Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20555

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies;	)	**WT Docket No. 16-421**
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments in response to the Federal Communications Commission's (FCC) December 22, 2016 Notice in the above-captioned proceeding. [1]

For over 125 years, NARUC, a quasi-governmental non-profit corporation in the District of Columbia, has represented the interests of public utility commissioners from agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with, *inter alia*, overseeing certain operations of telecommunications utilities.

[1] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421 (DA 16-1427 rel. December 22, 2016) available online at: https://ecfsapi.fcc.gov/file/12222748726513/DA-16-1427A1.pdf ; Order, (DA 17-51 rel. January 12, 2017) at https://ecfsapi.fcc.gov/file/0112380614184/DA-17-51A1.pdf.

NARUC is recognized by Congress in several statutes[2] and consistently by the Courts[3] as well as a host of federal agencies,[4] as the proper entity to represent the collective interests of State utility commissions.

At our recent February meetings in Washington, D.C., NARUC passed a resolution, attached as Appendix A, that

> *applauds the FCC and Chairman Ajit Pai for initiating the Broadband Deployment Advisory Committee and looks forward to an active role in that effort,*

but also specifically

> *opposes further efforts in petitions asking the FCC to preempt the traditional authority of the State and local authorities by replacing intrastate regulation of rights-of-way, Pole Attachments, and other*

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[2] See 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); See also 47 U.S.C. §254 (1996); See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where this Court explains "Carriers, to get the cards, applied to…(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system).

[3] See, e.g., *U.S. v. Southern Motor Carrier Rate Conference, Inc*., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (where the Supreme Court notes: "The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); Compare, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

[4] Compare, NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, mimeo at 31 (June 29, 2010) ("We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members' injury-in-fact.")

telecommunications facilities or services of public utilities with comprehensive federal mandates imposed by the FCC.

Citing the regime of cooperative federalism inherent in the 1996 legislation,[5] the resolution specifically instructs NARUC "to oppose any preemption that supplants State regulation of intrastate telecommunications with FCC mandates."[6]

BACKGROUND

The FCC issued a 2009 Declaratory Ruling[7] and a 2014 Infrastructure Order[8] that purported to clarify the scope of 47 U.S.C. §§ 253 and 332(c)(7) of the

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[5] The 1996 Act created a structure that requires the FCC to work hand-in-glove with State Commissions. See, e.g., *Weiser, Philip, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L.Rev. 1692, 1694 (2001) (describing the 1996 Act as "the most ambitious cooperative federalism regulatory program to date"). This principle was detailed in NARUC's 2013 Federalism Paper, which envisions a joint federal-State partnership in, among other things, the deployment of broadband facilities and service to all Americans.

[6] Note, Mobilitie states in its petition at 13, that it "holds authorizations from state public utility commissions nationwide to provide telecommunications services." Discussions during the contemplation of the NARUC resolution suggested to the undersigned that that might not be an accurate statement. NARUC hopes to garner additional information on this statement in time for the reply comment round.

[7] See, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, 24 FCC Red 13994, 14020, ¶ 67 (2009) (Declaratory Ruling), aff'd, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), aff'd, 133 S. Ct. 1863 (2013).

[8] See *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Red 12865,12866-69, 12878-81, ¶¶ 2-8, 29-34 (2014) , *erratum*, 30 FCC Red 31 (2015), aff'd, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015) (Infrastructure Order).

Communications Act[9] and Section 6409(a) of the *Middle Class Tax Relief and Job Creation Act of 2012* with respect to siting.[10]

On November 15, 2016, Mobilitie, LLC, filed a petition[11] arguing that additional FCC action is necessary. The FCC's December 22, 2016 public notice asks for comment on several arguments raised by the Mobilitie petition. The Notice basically asks for comment in three areas. First, whether the Commission should take further action to promote deployment of wireless network infrastructure. Second, whether providing a definition of the terms "fair and reasonable compensation" and "competitively neutral and nondiscriminatory," as contained in Section 253(c) of the Federal Communication Act 9 will facilitate deployment. Third, the Commission seeks information on the procedures used by local agencies in processing applications. NARUC will only address the first two.

ARGUMENT

As a matter policy, the FCC should not interfere with State rights-of -way regulation in this context.

Assuming, *arguendo*, the FCC has the requisite authority, there is no reason to act.

Why?

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[9] *Telecommunications Act of 1996*, Pub. L. 104-104, §§ 101,704 (codified at 47 U.S.C. §§ 253, 332(c)(7)).

[10] Section 6409(a) of the *Middle Class Tax Relief and Job Creation Act of 2012*, Pub. L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012) § 6409(a) (2012) (codified at 47 U.S.C. § 1455(a)), provides that a State or local government "may not deny, and shall approve" any request for collocation, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided this action does not substantially change the physical dimensions of the tower or base station.

[11] See, *Mobilitie, LLC Petition for Declaratory Ruling, Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) (Mobilitie Petition), online at: https://ecfsapi.fcc.gov/file/122306218885/mobilitie.pdf.

There is simply no statistical record to justify FCC intervention via a declaratory ruling.[12]

And, given the stage in 5G facilities deployments thus far, it is unlikely the industry can compile sufficient data to demonstrate a wide-spread problem exists.

What do we know?

Heretofore, the wireless tower industry has, under current laws, in the view of at least one analyst, "grown rapidly."[13]

True, the Mobilitie petition does make a strong factual showing that a very large number of additional cell sites will be needed to deploy 5G networks.

But other than a few anecdotes, they've not provided statistical data that the current process either is not working or will not work.[14]

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[12] See, Gibbs, Colin, *Mobilitie Downplays Small Cell Concerns, Says Sprint Really is Spending on Network Upgrades*, FierceWireless (June 22, 2016), online at: http://www.fiercewireless.com/wireless/mobilitie-downplays-small-cell-concerns-says-sprint-really-spending-network-upgrades (last accessed March 8, 2017). ("Finally, from Mobilitie, we heard a very contrarian and constructive view on Sprint's network initiatives," Jennifer Fritzsche of Wells Fargo wrote in a research note. "Mobilitie did indicate despite all the noise out there, *it is getting through the zoning and permitting stage much faster than the market appreciates* and *there have been no municipalities that have pushed a full-on moratorium on small cell deployment as some have speculated.*" (Emphasis added).) Cf. Mobilitie petition at 14, noting the company "has concluded rights-of-way agreements" with Los Angeles, CA, Anaheim, CA, Minneapolis, MN, Overland Park, KS, Olathe, KS, Independence, MO, Newark, NJ, Union City, NJ, Bismark, ND, Price, UT, Racine, WI, and Wautawtosa, WI – vs. unspecified problems with "many other localities."

[13] See, *Market Realist, An Overview of the Wireless Tower Industry*, by Steve Sage, January 11, 2016, online at http://marketrealist.com/2016/01/overview-wireless-tower-industry/ ("In the past few years, the wireless tower construction industry has grown rapidly. This rapid growth is attributed to the demand for mobile data and high-speed data connections . . . There is a total of 205,000 cell phone towers in the United States. Most of them are owned by Crown Castle International (CCI), American Tower (AMT), and SBA Communications (SBAC).") (last accessed March 8, 2017).

[14] Indeed, as noted at p. 5, in the March 7, 2017 filed *Comments of Cityscape Consultants, Inc*", available online at: https://ecfsapi.fcc.gov/file/1030726758975/Mobilitie%20Petition%20-CS%20Comments%20March%207%202017.pdf, "[i]t is somewhat disingenuous of Mobilitie to claim it is subject to excessive and unfair fees nationwide for use of rights of way, because our

There is, at least as of the filing of these comments, little evidence in the record demonstrating anything other than (i) a utility must pay for access to right-of-way owned by the public and (ii) that different configurations and placements in different communities have different prices.

Given the wide difference in property values and tax bases among communities, this is to be expected.

Absent a much stronger factual showing, any free market advocate or federal entity charged, in part, with protecting the public interest should tread carefully. This is particularly true in the circumstances presented, where [1] the FCC concedes "as did Congress in enacting Sections 253 and 332 of the Communications Act . . . localities play an important role in preserving local interests such as aesthetics and safety,"[15] and [2] as Mobilitie's petition recognizes, "[r]ights-of-way have always served the public interest by enabling citizens to obtain and use essential services, such as electricity, telephone, gas, water, and transportation." Rights- of-way are used for many things, and the ongoing provision of these crucial services requires detailed review of applications for both cell tower and wireless telecommunications facilities to ensure that they

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experience with Mobilitie in the various communities nationwide that we provide consultation to has been that Mobilitie has sought designation under applicable state law as a "telecommunications provider" (even though it is not a licensed wireless communications provider) and sought free access to rights of way without any compensation to local government." The comments provide an example in the footnote citing: "State of Florida Public Service Commission Docket 060626, wherein Mobilitie applied for and received (TA079) certification as an "alternative access vendor", which it has used throughout Florida to seek access to ROW without payment of any compensation to the local government pursuant to applicable Florida statutes (F.S. §337.401)." Compare footnote 12, *supra*.

[15] Notice, *mimeo* at 2. Courts too have recognized that distinctions based on traditional zoning principles, including aesthetic impact, e.g., *T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259 (4th Cir. 2012), and business – residential zoning differences, e.g., *Omnipoint Commc'ns Enters. v. Zoning Hearing Bd. of Easttown Twp.*, 331 F.3d 386 (3d Cir. 2003), *cert. denied*, 540 U.S. 1108 (2004).

will not raise safety or reliability concerns with respect to current right-of-way uses.

Consider that the FCC could not step in and tell a private landowner what compensation he must take to allow a tower company to use his or her land. For the same reason, the FCC should hesitate before telling elected officials that the citizens that voted them into office must subsidize specific uses of their property via an FCC mandate. Such decisions should continue to be made locally by elected officials with demonstrated unique expertise and knowledge relative to management of their rights-of-way as a guardian and trustee for their citizens. Not by an agency thousands of miles away with no local knowledge, expertise or – significantly - accountability to local and voting citizens.

Local control effectively allows citizens, through their elected officials, to review and address community needs relative to use of the public's rights-of-way and protections afforded to companies using those rights-of-way. Such local oversight is essential to protect the public health, safety and welfare and ensures citizens have actual input with respect to issues that affect them directly.

It is unclear if the FCC has the requisite authority.

Assuming, *arguendo*, there is an issue needing FCC intervention, it is far from clear that the FCC has the requisite authority. The *FCC Notice*, *mimeo* at 2, suggests the FCC "has regulatory tools to help resolve this dilemma" citing 47 U.S.C. §§ 253 and 332(c)(7) and § 6409(a), codified at 47 U.S.C. § 1455(a).

But all three of those provisions carry restrictions.

Section 332(c)(7), true to its caption - "Preservation of local zoning authority" - *focuses* on zoning regulations.[16] The conference agreement points out that the new section "prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matter except in the limited circumstances set forth in the conference agreement." It is a compromise between two competing goals (i) facilitating the growth of wireless services and (ii) maintaining substantial local control over tower siting."[17] As the Second Circuit, in *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 at 420 (2d Cir. 2002) pointed out:

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[16] Interestingly, unlike, 47 U.S.C. § 224 or § 253, the term "rights-of-way" is not referenced anywhere in §332(c)(7). It is also interesting that the Notice cites to *T-Mobile S., LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 812, (2015) (*T-Mobile*) as support for FCC authority under that section because that case deals with zoning restrictions on the construction of a 108-foot cell tower on 2.8 acres of *vacant residential* property – not a State right-of-way. Indeed, even the cases cited in that *T-Mobile* decision do not involve the respondent municipality's rights-of-way. See, e.g., *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453 (2005) (Amateur radio operator, who was denied conditional use permit to build radio tower on *his property*.); *SW. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 55 (1st Cir. 2001) (Southwestern Bell application for a permit to construct a 150–foot tall telecommunications tower *on a property offered to it by the Leicester Water Supply District*.); *New Par v. City of Saginaw*, 301 F.3d 390, 392 (6th Cir. 2002)("Because *New Par's property* did not meet Saginaw's minimum-size zoning requirements for "light industrial" use, New Par requested a variance."); *MetroPCS, Inc. v. City & Cty. of San Francisco*, 400 F.3d 715, 718–19 (9th Cir. 2005) (MetroPCS submitted to San Francisco's Planning Department an application for a permit to install six panel antennas on an existing light pole located on the roof of a "commercial structure" located in an NC–3 zoning district.); *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 424 (4th Cir. 1998) (City Council denied applications for a conditional use permit to erect two 135–foot communications towers at *the Lynnhaven Methodist Church in a residential area*.)

[17] *Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 13 & n.3 (1st Cir. 1999) (Noting the initial House version of this provision charged the FCC with developing a uniform national policy for the deployment of wireless communication towers but the final bill rejected blanket preemption of local land use authority, but retained specific limitations.).

> To begin with, the structure of § 332(c)'s paragraph (7) indicates that Congress meant preemption to be narrow and preservation of local governmental rights to be broad, for subparagraph (A) states that "*nothing* " in the FCA is to "limit or affect" local governmental decisions "*[e]xcept* as provided in this paragraph." 47 U.S.C. § 332(c)(7)(A) (emphases added). Thus, unless a limitation is provided in § 332(c)(7), we must infer that Congress's intent to preempt did not extend so far.

The limitations are spelled out in 47 U.S.C. § 332(c)(7)(b).

There is no mention of compensation – fair or otherwise.

It only says that a State or local government's regulations on placement of personal wireless service facilities cannot "unreasonably discriminate among providers of functionally equivalent services" or "effectively prohibit the provision of personal wireless services." Respectfully, the Mobilitie petition does not come close to demonstrating even a limited statistically significant violation of either standard. Certainly if past is prologue, then history would suggests that that new generations of wireless technology will continue flourish. Pointing to an industry that consistently touts itself as the poster child for <u>both</u> <u>competition</u> <u>and</u> <u>coverage</u>, and saying current State/local policies have been demonstrated to inhibit/prohibit the rollout of new services, requires an interesting thought process.

Moreover, it is no surprise that Courts have ruled that Section 332(c)(7) does not generally apply to local government actions or decisions relating to the siting of wireless facilities *on municipal property*.[18] That's because preemption

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[18] <u>See,</u> <u>e.g.,</u> *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-19 (2d Cir. 2002):

> Not all actions by state or local government entities, however, constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace. "A State does not regulate ... simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the

doctrines generally apply only to State *regulation* and not when a State owns and manages property.[19] Those circumstances lay completely beyond the FCC's reach, as they should.

Section 6409(a) has similar express limitations.

By its own terms it is narrowly focused on blocking State disapproval of "any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."

It, like§332(c)(7), nowhere mentions costs or compensation.

Also, like §332(c)(7), it is clear that Section 6409 does not apply when a governmental entity is acting as a landowner in a proprietary capacity, rather than a regulator. As the FCC has conceded more than once:

> As proposed in the *Infrastructure NPRM* and supported by the record, we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. . . courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate." As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely

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> marketplace. In so doing, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation."*

Compare, *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013)(Requirement for cellphone provider to obtain voter approval before constructing mobile telephone antennae on city-owned park property was not preempted.)

[19] See *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226-27 (1993) ("When a State owns and manages property … it must interact with private participants in the marketplace. In doing so, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation*."**)**.

> proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction." Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. (Footnotes omitted)

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, 29 F.C.C. Rcd. 12865, 12866-69, 12878-81, ¶ 239 (2014) aff'd, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015)[20]

Finally, there is § 253. The entire provision is written in terms of "telecommunications services" and "telecommunications providers." The most preemptive grant of authority, in § 253(a), is of entities providing "telecommunications services." As suggested in Note 4, it is not yet clear that Mobilitie qualifies as a provider of "telecommunications services." An entity that, according to its website, "works with venues and wireless carriers to ensure their customers are better connectioned,"[21] on its face does not seem to meet the definition of a telecommunications service provider. That is – it does not appear that Mobilite is offering ANYTHING "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public." Rather it appears they are offering a service to some entities that may or may not be telecommunications service providers. To use § 253 as a basis of authority, at a minimum, the FCC will have to specify the services provided are in fact

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[20] See also, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, 24 FCC Rcd 13994, 14020, ¶ 67 (2009) aff'd, *City of Arlington v. FCC*, 668 F. 3d 229 (5th Cir. 2012), aff'd,133 S. Ct. 1863 (2013).

[21] See, Mobiliitie, *Intelligent Infrastructure*, *About Us* at: http://www.mobilitie.com/ (Last accessed March 8, 2017)

"telecommunications services" and explain how Mobilitie is the "telecommunications service provider" instead of, e.g., Sprint – one of its partners.

Second, it is clear from the text of § 253(d) (and § 253(c)) that Congress meant § 253 to be applied on a State-specific and law or regulation-specific basis. Section 253(d) speaks in terms of "a state" and "such statutory or regulation" which is to be preempted "only to the extent necessary to correct such violation." Such text is hardly a prescription for general rules that apply to classes of different State regulations.

Similarly, Congress make clear that the reservation in § 253(c) is to be construed – if at all - by a court on a case-by-case basis. That section is designed specifically to preserve State and local regulatory authority over managing public rights-of-way and requiring fair compensation from "telecommunications providers." More than one Court has pointed out that only Sections 253(a) and (b) may be preempted by the Commission under Section 253(d). See, e.g. *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1266 (10th Cir. 2004); *Bell South Telecomm. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187-89 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 623 (6th Cir. 2000).

This is borne out by the plain text of § 253 and confirmed by its legislative history. During debate on § 253, Senator Gorton offered an amendment containing the current language of the section, explaining:

> There is no preemption ... for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition ... 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.
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> 141 Cong. Rec. S8213 (1995).

Later, Senator Gorton also pointed out that his amendment:

> retains not only the right of the local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.

141 Cong. Rec. S8308 (1995).

By giving the authority to enforce § 253(c) to the federal courts, not the Commission, Congress recognized not only the historic authority of state and local governments to manage their right-of-ways, but also that "fair and reasonable" compensation will vary by locality, and depend on a unique set of facts and circumstances.

Congress determined state and local governments are best situated to make such determinations, with the oversight of the federal district courts. The FCC should not override that determination.

Finally, §601(c)(1)[22] requires the FCC and Courts to do here, what the plain text of § 253 requires, i.e., construe this provision (and § 332(c)(7)) narrowly.

CONCLUSION

Congress purposely did not empower the Commission with regard to Section 253(c). The other provisions are not focused on specific compensation issues and provide the FCC with very limited authority. Moreover, the record thus far does not provide a factual basis for any relief. These determinations should be taken up on a case-by-case basis by local authorities.

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[22] 47 U.S.C. § 152 Telecommunications Act of 1996, Pub. L. No. 104-104, §601(c), 110 Stat. 56 (codified in the note to 47 U.S.C. § 152). Section 601(c) specifies:

> NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

NARUC requests the FCC recognize these facts and eschew any formal action. Instead, the FCC should focus on Chairman Pai's new broadband deployment task force to come up with best practices to facilitate specific State consideration of telecommunications carriers' proposals.

Respectfully submitted,

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Appendix A - *Resolution on Federalism and the Mobilitie Petition*

WHEREAS, The Federal Communications Commission (FCC) issued a Declaratory Ruling on November 18, 2009, at WT Docket No. 8-163, DA 09-99, establishing definite timeframes for State and local action on wireless facilities siting requests which, while preserving the authority of States and localities to make the ultimate determination on local zoning and land-use policies, adopted federal timelines of 90 days for collocation applications and 150 days for siting applications; *and*

WHEREAS, The FCC Declaratory Ruling of November 18, 2009, at WT Docket No. 8-163, DA 09-99 was upheld by the Supreme Court in *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1862 (2013) through application of the *Chevron* doctrine, a legal principle that defers to a federal agency's interpretation of law, to federal agency interpretations of their federal statutory authority; *and*

WHEREAS, The FCC adopted *In re: Connect America Fund* a Report and Order and Notice of Further Rulemaking in Docket 10-90 on November 18, 2011, 26 FCC Rcd 17663, 17973-74 (¶¶ 883-884) (FCC 11-161) (2011) *("USF/ICC Transformation Order" or "FNPRM")* proposing, among other things, to reform the federal universal service fund (USF) to revise existing high-cost support universal service mechanism and focus such support so as to deploy broadband network facilities capable of providing voice and broadband services to all Americans; *and*

WHEREAS, The *USF/ICC Transformation Order* preempted the States' traditional legal authority to establish rates for intrastate telecommunications access; *and*

WHEREAS, The FCC's preemption was upheld in its entirety by the federal courts in *In re FCC*, 753 F.3d 1015 (10th Cir. 2014), *petitions for rehearing en banc denied*, Aug. 27, 2014, *cert. denied*, 83 U.S.L.W. 3835, May 4, 2015 (Nos. 14-610, *et al*.); *and*

WHEREAS, Mobilitie, LLC filed a petition at WT Docket No. 16-421 addressing streamlining the deployment of small-cell infrastructure on November 15, 2016 (the Mobilitie Petition); *and*

WHEREAS, The FCC subsequently issued a Public Notice ("Public Notice") of the Mobilitie Petition on December 22, 2016 in Docket No. WT 16-421, DA 16-1427 stating that "[s]ections 253 and 332(c)(7) of the Communications Act and Section 6409(a) of the Spectrum Act are designed, among other purposes, to remove barriers to deployment of wireless network facilities by hastening the review and approval of siting applications by local land-use authorities"; *and*

WHEREAS, The FCC notice also asked for comments on how small cell deployment can be improved and expedited by the FCC issuing guidance on how federal law applies to local government review of wireless facility siting applications and local requirements for gaining access to rights of way, including requests for information on: 1) certain practices that prohibit or have the effect of prohibiting the provision of wireless service; 2) ways to improve the timeliness of right of way permit review; and 3) interpretation of the fair and reasonable compensation and non-discrimination requirements of 47 USC 253(c); *and*

WHEREAS, Prior decisions of the FCC in response to inquiries that examined State and local laws or policies, including those concerning facility siting or compensation, have resulted in truncating those State laws or policies, if not preempting them; *and*

WHEREAS, The general principles of federalism set out by the National Association of Regulatory Utility Commissioners (NARUC) in its 2013 Federalism Paper envision a joint federal-State partnership

in, among other things, the deployment of broadband network facilities and service to all Americans; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2017 Winter Committee Meetings in Washington, D.C., reiterates its support for the federal-State partnership envisioned in its 2013 Federalism Paper; *and be it further*

RESOLVED, That, consistent with NARUC's 2013 Federalism Paper, NARUC urges the FCC to act consistently with the principles of federalism endorsed there as it applies to the federal-State partnership underway in the deployment of wireless and wireline facilities, including the deployment of small-cell infrastructure; *and be it further*

RESOLVED, That NARUC applauds the FCC and Chairman Ajit Pai for initiating the Broadband Deployment Advisory Committee (BDAC) and looks forward to an active role in that effort; *and be it further*

RESOLVED, That NARUC also encourages its members to engage State and local authorities managing rights-of-way, pole attachments, and other telecommunications facilities or services under examination in the Mobilitie Petition to understand the important role that public utility access provided by those State and local authorities plays in the deployment of the broadband infrastructure of public utilities; *and be it further*

RESOLVED, That NARUC opposes further efforts in petitions asking the FCC to preempt the traditional authority of the State and local authorities by replacing intrastate regulation of rights-of-way, Pole Attachments, and other telecommunications facilities or services of public utilities with comprehensive federal mandates imposed by the FCC; *and be it further*

RESOLVED, That NARUC directs the NARUC General Counsel, and urges fellow State members, to participate in FCC proceedings to oppose any preemption that supplants State regulation of intrastate telecommunications with FCC mandates and to provide input regarding the Public Notice that encourages the FCC to issue guidance, including what constitutes reasonable and nondiscriminatory and thus, permissible fees under federal law, consistent with the governing authority contained in federal law at 47 U.S.C. Section 332 and 47 U.S.C. Section 253 and the principles that State and local governments are charged with managing the public rights of way and that State and local governments must protect the health, safety, and welfare of their citizens.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors on February 15, 2017