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September 19, 2018

**Via ECFS**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: City of Eugene, Oregon – *Ex Parte* Submission, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79; *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*, MB Docket No. 05-311

Dear Secretary Dortch:

On behalf of the City of Eugene, Oregon ("City" or "Eugene"), I submit this letter to respond to (1) NCTA's *ex parte* filings of June 11, 2018, in Docket No. 17-84,[1] and May 3, 2018, in Docket No. 05-311;[2] and (2) the September 5, 2018, *Draft Declaratory Ruling*'s hypothesis that preempting recurring above-cost right-of-way (ROW) and public infrastructure fees in economically attractive urban and suburban markets would result in more capital investment in economically unattractive rural and other low-density markets.[3]

NCTA's position is contrary to the plain language and clear legislative history of both the Cable Act and the 1996 Telecommunications Act and would result in the very sort of

[1] Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed June 11, 2018) ("NCTA June Letter").
[2] Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (filed May 3, 2018) ("NCTA May Letter").
[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC-CIRC1809-02, at ¶¶ 58-63 (Sept. 5, 2018), https://docs.fcc.gov/public/attachments/DOC-353962A1.pdf ("*Draft Declaratory Ruling*").

discriminatory, non-competitively neutral treatment of broadband providers about which NCTA complains – but conveniently, in cable operators' favor.

The *Draft Declaratory Ruling*'s capital investment hypothesis relating to state and local ROW and infrastructure fees rests on nothing more than a hope that providers will engage in voluntary cross-subsidization without any regulatory obligation to do so – a hope that is at odds with rational firm profit-maximizing behavior and with providers' own past and current conduct.

**1. NCTA's Position That Cable Operators Are Entitled to Unique, and Discriminatorily Favorable, Treatment with Respect to ROW Use Fees for Non-Cable Services Is Contrary to the Language and Purposes of the Act.**

NCTA attacks the Oregon Supreme Court's decision in *City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (Or. 2016), which upheld a generally applicable Eugene ordinance requirement that telecommunications service providers (defined by Eugene's ordinance to include broadband service providers) must pay a gross revenue-based ROW license fee. Specifically, NCTA asks the Commission to rule that "the federal 5% cap on cable service franchise fees establishes an upper limit on the imposition of franchise fees (or equivalent taxes or fees such as those at issue in the *Eugene* case) on franchised cable operators for use of the public right-of-way for the provision of cable *and* non-cable services and that franchised cable operators should not be required to pay more than 5% of their cable service revenue for the operation of their systems." NCTA June Letter at 6 (emphasis in original). *See also id*. 3-7; NCTA May Letter at 3-8.

In our reply comments in Docket Nos. 17-79 and 17-84, Eugene and its fellow commenters have already explained why NCTA's position is wrong, both as a statutory matter and as a matter of policy.[4] We will not repeat our arguments here, but to ensure that those arguments are also included in the record in MB Docket No. 05-311, a copy of the San Antonio Infrastructure Reply Comments in the *Wireless/Wireline Infrastructure Dockets* is attached as Exhibit A. We also highlight the following errors in NCTA's position:

*First*, NCTA's discussion of the Cable Act's franchise fee provision, 47 U.S.C. § 542, purposefully avoids any mention of the key phrase in the Act's "franchise fee" definition that dooms its position: "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, *solely because of their status as such*." 47 U.S.C. § 542(g)(1) (emphasis added). NCTA never explains how a generally applicable ROW fee, like Eugene's, that is imposed on broadband and telecommunications service providers, regardless whether those providers are also "cable operator[s]" or operate a "cable system" as defined in the Cable Act, 47 U.S.C. § 522(5), (6), is a fee imposed on cable operator or subscriber "solely because of their status as such."[5] Indeed,

[4] Reply Comments of the Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79 and WC Docket No. 17-84 ("*Wireless/Wireline Infrastructure Dockets*"), at 24-35 (filed July 17, 2017) ("San Antonio Infrastructure Reply Comments").

[5] And if, as is clear, a generally applicable telecommunications/broadband ROW fee is not a "franchise fee" under the Cable Act, then that fee is not barred by that Act, and the other Cable Act provisions cited by NCTA (NCTA

Eugene's telecommunications ROW fee does not apply to cable service, and it does not apply to cable operators at all, *unless* those cable operators also provide broadband or telecommunications services. Thus, Eugene's fee applies to telecommunications and broadband service providers solely because of their status as telecommunications and broadband service providers, *not* because of their status as cable operators. This trait distinguishes non-cable ROW fees like Eugene's from each of the cases cited by NCTA (NCTA May Letter at 4 n.17; NCTA June Letter at 3 n.9), where a municipality sought, through its cable franchise agreement or otherwise, to impose a fee on cable operators' – and only cable operators' – cable modem/broadband service.

*Second*, NCTA ignores the Act's legislative history and FCC decisions that undermine its position. NCTA cannot even bring itself to mention, much less attempt to refute, the Conference Report to the 1996 Act, which flatly contradicts NCTA's assertion that Congress intended cable operators' non-cable services to be immune from "fair and reasonable fees" for use of the ROW.[6] Also unmentioned by NCTA is the Commission's own Second Report and Order in Docket No. 05-311, which stated that its finding that a cable operator cannot be required to pay cable franchise fees on revenues from non-cable services "of course, does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services."[7] Unlike NCTA, the *Eugene* court recognized and applied these authorities, *see* 375 P. 3d at 459-61, so it is NCTA, not the *Eugene* court, that takes the position that is "the opposite of what . . . Congress intended."[8]

*Third*, NCTA's claim (NCTA May Letter at 6) that its position is "essential to competition" and would "treat[ ] like services alike," is 180 degrees off the mark. NCTA's position – that cable operators, and *only* cable operators, are immune from a generally applicable ROW fee on telecommunications and broadband service providers – would be discriminatory, not competitively neutral, and would treat likes (wireline telecommunications/broadband services providers) unalike, depending on whether they are also cable operators.

*Fourth*, that cable operators, unlike non-cable operators, pay a 5% cable franchise fee (NCTA June Letter at 1; NCTA May Letter at 8) is beside the point. Cable operators can – and uniformly do – itemize and recover their cable franchise fee from cable subscribers. *See*

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May Letter at 3-4 (citing 47 U.S.C. §§ 522, 541, 544, 556); NCTA June Letter at 2-4 (same)) do not alter that conclusion.

[6] H.R. Rep. No. 104-458, at 180 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 193. *See also* San Antonio Infrastructure Reply Comments at 31.

[7] *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*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd. 19,633, 19,638 n.31 (2007), *clarified*, 30 FCC Rcd. 810 (2015), *review granted in part and denied in part on other grounds sub nom. Montgomery Cty., Md. v. FCC*, 863 F.3d 485 (6th Cir. 2017). *See also* San Antonio Infrastructure Reply Comments at 31-32.

[8] June NCTA Letter at 7. NCTA's citation to the *RIF Order* (*id.* at 3 n.8 & 7 n.22 (citing *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 32 FCC Rcd. 311, 426-28 ¶¶ 194-95 (2018) (*RIF Order*)) is a mystery. The *RIF Order* passage that NCTA cites says nothing at all about ROW fees, referring only to "so-called 'economic' or 'public utility-type' regulations," *RIF Order* ¶ 195. A ROW fee is neither an "economic" nor "public utility-type regulation"; it is instead the exercise of state-granted municipal authority over the ROW, which the *RIF Order* indicates the Commission was not disturbing. *See id.* ¶ 196.

47 U.S.C. § 542(c). So under NCTA's approach, cable operators' broadband/telecommunications services would receive a free ride on the ROW, while broadband/telecommunications providers that are not cable operators would have to pay ROW fees on their broadband/telecommunications services.

*Fifth*, NCTA's suggestion that the 5% cable franchise fee is "more than 'fair and reasonable compensation' for [cable operators'] use of the public ROW" (NCTA May Letter at 8) is irreconcilably at odds with the Cable Act itself, which permits a 5% cable franchise fee.

*Sixth*, NCTA's assertion that imposing generally applicable gross revenue-based ROW fees on cable operators' non-cable services is a "local entry barrier[ ]" under Section 253[9] is unsupported by facts or common sense. Cable operators are by far the largest broadband service providers in the nation,[10] and they have more broadband subscribers than cable subscribers.[11] Moreover, the record stands unrefuted that Eugene's non-cable ROW fee has not prohibited telecommunications or broadband service in any way.[12] To suggest that requiring cable operators to pay the same gross revenue-based fee that their non-cable wireline broadband competitors pay is an "entry barrier" is therefore belied by the record.

### 2. The *Draft Declaratory Ruling*'s "Voluntary Cross-Subsidization" Rationale for Preempting Non-Cost-Based ROW Fees in Markets Where No Prohibition Can Be Shown Makes No Economic Sense.

Confronted with the awkward, but undeniable fact that deployment is occurring primarily in more urban, higher-density communities where ROW fees tend to be higher, and not occurring in more rural communities where ROW fees are low or non-existent,[13] the *Draft Declaratory Ruling* seeks to sidestep this problem by asserting the supposedly "simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether the reduction takes place on a local, regional or national level."[14] Aside from self-serving, but wholly non-binding, assertions by providers that they could use money saved in attractive markets to invest in otherwise economically unattractive markets, the only purportedly empirical support for the *Draft Declaratory Ruling*'s "voluntary cross-subsidization" hypothesis are two reports prepared by CMA Strategy Consulting and submitted by Corning, one before the

[9] NCTA May Letter at 7 (citing 47 U.S.C. § 253(a)).
[10] Press Releases, Leichtman Research Group, Inc., *455,000 Added Broadband in 2Q 2018* (Aug. 14, 2018), https://www.leichtmanresearch.com/455000-added-broadband-in-2q-2018/.
[11] *See* NCTA, Cable's Customer Base (66.4 million broadband customers, 51.9 million "television" customers), *available at* https://www.ncta.com/chart/cables-customer-base.
[12] *See* Letter from Tillman L. Lay, City of Eugene counsel, to Marlene H. Dortch, Secretary, and Elizabeth Bowles, Chair, Broadband Deployment Advisory Comm., FCC, WC Docket No. 17-84, GN Docket No. 17-83, WT Docket No. 17-79, at 3-4 & Attach. 5 (filed Dec. 19, 2017).
[13] *See*, *e.g.*, San Antonio Infrastructure Reply Comments at 22-23; Comments of the Cities of San Antonio, *et al.*, *Wireless/Wireline Infrastructure Docket*, Ex. C, at 6-8, Ex. D, at 7-9 (filed June 15, 2017). Commissioner Carr has conceded as much. Remarks of FCC Commissioner Brendan Carr at the Above Ground Level Summit, Philadelphia, PA, at 3 (June 14, 2018), https://docs.fcc.gov/public/attachments/DOC-351626A1.pdf (New York and San Francisco "will get 5G almost regardless of what we do at the FCC.").
[14] *Draft Declaratory Ruling*, ¶ 58. *See generally id.* ¶¶ 58-65.

*Draft Declaratory Ruling* was released,[15] and another just after its release.[16] These reports conclude that preemption of non-cost-based ROW application and use fees "*could* reduce deployment costs by $2.0 billion over five years," and these "cost savings *could* lead to an additional $2.4 billion in capital expenditure . . . . 97% of this capital expenditure would go towards investment in rural and suburban areas."[17]

In other words, the *Draft Declaratory Ruling*'s hypothesis, and the Corning studies' assumption, is that (1) preemption of above-cost local ROW fees in markets, like Eugene, New York City, San Jose, San Francisco and elsewhere, where no prohibition can be shown, will put an extra $2 billion in the pockets of providers over five years, and (2) providers – without any regulatory compulsion to do so and with many alternatives available for use of those funds – will nevertheless spend the extra $2 billion to invest in deploying facilities in lower-density, currently economically unviable, markets.

This "voluntary cross-subsidization" hypothesis is irredeemably flawed on theoretical, factual and legal grounds. Here are just a few of those flaws:

*First*, the Corning-backed reports on which the *Draft Declaratory Ruling* relies calculate the "cost savings" from preempting above-cost local fees by extrapolating from anecdotal, unverified local cost and fee information in industry's past filings in the *Wireless/Wireline Infrastructure Dockets*.[18] Even assuming for the sake of argument that industry's anecdotal allegations about a relative handful of local fees are accurate, anecdotal data cannot serve as a reliable basis for estimating what total nationwide ROW fees would be absent FCC preemption, and therefore are an inherently unreliable basis for calculating what the "cost savings" to industry would be from FCC preemption of those fees.

*Second*, the Corning-backed studies conclude that 95% of the $2 billion in supposed five-year cost savings from preempting local ROW fees comes from reduced operating expenses (recurring ROW fees), *not* reduced capital costs (up-front application fees).[19] That contradicts, rather than supports, the *Draft Declaratory Ruling*'s entire thesis (at ¶¶ 58-59) about the effect of such fees on providers' supposedly "limited capital budgets" (*id.* ¶ 59).

*Third*, if the Commission were to preemptively reduce providers' recurring ROW fee operating costs, in a competitive market those reduced costs would be passed through to the providers' customers in the form of lower prices. (And we note that the Commission has recently found the wireless market to be competitive.[20]) And if those ROW fee cost savings were in fact passed on to providers' customers, they would not be available to the provider to

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[15] Letter from Thomas J. Nevin, Corning, Inc. counsel, to Marlene H. Dortch, Secretary, FCC, WTC Docket No. 17-79, Attach. A (filed Aug. 29, 2018) ("Corning Aug. filing").
[16] Letter from Thomas J. Nevin, Corning, Inc. counsel, to Marlene H. Dortch, Secretary, FCC, WTC Docket No. 17-79, Attach. A (filed Sept. 5, 2018) ("Corning Sept. filing").
[17] *Id.* at 1 & Attach. A, at 2-3 (emphasis added).
[18] *See* Corning Aug. filing, Attach. A, at 8 tbl.2 & n.26.
[19] *Id.* Attach. A, at 4; Corning Sept. filing at 2.
[20] *In re Implementation of Section 6002(b) of The Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 17-69, Twentieth Report, 32 FCC Rcd. 8968, 9037 (2017).

invest in deployment in other markets, again undercutting the *Draft Declaratory Ruling*'s entire thesis.

*Fourth*, assuming that providers were able to pocket the "cost savings" from preemptively reduced ROW fee operating costs (an assumption that would also mean that providers do in fact have market power[21]), at best that means that the *only* thing that we can be sure the *Draft Declaratory Ruling*'s proposed ROW fee preemption would accomplish is to increase providers' profit margin, and profits, in those markets where the fees were preempted. What the preemption would *not* do is to furnish providers with any additional economic incentive to use the extra profits in these lucrative markets to invest in any market whose low density or other characteristics make it an economically unattractive market in which to invest the providers' capital. Put a little differently, that a provider might earn more profits in Eugene or New York City as a result of Commission preemption of their current ROW fees, would not make investing those additional profits in rural North Dakota or Mississippi an any more attractive option than it was if Eugene's or New York City's ROW fees had not been preempted. It would just mean that the providers earn more profits in Eugene and New York City. But providers would have several other options for use of the additional profits made possible by the FCC's preemption. Here are just a few, each of which small cell/wireless industry members have recently done:

- Corporate acquisitions.[22]
- Increasing shareholder dividends.[23]
- Repurchase of stocks or bonds.[24]

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[21] In fact, as noted below, the kind of cross-subsidization that the *Draft Declaratory Ruling* supposes cannot occur unless a provider has market power in the subsidizing market (here, the lucrative high-density markets with higher ROW fees that the Commission proposes to preempt).

[22] *See, e.g.*, Michael J. de la Merced, *AT&T Agrees to Buy Time Warner for $85.4 Billion*, N.Y. Times (Oct. 22, 2016), https://www.nytimes.com/2016/10/23/business/dealbook/att-agrees-to-buy-time-warner-for-more-than-80-billion.html; Thomas Gryta, *AT&T Closes $49 Billion DirecTV Buy*, Wall St. J. (July 24, 2015), https://www.wsj.com/articles/at-t-closes-49-billion-directv-acquisition-1437766932; Ryan Knutson & Deepa Seetharaman, *Verizon Agrees to Buy Yahoo's Web Assets for $4.83 Billion*, Wall St. J. (July 25, 2016), https://www.wsj.com/articles/verizon-agrees-to-buy-yahoo-for-4-83-billion-1469444984; Mike Shields & Thomas Gryta, *Verizon Agrees to Buy AOL for $4.4 Billion*, Wall. St. J. (May 12, 2015), https://www.wsj.com/articles/verizon-to-buy-aol-for-4-4-billion-1431428458.

[23] *See*, *e.g.*, *See, e.g.*, Press Release, AT&T Inc., *AT&T Declares Quarterly Dividend* (June 29, 2018), http://about.att.com/story/att_declares_quarterly_dividend_2018.html; Press Release, Verizon Commc'ns Inc., *Verizon Increases Dividend for 12th Consecutive Year* (Sept. 6, 2018), https://www.verizon.com/about/news/verizon-increases-dividend-12th-consecutive-year; Press Release, T-Mobile US, Inc., *T-Mobile Announces Quarterly Preferred Stock Dividend* (Nov. 17, 2017), http://investor.t-mobile.com/file/Index?KeyFile=391155125; News Release, Crown Castle Int'l Corp., *Crown Castle Declares Quarterly Common Stock Dividend* (Aug. 2, 2018), http://investor.crowncastle.com/news-releases/news-release-details/crown-castle-declares-quarterly-common-stock-dividend-20; Press Release, Corning, Inc., *Corning Declares Quarterly Dividend* (July 19, 2018), https://investor.corning.com/investor-relations/news-and-events/details/2018/Corning-Declares-Quarterly-Dividend-4473370f5/default.aspx.

*Fifth*, the *Draft Declaratory Ruling*'s "voluntary cross-subsidization" hypothesis rests entirely on the assumption that industry members will devote the $2 billion in ROW fee "cost savings" in lucrative, but above-cost ROW fee, markets to deploying facilities in rural and suburban markets that, absent the extra funds from lucrative markets, would not be economically viable. But this hypothesis runs directly contrary to established economic literature about cross-subsidization that the FCC should well know: A rational firm will not engage in such voluntary cross-subsidization; regulatory compulsion is required. A recent study sponsored by USTelecom and NTCA, cites the economic literature and explains the principle well:

> *The economics literature deals with cross-subsidies in detail*. A cross-subsidy by the same firm involves pricing one service below cost while other services are priced above cost to a degree sufficient to cover the below-cost pricing. More precisely, the service receiving the subsidy is priced such that the present value of the revenues from that service are below the present value of the costs caused by that service – the shortfall being recovered from other services offered by that same firm. As noted above, *any rational firm should avoid such a cross-subsidy since avoiding offering the subsidized service (or raising the price of the service to eliminate the subsidy) would yield a higher stream of present-value adjusted profits. In addition, the services priced above cost to provide the cross-subsidy will invite competition which then puts pressure on the source of funding for the cross-subsidy. Such cross-subsidies can exist however when prices are regulated or otherwise mandated by a government agency*. This has occurred in price-regulated (rate-of-return) industries, as is described in the sections below (in telecommunications, for example, below-cost basic exchange service prices to residential customers were established for rate-of-return local telecommunications providers).[25]

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[24] *See*, *e.g.*, *See, e.g.*, Press Release, American Tower Corp., *American Tower Corporation Declares Quarterly Distribution and Announces New Stock Repurchase Program* (Dec. 7, 2017), http://www.americantower.com/corporateus/investor-relations/press-releases/news-item.htm?id=2321626; Press Release, T-Mobile US, Inc., *T-Mobile Announces $1.5 Billion Stock Repurchase Program* (Dec. 6, 2017), http://investor.t-mobile.com/file/Index?KeyFile=391358109; Press Release, Verizon Commc'ns Inc., *Verizon Announces Tender Offers for 8 Series of Notes*, Sept. 6, 2018: https://www.verizon.com/about/news/verizon-announces-tender-offers-8-series-notes; Press Release, AT&T Inc., *AT&T Inc. Announces Cash Offers for Four Series of Notes Open to All Investors* (Mar. 29, 2018), https://about.att.com/story/cash_offers_for_four_series_of_notes_open_to_all_investors.html.

[25] Steve Parsons & James Stegeman, *Rural Broadband Economics: A Review of Rural Subsidies*, at 14 (rev. July 13, 2018) (emphasis added), https://www.ustelecom.org/sites/default/files/Rural%20Broadband%20Economics-A%20Review%20of%20Rural%20Subsidies%20final%20paper.pdf (citing Steve G. Parsons, *Cross-Subsidization in Telecommunications*, 13 J. Reg. Econ. 157 (1998). *See also* Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 Am. Econ. Rev. 966-77 (1975).

Thus, if long-accepted economic theory holds (and neither the *Draft Declaratory Ruling* nor any of industry's filings it cites give a reasoned explanation as to why it wouldn't), the Commission's "voluntary cross-subsidization" proposal would, by industry's own calculation, result in nothing more than a wealth transfer of $2 billion from local governments and their taxpaying residents to industry and its shareholders over a five-year period.

*Sixth*, even if, contrary to economic theory, as well as providers' own past behavior, they nevertheless chose to engage in the voluntary cross-subsidization that the *Draft Declaratory Ruling* hypothesizes, Section 253 cannot plausibly be construed to empower the Commission, by preemptive fiat, to compel states and localities (and thus their taxpayers) to fund that cross-subsidization. Neither Section 253's plain language, nor its legislative history, remotely suggests that, hiding beneath its "prohibiti[on]" language was a grant to the FCC of the power to force some state or local governments and their taxpayers to subsidize the provision of service to other states or localities. Construing Section 253 to authorize such a Commission-imposed implicit cross-subsidization scheme would be directly contrary to the 1996 Telecommunications Act's purpose of eliminating implicit cross-subsidies in favor of explicit subsidies through a revamped universal service funding mechanism.[26] It also would raise serious constitutional questions under the Commerce Clause, the Spending Clause, the Necessary and Proper Clause, and the Tenth and Eleventh Amendments.[27]

*Seventh*, the *Draft Declaratory Ruling*'s reliance on *Puerto Rico Telephone Co. v. Municipality of Guayanilla*[28] as support for its "voluntary cross-subsidization" hypothesis is misplaced. As an initial matter, *Guayanilla's* reading of Section 253(a)'s language has been criticized and rejected by other circuits, [29] and rightfully so. But in any event, the *Guayanilla* court's ruling was not based solely, or even primarily, on "the notion that all other municipalities will follow the Municipality of Guayanilla's lead by enacting gross revenue fees." 450 F. 3d at 17. Rather, it was based on the court's finding that Guayanilla offered no evidence at all to rebut the plaintiff telephone company's factual showing about the adverse fiscal impact of the fee on the company (including an "86% decline" in overall profits, *id.*) and the court's finding about the impact of the fee "on the profitability of PRTC's operations *within the Municipality itself*" (*id.*) (emphasis added). The court reasoned that "it generally costs more to provide services in rural or less heavily populated areas [like Guayanilla] than it does in large urban centers," so "PRTC's profit margin on services that it sells within [Guayanilla] is likely to be *lower* than the company's overall, island-wide margins." *Id.* (internal quotations omitted). *Guayanilla* therefore presented the inverse of the *Draft Declaratory Ruling*'s "voluntary cross-subsidization" hypothesis: the imposition of an above-cost ROW fee in an area that was rural and, prior to imposition of the fee, already marginally profitable at best. Nothing in *Guayanilla* suggests that, absent any showing

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[26] *See* 47 U.S.C. § 254(k); H.R. Rep. No. 104-458, at 134, *reprinted in* 1996 U.S.S.C.A.N. at 146; H.R. Rep. No. 104-204, at 67-68 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 33.

[27] Could, for instance, the federal government order that the price of one state's property must be reduced to cost in order to subsidize service to another state? Precedent suggests not. *See Nat'l Fed. Of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575-88 (2012); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-78 (2018).

[28] 450 F.3d 9, 19, 17 (1st Cir. 2006) (cited in *Draft Declaratory Ruling* at ¶ 58 & n.156, ¶ 60 & n.169).

[29] *Level 3 Commc'n, LLC v. City of St. Louis*, 477 F. 3d 528, 532-33 (8th Cir. 2007). *See also Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577-78 (9th Cir. 2008) (en banc).

of a prohibitory effect in Guayanilla, Section 253 would still mandate preemption of Guayanilla's fee to promote deployment outside of Guayanilla.

*          *          *          *          *

Accordingly, Eugene urges the Commission (1) to reject NCTA's cable franchise fee arguments and (2) not to adopt the *Draft Declaratory Ruling*'s conclusion that above-cost local ROW and infrastructure fees are preempted by Section 253.

Respectfully submitted,

*/s/ Tillman L. Lay*

Tillman L. Lay

*Counsel for the City of Eugene, Oregon*

TLL:smh
Attachment

# EXHIBIT A

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WT Docket No. 17-79 |
| | ) | |
| Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WC Docket No. 17-84 |
| | ) | |

# REPLY COMMENTS OF THE CITIES OF SAN ANTONIO, TEXAS; EUGENE, OREGON; BOWIE, MARYLAND; HUNTSVILLE, ALABAMA; AND KNOXVILLE, TENNESSEE


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July 17, 2017

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The Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee (collectively, "Cities"), submit these reply comments in response to the Commission's Notices of Proposed Rulemaking and Notices of Inquiry in the above-captioned dockets,[1] as well as the opening comments filed in those dockets.

## I. INTRODUCTION AND SUMMARY

Industry comments make clear its members' objective: to seize onto the *Wireless NPRM/NOI* and the *Wireline NOI* as a vehicle to transform the Commission into both (1) a national land use zoning board to oversee local land use authorities, and where necessary, "deem granted," local wireless facility siting applications, and (2) a national right-of-way ("ROW") access and rate regulation oversight board to promote telecommunications and broadband providers' subsidized access to state and local ROW, infrastructure and other property. In other words, industry, admittedly encouraged by some statements from Commission members, wants to transform the Commission into a regulator of state and local governments, rather than a regulator of communications service providers.

The Commission, having cracked open this door, must now firmly shut it. Fidelity to the rule of law, as opposed to the personal policy preferences of an unelected Commission, requires no less.

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[1] *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, WT Docket No. 17-79, Notice of Proposed Rulemaking ("*Wireless NPRM*") and Notice of Inquiry ("*Wireless NOI*"), 32 FCC Rcd. 3330 (Apr. 21, 2017) (collectively "*Wireless NPRM/NOI*"); *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry ("*NOI*"), and Request for Comment, 32 FCC Rcd. 3266, 3296-3301 (Apr. 21, 2017) ("*Wireline NOI*").

Regardless of the policy merits of the *Wireless NPRM/NOI* and *Wireline NOI* proposals (and we see little or none in most of them), virtually all of those proposals are at clear odds with the plain language and legislative history of Sections 332(c)(7) and 253, as well as court precedent and prior Commission precedent construing those provisions. A Congress that thought that it was giving the courts "exclusive jurisdiction over all [non-RF-related] disputes arising under [Section 332(c)(7)]"[2] would be surprised to learn that the Commission has jurisdiction not only to set uniform, irrebuttable nationwide shot clocks, but also to back them up with a Commission-imposed "deemed granted" remedy. And both Congress and the courts that have construed Sections 253 and 332(c)(7) to date would be equally surprised to learn that those statutes give the Commission authority not only to adopt rate regulation rules for the pricing of state and local ROW and other public property, but also to grant access to that property without the consent of the state or local government.

Yet those are precisely the sweeping propositions that the *Wireless NPRM/NOI* and *Wireline NOI* offered, and that industry has rushed to endorse in their opening comments. In the words of now-Justice Gorsuch, the *Wireless NPRM/NOI* and *Wireline NOI* proposals would permit the Commission:

> [T]o swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design.[3]

The Commission should step back from the precipice, and trust the courts to handle disputes under Section 253(c) and Section 332(c)(7), as Congress intended.

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[2] H.R. Rep. No. 104-458, at 208 (1996) (Conf. Rep.) ("Conference Report").

[3] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

## II. THE WIRELESS NPRM AND NOI (Docket No. 17-79).

### *A. The Record Makes Plain that the Wireless NPRM's "Deemed Granted" and Shortened Shot Clock Proposals Would Be Unwise Policy and Beyond the Commission's Legal Authority to Adopt.*

As expected, wireless industry commenters praised and endorsed the *Wireless NPRM*'s proposals to construe Section 332(c)(7) of the Communications Act to permit the Commission to adopt a "deemed granted" remedy for a locality's failure to meet the "shot clock" deadline, and to shorten those shot clocks further. But as we and other local government commenters pointed out,[4] the *Wireless NPRM*'s "deemed granted" and shortened shot clock proposals cannot be squared with Section 332(c)(7)'s plain language, its legislative history, the Commission's own reasoning in the *Shot Clock Order*,[5] the Fifth Circuit's reasoning in upholding the *Shot Clock Order*,[6] the Commission's reasoning in the *2014 Infrastructure Order*,[7] or the Fourth Circuit's reasoning in upholding that order. In essence, both the *Wireless NPRM*'s proposals, and industry's support of them, rest on the untenable (and for that reason apparently largely unspoken) premise that there is no real difference between the language of Section 332(c)(7) and the language of Section 6409(a) of the Spectrum Act. That patently false premise cannot be accepted by a Commission that follows the law that Congress has enacted, rather than rewriting that law to be what the Commission or industry might prefer Congress had enacted.

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[4] *See, e.g.*, Cities Comments, Exs. A and B. Comments of Smart Communities and Special Districts Coalition at 37-55, *Wireless NPRM/NOI* ("Smart Communities Comments, *Wireless NPRM/NOI*").

[5] *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) 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, WT Docket No. 08-165, 24 FCC Rcd. 13994 (Nov. 18, 2009) ("*Shot Clock Order*").

[6] *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) ("*Arlington*"), *aff'd*, 133 S. Ct. 1863 (2013).

[7] *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-328, Report and Order, 29 FCC Rcd. 12865 (Oct. 21, 2014) ("*2014 Infrastructure Order*").

### 1. The proposed "deemed granted" remedy for missing shot clock deadlines is flatly at odds with Section 332(c)(7)'s language and legislative history.

Although industry commenters supported one or more of the *Wireless NPRM*'s "three options" (¶ 9) for rationalizing Commission adoption of a "deemed granted" remedy where a locality fails to act within the shot clock deadline, their support for the *Wireless NPRM*'s "deemed granted" proposal cannot overcome the proposal's many fatal legal flaws. "Deemed granted" proponents also overlook the counterproductive effects of such an inflexible, "one size fits all" remedy.

#### a) The "deemed granted" remedy would be flatly contrary to Section 332(c)(7)'s plain language and legislative history.

Whether dressed up as an "irrebuttable presumption" (¶¶ 10-13), a "lapse of state and local governments' authority" (¶ 14), or a "preemption rule" (¶¶ 15-16), the *Wireless NPRM*'s "deemed granted" proposals cannot be squared with Section 332(c)(7)'s plain language or legislative history. Nor can those proposals be squared with the courts' or the Commission's own prior interpretation of both Section 332(c)(7) of the Communications Act and Section 6409(a) of the Spectrum Act. A "fresh look" (*Wireless NPRM* ¶ 9) is not a free pass, absolving the Commission from complying with the statute's language or engaging in reasoned decision making.

The flaws in the *Wireless NPRM*'s legal analysis are numerous. Among the flaws, in no particular order:

*First*, the *Wireless NPRM*'s suggestion (¶ 12, emphasis removed) that Section 332(c)(7)(B)(ii)'s language—"taking into account the nature and scope of such request"—even when coupled with Section 332(c)(7)(B)(v)'s court remedy, "does not necessarily mean that a

reviewing court 'must consider the specific facts of individual applications,'" conflicts with the *Shot Clock Order*. The *Shot Clock Order* provides:

> 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 . . . . While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless siting applications and the surrounding circumstances can vary greatly.

*Shot Clock Order* ¶ 39. Although the Commission can change its mind about the meaning of a statute, it must provide a reasoned explanation for doing so. None exists here.

*Second*, the *Wireless NPRM*'s tentative conclusion also conflicts with the reasoning of the Fifth Circuit's decision in *Arlington* upholding the *Shot Clock Order*. The Fifth Circuit ruled that the *Shot Clock Order's* presumptive shot clocks were consistent with "[Section] 332(c)(7)(B)(ii)'s command that what constitutes a 'reasonable period of time' should be determined by taking into account 'the nature and scope of such request.'" *Arlington*, 668 F.3d at 258. According to the Fifth Circuit, this is so *precisely* "*because*":

> [T]he 90– and 150–day time frames do not eliminate the individualized nature of an inquiry into the reasonableness of a state or local government's delay. The time frames do provide the FCC's guidance on what periods of time will generally be "reasonable" under the statute, of course, and they might prove dispositive in the rare case in which a state or local government submits no evidence supporting the reasonableness of its actions. But in a contested case, courts must still determine whether the state or local government acted reasonably under the circumstances surrounding the application at issue.

*Id.* (emphasis added). The court further stated:

> [W]e believe the cities' challenges to the reasonableness of the 90– and 150–day time frames stem from a misunderstanding of the time frames' effect on the wireless zoning application process. *We do not read the Declaratory Ruling as creating a scheme in which*

> *a state or local government's failure to meet the FCC's time frames constitutes a per se violation of § 332(c)(7)(B)(ii). The time frames are not hard and fast rules but instead exist to guide courts in their consideration of cases challenging state or local government inaction.*

*Id.* at 259 (emphasis added).

In other words, both the Commission and the Fifth Circuit justified the shot clocks being consistent with Section 332(c)(7)(B)(ii) and (v) on the grounds that the shot clocks were presumptive only, and would be applied by courts, *not* the FCC, in individualized cases under Section 332(c)(7)(B)(v). Neither the *Wireless NPRM* nor industry commenters offer any plausible explanation as to how the proposed "deemed granted" remedy is consistent with the rationale of the *Shot Clock Order* or the *Arlington* decision.

*Third*, as the *Wireless NPRM* all but concedes (¶ 16), the "deemed granted" proposal is flatly inconsistent with the Conference Report statement the "[i]t is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all . . . disputes arising under this section."[8] The *Wireless NPRM* seeks to sidestep this problem by suggesting that the Conference Report passage is somehow inconsistent with the Commission's obligations under the Communications Act, but it points to nothing in the Act that is at all inconsistent with the Conference Report passage, and ignores the plain language of Section 332(c)(7)(B)(v), which is perfectly consistent with the Conference Report passage. The *Wireless NPRM*'s "deemed granted" proposal, in contrast, would resurrect precisely what Congress rejected in the Conference Report's final Section 332(c)(7) language, as Justice Breyer has noted:

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[8] Conference Report at 207-08.

> Congress initially considered a single national solution, namely, a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority . . . . But Congress ultimately rejected the national approach and substituted a system based on cooperative federalism . . . . State and local authorities would remain free to make siting decisions. They would do so, however, subject to minimum federal standards—both substantive and procedural—as well as federal judicial review.[9]

As the Supreme Court more recently held in *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 816 (2015), this "system of 'cooperative federalism,'" coupled with Section 332(c)(7)(A)'s savings clause, means that "the enumerated limitations [on state and local authority in Section 332(c)(7)(B)(i)-(v)] set[s] out an exclusive list," and Section 332(c)(7)(B)(v)'s provision permitting parties to seek court review is on that "exclusive list," *id.* at 822.[10] FCC displacement or supplanting of Section 332(c)(7)(B)(v)'s court remedy, however, is not on that "exclusive list."

*Fourth*, the "exclusive jurisdiction" passage in the Conference Report is not, as the *Wireless NPRM* misleadingly suggests (¶16), an isolated "statement, standing alone." Rather, it is part of an entire paragraph stating that, unlike the rejected wireless siting provision in the House version of the bill, Section 332(c)(7) was specifically intended to take all non-RF-related wireless siting disputes out of the Commission's hands and place them in the hands of the courts:

> The conference agreement creates a new section 704 *which prevents Commission preemption of local and State land use decisions* and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. *The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions*

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[9] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., joined by O'Connor, Souter and Ginsburg, JJ., concurring).

[10] We note that the *T-Mobile South* decision therefore dooms the *Wireless NPRM*'s (¶ 14) proposed "lapse of . . . authority" interpretation of Section 332(c)(7)(A).

> *of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.*[11]

*Fifth*, contrary to the *Wireless NPRM*'s suggestion (¶13), the reasoning of both the Commission's *2014 Infrastructure Order* in adopting a "deemed granted" remedy for Section 6409(a) violations, and the Fourth Circuit's decision upholding that order, refute, rather than support, any argument that a Commission-imposed "deemed granted" remedy is consistent with Section 332(c)(7). In the *2014 Infrastructure Order* (¶ 227), the Commission specifically relied on Section 6409(a)'s "may not deny, and shall approve," language in justifying the "deemed granted" remedy. So did the Fourth Circuit in upholding that remedy. *Montgomery County v. FCC*, 811 F.3d 121, 126 (4th Cir. 2015) ("To implement the Spectrum Act's mandate that localities 'shall approve' facility-modification requests covered by Section 6409(a), the Order establishes a so-called 'deemed granted remedy.'").

Unlike Section 6409(a), Section 332(c)(7) contains no "may not deny, and shall approve," language. Lacking the statutory language that forms the basis for a "deemed granted" remedy, Section 332(c)(7) countenances no Commission-imposed "deemed granted" remedy. The *Wireless NPRM*'s contrary assertion (¶ 13) that "Section 332(c)(7)(B)(ii) and (v) [are not] materially different from [Section 6049(a) of] the Spectrum Act in this regard" is simply, and flatly, incorrect.

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[11] Conference Report at 207-08 (emphasis added).

*Sixth*, applying a mandatory "deemed granted" remedy for any "failure to act" claim is in irreconcilable conflict with Section 332(c)(7)(B)'s language and structure. Unlike Section 6409(a), where a locality "may not deny, and shall approve," an eligible facility application, Section 332(c)(7) leaves a locality free to deny a wireless siting application unless a denial would prohibit service, or would be unreasonably discriminatory, impermissibly based on RF emission concerns, or inconsistent with Section 332(c)(7)(B)'s procedural protections. But as both the Commission[12] and the courts have made clear,[13] a locality's failure to comply with Section 332(c)(7)(B)'s procedural protections does not mean that a court should necessarily issue an injunction ordering the locality to grant the permit.

Yet that is precisely what a "deemed granted" remedy, imposed by the Commission on the courts, would do. It would mean, for example, that if a locality misses the shot clock deadline, the applicant is *ipso facto* entitled to build the facility, even if the applicant cannot show that denial would constitute a prohibition, or would be unreasonably discriminatory, or even if the facility will not be built in compliance with basic public safety, building code or camouflage requirements that no one even suggests are inconsistent with Section 332(c)(7)(B).

In other words, Section 332(c)(7) is not Section 6409(a), yet the *Wireless NPRM*'s "deemed granted" proposal improperly presumes that it is.

#### b) The "Deemed Granted" Remedy Represents Unsound and Counterproductive Policy.

The *Wireless NPRM* offers no justification as to why the shot clock presumptions adopted in the *Shot Clock Order* are inadequate, or why a "deemed granted" remedy should

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[12] *See, e.g.*, *Shot Clock Order* ¶ 39.

[13] *See, e.g.*, *T-Mobile South*, 135 S. Ct. at 819 (Alito, J., concurring) ("Nothing we say today should be read to suggest that when a locality has erred, the inevitable remedy is that a tower must be built.").

supplant the shot clock presumption. And industry commenters offer no reasonable or legally cognizable justification, either.

To be sure, industry commenters claim that a Commission-imposed "deemed granted" remedy is needed because the judicial remedy provided by Section 332(c)(7)(B)(v) is too costly and time-consuming.[14] But whether or not that is true (we think not), that is an argument to be made to Congress, not the Commission. Congress provided the expedited judicial remedy about which industry commenters complain. "Congress could adopt such a [FCC-based 'deemed granted' remedy] if it were so inclined, but it did not do so in this statute. It is not [the court's or the Commission's] place to legislate another approach."[15]

But even if the Commission had the authority to adopt a "deemed granted" remedy (which it does not), that remedy would likely be counterproductive to the Commission's and industry's claimed goals: to minimize litigation, save costs, or speed permit issuance. A Commission-imposed "deemed granted" remedy would leave a locality facing an impending shot clock deadline with only one option to preserve its rights: deny the application before the shot clock expires and force the applicant to sue under Section 332(c)(7)(B)(v). As noted above, unlike the case with Section 6409(a), denial is an option for the local authority under Section 332(c)(7). Thus, a Commission-imposed "deemed granted" remedy would likely lead to more, not less, litigation under Section 332(c)(7).

**2. There is no basis for further shortening the current shot clocks.**

Not surprisingly, most, if not all, industry commenters supported shortening the *Shot Clock Order*'s 90– and 150–day presumptive deadlines. But other than their self-interested desire

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[14] *See, e.g.*, Mobile Future Comments at 6-7, *Wireless NPRM/NOI*.

[15] *T-Mobile South*, 135 S. Ct. at 818.

to make all shot clocks as short as possible (and to back them up with a "deemed granted" remedy), they offer nothing remotely suggesting why the current 90– and 150–day shot clocks are too long, or how circumstances have changed since the 2009 *Shot Clock Order* that would justify findings that localities are acting, or can be reasonably expected to act, more quickly now than they could eight years ago, or how what was presumptively reasonable eight years ago is now somehow presumptively unreasonable—perhaps even conclusively so.

Moreover, the *Wireless NPRM* and its industry supporters seem blissfully unaware that Section 332(c)(7) and Section 6409 are two very different, and very differently worded, statutes. Therefore, seeking to "harmonize the shot clocks for applications that are not subject to [Section 6409(a)] with those that are" (*Wireless NPRM* ¶ 18) would be nothing more than an impermissible Commission rewrite of both Section 6409(a) and Section 332(c)(7).

By its terms, Section 6409(a) only applies for modification to eligible facilities requests—i.e., applications for modification of an existing tower or base station that do *not* "substantially change the physical dimensions" of the tower or base station. In contrast, the current 90–day collocation shot clock implementing Section 332(c)(7)(B)(ii) applies to (among other things) collocation requests that *would* "substantially change the physical dimensions" of the existing facility. Erasing that distinction would impermissibly rewrite and expand Section 6409(a), and coupled with the proposed new "deemed granted" remedy, essentially rewrite Section 332(c)(7)(B) to be nothing more than a mimic of Section 6409(a).

Only Congress, not an unelected Commission, has the authority to rewrite Sections 332(c)(7) and 6409(a) in this manner.

### *B. The Commission Should Decline to Act on the Wireless NOI Proposals.*

#### 1. The Intersection of Sections 253(a) and 332(c)(7) is the Null Set.

The answer to almost all of the *Wireless NOI*'s queries on this issue is found in the plain language of Section 332(c)(7)(A), which forbids application of Section 253 in any way that would "limit or affect" local authority over wireless siting decisions. In other words, where Section 332(c)(7) applies, Section 253 does not.[16]

Moreover, while the "prohibition" language in Section 253(a) and Section 332(c)(7)(B)(i)(II) is similar, prohibitive effect is determined differently in each, and for good reason. As noted in our opening comments,[17] ROW access is an essential facility for installing wireline facilities and providing wireline service; it is not for installing wireless facilities (even small cell facilities) or for providing wireless service. As a result, "prohibitive effect" in the case of Section 332(c)(7)(B) must always include a factual assessment of the provider's wireless service coverage, as well as the availability of alternative sites (on both public and private property) where the proposed facilities could be installed and still provide adequate coverage.

#### 2. "Prohibit or Have the Effect of Prohibiting" Requires a Showing of Actual Prohibitory Effect.

As we and others explained in our opening comments, the supposed conflicts in court interpretations of the "prohibition" language in Sections 253(a) and 332(c)(7)(B) are illusory.[18] The Commission cannot, consistent with the statute's language, rewrite "prohibit" to mean

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[16] *See, e.g.*, Cities Comments, Ex. A at 10-12.

[17] *Id.* at 12-14.

[18] *See, e.g.*, Cities Comments, Ex. B at 25-28; Smart Communities Comments at 58-62, *Wireless NPRM/NOI*.

anything that imposes any kind of cost or with which a provider would prefer not to have to comply.

### 3. The "Proprietary Exception" to Sections 253 and 332(c)(7) Must Be Preserved.

The Commission cannot, consistent with the Fifth or Tenth Amendments, eliminate the "proprietary exception" to Sections 332(c)(7) and 253—an exception that courts have repeatedly recognized.[19] There is simply nothing in either provision's plain language or legislative history remotely suggesting any congressional intent to grant telecommunications providers (wireless or wireline) a mandatory federal right to install their facilities on property that does not belong to them. That is why the "proprietary exception" exists, and why it must be preserved.

### 4. Compliance with utility undergrounding requirements is not "unreasonable discrimination."

The *Wireless NOI* asks (¶ 98) whether local utility undergrounding requirements should implicate Section 253 or 332(c)(7). The clear answer is no. Utility undergrounding requirements serve vital public safety, utility reliability and community aesthetics interests. These are compelling, generally applicable interests that pre-date, and have nothing to do with, wireless facility deployment, but which would be substantially frustrated if wireless providers were allowed to erect new poles in the ROW after all other utility poles were removed for undergrounding.

Moreover, undergrounding projects can cost local governments and their taxpayers millions of dollars. That value of that public investment would be substantially diminished if wireless providers were thereafter permitted to erect new poles in the underground district ROW. Unless wireless facility providers would be willing to reimburse local governments and

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[19] *See, e.g.*, Cities Comments, Ex. A at 14-15, Ex. B at 21-22; Smart Communities Comments at 62-65, *Wireless NPRM/NOI*.

taxpayers for the undergrounding costs that their local government has incurred, then of course a locality should be able to "deny applications to construct new above-ground wireless structures" (*Wireless NOI* ¶ 98) in ROW areas where utilities have been placed underground.

Nothing in Sections 253 and 332(c)(7) suggests that Congress intended to give wireless providers, and only wireless providers, preferred or special access to local ROW or other public property that neither utilities nor landline telecommunications service providers enjoy. There is much more private property than ROW property in most locations; that property remains as an alternative for siting wireless facilities after utility undergrounding.

## III. THE WIRELINE NOTICE OF INQUIRY (Docket No. 17-84).

### *A. The Commission Lacks Legal Authority to Adopt Prospective Rules under Section 253 that Preempt State and Local Governments' Regulation of ROW Matters.*

As several commenters explained in their opening comments, Section 253 only grants the Commission authority to undertake case-by-case, retrospective preemption of specific state or local statutes, regulations, or legal requirements.[20] It does *not* provide the Commission with authority to preempt state and local statutes, regulations or legal requirements through prospective rulemaking. Section 253(d) sets forth the circumstances under which the Commission is permitted to address certain State and local actions that are inconsistent with Sections 253(a) and 253(b):

> If, after notice and an opportunity for public comment, the Commission determines that *a State or local government* has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt *the enforcement of such statute, regulation, or legal*

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[20] *See, e.g.*, Comments of the National Association of Regulatory Utility Commissioners at 10, *Wireline NOI*; Comments of Public Knowledge at 17, *Wireline NOI*; Comments of the California Public Utilities Commission at 9-11, *Wireline NOI*.

> *requirement* to the extent necessary to correct such violation or inconsistency.[21]

To be sure, as several industry commenters note, the Commission typically has broad discretion to decide whether to act through adjudication or rulemaking. Here, however, that general discretion is constrained, because Congress specifically intended Section 253(d) to provide a clear limit on the Commission's preemption authority under Section 253. The Commission may not preempt state or local laws absent a "clear statement" from Congress granting it such authority,[22] and here Congress's "clear statement" regarding the Commission's authority to preempt state and local laws inconsistent with Sections 253(a) and 253(b) is specifically provided for in Section 253(d).

Furthermore, Section 253(c) explicitly preserves state and local governments' authority to manage the public rights-of-way and require fair and reasonable compensation for their use.[23] While Section 253(d) gives the Commission authority to address specific alleged violations of Sections 253(a) and (b), it explicitly excludes Section 253(c) ROW matters from the scope of the Commission's Section 253 authority. Section 253(d)'s omission of Section 253(c) ROW matters was deliberate. It was the product of a compromise amendment sponsored by Senator Gorton that was explicitly intended to bar the Commission from intruding on Section 253(c) ROW matters.[24] "[A]ny challenge to [local right-of-way requirements must] take place in the Federal

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[21] 47 U.S.C. § 253(d) (emphasis added).

[22] *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

[23] In full, Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c).

[24] 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (remarks of Senator Gorton).

district court in that locality and . . . the Federal Communications Commission [should] not be able to preempt [local ROW requirements]."[25] Thus, *even if* the Commission could "construe § 253(d) to permit rulemaking,"[26] as some industry commenters suggest, the statute would nevertheless require that any such rulemaking exclude Section 253(c) ROW management and compensation matters.

### ***B. The Commission Cannot and Should Not Adopt Rules Prohibiting Allegedly Excessive Fees.***

Despite Section 253(d)'s denial of Commission authority to promulgate prospective rules under Section 253 to address local governments' exercise of their ROW management and compensation authority, industry commenters' opening comments offer various requests for the Commission to address allegedly excessive fees. In particular, industry asks that the Commission (1) prohibit rent-based ROW fees, and (2) prohibit local governments from applying ROW-related fees to cable operators using the ROW to provide non-cable services.

Ultimately, these requests are a plea for federally-mandated, subsidized access to public property for industry's private, profit-making use. These requests have no basis in federal law, and neither is factually supported by the record before the Commission. The text and legislative history of Section 253(c) make plain that fair and reasonable compensation encompasses rent-based fees. Likewise, the Cable Act does not bar local governments from charging cable operators for the use of public rights-of-way to provide telecommunications and other non-cable services; the Communications Act grants cable operators no federal right to use the public ROW to provide non-cable services free of charge. Moreover, there is simply no factual support for the

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[25] *Id.*

[26] Comments of AT&T Services, Inc. at 70, *Wireline NOI*.

notion that rent-based ROW fees for the use of the public ROW are inhibiting or prohibiting the deployment of broadband technology or the provision of broadband services.

At the outset, we note that much of the purported legal basis in the *Wireline NOI* would evaporate should the Commission move forward with its proposal to reclassify broadband as an "information service" under the Communication's Act.[27] Section 253(a) only applies to state or local laws, regulations or requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service*."[28] Thus, Section 253(a) on its face does not apply to state or local requirements that may have a prohibitory effect on the provision of information services or other non-telecommunications services. The *Wireline NOI* itself states the Commission's view that "under Section 201(b) and Section 253, the Commission has the authority to engage in a rulemaking to adopt rules that further define when a state or local legal requirement or practice constitutes an effective barrier to the provision of *telecommunications service* under Section 253(a)."[29]

Nor can the Commission rely on Section 706 or on its general authority provisions in the Telecommunications Act (Sections 1, 4(i), 201(b), and 303(r)) to transform Section 253's plain language into a provision about information services or any other non-telecommunications services. What Commissioner O'Rielly said in his statement on the *Improving Competitive Broadband Access to Multiple Tenant Environments* Notice of Inquiry applies equally to the Commission's *Wireline NOI* here:

> [I]f the Commission ultimately adopts its recent proposal to classify broadband as an information service, much of this

[27] *See In re Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd. 4434 (May 23, 2017).

[28] 47 U.S.C. § 253(a) (emphasis added).

[29] *Wireline NOI* ¶ 109 (footnotes omitted) (emphasis added).

> discussion would seem to be moot. My previous views on section 706 as legal authority are well known and the idea of applying Title II to an information service solely because the facilities might also carry a legacy voice service would be a deeply questionable step that could discourage the deployment of broadband, contrary to the goals of the item.[30]

Thus, while even under the current regulatory framework the Commission cannot, and should not, enact rules under Section 253 to restrict state and local governments' control over their ROW compensation and management, the reclassification of broadband as an information service would eviscerate even any plausible legal basis for such action.

**1. Fair and reasonable compensation under Section 253(c) is not restricted to cost or cost-based fees.**

**a) Fair and reasonable compensation for the use of the public ROW encompasses rent-based fees.**

Even if the Commission did have the authority to promulgate prospective general rules to interpret or implement Section 253(a), and even if its jurisdiction included ROW compensation under Section 253(c), it could not accept industry's invitation to interpret "fair and reasonable compensation" as limited to only the direct costs related to ROW management. As demonstrated in our initial comments and those of other commenters, both the language of the statute and its legislative history leave no doubt that fair and reasonable compensation includes rent-based fees.[31]

Although industry commenters would no doubt prefer a statute that limits fees to cost-based recovery, their comments cannot overcome the fact that this is not what Section 253(c) provides.[32] The plain language of Section 253(c) certainly does not suggest that

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[30] *In re Improving Competitive Broadband Access to Multiple Tenant Env'ts*, Notice of Inquiry at 14, GN Docket No. 17-142, FCC 17-78 (June 23, 2017).

[31] Cities Comments, Ex. A at 22-25.

[32] *See, e.g.*, Comments of Verizon at 13-15, *Wireline NOI*, ("Verizon Comments"); Comments of Competitive

"fair and reasonable compensation" connotes merely the reimbursement of costs.[33] And while industry pejoratively characterizes the fees of some local governments as "revenue generating schemes,"[34] this characterization provides no legal basis for action by the Commission. Industry points to no law—certainly no federal law—suggesting that state or local governments are entitled only to cost recovery for private use of public property. As fully detailed in our opening comments, the only place in the legislative history of Section 253 where the meaning of "fair and reasonable" ROW compensation was discussed was in the debate over the Barton-Stupak amendment in the House of Representatives.[35] That legislative history unequivocally leads to two conclusions. *First*, both proponents *and* opponents of the Barton-Stupak amendment agreed that the amendment permitted rent-based ROW fees and eliminated federal second-guessing of the reasonableness of locally-set fees. *Second*, the House majority overwhelmingly rejected the minority's distaste for rent-based fees by a 338 to 86 vote.[36]

Verizon attempts to provide a justification for an interpretation of Section 253(c) that would restrict compensation to cost-based recovery, but its effort fails. Even assuming *arguendo* the Commission has jurisdiction to construe Section 253(c) in the first place, Verizon misstates the relevant question before the Commission: the question is not whether "cost-based fees are 'reasonable,'"[37] but rather whether it is reasonable to interpret "fair and reasonable

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Carriers Association at 5-6, *Wireline NOI*; Comments of T-Mobile USA, Inc. at 29, *Wireline NOI* ("T-Mobile Comments"); Comments of the Fiber Broadband Association at 24-25, *Wireline NOI* ("FBA Comments"); Comments of the Oregon Telecommunication Association at 6-7, *Wireline NOI* ("OTA Comments"); Comments of CTIA at 31-33, *Wireline NOI*.

[33] *See* Cities Comments, Ex. A at 22-23 (further demonstrating that the plain language of Section 253(c) does not limit compensation to cost reimbursement).

[34] OTA Comments at 6.

[35] *See* Cities Comments, Ex. A at 24-25 (detailing the legislative history of Section 253(c)).

[36] 141 Cong. Rec. H8477 (daily ed. Aug. 4, 1995) (recorded vote).

[37] Verizon Comments at 14.

compensation" as used in Section 253(c) as permitting *only* cost-based recovery. Neither of the two dictionary definitions cited by Verizon suggests that compensation cannot encompass rent-based fees, and the same dictionary also defines "adequate compensation" and "just compensation" for the use of property as "the property's *fair market value*."[38] Verizon also cites to examples where the Commission and other agencies have found cost-based fees to be "reasonable."[39] But again, these examples do not address the question of whether it would be reasonable for the Commission to construe "fair and reasonable compensation" as *not* encompassing rent-based fees. Indeed, although largely ignored by industry commenters, there is a long line of court precedent holding that non-cost-based fees are permissible as compensation for the installation of private commercial facilities in the public ROW.[40]

Verizon next relies on an out-of-context excerpt from the Senate floor debate about what is now Section 253(d), quoting a passage from Senator Feinstein concerning municipalities "[r]equir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation."[41] On its face, this statement does not

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[38] *Compensation*, Black's Law Dictionary (10th ed. 2014) (emphasis added).

[39] Verizon Comments at 14.

[40] In the directly analogous context of cable television franchise fees, the Fifth Circuit held that the 5% franchise fee permitted by 47 U.S.C. § 542 is "essentially a form of rent: the price paid to rent use of public right-of-ways." *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997). Other courts have reached the same conclusion for over a hundred years, in the context of both local telephone and local cable television franchises. *E.g.*, *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 98 (1893) (franchise fee is rent for use of local rights-of-way); *City of Plano v. Pub. Util. Comm'n*, 953 S.W.2d 416, 420 (Tex. Ct. App. 1997) (gross receipts-based franchise fee is rent for use of local rights-of-way); *City of Albuquerque v. N.M. Pub. Serv. Comm'n*, 854 P.2d 348, 360 (N.M. 1993) (same); *City of Montrose v. Pub. Utils. Comm'n of Colo.*, 629 P.2d 619, 624 (Colo. 1981), *related proceeding,* 732 P.2d 1181 (Colo. 1987) (same); *City of Richmond v. Chesapeake & Potomac Tel. Co. of Va.*, 140 S.E.2d 683, 687 (Va. 1965) (same); *Pac. Tel. & Tel. Co. v. City of L.A.*, 282 P.2d 36, 43 (Cal. 1955) (same); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); *Grp. W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), *rehearing denied*, 679 F. Supp. 977, 979 (N.D. Cal. 1988) (same); *Erie Telecomms., Inc. v. City of Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) (same).

[41] 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (remarks of Sen. Feinstein).

suggest that what is now Section 253(c) *limits* municipalities to cost-based recovery; it merely suggests that it *permits* cost-based recovery.

More fundamentally, the amendment, which was the subject of the Senate debate and which was adopted, was *not* about the meaning of "fair and reasonable compensation" in Section 253(c). It was instead about amending what is now Section 253(d) to ensure that Section 253(c) ROW matters would be resolved by courts, *not* the Commission. In other words, the debate to which Verizon points makes clear that Congress intended Section 253(d) to prevent precisely what industry now requests: Commission intrusion into ROW compensation matters. Senator Feinstein was speaking in support of an amendment that would have removed what is now Section 253(d) and thus remove the Commission's preemption authority under Section 253 entirely. Subsequently, a compromise amendment, sponsored by Senator Gorton, was adopted and instead of Section 253(d) giving the Commission either complete or no preemption authority under Section 253, Section 253(d) was amended to exclude Section 253(c) ROW matters from the scope of the Commission's preemption authority.[42] Thus, as amended and ultimately enacted, Section 253(d) was designed to "preserve[] to local governments control over their public rights of way [and] [a]ccept[ ] the proposition . . . 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."[43]

Section 253's plain language and legislative history thus make clear that (1) Congress intended only the courts, *not* the Commission, to have authority to resolve "fair and reasonable

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[42] 141 Cong. Rec. 8213 (1995) (remarks of Senator Gorton).

[43] *Id.* (emphasis added).

compensation" disputes under Section 253(c), and (2) "fair and reasonable compensation" encompasses rent-based fees.

**b) There is no factual or policy basis for the FCC to construe Section 253(c) as excluding rent-based fees.**

As the Commission has previously recognized, broadband deployment and adoption in rural areas lags considerably behind that in non-rural areas.[44] Nationwide, only 4% of the population in non-rural areas lack access to 25 Mbps/3 Mbps advanced telecommunications capability, whereas approximately 39% of Americans living in rural areas lack access to such advanced telecommunications capabilities.[45] This disparity exists at slower speeds as well; 25% of rural Americans lack access to 10 Mbps/1 Mbps fixed terrestrial broadband services compare to just 2% of urban Americans, and 19% of rural Americans lack access to 4 Mbps/1 Mbps fixed terrestrial broadband service compared to 2% of urban Americans.[46]

The same pattern holds true in Alabama, Maryland, Oregon, Tennessee, and Texas, the states where the Cities are located. In Alabama, 91.7% of the urban population has access to download speeds of at least 25 Mbps, while just 53.9% of the rural population has such access.[47] In Maryland, 96.3% of the urban population has access to download speeds of at least 25 Mbps compared to 76.2% of the non-urban population.[48] In Oregon, this gap is 99.3% to 71.1%; in Tennessee it is 96.7% to 61%; and in Texas it is 73.4% to just 21.2%.[49]

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[44] FCC, 2016 Broadband Progress Report (Jan. 29, 2016).

[45] *Id.* at ¶ 79.

[46] *Id.* at n.242.

[47] *Broadband Statistics Report: Broadband Availability in Urban vs. Rural Areas*, National Broadband Map, at 7 (2015), https://www.broadbandmap.gov/download/Broadband%20Availability%20in%20Rural%20vs%20Urban%20Areas.pdf.

[48] *Id.*

[49] *Id.* at 8.

As we suspect is true in other states across the county, broadband in the states where the Cities are located is largely deployed in urban/suburban areas but is much less widely deployed in rural areas, *despite the fact that that it is the urban/suburban areas, not rural ones, that impose the greater right-of-way management and compensation requirements about which providers complain*. As demonstrated in our opening comments,[50] this leads to two key conclusions: (1) local ROW management and compensation requirements are *not* a significant impediment to broadband deployment (low potential customer density is), and (2) in areas where broadband is already ubiquitously and competitively deployed, any FCC preemption or limitation of local ROW compensation and management requirements would not promote deployment, but would instead yield only a windfall to broadband providers and their shareholders at the expense of local taxpayers.

Moreover, industry's desire for ROW fees that are uniform, predictable, and minimal is inconsistent with its request for cost-based fees. The actual direct costs associated with the review and management of the public ROW would vary widely from municipality to municipality. Actual costs would also certainly increase over time, and consequently a requirement for cost-based fees would mean that later-arriving applicants would have to pay more than earlier ones.

Limiting compensation so as to only include cost recovery would also undermine municipalities' ability to ensure the efficient use of their resources. The Smart Communities commenters have introduced expert testimony explaining the economics of ROW pricing.[51] By

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[50] Cities Comments, Ex. C at 6-8, Ex. D at 7-9, *Wireline NOI*.

[51] Comments of Smart Communities and Special Districts Coalition at 30, *Wireline NOI* (citing "The Economics of Government Right of Way Fees" (referred to herein as the ECONorthwest Declaration), Dr. Kevin Cahill, Ph.D, at p. 5, Exhibit G of 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

charging a market rate—not a below-market rate, such as one limited to only cost recovery—local governments ensure that private users of the ROW consider the full costs of accessing the ROW and thus use it in an efficient manner. The full costs of ROW access and use go beyond simply the direct costs of local governments in managing their ROW and reviewing applications; they also include opportunity costs as well as other externalities. And competition among municipalities and between municipal and private property, and ultimately voters' control over their elected officials, will safeguard against above-market pricing.[52] A requirement that ROW compensation be limited to only cost recovery, imposing a one-size-fits-all nationwide mandate, would thus deprive local governments of any ability to promote deployment of broadband technology in a manner consistent with the optimal use of scarce public resources.

**2. The Cable Act permits local governments to charge cable operators for their use of public rights-of-way to provide non-cable services.**

The Commission's "preliminary view . . . that Section 622(i) would prevent the Commission from enacting rules pursuant to Section 253 to address 'excessive' cable franchise fees"[53] is not merely correct; it is undisputable. That Congress itself has permitted cable franchise fees to up to 5% of a cable operator's gross revenues "derived . . . from the operation of the cable system to provide cable services"[54] precludes any suggestion that the cable franchise fees permitted by Section 622 are somehow "excessive." Section 622(b) instead makes clear

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Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association, *In re 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 11-59 (filed July 17, 2011)) ("Smart Communities Comments").

[52] Smart Communities Comments, Ex. 2 at 6-7, *Wireline NOI*.

[53] *Wireline NOI* ¶ 104.

[54] 47 U.S.C. § 542(b).

Congress's views that (1) gross revenue-based fees are a permissible and not inherently unreasonable form of ROW compensation, and (2) cable franchise fees of up to 5% are reasonable and not excessive.

Cable industry commenters put forth the misplaced proposition that the Commission can nevertheless consider cable franchise fees when determining whether other fees on a cable operator's non-cable services are excessive. These cable commenters go even further and argue that *any* compensation for the use of the ROW imposed on a cable operator is excessive and unreasonable if the operator is already paying a separate cable franchise fee.[55] In other words, cable operators seek a right to free use of the ROW to provide non-cable services, even though their non-cable operator competitors would have to pay such a fee for their use of the ROW to provide non-cable services. Cable industry commenters are wrong. Both Congress and the Commission have recognized that the Act preserves local governments' right to charge for the use of public ROW to provide non-cable services, and cable operators are not exempt from that.

Cable industry commenters point to Eugene as an example of their concern regarding charges for the use of the ROW for non-cable services being imposed on cable operators.[56] In 2016, the Oregon Supreme Court upheld Eugene's license fee on companies providing "telecommunications services," and rejected Comcast's argument that imposing the license fee on Comcast's non-cable services was a franchise fee barred by the Cable Act or a tax barred by the Internet Tax Freedom Act.[57] While the conclusions industry draws about the Oregon Supreme Court's analysis in *City of Eugene* and the situation in Eugene itself are wrong, they are right to highlight Eugene as a relevant example. Not only, as explained below, is the Oregon

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[55] *E.g.*, Charter Comments at 16-17; Comcast Comments at 11-14; NCTA Comments at 23-27.

[56] NCTA Comments at 26-27; Charter Comments at 23; Comcast Comments at 11-13.

[57] *City of Eugene v. Comcast of Or. II., Inc.*, 375 P.3d 446, 558 (Or. 2016).

Supreme Court's decision correct, but the facts on the ground in Eugene also demonstrate that Eugene's telecommunications ROW license fees have not adversely affected broadband employment at all. To the contrary, broadband is universally, and competitively, deployed in Eugene: 100% of Eugene's population has access to landline broadband, and 96.4% of Eugene's residents have access to at least three landline providers, compared to only 56% of the population nationwide.[58] The situation is much the same on the wireless side: 96.5% of Eugene residents have access to wireless broadband at speeds of 50 Mbps (both download and upload), compared to just 6.6% (for download speed) and 5.7% (for upload speed) nationwide.

Thus, contrary to the cable industry's allegations, the undisputed factual evidence is that Eugene's ROW compensation and management requirements do *not* "materially inhibit the provision of broadband or telecommunication services" at all.[59] The City's telecommunications licensing ordinance has been in place since 1997 and has been enforced on cable modem services since at least 2002.[60] Despite multiple lawsuits challenging Eugene's ordinance, up to and including the Oregon Supreme Court's decision in *City of Eugene*, the City has worked cooperatively with providers and seen a significant growth in the number providers over the past two decades. In light of these facts, even if the Commission had the statutory authority to consider the cost of cable franchise fees when evaluating whether other types of fees are excessive (which it does not), there is no factual basis for doing so because there is nothing in the record indicating that these fees are in any way prohibiting the provision of telecommunications or broadband service.

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[58] *Summary of Eugene, Oregon*, National Broadband Map (June 30, 2014), https://www.broadbandmap.gov/summarize/state/oregon/census-places/eugene.

[59] NCTA Comments at 27.

[60] *City of Eugene* at 450-51. The City's ordinance defines telecommunications services to include broadband service but exclude cable television service. Eugene, Or., City Code § 3.005 (2015).

**a) Federal law strives for competitive neutrality; it does not give cable operators a competitive advantage over all other providers of non-cable services.**

Cable industry commenters' assertion that "a cable operator with a franchise to provide cable service has a statutory right to use the rights-of-way to provide broadband services"[61] is wrong as a matter of law. Such an interpretation of the Cable Act, as amended by the 1996 Telecommunications Act, would subvert two of the primary goals of the 1996 Act: competitive neutrality, and preservation of a local government's right to manage and obtain compensation for the use of the public ROW.

In the 1996 Act, Congress took steps to ensure that the Cable Act's requirement of a cable franchise did not put cable operators at a competitive disadvantage with respect to their provision of telecommunications services. Because a Cable Act franchise necessarily singles out cable operators, the 1996 Act limited the obligations a local cable franchising authority may impose by means of a cable franchise. To ensure competitive neutrality, the 1996 Act prohibited the use of a Cable Act franchise as a mechanism for regulating or charging fees for a cable operator's provision of telecommunications services. As the Commission has said, "Congress clearly intended to separate the functions of cable franchising from the regulation of telecommunications services." *In re TCI Cablevision of Oakland Cty., Inc*., Docket No. CSR-4790, Memorandum Opinion and Order ¶ 6, FCC 97-331 (Sept. 19, 1997); *accord*, ¶ 42 (emphasis added). But, as discussed below, Congress was also at pains to clarify that the fact that a local government cannot, through its cable franchising authority, impose a cable franchise fee or other cable franchise obligations with respect to a cable operator's provision of

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[61] Comcast Comments at 11; *see also* Charter Comments at 17 ("Where a provider already has an entitlement to construct and operate facilities in the right of way via a cable franchise, demands by franchising authorities that such providers obtain additional legal authorization to offer broadband services are contrary to federal law and sound policy.").

telecommunications services; this does *not* mean such a fee or other obligation cannot be imposed at all.

Thus, the 1996 Act amended the Cable Act in various ways that were intended to keep the regulation of a cable operator's provision of telecommunications services, and the imposition of charges for those services, out of the Cable Act franchise process. *See, e.g.*, 47 U.S.C. § 542(b), as amended in 1996 (prohibiting inclusion of non-cable revenues in base used to calculate the 5% cable franchise fee); 47 U.S.C. § 541(b)(3) (prohibiting cable franchising authorities from conditioning, restricting, or otherwise linking the provision of telecommunications services to a cable franchise).

But in making these revisions to the Cable Act in the 1996 Act, Congress made equally clear that, while the Cable Act franchises fee and other requirements cannot be imposed on cable operators' provision of telecommunications services, cable operators are *not* immunized from other generally applicable obligations or fees imposed on non-cable operators' provision of non-cable services. That is why Cable Act franchise fees are defined to mean only fees imposed on cable operators "solely because of their status as such" (47 U.S.C. § 542(g)(1)), and to exclude fees of "general applicability," including fees imposed on both utilities and cable operators unless they are unduly discriminatory against cable operators or subscribers (47 U.S.C. § 542(g)(2)(A)). That is also why 47 U.S.C. §§ 541(b)(3)(A), (B), and (C) do not specify absolute prohibitions on the obligations that can be imposed on a cable operator, but only prohibitions on the obligations that can be imposed on them "under this subchapter," *i.e.*, under the Cable Act. And that is why the Cable Act does not apply to cable operators' provision of telecommunications and other non-cable services. 47 U.S.C. § 541(b)(3)(A)(ii).

The cable industry's request that the Commission grant cable operators, and only cable operators, a right to free use of the ROW to provide non-cable services would violate Congress's goal of competitive neutrality. Cable industry comments point to no provision of the Cable Act or other federal law expressly granting cable operators preferential treatment over non-cable providers with respect to their use of the ROW to provide non-cable services. And they identify no statute forbidding local governments from charging a fee for the use of ROW to provide non-cable services where the fee is *not* targeted solely at cable operators, and thus is not a Cable Act "franchise fee."

Lacking any statute expressly stating that local governments are barred from imposing a generally applicable fee for use of the ROW to provide non-cable services, industry contends that various provisions of the federal Act should be read as barring such a fee by implication. But the 1996 Act itself declares that it is not to be interpreted to have implicitly preemptive effect. Section 601(c)(1) expressly declares that it "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Pub L. No. 114-95, § 601(c), 110 Stat. 143 (1996) (reprinted as note to 47 U.S.C. § 152).

The Fifth Circuit's decision in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), reveals the fallacy of industry's position. *Dallas* involved an appeal of the FCC's decision implementing the open video system (OVS) provisions of the 1996 Act, 47 U.S.C. § 573. *See In re Implementation of Section 302 of the Telecommunications Act of 1996*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd. 18223 (June 3, 1996) ("*OVS Order*"). Section 573 provides that some provisions of the Cable Act will apply to OVS operators, while others will not. 47 U.S.C. § 573(c). Among the Cable Act provisions that do not apply to OVS operators is the "franchise" requirement in Section 541(b)(1). *See* 47 U.S.C. § 573(c)(1)(C).

Based on that, the Commission ruled in its *OVS Order* that local governments were preempted from requiring OVS operators to obtain a local franchise to use the ROW to provide OVS service. *OVS Order* ¶ 212. Local governments challenged that ruling on the grounds that (1) the Commission exceeded its statutory authority in exempting OVS operators from local franchising requirements, and (2) alternatively, that any preemption of such franchising authority would violate the 5th and 10th Amendments. The Fifth Circuit agreed with local governments' first argument and therefore did not reach their constitutional arguments. The court flatly rejected the Commission's argument that local governments' authority to franchise cable operators' use of the ROW arises from the franchise requirement of Section 541(b)(1):

> While [Section 541(b)(1)] may have expressly *recognized* the power of localities to impose franchise requirements, it did not *create* that power, and elimination of [Section 541(b)(1)] for OVS operators does not eliminate local franchising authority.
>
> The Commission could come to a contrary conclusion only by reading its preemptive authority broadly. But [Section] 601(c) precludes a broad reading of preemptive authority, as does [*Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)]….

*Dallas* at 348.

Cable industry commenters here, much like the Commission in the *OVS Order*, are trying to claim that the Cable Act, without its statutory text anywhere specifically saying so, was intended to preempt all local franchising authority over a cable operator's provision of non-cable services. And for the same reasons that the Fifth Circuit in *Dallas* rejected the FCC's effort to preempt general non-cable local franchise requirements in the *OVS Order*, the cable industry is wrong here in asking the Commission to preempt local governments' application of ROW fee requirements to cable operators' provision of non-cable service.

As the *Dallas* court noted, such an expansive reading of the Cable Act's preemptive effect would also conflict with Supreme Court precedent. In *Gregory v. Ashcroft*, the Court

stated that, if Congress intends to preempt a power traditionally exercised by a state or local government, "it must make its intention to do so unmistakably clear in the language of the statute." 501 U.S. 452, 460-61 (1991) (*quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotations omitted). There is simply nothing in the Cable Act's language, much less anything "unmistakably clear," that Congress intended to give cable operators, and only cable operators, their own unique immunity from ROW compensation requirements with respect to their provision of non-cable services.

**b) Both Congress and the FCC have expressly recognized the right of local governments to charge for the use of public ROW for telecommunications services, including when they are provided by cable operators.**

The 1996 Act expressly preserves the authority of local governments to impose generally applicable ROW fees, as long as those fees are competitively neutral and non-discriminatory.[62] When, in the 1996 Act, Congress amended the Cable Act's franchise fee provision, 47 U.S.C. 542(b), to exclude of revenues from non-cable services in the cable franchise fee base, the drafters said:

> 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 non-discriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees.[63]

In 2007, when the Commission ruled that a cable operator is not required to pay cable franchise fees on revenues from non-cable services, it specified that, "[t]his finding, of course,

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[62] 47 U.S.C. § 253(c).

[63] Conference Report at 180 (emphasis added).

*does not apply to non-cable franchise fee requirements*, such as any lawful fees related to the provision of telecommunications services."[64]

If the language of the statute itself left any doubt, the Conference Report and the Commission's own *Second Video Franchising Order* remove it. The cable industry's argument that federal law provides cable operators, and only cable operators, with a unique right to free use of the public ROW for the provision of non-cable services, is simply wrong.

#### c) The Communications Act provisions cited in cable industry comments do not support any cable operator right under federal law to free use of the ROW to provide non-cable services.

Charter, Comcast, and NCTA rely on 47 U.S.C. § 541(a)(2),[65] which provides:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . . .

But, this language speaks only to the facility that a cable franchise authorizes to be constructed in the ROW. It is silent as to the type of services to be provided over that facility. While it is true, as cable commenters note, that the drafters of the original Cable Act acknowledged that both cable and non-cable services are capable of being provided over the closed transmission pathways component of a cable system, and that a cable system does not cease to be a cable system by virtue of also providing non-cable services,[66] this does not then mean that local governments cannot charge for the use of the ROW to provide those non-cable

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[64] *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*, MB Docket No. 05-311, Second Report and Order at 6 n.31, 22 FCC Rcd. 19633, (Nov. 6, 2007) ("*Second Video Franchising Order*") (emphasis added).

[65] Charter Comments at 27; Comcast Comments at 12; NCTA Comments at 24.

[66] *See* H.R. Rep. No. 98-934, at 44 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 4655, 1984 WL 37495; *In re Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, ¶ 24, 6 FCC Rcd. 7099 (Nov. 29, 1991).

services. Indeed, as discussed above, Congress and the Commission have expressly acknowledged that local governments can change such fees in the Conference Report and in the *Second Video Franchising Order*.

In fact, from the time of the 1984 Cable Act until the 1996 Act (well after the *Heritage* case was decided in 1991), Section 622 permitted local governments to impose the Cable Act's 5% cable franchise fee on cable operators' provision of non-cable services. In 1996, Congress amended Section 622(b) to limit the revenue base for Cable Act franchise fee to "gross revenues . . . from the operation of the cable system *to provide cable services.*" 47 U.S.C. § 542(b) (emphasis added). But as noted above, tied to this amendment was Congress' express intention that local governments could charge cable operators compensation for use of the ROW to provide non-cable services under state or local laws. *See* Conference Report, *supra*, at 180. That is because those fees do not apply to cable operators solely because of their status as such, but are instead competitively neutral.

Similarly, the cable industry's assertion that cable operators "already provide reasonable compensation (as defined by Congress via the Cable Act's franchise fee provisions) for use of the right of way"[67] is incorrect. The cable franchise fee is limited to only those fees imposed on cable operators "solely because of their status as such,"[68] and thus the cable franchise fee provides no compensation for the use of the ROW to provide non-cable services. At least where both the cable and non-cable franchise fees are based on a percentage of gross revenues, these

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[67] Charter Comments at 31.

[68] 47 U.S.C. § 542(g)(1).

distinct fees are neither "functional[ly] equivalent"[69] nor "duplicative,"[70] and there is no legal basis to consider cable franchise fees in any evaluation of other types of fees.

Finally, several cable industry commenters point to footnote 1285 of the FCC's *Open Internet Order*[71] as support for their position.[72] But that footnote merely states the Commission's belief that its reclassification of broadband services to be a telecommunications service under the Communications Act would not be an appropriate basis for local governments' imposition of fees on those services. But a locality's imposition of fees on use of the ROW to provide non-cable services is not based on whether or not a non-cable service is, or is not, a telecommunications service within the meaning of the Communications Act. It is instead based on a provider's use of the ROW to provide that service, regardless of its classification for federal Communications Act purposes.

Ultimately, the answer to the questions posed in the *Wireline NOI*—whether it is excessive to charge a cable operator for its use of the public ROW to provide non-cable services and whether the Commission may take into account cable franchise fees when determining whether other types of fees are excessive—must be answered in the negative. Cable franchise fees and fees for the use of the ROW to provide non-cable services are legally and functionally distinct. Federal law, specifically the Cable Act, does not provide cable operators with a preemptive federal right to occupy the local public ROW for any and every purpose the cable operator wants. Cable operators, like any other provider of non-cable services, remain subject to generally applicable fees and requirements for the use of the ROW to provide non-cable services.

[69] Comcast Comments at 13.

[70] Charter Comments at 31.

[71] NCTA Comments at 24-25 (citing *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)).

[72] *See* Charter Comments at 20-21; Comcast Comments at 11-12; NCTA Comments at 24.

The Commission should reject arguments that cable operators, and only cable operators, enjoy a unique federal right to a free ride on the ROW to provide non-cable services.

### *C. The Commission Has No Legal Authority to Impose Time Limits on ROW Negotiations and Approval Processes under Section 253.*

For the same reasons that Section 253(d) deprives the Commission of authority to regulate fees charged for use of the public ROW, it also deprives the Commission of authority to adopt rules to eliminate allegedly excessive delays in negotiations for ROW agreements. The Commission is not permitted to regulate generally under Section 253(d), and even more specifically, Section 253(c) creates a carve-out for ROW matters. This carve-out includes not only local governments' ability to obtain compensation for use of the ROW, but also their authority "to manage the public rights-of-way."[73]

Some industry commenters, as well as the *Wireline NOI* itself, point to the various shot clocks in the wireless and cable franchise contexts.[74] But these examples all fall under very different legal frameworks than Section 253. In the case of time limits that apply applicants for cable franchises, for example, both the Commission and the Sixth Circuit relied on the term "unreasonably refuse" in Section 621(a)(1),[75] and the ambiguity of that term, in concluding that the Commission could adopt time limits pursuant to that that statute.[76] Similarly, Section 332(c)(7)(B)(ii) specifically provides that "[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless

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[73] 47 U.S.C. § 253(c).

[74] *Wireline NOI* ¶ 103; *see e.g.*, Comments of Conterra Broadband Services, Southern Light, LLC and Uniti Group, Inc. at 17-20, *Wireline NOI*; FBA Comments at 21-24, *Wireline NOI*.

[75] 47 U.S.C. § 541(a)(1).

[76] *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as amended by the Cable Television Consumer Prot. & Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking at 34, 22 FCC Rcd. 5101 (March 5, 2007); Alliance for Cmty. Media v. FCC, 529 F.3d 763, 777-78 (6th Cir. 2008).

service facilities *within a reasonable period of time* . . . taking into account the nature and scope of such request."[77] Section 253, in contrast, provides a very different framework—one that explicitly preserves local governments' authority over their ROW and provides no statutory basis for limiting the time that local governments have to negotiate, and manage, their ROW.

The *Wireline NOI's* inquiry into whether the Commission should "adopt a mandatory [right-of-way] negotiation and/or approval time period"[78] also assumes that local governments, and not providers, are the cause of most, if not all, delays. The record, however, indicates that providers themselves are often the cause of delays.[79] Again, not only is there no legal basis for the Commission's intrusion into ROW negotiations, but there is also no factual justification.

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[77] 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

[78] *Wireline NOI* ¶ 103.

[79] Cities Comments, Ex. A, at 9-10, *Wireline NOI* (explaining that "[i]n the experience of the Cities, the application process is often positive and cooperative, and when there is delay, it is most likely to be on the applicant's end, not the Cities'"), Ex. B at 7-11 (identifying various misrepresentations in applications that result in delays); NATOA Comments, attaching Comments of the National League of Cities, the National Association of Telecommunications Officers and Advisors, the National Association of Towns and Townships, the National Association of Counties, the National Association of Regional Councils, and the Government Finance Officers Association, WT Docket No. 16-421 (March 8, 2017) at 12-13, *Wireline NOI* ("One of the greatest causes of delay in the process of local government review and approval of a wireless facility siting request is incomplete application materials."); Letter of the City of Mukilteo at 1-2, *Wireline NOI*.

## IV. CONCLUSION

The Commission should not adopt any new rules in either the *Wireless NPRM/NOI* or *Wireline NOI* dockets, nor should it issue any declaratory ruling purporting to construe Section 332(c)(7) or Section 253.

Respectfully submitted,

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