Minority Report

Broadband Deployment Advisory Committee
of the
Federal Communications Commission
(GN Docket No. 17-83)

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INTRODUCTION

There is much to be recommended in the reports developed by the Broadband Deployment Advisory Committee ("BDAC") Work groups for presentation to the BDAC in an effort to advise the Federal Communications Commission ("FCC" or "Commission"). But the reports are grounded in a flawed theory that the FCC possesses certain legal authority that we believe, and a review of case law will affirm, that it does not possess. Moreover, because state and local interests were far outnumbered in both the BDAC itself and on the various working groups, the proposed "consensus reports" more often than not reflect only industry's interests while turning a blind eye to the position of municipalities.[1] In some of the reports, capturing this legal conflict in footnotes was not workable as the legal fiction of the Majority was the basis for almost every recommendation buttressed with a threat of preemption should state or local government not toe the line or act in the timelines outlined by the Majority.[2]

I. BDAC STRUCTURE, NOT BDAC MEMBERSHIP EFFORTS, SERVED AS BARRIER TO MEET BDAC'S MISSION AS ASSIGNED.

Local leaders across the country recognize the inherent value of broadband access. It is an essential economic input of the 21st century. High-speed broadband is critical for economic growth, education, healthcare, and the general development and growth of healthy communities, large and small. Local governments, therefore, cheered the Federal Communications Commission's announcement that it would convene a multi-stakeholder body charged with the mission ".. to make recommendations to the Commission on how to accelerate the deployment of high-speed Internet access, or "broadband," by reducing and/or removing regulatory barriers to infrastructure investment."[3]

Over the past year, however, the BDAC has, regrettably, failed to live up to its mission. What was originally communicated as a broad mandate to find collaborative solutions[4] has been handicapped by a fundamentally flawed structure[5] which failed to balance the interests of all

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[1] It should be noted that the Model Code for States working group had no local government representatives, and as this Minority Report is being drafted, local government is not aware of what is in the work group's report. We, therefore respectfully request the right to supplement this report to address the State Model Code work group. In contrast, the Model Code for Municipalities working group did operate primarily on a consensus standard as that term is understood.

[2] This Minority Report is not meant to replace the hundreds of pages of work product created throughout the BDAC's proceedings, but rather is intended to raise the most important issues to local government. It is also not meant to be comprehensive *(i.e.*, we believe that the legal authority issues raised apply to all recommendations of the BDAC, but we cannot promise our report addresses each of these flaws.)

[3] FCC Announces The Establishment Of The Broadband Deployment Advisory Committee And Solicits Nominations For Membership, DA 17-110, (rel. Jan. 31, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-17-110A1.pdf.

[4] *Id.*

[5] The composition of the BDAC has been debated from the day the membership was announced. A representative account of the debate may be found in Blake Dodge, *FCC Packs Broadband Advisory Group With Big Telecom Firms, Trade Groups*, Center for Public Integrity, August 11, 2017 available at https://www.publicintegrity.org/2017/08/11/21057/fcc-packs-broadband-advisory-group-big-telecom-firms-trade-groups. *See also,* Hans Riemer, *Letter to the Editor,* County News, October 30, 2017 available at

stakeholders and provided no incentive for consensus-building[6], and has resulted in recommendations in favor of industry favored solutions that are not mindful of the statutory and Constitutional limitations placed on the Commission. As a result, despite many hours of hard, earnest work by representatives from across the nation and the ideological spectrum, the work product developed by the BDAC is, with some exceptions, decidedly not representative of the views of all stakeholders nor grounded in legally viable solutions. Accordingly, those affixing their name to this report felt compelled to develop this report to ensure that the Commission hears all perspectives, not just those brought to the forefront by virtue of the BDAC's structural flaws.

It is essential to state clearly that the fault for this outcome does not rest with any one member of this body. While we have all had disagreements over the course of the BDAC's work, interactions have been collegial, the work has been professionally conducted, and we appreciate the consistent effort and engagement of all BDAC and working group members as we wrestled with very difficult issues. Disagreement is inherent in policymaking, and it must be made abundantly clear that this document does not serve as a counterpoint to the BDAC's work product, but serves to highlight the shortcoming of BDAC's fundamentally flawed understanding of the law and limitation of barrier review to the actions of governments other than the FCC, with no constructive criticism of industry generated barriers. This Minority Report is not a rebuke of any BDAC member or constituency.

II. THE COMMISSION LACKS THE LEGAL AUTHORITY TO MANDATE ACCESS TO PUBLIC ASSETS FOR WIRELESS PROVIDERS

The BDAC's proposed actions exceed the Commission's authority. Wireless services are governed exclusively by Section 332(c)(7) of the Communications Act, which grants to the courts alone the authority for determining whether a state or local government has violated its terms.

Section 332's plain language makes clear it is the only provision which applies to placement of personal wireless facilities, as does the statute's legislative history. Section 253 plays no role in wireless facilities. Section 332(c)(7)(A) states plainly, except for four limitations at (7)(B) which includes:

> [N]othing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof [over decisions

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http://www.naco.org/articles/letter-editor-oct-30-2017, "Of the 30 members of the BDAC, only two come from local governments. The rest largely come from industry. While the local government representatives are doing an admirable job, how can such a group possibly produce balanced recommendations on topics like 'Model Code for Municipalities' and 'Removing State and Local Regulatory Barriers?'"

[6] Some broadband companies concede that a lack of local government representation on the committee may present a problem. "We have a lot of groups who are concerned that they're not at the table, David Don, vice president of regulatory policy at Comcast, said at the BDAC's July meeting. And if they don't feel included, not only are they outside throwing [darts] at this process, but then in the end it's those groups that we want to adopt these model codes." Blake Dodge, *FCC Packs Broadband Advisory Group With Big Telecom Firms, Trade Groups*, Center for Public Integrity, August 11, 2017 available at https://www.publicintegrity.org/2017/08/11/21057/fcc-packs-broadband-advisory-group-big-telecom-firms-trade-groups.

> regarding] the placement, construction, and modification of personal wireless service facilities.[7]

And if there was any additional doubt as to the inconsistency between Section 332(c)(7) and Section 253, the Conference Report explained:

> It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all other disputes arising under this section.[8]

Consistent with these plain directives, the Commission has never used its authority under Section 253(d) to preempt any state or local action (or inaction) involving wireless facilities siting.[9]

Section 332(c)(7) directs disputes exclusively to the federal courts and only grants authority to the Commission for considering disputes with regard to Radio Frequency ("RF") emissions.[10] Not only did Congress entrust disputes between localities and carriers with regard to the meaning of Section 332(c)(7), but the courts are extremely well-suited to applying a particular set of facts to a legal standard.[11] Commission action here is not only outside of its authority, it is unnecessary.

III. THE COMMISSION'S LEGAL AUTHORITY UNDER SECTION 253 IS LIMITED.

The BDAC recommendations propose actions which are not permitted under Section 253. Specifically, Section 253 applies only to telecommunications services when broadband is no longer classified as a telecommunications service. Further, the Commission lacks authority for broad preemption, instead it is limited to case-by-case decision-making by Section 253 of the Communications Act.

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[77] The declaration is reinforced by Section 601(c) (Pub. Law 104-104, 110 Stat 142 (Feb. 8, 1996)) of the Telecommunications Act of 1996, stating that "the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided . . . ."

[8] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996), 1996 U.S.C.C.A.N. 124, 221-22.

[9] *See Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd. 13360, (WT Docket No. 16-421) ("Mobilitie Public Notice") at n.33.

[10] 47 USC §332 (c)(7)(b)(v).

[11] The Commission acknowledges the courts have developed consensus on the relevant legal standard. *Mobilitie Public Notice* at 13369 ("a carrier may establish that a land-use authority's denial of its siting application 'prohibits or has the effect of prohibiting' the provision of service by showing that it has a significant gap in service coverage in the area and a lack of feasible alternative locations for siting facilities.") While the Commission and industry contend that the courts do not agree with regard to the showings needed to satisfy this standard, *id.*, the application of a legal standard to facts is the precise scenario that are well-suited to district court proceedings. See *360 Degrees Communs. Co. v. Board of Supervisors of Albermarle County,* 211 F.3d 79, 86-87 (4th Cir. 2000) ("this statutory question requires no additional formulation and can best be answered through the case-by-case analysis that the Act anticipates.") (citing *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach,* 155 F.3d 423, 428-429 (4th Cir. 1998).)

A. Because Broadband Has Been Reclassified As An Information Service, Section 253 Does Not Apply.

Section 253, by its terms, protects the provision of telecommunications service. 47 USC §253(a). The Commission [voted in December] to reclassify broadband Internet access service as an information service, and therefore broadband is no longer subject to section 253.[12] The Commission cannot regulate information services because of their impact on broadband services – just such an effort was overturned when the Commission attempted to adopt net neutrality rules pursuant to its ancillary jurisdiction.[13]

B. Section 253 Lays Out Limited and Precise Preemption Authority

Regardless of the Commission's reclassification of broadband Internet access service, Congress cabined the power of the Commission to preempt "barriers to entry" precisely. It did not authorize a wide-ranging Commission effort to block local moratoria, and to regulate the management of and charges for use of the public right-of-way, negotiations and procedures. Congress preempted local requirements that cause a specific effect: the effect of "prohibiting" the ability to provide telecommunications services. In addition, Congress adopted a safe harbor to preserve certain local right-of-way requirements even if they were to run afoul of this requirement, and developed a specific review process for addressing actions that prohibit or effectively prohibit the provision of services.

Section 253's only preemptive language appears in subsection (a):

> **(a) In general**
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> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

If a local requirement were to violate subsection (a), it would still be lawful if it qualified under the safe harbors provided by subsections (b) or (c), as the Commission has acknowledged in some of its recent proceedings addressing these matters:[14]

> **(b) State regulatory authority**
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> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of

[12] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, rel. Jan. 4, 2018.

[13] *Comcast Corp. v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010) (quoting *National Assoc. of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976)) ("[T]he allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority.").

[14] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking Notice of Intent, 82 Fed. Reg. 22453 (WC 17-84), at ¶ 100 (Rel. May 16, 2017).

> this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> **(c) State and local government authority**
>
> 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.

Subsections (b) and (c) have been clearly recognized as exceptions to (a) by the courts.[15] Subsection (a) "is the only portion of section 253 that broadly limits the ability of states to regulate. All of the remaining subsections . . . carve out defined areas in which states may regulate."[16] Adopting rules that govern the matters explicitly reserved to states and localities would obviously violate 253(b) and (c). Even as to matters it may address, the Commission may only preempt: it may not regulate.

C. The Commission's Authority to Preempt Does Not Permit Preemption by Rule.

The Commission is further bound to Section 253(d)'s process. Section 253(d) requires the Commission to offer "notice and an opportunity for public comment" before it can preempt a particular state or local government statute only "to the extent necessary to correct such violation or inconsistency."[17] Broad ranging rules of general applicability would not meet this standard. Section 253(d) envisions a case-by-case, tailored determination. The Commission has acknowledged "… it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers' ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement … must supply us with *credible and probative evidence* that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[18]

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[15] *BellSouth Telecomns., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001) (quoting *In re Missouri Municipal League*, 16 FCC Rcd. 1157, 2001 (2001) ("it is clear that subsections (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a)."); *In re Minnesota*, 14 FCC Rcd. 21,697, 21,730 (1999); *In re American Communications Servs., Inc.*, 14 FCC Rcd. 21,579, 21,587-88 (1999); *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,203 (1997).

[16] Brief for the United States as *Amicus Curiae*, *Level 3 Comms. LLC v. City of St. Louis*, (Nos. 08-626, 08-759) (May 2009) (quoting *In the Public Utilities Commission of Texas, "Texas PUC Order,"* 13 FCC Rcd. 3460, 3481 ¶ 44.).

[17] 47 U.S.C. § 253(d).

[18] *In the Matter of TCI Cablevision of Oakland County, Inc.*, FCC 97-331, 12 FCC Rcd. 21,396, 21440 (Sept. 19, 1997) at ¶101 (emphasis added).

IV. COMMISSION RATE REGULATION OF THE PUBLIC RIGHT-OF-WAY OR PUBLIC PROPERTY IS PROHIBITED.

The BDAC recommendations are premised on a legal falsehood: the Commission is prohibited by the Constitution and the law from regulating the value at which state and local government grants access to the property it controls. Charging fair market value for this access is per se reasonable, and often mandated by state and federal laws. And the Commission may certainly not limit the rate charged to cost. As a general matter, the Commission regulates communications; it does not have authority to regulate rates for access to public or private property or facilities that may be useful for communications, except where specifically granted.

A. Commission Rate Regulation of Public Property Violates the Constitution.

The BDAC recommendations fail to respect the limitations on federal government overreach with regard to state and local authority. The Commission was created fundamentally for the purpose of "regulating interstate and foreign commerce in communication by wire and radio."[19] As a general matter, the Commission regulates communications; it does not have authority to regulate rates for access to public or private property or facilities that may be useful for communications, except where specifically granted.

1. *States and Localities Receive Protection of the Fifth Amendment.*

If the federal government were to require a local government to place a wire on its property without compensation, it would constitute an unlawful taking under the Fifth Amendment.[20] The Supreme Court has clearly recognized a local government's "right to exact compensation" for such property uses: "permission to a telegraph company to occupy the streets…. for which the giver has a right to exact compensation, which is in the nature of rental."[21] It matters not that the intrusion may be relatively slight:

> [P]ermanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.[22]

Moreover, courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate. The former type of

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[19] 47 U.S.C. § 151.

[20] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 433 (1982) (state law requiring property owner to permit access to cable company to install lines on private property constituted a taking).

[21] *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 99 (1893), *op. on rehrg.*, 149 U.S. 465 (1893); *see also Cities of Dallas and Laredo v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) ("Franchise fees are . . . essentially a form of rent: the price paid to rent use of the public right-of-ways.").

[22] *Loretto*, 458 U.S. at 430.

action is not subject to preemption while the latter is."[23] Because the Communications Act is subject to this maxim, it "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[24] Thus, when local governments enter into contracts for use of property they own, Section 253 does not apply.

The Supreme Court has construed the Fifth Amendment's Takings Clause to protect the property of State and local governments from uncompensated taking under federal law,[25] and held that it "requires that the United States pay 'just compensation' normally measured by fair market value."[26] Reading the Act to compel the state of local government to provide access and to allow the Commission to limit compensation would violate the Fifth Amendment.[27]

2. *States and Localities Receive Special Protection under the Tenth Amendment and the Guarantee Clause.*

The preemption of local right-of-way practices and compensation would also offend the Tenth Amendment and the Guarantee Clause of the Constitution. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[28] As part of the system of "dual sovereignty," the federal government "may not compel the States to enact or administer a federal regulatory program."[29] Even in areas where the federal government has authority to act, the Constitution only authorizes the federal government to regulate individuals, not States.[30] If the Commission were to assert control over right-of-way practices or compel local governments to provide access to public rights-of-way on federally-prescribed terms, the Commission would unconstitutionally commandeer the local administration of public property in service of a federal regulatory program. The suggestion that the locality may abandon management of the right of way altogether means, effectively, that the locality *must* give up control of its property to the federal government – an equally offensive and untenable result.[31]

Preemption of local discretion over property rates also raises concerns under the Guarantee Clause.[32] The Guarantee Clause precludes the federal government from interfering with a state's

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

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

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

[26] *Id.* at 25.

[27] *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

[28] U.S. Const. amend. X.

[29] *Printz v. United States*, 521 U.S. 898, 918-19, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

[30] *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

[31] *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 557-58 (2012).

[32] U.S. Const., art. IV, § 4.

distribution of power among the various levels of government.[33] Local governments have a fiduciary duty, as landlord and trustee of public rights-of-way, to protect the public welfare and safety of their residents as well as the welfare of others who might occupy the public rights-of-way. Where a state has decided to allow local governments to obtain certain fees, the Commission may not undermine the state's decision by leaving the local government without a means to recover that compensation. While the federal government may use its Commerce Clause authority to limit certain actions of state and local officers, it may not—consistent with the unqualified *guarantee* to the people of the states of "a Republican Form of Government"—curtail the fundamental powers or property rights of local governments as local governments.

B. Section 253 Prohibits, and Does Not Authorize, Rate Regulation of Public Property.

Under Section 253(c) the Commission has no given authority to set prices or formulae for regulatory fees, or for the use of proprietary property. Section 253(d) prevents the Commission from addressing disputes that arise under Section 253(c), which preserves state and local governments' authority to regulate the rights-of-way and to receive "fair and reasonable compensation" for the use of public rights of way. That omission is important, and the power cannot be implied. The Commission lacks authority to determine what is fair and reasonable compensation under Section 253(c).

C. Fair Market Value is *Per Se* Reasonable and Often Mandated.

By definition, charging fair market value for use of property is "fair and reasonable" compensation under the Fifth Amendment. The Supreme Court has construed the Fifth Amendment's Takings Clause to protect the property of state and local governments from uncompensated taking under federal law, and held that it "requires that the United States pay 'just compensation' normally measured by fair market value."[34] Several state constitutions require that localities obtain fair market value in return for providing access to public property.[35] In some cases federal regulations also required for the just treatment of taxpayers. For example, as the Virginia Department of Transportation ("VDOT") explains it has "spent many millions of dollars acquiring ROW throughout the Commonwealth" and because the majority of these acquisitions were made using federal funds, VDOT must comply with federal rules, including a USDOT regulation that requires that all property interests obtained with funding under Title 23,

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[33] *City of Abilene v. FCC*, 164 F.3d 49, 52 (DC Cir. 1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty").

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

[35] For example, Michigan local communities have a Constitutional right and obligation to their taxpayer residents to seek and obtain franchise support for the substantial cost of public right-of-way development, preservation and maintenance from those who wish to utilize this precious and limited resource for the purpose of doing business with its residents. Mich. Const. art. VII §. 21 prohibits localities from using tax revenues for non-public purposes (such as subsidizing Mobilitie) and even public utilities must obtain consents and accede to appropriate conditions as a condition of public right-of-way use. (Mich. Const. art. VII §29) *See* also Tex. Const. art. III, §52; *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Comments of Arlington, Texas, WT Docket No. 16-421 (filed Mar. 7, 2017); *Comments Sought on Streamlining Mobilitie Petition*, Comments of Texas Municipal League, WT Docket No. 16-421 (filed Mar. 8, 2017) (Texas Constitution prohibits a municipality from granting any public funds or thing of value to an individual, association or corporation.).

the use or disposal of such interests must be for "current fair market value."[36] Further, many state constitutions include "gift clauses" which prohibit a locality from subsidizing a private entity as a way to protect taxpayer funds.[37] The federal government, when acting through agencies tasked with managing public assets, has also commanded market prices for communications uses of public property.[38] The Commission has no authority to require state or federal taxpayers to subsidize the business plans of private companies.

Congress and the Commission's recent embrace of using spectrum auctions is an excellent endorsement for the appropriateness of using market values for unique government-managed resources. As the current Commission Chairman has explained, the principles of market economics dictate that essential inputs should be allocated according to market principles.[39] The Commission has explained that, since the implementation of 1993 rules to authorize them, "spectrum auctions more effectively assign licenses than either comparative hearings or lotteries. The auction approach is intended to award the licenses to those who will use them most effectively."[40] Not charging for use of a local government's rights-of-way would treat it as if it were a free good with no economic value.

D. The Commission Cannot Limit Rates to Cost.

The Commission is given no authority to decide what rate a local government may charge under Section 253, and it certainly cannot limit rates to incremental costs.[41] Section 253 does not grant rate-setting authority to the Commission. Section 253 does not contain provisions comparable to Section 205 or Section 224 that would permit the Commission to prescribe particular rates.[42] Ironically, before Section 224 was adopted, the Commission itself recognized:

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[36] *Mobilitie Petition*, VA DOT Comments, WT Docket No. 16-421, (filed Mar. 8, 2017) at pp. 3-4 (citing 23 C.F.R. §710.403(e)); *Mobilitie Petition*, American Association of State Highway and Transportation Officials Comments, WT Docket No. 16-421, (filed Mar. 21, 2017) at p. 2.

[37] Frederick Ellrod III & Nicholas P. Miller, 26 Seattle Univ. L.Rev. 475, 490 (2003); Richard Briffault, The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 Rutgers L. J. 907 (2003) ("State constitutions limit the purposes for which states and localities can spend or lend their funds…. These provisions may be said to constitutionalize a norm of taxpayer protection.")

[38] Ellrod & Miller at 495-96 (citing National Oceanographic and Atmospheric Administration obligation to charge fair market value for use of the federal lands it controls.)

[39] *The Importance of Economic Analysis at the FCC*, Remarks of FCC Chairman Ajit Pai at the Hudson Institute, April 5, 2017, available at https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy (last accessed Jan. 22, 2018).

[40] Federal Communications Commission, *About Auctions*, available at http://wireless.fcc.gov/auctions/default.htm?job=about_auctions (last accessed Jan. 22, 2018).

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

[42] 47 U.S.C. § 205.

> The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites.[43]

This Commission reasoning remains as valid today as it did nearly 40 years ago and provides further support for maintaining a clear distinction between state and local governments' regulatory roles versus their proprietary roles as "owners" of public property and resources.

Indeed, one of Congress's principal purposes in adopting Section 253(c) was to ensure that Section 253 did not constitute an unfunded mandate.[44] As Representative Joe Barton (Texas) put it: "The Federal Government has *absolutely no business* telling State and local government how to price access to their local right-of-way. We should vote for localism and vote against *any kind* of federal price controls."[45] As described above, Section 253 protects the state and local right to "fair and reasonable compensation." It has long been recognized that a wide range of prices are "reasonable" and that there are a variety of ways in which reasonable prices can be set.[46] A local government can set a reasonable rate based on its costs (should it wish to do so) or by using any number of different methods. Moreover, it would defy Congress's intent if Section 253(c)'s reference to "fair and reasonable compensation" only reaches to costs of managing the public rights-of-way incurred as a direct result of a carrier deploying facilities.

V. PROPOSALS TO COMPEL LOCAL GOVERNMENTS TO SURRENDER USE OF THEIR PROPERTY FOR BELOW-MARKET RATES ARE FUNDAMENTALLY INCONSISTENT WITH THE FUNCTIONING OF A FREE MARKET AND WILL ENCOURAGE INEFFICIENT, INEQUITABLE DEPLOYMENT.

Setting aside the myriad of legal issues with BDAC and Commission proposals to compel local governments to surrender use of their property for below-market rates, those same proposals are

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[43] *See* Sen. Rep. No. 95-580, 95th Cong., 1st Sess. (1977) at p. 14 (*emphasis added*).

[44] 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak) ("It is ironic that one of the first bills we passed in this House was to end unfunded Federal mandates. But this bill, with the management's amendment, mandates that local units of government make public property available to whoever wants it without a fair and reasonable compensation. The manager's amendment is a $100 billion mandate, an unfunded Federal mandate. Our amendment is supported by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures and the National Governors Association. The Senator from Texas on the Senate side has placed our language exactly as written in the Senate bill. Say no to unfunded mandates, say no to the idea that Washington knows best. Support the Stupak-Barton amendment.").

[45] *Id.*

[46] *See FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir.1987), quoting, *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C.Cir.1950), cert. denied, 340 U.S. 952 (1951). *See also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("it is the result reached not the method employed which is controlling").

fundamentally inconsistent with the functioning of a free market, and will encourage inefficient deployment and will not meaningfully address the need for rural deployment to close the digital divide. As discussed in greater detail in expert declarations submitted to the Commission in the Mobilitie and Wireless Infrastructure proceedings, undermining the free market in this way will lead to inefficient allocation of scarce resources and distort various aspects of the infrastructure marketplace.

Public property, both state and local, represents a scarce economic resource. There is, after all, only so much space, and numerous interests compete for its use. In the same way that the Commission has long deemed market-based auctions to be the most appropriate means to efficiently and economically distribute spectrum licenses, so too is market-based pricing the best system to efficiently distribute use of the public rights-of-way. Fees for use of rights-of-way, determined by competitive market rates, allow market forces to determine the most efficient allocation of that scarce resource, while ensuring the owner is compensated for the direct, opportunity, and negative externality costs associated with a particular use of that property.
Those same market forces discipline above-market pricing, as well, limiting any property owner's ability to charge prices which are above that set by the market. An attempt to extract excess value above the true market rate would depress demand, hampering competition and making other property more appealing to potential users. Furthermore, public lands compete with private property in wireless siting markets; artificially lowering public property rates would not only increase supply, but also harm private property owners by diminishing the competitiveness of their offerings in the market. Market forces, in other words, work both ways. Setting prices at market rates allows market forces to correct abusive pricing behaviors, while ensuring that private property owners and local government interests are not harmed by market distortion induced by mandated subsidies. While beneficial for one industry (broadband providers) actions of this nature substantially disrupt the function of the market, and are inconsistent with sound economic policy.

It is important, too, to note that flexibility in pricing and other terms is essential to allowing local governments, as property owners, to compete in the marketplace. Communities compete with one another for residents, businesses, and economic activity, all of which thrive with the availability of modern broadband. Communities nationwide value the flexibility they enjoy in pricing their assets. The City of San Jose, for example, derives great value from its ability to differentiate pricing of its public property across its community. By lowering property costs in areas where the need for broadband is greater, the City can proactively work to promote broadband deployment in its community by working collaboratively to provide incentives for service providers. Tying that City's hands deprives it of the ability to incentivize buildout which will close the digital divide.

Even more broadly, efforts to close the digital divide in rural America are hampered, not aided, by streamlining efforts and fee caps targeting local governments. First and foremost, the small-cell and 5G technologies touted as justification for this streamlining are not well-suited to rural buildout. They are best suited to add capacity to mobile networks where congestion is rampant and demand is high, or where macro sites are impossible to deploy. These conditions do not apply in rural America; bandwidth demand is comparatively low due to reduced population density, and macro sites are easy to deploy as land is ample and land use restrictions are

generally greatly reduced. Furthermore, local processes have little to no impact on rural broadband deployment. "The fundamental dynamic of broadband investment is that network deployments and upgrades are capital-intensive – and capital flows to areas where projected returns are greatest because demand is most concentrated and per customer costs lowest."[47] Any national conformity in deployment processes and pricing would, at most, benefit urban and rural buildout costs equally; such a change would do just as much to incentivize greater urban and suburban deployment as it would rural. With no net change – i.e. no greater improvement to rural than urban/suburban – there would be no added incentive to shift capital from already-developed areas toward closing the digital divide. In any event, neither the BDAC nor the Commission's proposals, when justified on the basis of improving rural buildout, contain any obligation on providers to actually leverage their cost savings to improve rural buildout. If such a result is a certainty, there should be some obligation to follow through.

VI. GIVEN THE BILLIONS IN POTENTIAL HARMS, AND THE LIMITED POTENTIAL BENEFIT, THERE IS EVERY REASON FOR BDAC TO ENCOURAGE THE COMMISSION TO EXERCISE RESTRAINT.

As described in detail throughout this report, the BDAC's proposals rest on fundamentally flawed presumptions about legal authority and market structures. Furthermore, the framework under which the majority's recommendations were developed gave little opportunity for true agreement to develop, leaving little chance for a consensus result to be achieved. Furthermore, it is unclear, at best, the extent to which the BDAC's proposals will truly speed broadband deployment to *all* Americans, or whether the proposals adopted by this body truly represent common ground, mutually beneficial solutions. In light of that substantial uncertainty, and the potential for immense disruption posed by these processes, the Commission must exercise restraint in this area. One area, however, where the Commission can and should be doing more, is in the area of collaborative engagement with state and local policymakers.

Time and again, the best results in broadband deployment have been achieved not when communities' views are shunted aside and industry given free reign, but rather when state and local leaders work cooperatively with broadband providers to achieve all parties' shared goal of promoting broadband deployment and adoption throughout the nation. In San Antonio, Texas, for example, Verizon and the City worked together to develop a master license agreement that addressed wireless deployment on a city-wide basis, providing a stable and efficient path forward. Other communities have found great success by treating broadband deployment as a part of its development and planning process. Master planning approaches and collaborative problem-solving lead to solutions which ensure adequate resources are available for all utility and communications providers, while the concerns of residents and leaders are respected and incorporated. Cities, counties, and other local communities across the nation are actively engaging with the broadband industry at the local level in search of solutions to encourage broadband deployment in their neighborhoods.[48]

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[47] *Mobilitie Petition*, Report and Declaration of Andrew Afflerbach for the Smart Communities Siting Coalition, WT-16-421, (filed Jul. 16, 2017) at p. 18.

[48] See e.g. the efforts of the City of Boston to promote small cell deployments are serving as a model for many other communities, available at https://drive.google.com/a/boston.gov/file/d/0B4xeMqUdJjX2eWhXa UtTYVhVUk0/view?usp=gmail. See also an opinion piece by Boston CIO Jascha Franklin-Hodge on the role 5G

These solutions must not only be creative, but sustainable. Broadband technology evolves far faster than public policy, and both service providers and local communities need to be equipped with robust tools to enable them to tackle new challenges as they arise. Creative solutions including broadband-readiness checklists such as those proposed by the BDAC are one of many tools which could be used. Cities like Boston now incorporate voluntary broadband-readiness certifications into their building permitting processes[49], and cities and counties nationwide are constantly updating their local laws to facilitate the deployment of broadband sought by their residents.

While there is no indication, in any event, that the status quo is not working, in fact the data indicates deployment is happening at a faster pace than ever before, industry, government and other consumers are faced with the challenge of siting new infrastructure on areas and in numbers not seen before. But in acknowledging this challenge, we must also acknowledge that the wireless industry, in particular, is quick to simultaneously preach doom and gloom where deployment is concerned, laying blame at the feet of local governments, even as they tout unprecedented success elsewhere and the data proves that .[50] All four major nationwide wireless carriers are engaged in aggressive deployment of innovative technologies at a breakneck pace, and take every opportunity to celebrate their deployment and innovation. To be sure, celebrating the important progress these companies are making in deploying wireless services is an essential part of their marketing and business strategies, but their statements and releases announcing deployment plans and success stories stand in stark contrast to the litany of complaints and claims of prohibitions upon deployment submitted here. Actual or *de facto* prohibitions – that narrow category of policies the Commission has authority to preempt – would surely prevent providers from achieving just the kinds of deployment and investment successes they so frequently celebrate.[51]

The designs and standards for true 5G have not been set, carriers are in the process of conducting technical trials, and test roll-outs, without any real indication that ultimate deployment will be delayed. In its 2016 Annual Report, Lowell McAdam, President and CEO of Verizon Communications, Inc., wrote "In 2016, we conducted successful technical trials of 5G infrastructure and will follow up in 2017 with pre-commercial pilots in 11 markets around the

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could play in overcoming traditional broadband monopolies, available at http://statescoop.com/will-5g-allow-cities-to-kill-broadband-monopolies.

[49] *Id.*

[50] *See, e.g. Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment proceedings,* Comments of AT&T, WT Docket No. 17-79 at 2 (filed Jun. 15, 2017); Comments of T-Mobile, WC Docket No. 17-84, WT Docket No. 17-79, at 3 (filed Jun. 15, 2017) ; Comments of Sprint Corporation, WC Docket No. 17-84, WT Docket No. 17-79, at ii (filed Jun. 15, 2017; Comments of Verizon, WC Docket No. 17-84, WT Docket No. 17-79, at 1 (filed Jun. 15, 2017).

[51] For purposes of this discussion, we are not distinguishing between a claim of effective prohibition under Section 253, and a claim of effective prohibition under Section 332. As we explained in our initial filing, where wireless siting is involved, Section 253 does not apply at all.

country in preparation for introducing fixed wireless service."[52] In September 2016, AT&T announced that it was nearly ready for field trials of its Project AirGig technology to deliver wireless broadband using power line infrastructure, announcing that they "expect to kick off [their] first field trials in 2017."[53]

Of course, most of the deployment now occurring does not involve 5G (although that is often a code word used to justify preemption); rather deployment today involves continued roll-out of fourth generation LTE technology and densification of 4G networks. That also proceeds apace.[54] T-Mobile celebrated expanding its network by more than 2000 new cell sites over the course of 2016.[55] Sprint routinely announces network densification efforts, including recent promises to bring "hundreds of network enhancements" to metropolitan areas like Milwaukee, Chicago, Detroit, and New Orleans, since March 2017 alone.[56] These ongoing investments and densification efforts suggest a marketplace which is permissive, rather than prohibitive, where deployment is concerned.

If local policies were causing problems, this level of deployment simply would not be happening. Providers may not like that the law guarantees states and localities a role in the deployment of wireline and wireless technologies, but that does not entitle providers to preemptive action. The law does not entitle carriers to relief from the costs of doing business, or to subsidies at local expense to improve their profitability.

One-size-fits-all solutions dictated from Washington, D.C. may seem appealing when presented as turnkey solutions, but reality is far more complicated. Communities across the country face unique challenges, and have widely disparate needs. Leaders in those communities must have the flexibility to work collaboratively with industry stakeholders in designing solutions that meet

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[52] Lowell McAdam, Chairman and Chief Executive Officer, Verizon Communications Inc., *Annual Letter to Shareholders* (Dec. 2016), *available at* http://www.verizon.com/about/sites/default/files/annual_reports/2016/letter.html.

[53] Press Release, *AT&T Labs' Project AirGig Nears First Field Trials for Ultra-Fast Wireless Broadband Over Power Lines*, (Sep. 20, 2016), http://about.att.com/newsroom/att_to_test_delivering_multi_gigabit_wireless_internet_speeds_using_power_lines.html.

[54] The wireless industry's own data makes it clear that deployment is proceeding. Scott Bergmann Prepared Statement to House E&C, April 5, 2017: "In just seven years, wireless providers have blanketed the country with $200 billion in network spending to deliver 4G LTE mobile broadband nationwide. Today, 99.7 percent of Americans have access to 4G LTE service, and 95.9 percent can choose from three or more 4G LTE providers."

[55] T-Mobile 2016 Annual Report (2017) ("We had approximately 66,000 cell sites, including macro sites and distributed antenna system network nodes as of December 31, 2016, compared to approximately 64,000 cell sites as of December 31, 2015"), *available at* http://investor.t-mobile.com/Cache/1001223313.PDF?O=PDF&T=&Y=&D=&FID=1001223313&iid=4091145.

[56] *See, e.g.* Press Release, *The Secret's Out! Sprint to Illuminate Chicago with Thousands of Network Enhancements and 100+ New Stores* (May 8, 2017), available at http://investors.sprint.com/news-and-events/press-releases/press-release-details/2017/The-Secrets-Out-Sprint-to-Illuminate-Chicago-with-Thousands-of-Network-Enhancements-and-100-New-Stores/default.aspx; Press Release, *Sprint's New Cell Sites Hit Network Coverage Out of the Park in Downtown Detroit* (Apr 3, 2017), available at http://investors.sprint.com/news-and-events/press-releases/press-release-details/2017/Sprints-New-Cell-Sites-Hit-Network-Coverage-Out-of-the-Park-in-Downtown-Detroit/default.aspx.

everyone's needs. The recommendations stemming from this body today, unfortunately, seem destined to place a greater emphasis on the convenience and profits of providers than the needs of communities and average Americans. For the Commission to truly achieve its laudable goal of closing the digital divide, deployment policy must be collaborative, not combative. It is deeply regrettable that this body was not equipped to achieve the lofty goals set out for it in this regard, despite the hard and honest work of the many voices who participated.

VII. STATE REPORT

Local government has no representative on the Model Code for States working group. Therefore, local government representatives on the BDAC have not yet seen that group's final recommendations, and request leave to amend this report to include our response. Failure to allow local government's point of view on this supplemental report will further undermine the BDAC's usefulness. This is especially true given that a review of the working document released by the group in November of 2017 reveals an initial effort to remove local franchising authority, based on an unsubstantiated assertion that such an action would result in enhanced broadband deployment. Such a position is not supported by the FCC's own data. (See Table 1, attached)

The limited analysis found in Table 1 reveals that states with local franchising enjoy greater rates of service expansion (35% to 19%), and slightly better overall rates of broadband availability (10% to 11%) than states that have eliminated local franchising rights. The BDAC and its working groups were directed to identify policies which would promote broadband deployment; statewide franchising has no demonstrable beneficial impact on broadband deployment. This research runs counter to the claims of the Model Code for States working group, that local franchising serves as a barrier to investment or broadband deployment.

TABLE 1[57]

LOCAL FRANCHISE STATES HAVE BETTER BROADBAND AVAILABILITY RATES

State	Unserved in 2013	Unserved in 2014	Change	Population Unserved	Local Franchising
Alabama	1,701,300	985,263	-42.09%	20%	Y
Alaska	284,800	194,375	-31.75%	26%	N
Arizona	1,162,200	898,724	-22.67%	13%	Y
Arkansas	1,751,500	744,572	-57.49%	25%	N
California	2,601,400	2,017,166	-22.46%	5%	N
Colorado	942800	539,327	-42.80%	10%	Y
Connecticut	49,900	47,464	-4.88%	1%	N
Delaware	29,700	29,789	0.30%	3%	N
Florida	1,278,300	1,297,648	1.51%	7%	N
Kentucky	1,766,700	699,360	-60.41%	16%	Y
Maryland	417,500	262,002	-37.25%	4%	Y
Massachusetts	238,000	183,103	-23.07%	3%	Y
New York	518,000	430,202	-16.95%	2%	Y
Wisconsin	961,700	744,002	-22.64%	13%	N

[57] Data Source: Appendix E included with the FCC's 2015 and 2016 Broadband Progress Reports, detailing county-level numbers of unserved individuals. Due to changes in FCC data, and the decision by the FCC not to publish a report with 2015 data in 2017, only a one-year comparison is readily available. Data through the end of 2016 (two additional years) is available from the FCC's website, but analysis has not yet been published by the agency. As the FCC has proposed changes to its methodology in reporting on deployment, it is unclear whether the Appendix E used for this initial analysis will be continued in any future reports. States in this n on-representative sample were selected with a focus on ensuring equal sample size for each type of franchising process; we are, however, confident that a broader analysis would yield similar results.