower. AT&T claims that the ordinance makes it "virtually impossible" to add new towers.[88] However, AT&T fails to explain why this public safety measure is unreasonable. It also fails to mention the fall zone may be reduced through a special use approval process, where an applicant shows that public safety would not be compromised. But the central point is: there is a real issue here which cannot simply be ignored for AT&T's convenience. As these YouTube videos seem to show,[89] cell towers do collapse, and not just straight down upon themselves:

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[86] AT&T Comments at 9.

[87] AT&T Comments at 12 n.13.

[88] AT&T Comments at 10 n.11.

[89] http://www.youtube.com/watch?v=yN_KU4lmgO0; http://www.youtube.com/watch?v=0cT5cXuyiYY.

It is not obvious that these collapsing facilities (and the facilities attached) would only impact an area co-extensive with the monopole's height. Local governments can consider potential impacts, and tailor their requirements based on local circumstances in a way the Commission cannot.

f. *Use of Private Property.*

Just as the industry believes it should have unfettered access to the public rights-of-way, it also appears to suggest that it should have special dispensation for access to private lands. Industry commenters repeatedly complain of the high rents that private landowners require. For instance, AT&T complains that one landlord in New York sought "prohibitive rents" of $6,000 a month for a cell site. But, again, the Commission is in no position to interfere with the competitive market or to dictate how property owners grant access to their property. It is certainly not in a position to decide the rent is "prohibitive" or unfair without more information than AT&T has provided.

g. *Local Review of DAS Deployments.*

PCIA claims that local governments "often struggle with the regulation and permitting of DAS."[90] PCIA has it backwards. It is DAS providers—unlike companies that more regularly use the rights-of-way or place wireless facilities—that often struggle to understand well-established and well-accepted local permitting practices. This struggle is evident even here, as the industry

[90] PCIA Comments at 28.

criticizes local governments both for *not* "specifically account[ing] for DAS . . . within their ordinances"—and for doing just that.[91]

DAS antennas can have different impacts on communities, and not all proposed installations are the same. While some providers propose to install relatively small whip-style antennas on poles, others propose installations that require poles to be replaced with heavier and substantially higher structures.

Many local governments are actively working with DAS providers to help them overcome their challenges.[92] Of course, by placing wireless facilities at regular intervals, DAS providers impact local rights-of-way differently than do traditional wireline providers, and local governments act reasonably when they take this differential impact into account. But one of the great virtues of local practices is that they need not be cut from whole cloth each time a new technology or service model arises. These practices are rooted in age-old concepts of police powers and property rights, and they are readily adaptable to DAS.

C. The Record Underscores That a Case-by-Case Approach Is Appropriate.

While the current process has many benefits, we do not mean to suggest that every community, in every case, complies with the Communications Act. Each case requires analysis on its facts. In some cases, courts have found communities violated the law. In others, courts concluded that the industry's complaints were overblown. But perhaps more than anything else, the record here shows that this case-by-case model is the right one.

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[91] *Compare* PCIA Comments at 28 ("Most jurisdictions across the country have not specifically accounted for DAS and other wireless attachments in the right of way within their ordinances") with AT&T Comments at 17 ("Mountain View is taking the position that it must have a new ordinance just for DAS facilities before it can allow them.").

[92] *See, e.g.*, NATOA, Ex Parte Letter from Steve Traylor to Marlene H. Dortch, WC Docket No. 11-59 (Sept. 9, 2011) (discussing government/industry educational forum where issues can be addressed).

The industry has pointed to no evidence of an endemic or widespread problem that would support generalized rules. What remains are factual questions best resolved on a case-by-case basis: Has the provider named the correct community? Are its claims accurate? Does the provider omit key details? For example, AT&T contends that "for cell sites that came on air in 2010 in the Los Angeles, San Francisco, Chicago, New York, Baltimore, and Washington, D.C. metropolitan areas, it took more than two and [a] half years from the time AT&T initiated the search for the site to the time the site was fully acquired with all approvals obtained."[93] But AT&T provides no details on the particular cases in any of these communities. Level 3 claims that its own decade-old agreement prohibits it from providing service,[94] but it does not document how the agreement does so, or whether it could serve the areas in question in other ways (for example, by using rights-of-way that parallel the New York State Thruway). A federal court is currently addressing the matter, after declining to refer it to the Commission.[95] The industry also raises questions of State law, which the Commission is in no position to address.[96]

The record also shows that the Commission's previous effort to impose "one-size-fits-all" rules" in this area has been both costly and ineffective. While a number of local governments discussed the costs of the Commission's shot clock order,[97] the industry cited minimal benefits from it. They claim it "has not been as effective as hoped,"[98] indicate it is "unclear" whether it

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[93] AT&T Comments at 4.

[94] Level 3 Comments, WC Docket No. 11-59 (July 18, 2011).

[95] *N.Y. State Thruway Auth. v. Level 3 Communs., LLC*, 734 F. Supp. 2d 257, 259 (N.D.N.Y. 2010).

[96] *See, e.g*, PCIA Comments at 29 (raising questions about Cal. Pub. Util. Code § 7901.1).

[97] *See, e.g.*, Comments of Montgomery County, Maryland, WC Docket No. 11-59, at 39 (July 18, 2011); Comments of the Greater Metro Telecommunications Consortium *et al*,, WC Docket No. 11-59, at 16 (July 18, 2011).

[98] AT&T Comments at 14.

has reduced delays,[99] and state that they have only rarely brought court actions based on it.[100] Although the industry will always have an incentive to push for further Commission actions that may lower its basic costs of doing business, the Commission should recognize that federal regulation of State and local practices has not solved and will not solve the country's broadband deployment problems.

D. The Record Reveals Opportunities for Non-Regulatory Commission Action To Promote Our Shared Goals.

Although the record provides no basis for the Commission to regulate State and local practices, it does highlight certain non-regulatory actions that the Commission can take that might be helpful, and reemphasizes points the National Associations made in their initial comments.

1. *The Commission Can Promote Understanding Between Local Governments and Industry.*

The record shows that the Commission can play an important role in facilitating understanding. The Commission can share information about the latest technologies, and promote appreciation for the vital role that local governments play. We have repeatedly encouraged the Commission to activate the Intergovernmental Advisory Committee ("IAC").[101] We have also urged the Commission to follow the National Broadband Plan's recommendation for a Right-of-Way Task Force, to highlight effective local practices by drawing from local experts in the field, and to establish a strictly voluntary mediation program.[102]

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[99] PCIA Comments at 12.

[100] Verizon and Verizon Wireless Comments at 5.

[101] National Associations Comments at 49.

[102] *Id.* at 50-51.

2. *The Commission Should Play a More Active Role on RF-Emissions Matters.*

The Commission should also play a more active role on RF-emissions matters. The issue is not insignificant: PCIA's opening comments categorize RF-emissions as a "public health issue."[103] CTIA notes that the Commission's "Local Government Official's Guide to Transmitting Antenna RF Emission Safety" is over a decade old and in need of updating or replacement.[104] Although local governments' authority is limited in this area, concerned citizens often raise the issue in local proceedings because they do not understand how or if the Commission is addressing it. This can be disruptive. The Commission should identify the members of its staff that concerned citizens should call, prominently address the issue on its website, and regularly re-visit its rules in light of the latest findings and developments.

3. *The Commission Can Advocate for Municipal Broadband Networks.*

The Commission should also become a more active advocate for municipal broadband networks. If it is broadband deployment that the Commission seeks, many local governments have stepped in to provide it, especially in cases where the industry will not. But the Commission has done little to promote or champion these efforts.

III. THE COMMISSION LACKS AUTHORITY TO REGULATE LOCAL RIGHT-OF-WAY OR FACILITY SITING PRACTICES AS THE INDUSTRY PROPOSES.

The industry's comments call for the Commission to adopt a range of new rules regulating local right-of-way and wireless facility siting practices. As shown above, the Commission must resist these calls: regulation is not needed and could have significant, negative effects. As importantly, the industry's proposed rules exceed the Commission's existing

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[103] PCIA Comments at 19.

[104] CTIA Comments at 30 n.84.

authority under the Communications Act. Indeed, many commenters appear to recognize this point, and urge the Commission to support changes in the law.

A. Section 253 May Not Be Expanded To Allow the Commission To Regulate Local Right-of-Way Practices.

A number of industry commenters urge the Commission to take various actions under Section 253 of the Communications Act. These comments fail to recognize important features of Section 253, and propose Commission rules that do not fit within the statute.

1. *Section 253 Does Not Rate Regulate Local Governments.*

One of the industry's major mistakes is to assume that Section 253 can be used to "rate regulate" local governments. This conclusion is based on two basic errors. First, it blurs Section 253(a), the statute's only preemptive language, with Section 253(c), the statute's safe harbor for right-of-way management and compensation. According to Verizon, Section 253(c) functions not as a stand-alone safe harbor, but as a guide to construing Section 253(a).[105] PCIA also conflates Section 253(a) and Section 253(c), claiming that the Commission should adopt a uniform definition of the type and amount of right-of-way or wireless siting fees that will be presumed to automatically violate both subsections.[106] Second, as discussed *infra* at Part III.A.6, the industry derives its conclusion from an overly narrow reading of Section 253(c)'s reference to "fair and reasonable compensation."

As we have shown, the courts and the Commission have clearly recognized that Section 253(a) and Section 253(c) operate separately, and that only Section 253(a) has preemptive force.[107] The industry suggests that a fee that is "unreasonable" or "discriminatory" is inherently

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[105] Verizon Comments at 34.

[106] PCIA Comments at 57.

[107] National Associations Comments at 55-56.

prohibitory. But that is not the case. A fee could be discriminatory, but at such levels that it has no effect on competition. A fee could also be unreasonable and have no impact on services.[108] The central point is that Section 253(c) by its terms provides a safe harbor within which no preemption is permitted, even if there is a prohibitory effect; what falls outside of Section 253(c) *may* be subject to preemption, but this turns on the facts. To put it another way, just as Section 253(b)'s focus on State efforts to "safeguard the rights of consumers" reveals nothing about whether a local requirement "has the effect of prohibiting" an entity's ability to provide telecommunications service, neither does Section 253(c)'s reference to "fair and reasonable compensation" mean that in all other cases, a prohibition is occurring.[109]

Blurring the line between Sections 253(a) and (c) cannot be squared with either the statute's plain language or Congress's intent. As we have explained, Congress did not intend to interject the federal government into scrutinizing State and local right-of-way practices or pricing models. Congress was primarily concerned about local practices designed to maintain the monopoly status of certain providers. In fact, ordinarily, compensation (whether fair or unfair) could not even be addressed through a preemptive statute, *see infra*. It is only where a State or local government seek a regulatory end with compensation requirements—and those requirements effectively prohibit the provision of services—that the concern arises.[110] As one court recently put it: "[A] municipality's assessment of a fee for franchise rights, and the

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[108] This would be true if the fee could be passed through to customers. It would also be true where there are alternative facilities—*e.g.*, a railroad easement paralleling a street. There are other examples.

[109] *Level 3 Commc'ns LLC v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007).

[110] National Associations Comments at 56.

franchisee's rights being conditioned on the payment of this fee 'cannot 'be described as a prohibition within the meaning of section 253(a) . . . ."[111]

Nor can Section 253(a) and (c) somehow be combined to create an authority to set rates. Section 253(a) provides that "no State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." This gives the Commission no authority to set rates. Section 253(c), at most, defines a safe harbor; it does not direct the Commission (or permit the Commission) to do anything not permitted by other provisions of the Act. Section 253(d) then gives the Commission the authority to preempt laws that have the requisite prohibitory effect (where a safe harbor is not involved). Read as a whole, then, Section 253 gives the Commission no authority to set rates, or to direct local governments to charge particular rates. Section 224 and Commission precedent make clear that the Commission may not set rates for municipally-owned rights-of-way.[112]

2. *Section 253 Sets a High Standard for Preemption That the Commission May Not Lower by Rule.*

A number of providers ask the Commission to lower the standard for preemption under Section 253. CenturyLink contends the statute is best read to preempt local requirements that "adversely affect" carriers.[113] PCIA claims that Section 253 preempts requirements that "may prohibit" the provision of service, and that "possible prohibition" is sufficient.[114] Level 3 maintains that whether a local requirement is preempted does not depend on any provider's

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[111] *City of New Orleans v. Bellsouth Telecomms. Inc.* 2011 U.S. Dist. LEXIS 60925 at *20 (E.D. La. 2011) (quoting *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000)).

[112] *See infra* at Part III.A.3.

[113] CenturyLink Comments at 17.

[114] PCIA Comments at 56.

factual showing that a local requirement renders it unable to provide service, but on whether there would be a prohibition if the requirement were adopted by a significant percentage of local governments across the nation.[115] All of these articulations defy Section 253's plain language, its interpretation by the courts, and well-established decisions of the Commission.

As discussed above, Section 253's plain language is clear: it only reaches local requirements that "prohibit or have the effect of prohibiting the ability" to provide telecommunications service. And the Commission's *California Payphone* test discussing this phrase has been widely accepted: a local requirement is preempted if it "materially limits or inhibits the ability of a provider to compete in a fair and balanced legal and regulatory environment."[116] Applying this test, the Commission (like the courts) has been careful to require a showing of more than additional expense, lower profits, or hypothetical harms to support a prohibition claim. In cases where the "effect" is disputed, the Commission has appropriately applied this test to require a provider to make a factual showing as to how a local requirement jeopardizes its ability to enter or remain in the market. As the Commission has explained:

> [I]t is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement . . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c). We will exercise our authority only upon such fully developed factual records.[117]

California Payphone itself rejected a claim that Section 253(a) was violated because a local requirement would reduce a provider's revenue:

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[115] Level 3 Comments at 7.

[116] *In re California Payphone Ass'n,* 12 FCC Rcd. 14191 at ¶ 42 (1997).

[117] *In re TCI Cablevision of Oakland County,* 12 FCC Rcd. 14191 at ¶ 101 (1997).

> Even assuming, *arguendo*, that indoor payphones would generate less revenue than outdoor payphones in the Central Business District, that fact, standing alone, does not necessarily mean that indoor payphones are "impractical and uneconomic," as argued by CPA. For us to reach that conclusion, the record would have to demonstrate that indoor payphones in the Central Business District would generate so little revenue as to effectively prohibit the ability of an entity to provide payphone service in the Central Business District. The present record does not contain much relevant information, however, beyond unsupported assertions of the inferiority of indoor payphones vis-à-vis outdoor payphones.[118]

Indeed, the Commission's *Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act*,[119] specifically ask the complainant to identify: "What specific telecommunications service or services is the petitioner prohibited or effectively prohibited from providing? . . .What are the factual circumstances that cause the petitioner to be denied the ability to offer the relevant telecommunications service or services?" When providers have only made "bare assertion[s]" of harm without showing facts to document a prohibitory "effect," the Commission has rejected Section 253(a) challenges.[120]

As suggested above, the courts have coalesced around this reading,[121] and the Commission could not lower the standard for preemption further while honoring the statute's plain language. As a matter of plain language, the Supreme Court interpreted the word "impair" under the Act to require more than a showing of an increase in costs.[122] It follows that the more-

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[118] *In re Cal. Payphone Ass'n*, 12 FCC Rcd. at 14209-14210 ¶ 40 (emphasis added). The Commission also squarely rejected a *per se* test for Section 253(a) based on the City's contracting authority, and thus made clear that providers must *demonstrate* that the a requirement will have the outlawed "effect." *Id.* at ¶ 38. *See also id.* at ¶ 37 ("On the foregoing record, we cannot conclude that payphone service providers other than Pacific Bell lack a realistic opportunity to contract with the City to install payphones. . .").

[119] 13 FCC Rcd. 22970 (1998).

[120] *In re Public Utility Comm'n of Tex.*, 13 FCC Rcd. 3460 ¶ 97.

[121] *Level 3 Commc'ns LLC v. City of St. Louis*, 477 F.3d 528, 533-34 (8th Cir. 2007); *Sprint Tel. PCS LP v. County of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) (*en banc*).

[122] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 389-390 (1999).

absolute term under the Act—effect of "prohibiting"—would require a telecommunications company complaining about a local requirement to show much more than that the local requirement increases its costs, and certainly more than "hypothetical" harms. It is likewise difficult to see how hypothetical effects could be prohibitory in actuality.

Accordingly, PCIA's "possible prohibition" theory has been rejected by the courts and the Commission.[123] Level 3's selective quotations from the amicus brief filed by the Solicitor General in opposition to certiorari in *Level 3 Commc'ns, LLC v. City of St. Louis*,[124] omits the critical point: the mere possibility of prohibition does not establish a violation of Section 253(a).[125]

To be sure, Level 3 seems to argue its test is not hypothetical. But its "significant percentage" test is entirely hypothetical. It presumes, first, that property in Manhattan, Kansas, and Manhattan, New York, should be priced identically, so a fee that is too high in one place will be deemed too high in another. Level 3 speculates that all local government will move to the same pricing levels, an assumption belied by the company's own experience, and unsupported by any analysis. Moreover, even if Section 253(a)'s plain language permitted this hypothetical test (it does not), it is not clear how it could be applied practically.

Level 3 claims that *Puerto Rico Telephone Co. v. Municipality of Guayanilla* supports its test; this mischaracterizes the decision.[126] In *Guayanilla*, the court considered a very small

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[123] *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) (finding clear language of statute shows that the "mere possibility of prohibition" is insufficient); *Brief for the United States as Amicus Curiae*, Nos. 08-626 and 08-759, at 8-12 (S. Ct. May 2009).

[124] Level 3 Comments at 6-7, 21.

[125] *Brief for the United States as Amicus Curiae*, Nos. 08-626 and 08-759, at 8-12 (S. Ct. May 2009).

[126] 450 F.3d 9 (1st Cir. 2006).

market, where there was no information available to assess a proposed fee increase's impact on the provider's operations. It was clear, however, that the impact in Guayanilla would be greater than in larger communities where there were greater revenue opportunities. Therefore, the court could safely assume that if a fee was prohibitory in the larger market, it would also be prohibitory in the smaller market.[127] The court's analysis appropriately focused on the particular market at issue; the court simply used the only available information to devise a proxy for local impact in that market. This is, of course, far different than the test Level 3 proposes, which would ignore readily-available information about competitive impacts in specific markets.[128]

3. *Section 253 Bars the Commission From Addressing Claims That Raise Section 253(c) Issues.*

Level 3 and others assert that the Commission has jurisdiction to resolve any Section 253 claim, even those that raise issues under Section 253(c).[129] This is not correct. As we have shown, Congress deliberately amended Section 253(d) to clarify that the Commission may not address Section 253(c) issues.[130] Level 3 would have the Commission read the statute as if Congress never made this change.

Level 3 argues that the legislative history supports its view by quoting it selectively, and arguing that Senator Gorton supported a "uniform" federal standard for compensation and right-

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[127] *Id.* at 17-19 (finding "it is reasonable to conclude that that the effect of Ordinance No. 40 on the profitability of its operations within the Municipality would be similarly, or perhaps even more, substantial.") (emphasis added).

[128] Level 3's arguments are virtually identical to those it has raised in a separate matter addressing its claims against NYSTA. *In re Level 3 Communications, LLC, Petition for Declaratory Ruling That Certain Rights-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, WC Docket No. 09-153. NATOA incorporates its filings in that matter by reference for a fuller discussion of the flaws in this, and other of Level 3's legal and factual arguments.

[129] Level 3 Comments at 22-31; PCIA Comments at 65; Verizon Comments at 34.

[130] National Associations Comments at 60-61.

of-way management.[131] In fact, the legislative history makes clear that Senator Gorton was discussing Section 253(a).[132] With respect to Section 253(c), Senator Gorton was quite clear that the Commission had no role, and that challenges would be heard on a case-by-case basis:

> There is no preemption, even if my second-degree amendment is adopted, Mr. President, for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition from those two Senators that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.

Level 3 contends that Section 253(a) would be rendered "inconsistent, meaningless, or superfluous" if the statute is read so that the Commission cannot decide Section 253(c) issues.[133] That is not true. First, many cases do not involve compensation or right-of-way management at all. For cases that do involve such practices, Section 253(d) merely clarifies *where* the complaint is to be heard, not *whether* it will be heard. Section 253(d) provides: that "If . . .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), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[134] Contrary to industry claims, this "if . . . determines" language clarifies what the Commission is to do if it decides a case; but it does not authorize the Commission to decide every case, much less require it to do so. Where Section 253(c) issues

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[131] Level 3 Comments at 29-30.

[132] Even with respect to section 253(a), Senator Gorton plainly did not envision that "uniformity" would be achieved through FCC hearings. Courts plainly have jurisdiction to hear claims arising under Section 253(a), and no one has suggested that only the Commission may decide Section 253(a) cases. Uniformity has in fact been achieved by applying the plain language of the statute to particular situations, see *supra.*

[133] Level 3 Comments at 27.

[134] 47 U.S.C. § 253(d).

arise, the Commission should either permit a court to determine whether the safe harbor applies, and retain jurisdiction of Section 253(a) issues; or allow a court to hear the entire case. Both approaches honor Section 253's plain language, and give full effect to Congress's clearly expressed intent.

Level 3 makes the related argument that the Commission must be able to decide whether a local law is saved by the Section 253(c) "safe harbor" in order to determine whether it could hear a case under Section 253(a).[135] That is not so, and it muddles two basic legal questions: jurisdiction and the merits. To decide whether it has jurisdiction, the Commission can properly determine, from the pleadings, whether the "subject matter" of a case involves disputes with respect to "compensation" or "right-of-way management." This is precisely what the Commission did in the *Classic Telephone* case, where, based on the pleadings, it easily rejected a late-filed claim that the actions in question constituted right-of-way management.[136] This does not, however, require the Commission to determine whether a particular local requirements fall within the safe harbor on the merits. Consistent with Section 253(d), it may not do so.[137]

4. *Even if the Commission Had Some Authority With Respect to Section 253(c), It Could Not Adopt a Permitting Shot Clock or Other Federal Right-of-Way Rules.*

Even if the Commission had authority to interpret Section 253(c), it has no authority to establish rules with respect to right-of-way management. Congress clarified that the Commission cannot address right-of-way practices. The operative language—"Nothing in this section affects

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[135] Level 3 Comments at 24-25.

[136] *In re Classic Tel., Inc.*, 11 FCC Rcd. 13082 at ¶¶ 41-42 (1996).

[137] The Commission has long recognized that it does not have general authority under the Communications Act to regulate charges for rights-of-way used by telecommunications providers. *In re Cal. Water and Tel. Co.*, 64 FCC 2d 753 at ¶¶ 14-15 (1977). Section 253(d) certainly does not change this.

the authority of a State or local government to manage the public rights-of-way"—is absolute; all right-of-way management is protected from preemption.[138] Congress understood that local public servants, not the Commission, should make the factual determinations of when and how rights-of-way should be managed and accessed. The comments in this proceeding prove the point. Many commenters have advised that they can and do streamline processes to promote development generally, and broadband deployment in particular. National Associations Comments at 51. Communities are already sharing information concerning best practices.[139] And, of course, every local enactment will be subject to some review under State and local laws. The critical point is that the Commission has no authority to implement Section 253(c) by adopting *federal* rules regulating right-of-way management.

When PCIA urges the Commission to construe the Section 253(c) safe harbor for right-of-way management narrowly, it defies the statute by demanding a qualitative standard: it contends that reasonable right-of-way management "would not include a time-consuming and/or complicated application process and unfettered discretion to reject an application for any reason."[140] But Section 253(c) contains no qualitative standard. Congress relied on the many incentives local governments have to encourage broadband deployment to lead to best practices.

Similarly, a number of providers urge the Commission to avoid the obvious limitations created by Section 253(c) by using Section 253(a) to adopt a shot clock for permitting.[141] CTIA explains that "where a local authority fails to act on a wireless carrier's right-of-way application within a specified period of time (*e.g.*, 45 days), by rule such failure to act should be

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[138] By definition, the safe harbor protects provisions from preemption regardless of their effect.

[139] National Associations Comments at 51.

[140] PCIA Comments at 49.

[141] AT&T Comments at 20; CTIA Comments at 37; Sunesys Comments at 3, 5.

automatically deemed as 'prohibiting' or 'having the effect of prohibiting' wireless service, and thus should be deemed automatically preempted unless the relevant local authority is able to demonstrate that the safe harbors in Section 253(b) or Section 253(c) apply."[142] Such a shot clock would be both pointless and inconsistent with Section 253.

The rule would serve little purpose. The fact that the Commission "deems" a local government practice to be effectively prohibitory or prohibitory would not mean that the local government could not enforce the practice. Because of Section 253(c), a complaint would need to be brought in court, and the practice would only be preempted if the court determines that it is *not* a right-of-way management practice. Neither the courts nor the Commission can preempt the enforcement of a local requirement unless it violates Section 253(a); and a requirement protected by Section 253(c) *never* violates Section 253(a).

A shot clock rule would also defy Section 253. Unlike other statutes where the Commission has added shot clocks,[143] Section 253 does not address the reasonableness or timeliness of local government action. It contains no provision that would permit the Commission to regulate local processes. It asks only a basic *factual* question: whether local legal requirements "prohibit" or "have the effect of prohibiting" an entity's ability to provide telecommunications service. This requires a factual examination of the effect of particular

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[142] CTIA Comments at 38.

[143] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101 (2007); *In re 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*, Declaratory Ruling, 24 FCC Rcd. 13994, 14021 ¶ 71 (2009) ("Shot Clock Order"), *recon. denied*, 25 FCC Rcd 11157 (2010), appeal pending sub nom., *City of Arlington and City of San Antonio v. FCC*, Nos. 10-60039 & 10-60805 (5th Cir.).

actions under the circumstances. Notably, commenters fail to explain why a delay is actually or effectively prohibitory in all cases.[144]

5. *Even if the Commission Had Some Authority To Implement Section 253, It Could Not Use the Statute To Address Local Government Proprietary Actions.*

In their requests for new Commission rules, the industry comments do not distinguish between local government property rights and regulatory actions. In addition, the NOI raises concerns about basic features of property ownership, contending that "fragmented property ownership creates a patchwork of requirements" that providers must satisfy on a piecemeal basis.[145] And Level 3 suggests that it can directly attack, and the Commission can rewrite, contracts that it entered into years ago for use of publicly-owned property.[146] The Commission should recognize that Section 253 preempts only local government regulations, not property rights.

It is well-established that preemption applies only to state regulation.[147] Courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a

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[144] It is easy to imagine cases in which a delay in granting a permit is far from a prohibition, such as a case in which the permit in question has been requested by an entity that has no authority to occupy the rights-of-way because it has not applied for or obtained a franchise. That is, a *per se* rule would necessarily find prohibition where none could exist.

[145] NOI ¶ 4. Property rights are of course protected by the Fifth Amendment to the Federal Constitution and this "fragment[ation]" necessarily follows from private land ownership (no fragmentation would exist if the federal government owned all land). To base federal regulatory authority on the need to undo the "problem" necessarily created by essential rights guaranteed by the Constitution would turn the notion of limited federal government powers and limited agency authority upside down.

[146] Level 3 Comments at 2-3.

[147] *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993).

proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is."[148] Because the Communications Act is subject to this maxim, it "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[149] Thus, when local governments enter into contracts for use of property they own, Section 253 does not apply. For example, complaints about charges for access to light poles are not cognizable, because such contracts clearly fall outside of Section 253(a).

6. *Even if the Commission Had Some Authority To Implement Section 253, It Could Not Use the Statute To Limit Compensation to Costs.*

The Commission also may not limit local governments to only recovering their costs in exchange for telecommunications providers' use of their rights-of-way. Verizon argues that Section 253(c)'s reference to "fair and reasonable compensation" only reaches "costs of managing the public rights-of-way incurred as a direct result of a carrier deploying facilities."[150] CenturyLink and PCIA adopt a similar position.[151] This would defy Congress's intent.

For well over a century, it has been understood that when telecommunications providers occupy their property, local governments are entitled to "compensation, which is in the nature of

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[148] *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000).

[149] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993) ("[P]re-emption doctrines apply only to state regulation").

[150] Verizon Comments at 36.

[151] CenturyLink Comments at 20; PCIA Comments at 50.

rental."[152] Section 253(c) simply builds upon this understanding, as the legislative history we cited overwhelmingly shows.[153] As Representative Barton put it: "The Federal Government has *absolutely no business* telling State and local government how to price access to their local right-of-way. We should vote for localism and vote against *any kind* of federal price controls."[154] Level 3 simply underscores the point when it analogizes the term "compensation" in Section 253 to the term "compensation" in the Fifth Amendment to the U.S. Constitution.[155] The Supreme Court has construed the Fifth Amendment's Takings Clause to protect the property of State and local governments from uncompensated taking under federal law,[156] and held that it "requires that the United States pay 'just compensation' normally measured by fair market value."[157]

As importantly, Section 253(c)'s sweep is not limited to cases where a local government charges a "fair and reasonable" fee that is preferred by the Commission, or a "fair and reasonable" charge that is established using a particular methodology. Section 253 does not contain provisions comparable to Section 205 that would permit the Commission to "prescribe" particular rates. [158] It has long been recognized that a wide range of prices are "reasonable" and that there are a variety of ways in which reasonable prices can be set.[159] As long as the

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[152] *City of St. Louis v. W. Un. Tel. Co.*, 148 U.S. 92, 99 (1893), opinion on rehearing, 149 U.S. 465 (1893).

[153] National Associations Comments at 57-60.

[154] 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995).

[155] Level 3 Comments at 11.

[156] *United States v. 50 Acres*, 469 U.S. 24, 31 (1984).

[157] *Id.* at 25.

[158] 47 U.S.C. § 205.

[159] *See FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir.1987), *quoting, Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C.Cir.1950),

compensation is "reasonable" in this sense, it falls within the Section 253(c) safe harbor. A local government can set a reasonable rate based on its costs (should it wish to do so) or, as our opening comments showed, by using any number of different methods.[160] By definition, charging fair market value for use of property is "fair and reasonable" compensation, a conclusion long-established by the precedent cited above. Thus, even under the most liberal reading of Section 253, the Commission is given no authority to decide what rate a local government may charge, and it certainly cannot limit rates to incremental costs.[161] Indeed, one of Congress's principal purposes in adopting Section 253(c) was to ensure that Section 253 did not constitute an unfunded mandate.[162] Reading Section 253 as the industry proposes would directly defy this intent.

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cert. denied, 340 U.S. 952 (1951). *See also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("it is the result reached not the method employed which is controlling").

[160] National Association Comments at 24-25.

[161] Even where the Commission bases rate on costs, it has recognized that cost-based rates are reasonable as long as those costs fall between incremental costs and fully allocated costs, including opportunity costs. *In re Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240 at ¶ 141 (2011). By definition then, a rate based on a full cost allocation would be reasonable and protected by Section 253(c). The Commission has itself set fees based on gross revenues, and thus cannot argue that there is something inherently unfair or unreasonable about such fees. *In re Telephone Number Portability*, 13 FCC Rcd. 11701 ¶ 109 n.354 (1998).

[162] 141 Cong. Rec. H8460 (daily ed. August 4, 1995)(statement of Rep. Stupak) ("It is ironic that one of the first bills we passed in this House was to end unfunded Federal mandates. But this bill, with the management's amendment, mandates that local units of government make public property available to whoever wants it without a fair and reasonable compensation. The manager's amendment is a $100 billion mandate, an unfunded Federal mandate. Our amendment is supported by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures and the National Governors Association. The Senator from Texas on the Senate side has placed our language exactly as written in the Senate bill. Say no to unfunded mandates, say no to the idea that Washington knows best. Support the Stupak-Barton amendment.").

7. *Section 253 Cannot Impact Local Zoning Authority Under Section 332(c)(7).*

PCIA urges the Commission to use Section 253 to alter local authority over the siting of wireless service facilities.[163] The Communications Act expressly forbids this. Section 332(c)(7)(A) states that "[e]xcept as provided in *this paragraph, nothing in this Act* shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."[164] As a separate provision of the Communications Act, Section 253 cannot "limit" or even "affect" State and local authority in this area.[165]

8. *Section 253(c) Does Not Mandate Precise Parity In Regulation or Fees.*

A number of entities urge the Commission to issue a rule mandating that local governments treat entities equally under Section 253(c). PCIA claims that the Commission should define "nondiscriminatory" to "require access to the public rights of way without distinction between wireline and wireless facilities." It adds that the Commission's rule "should create a presumption that treating wireline and wireless installations in the right of way inconsistently is therefore discriminatory, except in very limited circumstances (*e.g.*, verification of compliance with federal RF standards)."[166] Verizon claims that "[d]iscriminatory fees are prohibited to the extent they exceed the lowest rate charged to any competitor in the locality."[167]

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[163] PCIA Comments at 54.

[164] 47 U.S.C. § 332(c)(7).

[165] Of course, the Commission cannot avoid the shield created by Section 332(c)(7)(A) by relying on Section 706 of the Telecommunications Act of 1996.

[166] PCIA Comments at 49.

[167] Verizon Comments at 36.

As explained above, the Commission has no authority to adopt rules under Section 253(c). Even if it had such authority, there is little reason for the Commission to adopt rules implementing Section 253(c)'s safe harbor since only Section 253(a) has preemptive force. The rules would only be relevant in the rare event that a local requirement has the "effect of prohibiting" its ability to provide service.

But the industry's proposed "non-discrimination" rules are problematic for an even more basic reason: they defy the statute. As we showed in our opening comments, before it adopted Section 253, Congress considered a "parity" amendment that would have mandated that local governments charge all providers equal fees. It read:

> Sec. 243(e) PARITY OF FRANCHISE AND OTHER CHARGES. Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services that distinguishes between or among providers of telecommunications services, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.

Congress rejected this approach, and replaced it with Section 253(c)'s safe harbor language. The courts have recognized that local governments can charge providers different fees and still qualify for the Section 253(c) safe harbor. The Second Circuit has emphasized that "[t]he statute does not require precise parity of treatment." Thus:

> [A] city can negotiate different agreements with different service providers; thus, a city could enter into competitively neutral agreements where one service provider would provide the city with below-market-rate telecommunications services and another service provider would have to pay a larger franchise fee, provided the effect is a rough parity between competitors.[168]

[168] *TCG New York, Inc., v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002)/

Section 253(c)'s safe harbor is applicable unless there is a significant imbalance; and if the difference in treatment is not justified.[169] Some cities, for example, grandfather existing facilities; distinguishing between existing and new facilities is not discriminatory.[170] As the Commission is aware, many ordinances provide for exceptions processes that permit, for example, wireless facilities to exceed height limits that otherwise apply, and with which wireline facilities do comply. Even if the Commission could do so,[171] to read Section 253 (or Section 332(c)(7)) to compel local governments to apply identical rules to wireline and wireless utilities would certainly have interesting impacts in underground neighborhoods. Differences in compensation are also permitted. The simplistic standard Verizon posits (everyone pays the same as the lowest paying provider)[172] assumes:

- that everyone installs the same type of facilities;
- that everyone obtains the same rights (a local government might distinguish between entities that seek a franchise to install facilities unbiquitously, and one that seeks a right to install a single facility at a specified location); and
- that there are no differences in timing or legal rights.

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[169] *In re Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements*, 15 FCC Rcd. 16720 at ¶ 23 (July 13, 2000) (it is not unlawful discrimination to "differentiate among users so long as there is a valid reason for doing so."); *see also Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993).

[170] *Cablevision of Boston, Inc. v. Pub. Improvement Commission of the City of Boston*, 184 F.3d 88, 103 (1st Cir. 1999) ("[a]s long as the City makes distinctions based on valid considerations, it cannot be said to have discriminated….").

[171] The provisions of Section 253(c) with respect to discrimination apply to the compensation clause.

[172] Verizon Comments at 34.

Those assumptions are generally not correct.[173]

Section 253(c) is not suited to a *per se* rule that mandates equal treatment even if one could be established. Local governments are best positioned to address these impacts, in accordance with State law. Indeed, Section 253(c) exists to allow these local agencies—not a federal agency or a court—to make such determinations in the first instance, subject to court review should a particular discriminatory action result "prohibit" or "have the effect" of prohibiting an entity's ability to provide service.

B. Section 332(c)(7) Does Not Permit the Commission To Adopt the Rules That the Industry Proposes.

After noting that that the Commission's initial effort to make rules under Section 332(c)(7) has been of little or no effect,[174] the industry urges the Commission to make additional rules under Section 332(c)(7). The Commission must decline these requests.

1. *Section 332(c)(7) Does Not Permit the Commission To Regulate State and Local Siting Matters.*

As our opening comments indicated, the question of the Commission's authority to issue rules under Section 332(c)(7) is currently pending before the Fifth Circuit. On its face, Section

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[173] It is worth emphasizing that Congress rejected the rule Verizon proposes. It even recognized that in some cases, incumbents would be beneficiaries of old, long term franchise contracts. It clearly did not believe that local governments would be required to charge others the fees embodied in those agreements. 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak) ("Because the contracts [with telecommunications providers] have been in place for many years, some as long as 100 years, if our amendment is not adopted . . . you will have companies in many areas securing free access to public property.") As importantly, the Verizon test fails because local governments are not required to charge the lowest fee. Many local governments now work to develop formulas that are fair but that encourage new entry by tying compensation to revenues; a rule that required identical payments could increase costs to new entrants. A federal rule is not needed to address true discrimination, and a rule that attempted to lock in a particular definition of discrimination with simplistic tests could have negative consequences.

[174] *See*, *supra*, at II.C.

332(c)(7) greatly limits the Commission's authority in this area, for reasons already briefed extensively before that court. Based on those reasons, the Commission may not adopt new rules in this area at all, and it certainly should not do so before the Fifth Circuit case is resolved.

2. *Section 332(c)(7) Preserves Local Authority Over Additions to Existing Structures.*

Verizon urges the Commission to "eliminat[e]" the local zoning process to the extent it applies to the addition or upgrade of facilities to structures that have previously been approved.[175] The Commission may not do so. Section 332(c)(7) preserves local authority over personal wireless service facilities' "construction" *and* "modification," terms that capture additions and upgrades.[176] Because Section 332(c)(7) expressly preserves this authority, the Commission cannot "eliminate" it.

3. *Section 332(c)(7) Does Not Permit the Commission To Deem an Application Granted.*

AT&T and PCIA urge the Commission to "deem granted" an application at the end of the Commission's shot clocks.[177] The Commission previously rejected this approach, and for good reason. As the Commission explained:

> Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis." This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies. As the Petitioner notes, many courts have issued injunctions granting applications upon finding a violation of Section 332(c)(7)(B). However, the case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs. To the contrary, in those cases where courts have issued

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[175] Verizon Comments at 7-11.

[176] Verizon does not contend that any of Section 332(c)(7)(B)'s limitations bar local review of such additions or upgrades; they do not.

[177] AT&T Comments at 19; PCIA Comments at 43.

> such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case. While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.[178]

The Commission went on to define its authority under Section 332(c)(7) as limited to clarifying ambiguous terms in the statute (except with respect to RF emission). Thus, even under the Commission's own view of its authority, the Commission cannot limit the scope of local authority, compel particular results, or "grant" a permit even temporarily.

4. *Section 332(c)(7) Permits Local Governments To Create Pre-Filing Requirements and To Reject Applications for Incompleteness.*

AT&T and PCIA urge the Commission to prohibit local governments from creating pre-filing requirements or rejecting applications for incompleteness. This would turn Section 332(c)(7) on its head.

Outside of its five express limitations, Section 332(c)(7) allows local governments to develop the substantive standards for siting in their communities.[179] As suggested above, it follows that so long as they do not run afoul of these express limitations, local governments act well within their authority when they establish pre-filing requirements and ensure that applications fully satisfy them. The Commission cannot alter this.

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[178] Shot Clock Order at ¶ 39.

[179] National Associations Comments at 32.

5. *The Commission Is Not in a Position To "Clarify" the Application of 332(c)(7) to DAS.*

PCIA urges the Commission to clarify that DAS providers may benefit from the Commission's shot clock order.[180] The request is disingenuous. The Commission should recognize that in some communities, DAS providers have argued that they are not subject to local zoning requirements at all. This request appears to be an attempt by DAS providers to gain the benefits of Section 332(c)(7) shot clocks, while they ignore the very local rules that the statute protects. Benefits cannot be extended, unless the other provisions of Section 332(c)(7) also apply.

6. *Section 332(c)(7) Does Not Permit the Commission To Treat Entirely New Facilities as Collocations.*

AT&T urges the Commission to rule that its 90-day collocation shot clock applies to entirely new facilities, so long as they are not "substantial."[181] The Commission cannot grant such relief. The Commission only created a separate shot clock for collocation applications because such applications "do not implicate the effects upon the community that may result from new construction."[182] To suggest that *new construction* should be subject to the shorter timeframe defies the Commission's own logic. Moreover, in the absence of a pre-existing facility, the Commission's rule would not allow anyone to intelligibly determine whether the facility is "substantial," since the Commission's assessment of "substantiality" turns on how the pre-existing facility has changed.[183]

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[180] PCIA Comments at 47.

[181] AT&T Comments at 19.

[182] Shot Clock Order at ¶ 46. As discussed, *supra*, while a collocation may not have all the same effects on a community as new construction, it can still create significant disruption as an aesthetic and public safety matter.

[183] *Id.*

7. *Section 332(c)(7) Does Not Allow the Commission To Create Per Se Rules.*

PCIA calls upon the Commission to adopt a number of *per se* rules under Section 332(c)(7). It urges the Commission to decree: (a) that every denial of an application to collocate on a structure where a provider is already located is unreasonably discriminatory and a prohibition as a matter of law;[184] (b) that a preference for siting on municipal property is *per se* "unreasonably discriminatory"; (c) that a moratorium lasting more than six months and limits on siting in particular areas are *per se* "prohibitions"; and (d) that local consideration of technical or operational justifications for a wireless service facility are always preempted. These *per se* rules defy existing Section 332(c)(7) law.

As the courts have recognized, Section 332(c)(7) contemplates that local governments may deny applications. Therefore, if Section 332(c)(7) is to have any meaning, the mere denial of an application cannot be an unlawful "prohibition."[185] All courts seems to recognize that a prohibition claim can only be successful when it is linked to certain elements including, but not limited to, a demonstrated significant gap in coverage.[186]

Likewise, a predicate for an unreasonable discrimination claim under Section 332(c)(7)(B)(i)(I) is unjustified, differential treatment between providers. The Act "explicitly contemplates that some discrimination 'among providers of functionally equivalent services' is

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[184] PCIA Comments at 40.

[185] *360 Degrees Communs. Co. v. Board of Supervisors of Albermarle County*, 211 F.3d 79, 86-87 (4th Cir. 2000) (internal citation omitted).

[186] *See, e.g., MetroPCS Inc. v. City and County of San Francisco*, 400 F.3d 715, 732-35 (9th Cir. 2005).

allowed. Any discrimination need only be reasonable."[187] The legislative history explains that Congress intended to give local governments flexibility:

> The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.[188]

Federal courts have ruled that providers alleging unreasonable discrimination must show that they have been treated differently from other providers whose facilities are "similarly situated" in terms of the "structure, placement or cumulative impact."[189] Neither a "prohibition" claim nor an "unreasonable discrimination" claim can be established by *per se* rules; both depend on facts. Thus, none of the rules that PCIA—or any other entity—proposes under these statutory provisions is viable, because each would eliminate the factual analysis that the statute requires.

a. *Denial of an application to collocate on a structure where a provider is already located.*

PCIA urges the Commission to find that a denial of an application to collocate on a structure where another provider is already located is *per se* unreasonably discriminatory and a prohibition. In many cases—perhaps most cases—when a local government denies a particular collocation application, there will be no "prohibition" at all. Among other things, the applicant may have options for placing the facility, many of which may be less intrusive. In the abstract, the Commission is in no position to address the issue. Likewise, the Commission could not determine that all such denials are unreasonably discriminatory without the facts from specific

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[187] *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998).

[188] H.R. Conf. Rep. No. 104-458, at 208 (1996).

[189] *MetroPCS Inc.*, 400 F.3d at 727.

cases. The Commission could not address the "structure, placement or *cumulative* impact" of the particular facility in question. And, even if it could, if the proposed collocation would cause a facility to become unsafe, exceed height limits, or cause other impacts that the first facility did not, a local government's denial would be justified and not unreasonably discriminatory.

b. *Preference for siting on municipal property*

PCIA claims that local requirements that express a preference for siting on municipal property are *per se* "unreasonably discriminatory" because later wireless entrants—subject to the new preference—"do not have the same siting flexibility as their predecessors in a given area."[190] This is effectively an argument that local governments may *never* change their zoning ordinances, because any later ordinance will inevitably place different burdens on later applicants. Section 332(c)(7), which is designed to preserve State and local authority, surely does not freeze local zoning requirements in place for all time.[191] Local needs and preferences shift over time, and local governments may change their ordinances accordingly. Moreover, Section 332(c)(7) does not address discrimination among cell tower sites. It reaches only discrimination among service providers. As it happens, local governments often encourage collocation on municipal property in areas where towers are not normally permitted. This utilizes existing structures and minimizes the impact on the community.

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[190] PCIA Comments at 44.

[191] *See, e.g, Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996) ("Sprint and others seek to enter the Washington market more than ten years after other wireless communications companies began business there. Medina would consider any new applications by the earlier arrivals under the same rules governing newcomers' applications. Whatever Medina does, it could not now place Sprint in the same position as that of the earlier entrants.").

c. *Moratoria lasting more than 6 months or limits on placements in certain areas.*

PCIA urges the Commission to rule that moratoria lasting longer than six months or local "bans" on wireless facilities in particular zoning districts are *per se* prohibitions.[192] The Commission may not issue either rule.

PCIA claims that any moratorium lasting longer than 6 months should be *per se* illegal because the 1998 industry-community agreement used this as the standard. PCIA fails to mention, however, that the agreement said: "All parties understand that cases may arise where the length of a moratorium may need to be longer than 180 days."[193] Thus, the agreement provides no basis for a fixed 6-month rule. Courts have recognized moratoria to be traditional zoning tools that generally do not run afoul of the Communications Act.[194] Again, every case must be evaluated on its facts.

Additionally, PCIA claims that "wireless facility regulation frequently rules out entirely some types of zoning districts for wireless sites," and such rules should be deemed *per se* "prohibitions." As an initial matter, PCIA's claim that local standards "rule[ ] out entirely" some areas is not supported. Communities that generally forbid siting in certain areas, such as residential areas, often provide that such limits are subject to a variance process. Under these processes, providers *can* place their facilities in these areas, provided they can justify such a placement. This fits neatly with Section 332(c)(7)'s "prohibition" law, which looks to the factual circumstances just as these local processes do. Thus, PCIA's characterization of these as "blanket

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[192] PCIA Comments at 54.

[193] Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process, *available at*: http://transition.fcc.gov/statelocal.agreement.html.

[194] *See, e.g., Sprint Spectrum, L.P. v. City of Medina,* 924 F. Supp. 1036, 1039 (W.D. Wash. 1996).

bans" is wrong;[195] these policies are better characterized as local indicators that placing facilities in these areas would be most intrusive. Even if local governments did adopt *complete* blanket bans in certain areas (such as historic preservation areas), it does not follow that they constitute "prohibitions." Section 332(c)(7) does not ensure that a provider will never have a service gap[196] In many cases, a provider may be able to serve the same area by placing its facilities in less intrusive locations, in which case, no "gap" even occurs. Under a *per se* standard, a standard prohibiting facility placement on the Lincoln Memorial would be *per se* unlawful, as would local rules that prohibit construction in an airline glide path, in historical areas, or in sensitive wildlife preserves. Section 332(c)(7) simply does not give the wireless industry that sort of free rein, nor does it permit localities from placing certain areas off limits.

d. *Local consideration of operational or technical details.*

PCIA also urges the Commission to adopt a rule establishing "that consideration of technical or operational justifications for a wireless facility or the type of wireless deployment is a technological and operational decision preempted by federal law."[197] This, too, provides no basis for a general Commission rule.

While there may be limits on local governments' abilities to dictate a provider's specific network architecture or design, local governments are not forbidden from inquiring into a provider's "need" for a particular facility. Assessing whether there is such a need allows a local government to achieve two important goals. *First*, it allows the local government to confirm

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[195] PCIA Comments, Exhibit B at 10.

[196] *360 Degrees Communs. Co.*, 211 F.3d at 87 ("The Act obviously cannot require that wireless services provide 100% coverage. In recognition of this reality, federal regulations contemplate the existence of dead spots.").

[197] PCIA Comments at 55-56.

assess whether denying the application would create a gap in service, and thus whether denial would arguably have a prohibitory effect. It would be strange indeed to prevent a local government from assessing the effects of its action, given the prohibition standard under federal law. *Second*, such a rule has an important connection to land use. It allows local governments to ensure that their communities are not overrun with facilities that serve no useful purpose. This is perfectly appropriate.

Additionally, since the Communications Act does not expressly bar local governments from inquiring into such matters, PCIA's proposed rule would constitute a form of implied, not express, preemption. But Section 601(c) of the Telecommunications Act of 1996 clarifies that its provisions only may be construed to preempt expressly.[198] Thus, here as well, the Commission cannot adopt the *per se* rule the industry urges.

8. *Section 332(c)(7) Does Not Permit a Shorter Collocation Shot Clock.*

AT&T, CTIA, and PCIA call on the Commission to shorten the collocation shot clock.[199] The record provides no basis for the Commission to do so. The Commission just developed its 90-day rule based on its review of the record evidence, and its desire to "accommodate reasonable processes in most instances."[200] While we have serious concerns about the Commission's use of record evidence in that matter (and about its decision not to accommodate reasonable processes in *all* instances), there is certainly no basis to *shorten* the timelines now, a mere two years later. The Commission has virtually no new evidence on this question, nor is

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[198] 47 U.S.C. § 152 nt.

[199] AT&T Comments at 19; CTIA Comments at 33; PCIA Comments at 41.

[200] Shot Clock Order ¶¶ 44, 46.

such evidence likely to exist. Launching a rulemaking to search for it would seem especially wasteful. The Commission should focus its resources elsewhere.

C. Section 706 of the Telecommunications Act of 1996 Does Not Expand the Commission's Authority Over State and Local Governments.

PCIA, Verizon, and the Wireless Internet Service Providers Association urge the Commission to rely on Section 706 of the Telecommunications Act of 1996 to regulate State and local right-of-way and wireless facility practices.[201] The Commission may not do so. As the Commission is aware, its authority to adopt substantive rules under Section 706 is subject to challenge.[202] But even if the statute grants the Commission such authority, the Commission itself has recognized that Section 706 does not give it "authority over and above what it otherwise possessed" under specific Communications Act provisions.[203] As we have shown, the Commission's authority over State and local right-of-way and facility siting practices under the Act is limited. The Commission thus cannot use Section 706 to contract or expand Section 224, Section 253, or Section 332(c)(7).

D. The Commission May Not Use Title VI To Impact Other Local Rights.

NCTA adds no substantive support to the allegations made by the wireless and telephone industries, but does ask the Commission to declare, among other things, that "no additional, duplicative approvals should be required for entities to provide broadband over their existing

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[201] PCIA Comments at 58; Verizon Comments at 38; Wireless Internet Service Providers Association Comments at 7-8.

[202] *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010). A number of petitions for review have been filed challenging the Commission's Open Internet Order, which relied on Section 706. *In re Preserving the Open Internet*, Report and Order, FCC 10-201, GN Docket No. 09-191, WC Docket No. 07-52 (Dec. 23, 2010)

[203] *In re Preserving the Open Internet*, Report and Order, FCC 10-201, GN Docket No. 09-191, WC Docket No. 07-52 at ¶ 118 (Dec. 23, 2010).

rights of way and easement grants." The request appears to extend to private easements as well as to grants to use public property. The Commission can do no such thing.

By definition, of course, duplicative easements and authorizations are never required. NCTA is actually asking the Commission to alter private and public easements and other grants that may permit use of particular property for a particular purpose. Of course, many easements and other grants are limited in scope: just as an electric company's easement may be limited to placement of electric facilities, a cable operator may have an easement for purposes of providing cable television service, but not otherwise. NCTA fails to explain how the Commission has authority to expand the bundle of rights a particular user has obtained, or how it may do so without compensating the underlying property owner. The property NCTA describes is not subject to regulation under Section 224, nor does NCTA point to authority or a remedy under the Cable Act or elsewhere.

NCTA's claim is particularly daring because it reverses the industry's position in the Section 621 proceeding. In that proceeding, the industry asked the Commission to clarify, and the Commission ruled that "LFAs' jurisdiction under Title VI over incumbents applies only to the provision of cable services over cable systems and . . . an LFA may not use its franchising authority to attempt to regulate non-cable services offered by incumbent video providers."[204] Now, instead of arguing that Title VI authority and rights are limited, NCTA seeks to expand its Title VI franchise rights to encompass non-cable services, while avoiding any obligations associated with those rights.

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[204] *In re Implementation of Section 621(A)(1) of The Cable Communications Policy Act of 1984 As Amended by The Cable Television Consumer Protection And Competition Act of 1992*, Second Report and Order, MB 05-311, FCC 07-190, 22 FCC Rcd. 19633 at ¶ 17 (FCC Nov. 6, 2007).

Under such a regime, NCTA would likely argue that its provision of telecommunications services (or broadband services) cannot be subjected to fees that apply to other providers. Congress made clear, however, that it did not intend to allow operators to use cable franchises to escape these obligations. Discussing the changes to the franchise fee provision of the Cable Act, the conference committee noted:

> The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees.[205]

The Commission then endorsed this view in the Second Report and Order, noting that while it limited local authority to use Title VI authority to charge franchise fees on non-cable services, "[t]his finding, of course, does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services"[206] that might be established under State or local law. While a provider and an LFA should be able to address a range of services in a single document (encompassing Title VI and other issues), there is no basis for the Commission to adopt NCTA's position.

E. Many of the Industry's Proposed Rules Would Raise Serious Constitutional Concerns.

Many of the industry's proposed rules would raise serious constitutional questions under the provisions we discussed in our opening comments.[207] For example, the "deemed granted" rule that AT&T and PCIA urge would raise serious Tenth Amendment issues. The federal government may not commandeer local officials to execute a federal regulatory program.

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[205] H.R. 104-458 at 180 (1996).

[206] 22 FCC Rcd. 19633 at ¶ 11 n.31.

[207] *See* National Associations Comments at 64-66.

Describing broader concerns about Section 332(c)(7), one Fourth Circuit judge explained that the federal government cannot coerce local governments to take legislative actions:

> "[L]and-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community." If a state, county, or town abandoned its local land-use power to regulate the siting of communications facilities, any number of telecommunications towers and other communications facilities could be erected in the midst of residential neighborhoods, next to schools, or in bucolic natural settings such as in the woods or on top of mountains—areas held in high value by most communities. Abandoning land use power in this way would put at risk the property value of every home in the jurisdiction and create the possibility that aesthetic quality of every area in the jurisdiction would be destroyed. The abandonment of land use control for towers is not a viable option for state and local governments. Similar to the option offered to states in *New York*, the reality underlying this thin veil of "choice"—that Nottoway County must either submit to federal instruction or abdicate its zoning authority over the construction of communications towers, thus allowing them to be built anywhere without local participation, input, or approval—amounts in reality to coercion, not choice. The Constitution does not empower Congress to subject state and local lawmaking processes to this type of mandate.[208]

If the federal government were to "deem" that local officials have granted local approvals that they have not, these concerns would be heightened.[209] The Commission may also not grant access to property owned by State and local entities by federal decree. Doing so would raise serious Takings Clause, Tenth Amendment, and Guarantee Clause issues.[210]

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[208] *Petersburg Cellular v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) (Niemeyer, J.) (internal citations omitted).

[209] For similar reasons, requiring local governments to act on applications that are incomplete would also raise Tenth Amendment concerns.

[210] National Associations Comments 64-66.

CONCLUSION

For the above reasons and the reasons stated in our opening comments, the National Associations urge the Commission not to attempt to regulate State and local right-of-way and wireless facility siting practices or compensation requirements. The record shows that local governments are not deterring broadband deployment or adoption, and that these practices and compensation requirements play a critical role in promoting and protecting local values. Instead of attempting to regulate in an area where it has no authority, the Commission should partner with local governments, who stand ready to work with the Commission to encourage broadband deployment and adoption.

Respectfully submitted,

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