Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL ASSOCIATION OF REGIONAL COUNCILS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND UNITED STATES CONFERENCE OF MAYORS

> "It comes down to how … stupid the elected officials … are. There are many stupid cities around the country - really dumb. They're greedy…They don't give a s*** about their constituents."

Mobilitie CEO Gary Jabara[1]

Obviously, Mobilitie and its CEO hold local governments in utter contempt. With this attitude, Mobilitie and its representatives march into jurisdictions and make demands, expecting local governments to accede to the demands regardless of the needs of the communities.

These Reply Comments are filed by the National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities (NLC), the National Association of Towns and Townships (NATaT), National Association of Counties (NACo), National Association of Regional Councils (NARC), Government Finance Officers Association (GFOA), and the United States Conference of Mayors (USCM),[2] in response to the Comments filed in the

[1] Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure*, AGL Magazine AGLM, p.38 (March 2017).
[2] The United States Conference of Mayors is the official non-partisan organization of cities with a population of 30,000 or larger. Each city is represented by its chief elected official, the mayor.

above-entitled matter.

I. THE TAKINGS CLAUSE PREVENTS THE COMMISSION FROM LIMITING "FAIR AND REASONABLE COMPENSATION" IN § 253(c)

As we explained in our opening Comments, the United States Supreme Court has long recognized the ability of local governments to seek rent as compensation for physical occupations of local rights-of-way and other government property.[3] The Telecommunications Act of 1996 did not change that and, as NATOA and its fellow Commentators established, Congress was aware of local government's practice in charging rent and specifically protected that ability.[4] For the Commission to use interpretations and guidelines to find otherwise, as several Commentators request,[5] would violate the Fifth Amendment, which provides:

"[N]or shall private property be taken for public use, without *just compensation*."[6]

If the Commission adopts interpretations of the §§ 253 and 332(c) which require that local governments accept the placement of wireless facilities and associated equipment in their local rights-of-way and in, or on, other property (water towers, light poles, street signs, public buildings, and the similar property), such as through a "deemed granted" regime, then the Commission has committed a physical taking.[7] The Supreme Court's opinion *Loretto v.*

---

[3] *See, Comments of NATOA, et al.*, at 16-21 (filed March 8, 2017).
[4] *See, Comments of NATOA, et al*, at 21-24.
[5] *Comments of Competitive Carriers Association* at 16 (filed March 8, 2017); *Comments of AT&T* at 22 (filed March 8, 2017); *Comments of Verizon* at 11 (filed March 8, 2017).
[6] U.S. Const., amend. V. (Emphasis added.) While the Fifth Amendment refers to "private property," it is "most reasonable to construe the reference…as encompassing the property of state and local governments. *United States v. 50 Acres of Land*, 469 U.S. 24, (1984). *See also, Town of Bedford v. United States*, 23 F.2d 453, 457 (1927) "[The federal government] can no more take, without compensation, [a local government's] property rights, than it can those of an individual."
[7] 458 U.S. 419, 429-30 (1982), *relying on Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 570 (1904) (holding that placement the telephone lines in railroad right of way was a compensable taking because the right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181 (1872)("[W]here real estate is actually invaded … so as to … impair its usefulness, it is a taking, within the meaning of the Constitution."), as well as citing *Lovett v. West Va. Central Gas Co.*, 65 S.E.196 (W. Va. 1909); *Southwestern Bell Telephone Co. v. Webb*, 393 S.W.2d 117, 121 (Mo.App.1965). for the proposition that telegraph and telephone lines and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space.

Teleprompter Manhattan CATV Corp., makes clear that a "property owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property."[8] Fair market value is the standard for "just compensation."

Absent requiring physical occupation, the Commission may yet commit a regulatory taking with any interpretations or guidelines it issues as a response to this proceeding. The Supreme Court discussed regulatory takings with respect to Commission action in *F.C.C. v. Florida Power Corp.*[9] In that case, the Court did not find a *Loretto* taking because nothing in the Pole Attachments Act, as interpreted by the FCC, gave cable companies any right to occupy space on utility poles, or prohibited utility companies from refusing to enter into attachment agreements with cable operators. Ultimately, the Supreme Court did not find that the Fifth Amendment's Takings Clause applied to rate regulation in *Florida Power Corp*. because the Florida Power did not argue that the regulation was "confiscatory." That is, it did not argue that the regulation threatened its "financial integrity."[10] We do argue that any Commission action which limits the ability of local governments to seek compensation in the form of rent or other fees for the use of their rights-of-way or other property will be confiscatory.

Any such limitation is confiscatory because, unlike telecommunications providers, local governments are not for-profit corporations. They are not-for-profit entities; convenient vehicles for groups of citizens to come together to undertake activities for the benefit of all within their jurisdiction. Their "investors" are their citizens who "invest" by paying taxes. Local governments can borrow money under certain circumstances, but they do not manufacture products or sell services for the purpose of making a return on investment for private

[8] *Id.* 458 U.S. at 436.
[9] 480 U.S. 245, 252-53.
[10] *See*, *Verizon Communications Inc. v. F.C.C.*, 535 U.S. 467, 524 (2002)

shareholders. The mechanisms by which local governments provide libraries, schools, police and fire protection, and roads, highways, and other infrastructure are primarily taxes. In addition, they make use of the property they hold in trust for the public by renting, leasing, or otherwise charging for the private use of that property. The Petition and the Comments supporting it ask the Commission to take that authority away from local governments and to allow private, for-profit entities, to make essentially free use of public property to further their own bottom line. They ask that the taxpayers subsidize private corporate business activities by limiting the amount the taxpayers, through their local governments, can charge for property they own collectively. That effectively destroys the value of the property, that is "confiscation," and that is a regulatory taking.

As an aside, the same rationale supporting compensation for the use of public rights-of-way applies with even greater force to other property owned by local governments. The Town Hall, city library, and municipal water tower, all owned by local government, are the local government's "private" property, to control as it wishes, including having the ability to exclude third parties regardless of the reason for the exclusion. If the federal government and third parties are going to take local government property by physically occupying it, "just compensation" must be paid as it would be for any other private party. "Manifestly, the 'just compensation'" must go to or for the benefit of the persons damaged by the taking - in this case the taxpayers….We can find *not even a dictum* in the decisions of the Supreme Court to support any other doctrine."[11]

II. FEDERALISM PRINCIPLES FORECLOSE PROPOSED INTERPRETATIONS

While any Commission "interpretation" limiting local government compensation to costs

[11] *Town of Bedford v. United States*, 23 F.2d 453, 455 (1st Cir. 1923) (*emphasis added*), *citing St. Louis v. Western U. Teleg. Co.*, 148 U.S. 92 (1893) and *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U.S. 160 (1903).

is foreclosed pursuant to the requirements of the Fifth Amendment as applied to physical and regulatory takings, there is also a serious question as to the extent of Commission authority to interpret phrases and terms in either §§ 253 or and 332(c) so as to limit local government authority, especially with respect to any "deemed granted" remedy or foreclosing the availability of moratoria while appropriate zoning and local regulatory processes are put in place.

It is unreasonable to assume that Congress intends to allow federal officials to interfere with the public purposes of sovereign states without express authority.[12] There exists a presumption that authorized public uses are not to be interfered with under general terms of federal legislation.[13] The Federal Highway Act[14] serves as an example of what express authority looks like. That Act specifically allowed the Secretary of Commerce to file condemnation suits to take local government property, upon the request of a State, to build the Federal Highway System. Unlike the Federal Highway Act, the Telecommunications Act contains **NO** provision allowing the Secretary of Commerce or the Federal Communications Commission to condemn or otherwise take public property for the purpose of constructing the nation's "Information Super-Highway." What the Telecommunications Act **does** contain is **two** clauses that specifically recognize local government authority over 1) zoning decisions (§332(c)(7)) and 2) the right to manage rights-of-way and charge "fair and reasonable" compensation (§ 253(c)). The Commission *cannot* interpret terms and phrases in code sections that recognize, reiterate, and preserve state and local authority in such a way as to limit that same authority. Such back-door, boot-strapping violates the very core of federalism requirements and is contrary to the obvious congressional intent of including two clauses noting the preservation of local authority.

[12] *Town of Bedford* 23 F.2d at 455, *quoting United States v. Certain Lands in Town of New Castle Case (C.C.)*, 165 F. 783, 788 (1908).
[13] *Id*.
[14] 23 U.S.C. 107(a).

"[R]egulation of land use [is] a function traditionally performed by local governments."[15] Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of [local governments]… to plan the development and use… of land"[16] for the purposes of telecommunications deployment. The Commission has no authority to reduce that preservation of authority by "interpreting" phrases in the statute. Where, as here, "an administrative interpretation of a statute invokes the outer limits of Congress' power," courts expect a clear indication that Congress intended that result.[17] "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[18] Federalism concerns are heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.[19] "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[20] Not only did Congress not convey its purpose clearly to allow the Commission to adopt the interpretations urged by industry commentators, Congress clearly expressed just the opposite in the text of the statute, as well as in the legislative history.

III. A NOTE ON THE LEGISLATIVE HISTORY

Industry Commentators make the same mistake as Mobilitie did in its petition and cite to the Statements of Senator Diane Feinstein as support for the proposition that local governments may only charge for "costs" associated with a physical invasion of the rights-of-way.[21] Because

[15] *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994).
[16] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).
[17] *Id.*, 531 U.S. at 172, *quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).
[18] *Id.*, 531 U.S. at 172-73.
[19] *Id.*, 531 U.S. at 173.
[20] *United States v. Bass*, 404 U.S. 336, 349 (1971).
[21] *See*, *Comments of Verizon*, at 15-16.

this has become such a common mistake on the part of not only industry Commentators, but also the Commission and even some courts, NATOA, *et al*., have attached the relevant pages from the Congressional Record as Exhibits A and B to this filing, and encourage the Commission to actually read Senator Feinstein's statements, as well as those of Representative Stupak.

IV. EVIDENCE IN THIS PROCEEDING

Regarding the evidence in this proceeding, we point the Commission to all the comments filed by local governments taking issue with the factual representations of Industry Commentators. We specifically urge the Commission to take note of the materials filed by Spotsylvania County, Virginia, the Village of Lloyd Harbor, New York, and Leesburg, Virginia, some of the communities named by the Industry Commentators but unaware of that until contacted by NATOA. Additionally, attached as Exhibit C are summaries of conversations with other local governments who were not in a position to file separate Reply Comments.

In evaluating the evidence before it, the Commission should know that as of 2012, 89,004 local governments existed in the United States.[22] This included 3,031 counties, 19,522 municipalities, 16,364 townships, 37,203 special districts and 12,884 independent school districts.[23] This proceeding focuses primarily on counties, municipalities, townships and perhaps a few special districts. To be conservative then, this proceeding concerns approximately 38,910 local governments. Industry Commentators have named approximately 60 local governments as allegedly doing something they think is somehow interfering with their ability to provide personal wireless or telecommunications services. It should be striking how few communities are alleged to be "effectively prohibiting" the provision of services considering the sweeping

[22] 2012 United States Census of Governments, available at https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html
[23] *Id.*

regulatory solution that is being sought.

It would be laughable, were the consequences not so serious, that the Commission would base any curtailment of local government authority on the often spurious and incorrect allegations made against such a small number of local governments. Even when one is generous to Industry Commentators and includes their veiled references to "A Mid-Atlantic City" or "a city in the Northeast," Industry Commentators have referenced approximately 600 local governments as somehow inhibiting their progress. This number is overly generous, as we believe that several allegations are listed separately, but, in reality, refer to the same community and are therefore double counted. Regarding the probative value of such allegations, Industry Commentators might as well assert that the moon is made of Swiss Cheese. Accordingly, the Commission should give no weight to this "evidence."

The Commission would do well to consider the reverse:

No local government was complained of in the following 19 states (the numbers behind the state names signify the number of local governments in each state): Alabama (528), Arkansas (577), Connecticut (179), Delaware (60), Idaho (244), Kentucky (536), Mississippi (380) , Montana (183), Nebraska (1,040), New Mexico (136), North Dakota (1,723), Rhode Island (39), South Carolina (316), South Dakota (1,284), Tennessee (437), Vermont (294), Utah (274), West Virginia (287), Wyoming (122).[24] Collectively, these states have a combined total of 8,639 local governments within their borders. *As none were named, the Commission must conclude that these 8,639 communities have processes that are working well and appropriately.* They are processing applications in a timely manner, with no burdensome conditions. The Industry Commentators' own comments stand for this proposition – were this not so, Industry

[24] Any error of with respecting to identifying named communities or the numbers of them is unintentional.

Commentators would have provided evidence to the contrary.

Similarly, only one allegation is made against an often-unnamed local government in each of these eights states: Alaska (162), Colorado (333), Hawaii (4), Kansas (1,997), Louisiana (364), Maine (504), New Hampshire (244), and Oklahoma (667) – a total of 4,275 communities. *The conclusion must be that the remaining 4,267 communities in these states are processing applications appropriately and not "effectively prohibiting" the provision of services.*

Likewise, approximately five allegations were made against largely unnamed local governments in the following 10 states: Indiana (1,666), Iowa (1,046), Maryland (180), Michigan (1,856), Missouri (1,380), Nevada (35), New Jersey (587), North Carolina (653), Ohio (333), Oregon (277), and Wisconsin (1,923) - a collective total of 11,936 governments. *This means that approximately 11,886 local government entities in these states are not impeding deployment in any way.*

Approximately ten local governments were complained of in each of these nine states: Arizona (106), Georgia (688), Illinois (2,831), Massachusetts (356), Minnesota (2,724), New York (1,600), Pennsylvania (2,627), Virginia (324), and Washington (320) – a collective total of 11,576 governments. *Based on these calculations, 11,486 local governments are working well with providers.*

The States of California, (539 communities and approximately 74 allegations of misconduct); Florida (476 local governments and approximately 27 allegations of misconduct), and Texas (1,468 communities and approximately 12 allegations of misconduct) make up the remaining states. And absent any detail, the Commission should take the providers allegations for exactly what they are worth: Nothing. Without specifics – at a minimum identification of the communities - there is NO EVIDENCE of effective prohibition before the Commission.

CONCLUSION

The Commission does not have the authority to issue interpretations or guidelines which would curtail local government authority under Sections 253 or 332(c) and the Industry Commentators have not supplied credible or substantial evidence on which the Commission could base its actions even if it was empowered to radically alter local government authority over public rights-of-way or local government property.

Respectfully submitted,

Lani L. Williams
N67W34280 Jorgenson Court
Oconomowoc, WI 53066
(262) 490-7389
lani@lgl-roundtable.com

Counsel to
National Association of Telecommunications
Officers and Advisors

Copies to: National Association of Telecommunications Officers and Advisors, straylor@natoa.org
National League of Cities, panettieri@nlc.org
National Association of Towns and Townships, jimo@tfgnet.com
National Association of Counties, JTerrell@naco.org
National Association of Regional Councils, leslie@narc.org
Government Finance Officers Association, mbelarmino@gfoa.org
United States Conference of Mayors, kmccarty@usmayors.org

Exhibit A to NATOA's Reply Comments in WT Docket No. 16-421

This is the Senate's business. We hope that we can move along now expeditiously on this side of the aisle. If there are any amendments, we do appreciate the Senator from California, ready and willing and able to present the next amendment. Beyond that, I hope we can get some other amendments.

I yield the floor.

AMENDMENT NO. 1270

(Purpose: To strike the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications services)

Mrs. FEINSTEIN. Mr. President, on behalf of Senator KEMPTHORNE and myself, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself and Mr. KEMPTHORNE, proposes an amendment numbered 1270.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 55, strike out line 4 and all that follows through page 55, line 12.

Mrs. FEINSTEIN. Mr. President, I come to the floor today joined by our colleague, Senator KEMPTHORNE, to offer this amendment on behalf of a broad coalition of State and local governments. Since announcing my intention to proceed with this amendment, I have received letters of support from hundreds of cities across the country, including the States of Arizona, Colorado, Florida, Illinois, Indiana, California, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Oregon, Ohio, Texas, and Washington.

This amendment is supported by the National Governors' Association, the National Association of Counties, the National Conference of State Legislatures, the National League of Cities, and the U.S. Conference of Mayors, to name a few.

Mr. President, as a former mayor, I fully understand why Governors, mayors, city councils, and county boards of supervisors question allowing the Federal Communications Commission to second-guess decisions made at State and local government levels.

On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; with the other hand, this bill, as it presently stands, takes these protections away.

The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority. The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC.

That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist at the FCC, on what may be very broad question of State or local government rights.

In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for States. I hope to explain why. I know my colleague, the Senator from Idaho, will do that as well.

A cable company would, and most likely will, appeal any local decision it does not like to the telecommunications experts at the Federal Communications Commission.

The city attorney of San Francisco advises that, in San Francisco, city laws provide that all street excavations must comply with local laws tailored to the specifics of the local communities, including the geography, the density of development, the age of public streets, their width, what other plumbing is under the street, the kind of surfacing the street has, et cetera.

The city attorney anticipates that whenever application of routine, local requirements interfere with the schedule or convenience of a telecommunications supplier, subsection (d), the provision we hope to strike, would authorize a cable company to seek FCC preemption. Any time they did not like the time and location of excavation to preserve effective traffic flow or to prevent hazardous road conditions, or minimize noise impacts, they could appeal to the FCC.

If they did not like an order to relocate facilities to accommodate a public improvement project, like the installation, repair, or replacement of water, sewer, our public transportation facilities, they would appeal.

If they did not like a requirement to utilize trenches owned by the city or another utility in order to avoid repeated excavation of heavily traveled streets, they would appeal.

If they did not like being required to place their facilities underground rather than overhead, consistent with the requirements imposed on other utilities, they could appeal.

If they were required to pay fees prior to installing any facility to cover the costs of reviewing plans and inspecting excavation work, they could appeal.

If they did not like being asked to pay fees to recover an appropriate share of increased street repair and paving costs that result from repeated excavation, they would appeal.

If they did not like the particular kinds of excavation equipment or techniques that a city mandate that they use, they could appeal.

If they did not like the indemnification, they could appeal.

The city attorney is right, that preemption would severely undermine local governments' ability to apply locally tailored requirements on a uniform basis.

Small cities are placed at risk and oppose the preemption because small cities are often financially strapped. As the city attorney of Redondo Beach, a suburb of Los Angeles writes, every time there is an appeal, they would have to find funds to come back to Washington to fight an appeal at the FCC.

Recently, the engineering design center at San Francisco State University, conducted an interesting study for San Francisco on the impact of street cuts on public roads. The expected life and value of public roads and streets directly correlates with the number of cuts into the road.

Although this is rather dull and esoteric to some, the study reveals that streets with three to nine utility cuts are expected to require resurfacing every 18 years, a 30-percent reduction in service life, relative to streets with less than three cuts. The more road cuts, the steeper the decline in value of the public's asset will be. Streets with more than nine cuts are expected to require resurfacing every 13 years, a 50-percent reduction in the service life of streets with less than three cuts.

An even more dramatic decline in a street's useful life is found on heavily traveled arterial streets with heavy wheel traffic. For those streets, the anticipated useful life declines even more rapidly, from 26 years for streets with fewer than three cuts to 17 years for streets with three to nine cuts, a 35-percent reduction, to 12 years for streets with more than nine cuts, a 54-percent reduction.

What does this mean? It means that financially struggling cities and counties will undoubtedly be forced to include in franchise fees, charges to allow the recovery of the additional maintenance requirements that constantly cutting into streets requires. The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator is going to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have control over their streets. Counties should have control over their roads. States should have control over their highways.

The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $86 billion in 1993 alone. Of the $86 billion, more than $22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on State and local governments for the use of public right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.

I would also like to point out the preemption will change the outcome in some of the dispute between communication companies and cities and States. The FCC is the Nation's telecommunications experts. But they do not have the broad experience and concerns a mayor, a city council, a board of supervisors, or a Governor would have in negotiating and weighing a cable agreement and setting a cable fee.

If the preemption provision remains, a city would be forced to challenge the FCC ruling to gain a fair hearing in Federal court.

This is important because presently they can go directly to their local Federal court. Under the preemption, a city, State, or county government would have to come to the Federal court in Washington after an appeal to the FCC.

A city appealing an adverse ruling by the FCC would appear before the D.C. Federal Appeals Court rather than in the Federal district court of the locality involved. Further, the Federal court will evaluate a very different legal question—whether the FCC abused their discretion in reaching its determination. The preemption will force small cities to defend themselves in Washington, and many will be just unable to afford the cost.

By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review whether the city or State acted reasonably under the circumstances.

Edward Perez, assistant city attorney for Los Angeles, states this will be a very difficult standard to reverse, if they have to come to Washington. On matters involving communication issues, courts are likely to require a tough, heightened scrutiny standard for matters involving first amendment rights involving freedom of speech. Courts are likely to defer to the FCC judgment.

The FCC proceeding and its appeal in Washington will be very different from the Federal court action in a locality. Both the city and the communications company are more likely to be able to develop a more complete and thorough record if the proceeding is before the local Federal court rather than before a Government body in Washington.

We also believe the FCC lacks the expertise to address cities' concerns. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.

Mr. President, this stack of letters opposing the preemption includes virtually every California city and virtually every major city in every State.

What the cities and the States tell us they want us to give local governments the opportunity for home rule on questions affecting their public rights-of-way. If the cable company does not like it, the cable company can go to court in that jurisdiction. By deleting the preemption, we can increase fairness, minimize cost to cities, counties, and States, and prevent an unfunded mandate.

If the preemption remains in this bill, it creates a major unfunded mandate for cities, for counties, and for States. I hope this body will sustain the cities and the counties and the States, and strike the preemption.

So I ask unanimous consent to have a number of letters printed in the RECORD.

There being no objections, the letters were ordered to be printed in the RECORD, as follows:

OFFICE OF THE CITY ATTORNEY,

Re S. 652, Section 245(d) Preemption.
Mr. KEVIN CRONIN,

DEAR MR. CRONIN: You asked for our thoughts regarding S. 652, Sec. 254(d), which would create broad preemption rights in the FCC with respect to actions taken by local governments. Specifically, you are interested as to how section 254(d) could frustrate the ability of local government to manage its rights of way as Congress believes Local Government should (See Sec. 254(c)) and how it could prevent Local Government from imposing competitively neutral requirements on telecommunications providers to preserve and advance Universal Service, protect the public safety and welfare and to ensure the continued quality of telecommunications services and safeguard the rights of consumers. (See Sec. 254(b)).

Section 254(d) would permit the Federal Communications Commission ("FCC") to preempt local government:

"(d) PREEMPTION.—If, after notice and an opportunity for public comment, the Commission determined that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

Section 254(d) reposes sweeping review powers in the FCC and in effect converts a federal administrative agency into a federal administrative Court. The FCC literally would have the power to review any local government action it wishes (either sua sponte or at the request of the industry.) The undesirable consequence of this result will be that a federal agency—with personnel who do not answer directly to public—will be dictating in fine detail what rules local government and their citizens in distant places shall have to follow. The FCC would be given plenary power to decide what actions of local government are "inconsistent with" the very broad provisions in the bill and, without further review, to decide to nullify or preempt such governmental actions. That is unprecedented and for reaching authority for a federal agency to have over local government.

The FCC does have an important role to play in the scheme of things. It has a professional staff with proven expertise in telecommunications matters such as technical requirements. Moreover, issues that transcend state borders need the FCC as the overseer in order to ensure consistency and fairness between the states. On the other hand, the FCC is not in the best position to know what is best for citizens at the local level regarding local issues. An example of a singularly local issue, historically recognized by Congress and the Courts, is the local government's right to manage the public right-of-way (See Section 254(c)). Federal officials do not have an adequate understanding of local issues nor do they have the staff, either in size or proficiency, to resolve local issues about every city in this country. Local Governments and the local courts (entities which are knowledgeable about local issues) should be the forum for resolution of local issues.

An important point that needs to be explicated to Congress is the procedural problems associated with the FCC resolving local issues in Washington. First is the obvious problem. Most citizens, community groups and cities do not have the financial wherewithal to litigate before a federal agency located in Washington. Even if an action of the FCC is reviewed by the Courts, that also would occur in the Washington D.C. Circuit miles away. Section 254(d) does contain due process language and such a provision may meet the technical requirements of the U.S. Constitution. However, the provision "If, after notice and an opportunity for public comments * * *" provides little solace for local governments and its citizens. The FCC all too often provides too little time to respond to its rules and rulemaking proceedings for anyone other than the expensive FCC Bar. It is impractical for local people to respond in a timely fashion and FCC preemption consequently precludes the voice of those most effected.

Second, as a general rule the courts pay great difference to administrative agencies that are created for specific purposes. There is no argument with that proposition because of the proven expertise of federal agencies in matters properly within their purview. However, a serious problem is created when a federal administrative agency is given power over issues where it has little expertise, such as the management of local rights-of-way. This is largely so because of the legal standards for review of administrative decisions. Generally, a decision will stand unless the agency has abused its discretion or has exceeded its authority.

Again, for matters properly within an agency's purview there is no quarrel. However, the sweeping review powers that Section 254(d) places in the FCC would in essence permit the FCC to preempt any statute, regulation, or legal requirement that it believes is inconsistent with the Section 254(a) of the Act. This awesome power clearly belongs with the Courts and not distant administrative staffers. As written, it will be extremely difficult for a court to find that the FCC has exceeded its authority. Consequently, with regard to this standard its decisions may in effect be unreviewable.

Equally troublesome is the abuse of discretion standard applied to federal agency actions. Practitioners in administrative law know all too well that the courts will uphold administrative decisions the vast majority of the time. A reversal occurs only when there is a clear abuse of discretion, a condition infrequently found by the Courts.

The bottom line becomes very clear to local governments, such as Los Angeles, and its citizens. Control regarding telecommunications and zoning issues will be exercised by federal officials three thousand miles away. Individuals who know little or nothing about local interests, the important everyday decisions that should be made by local officials and that should be reviewable by local

courts, will be made by faceless names in Washington.

In addition, because if the procedural structure of the FCC, the normal right to cross-examine witnesses and their testimony is not present. The right to comment and reply to another interested party's comments theorically permits the FCC to make a fair and impartial judgment. However, the comments are not under oath and the testimony that is filed under penalty of perjury is never is reality tested for truth and accuracy. The practical effect is that anybody may say anything they wish with impunity. The decisionmakers, therefore, may be misled into believing erroneous "facts". This view is not intended to suggest that the courts are the answer for all issues. There exist some practical problems with the courts; they may be too slow and they may lack the technical expertise. However, Section 254(d) appears to effectively eliminate the courts because of the absence of any real or effective review of FCC decisions. Senate Bill 652 must be amended to leave local issues to local government and thereby permit local citizens, local governments and local courts to be active participants in the resolution of local issues.

Finally, the industry has clearly captured the decision making of officials at the FCC. In recent years the voice of local governments and its citizens have been routinely rejected by the FCC and the industry appears to have a lopsided influence.

We recommend that Section 254(d) be eliminated in its entirety. If that is accomplished, violations of S. 652 will be decided in the forum properly equipped to do so—the local Federal Courts.

As an additional note, we wish to comment that section (a) of S. 652 also represents a serious and significant invasion of local government authority over local interests. Most any action taken by local government in this area can be construed as having "the effect of prohibiting" an entity from providing telecommunications services. Surely more precise wording can be developed which would not so significantly erode the power of local government over local matters. Please advise if you would like further comment regarding this section.

If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

EDWARD J. PEREZ,

OFFICE OF CITY ATTORNEY,
CITY AND COUNTY OF SAN FRANCISCO,

Re Telecommunications Competition and Deregulation Act.
Hon. DIANNE FEINSTEIN,

DEAR SENATOR FEINSTEIN: I am writing to commend you for sponsoring an amendment to the telecommunications bill to preserve local control over the public rights of way. It is critical to local governments that subsection (d) of proposed 47 U.S.C. Section 254, which would authorize the FCC to preempt state and local authority, be deleted from the bill.

In San Francisco, as in other cities, we welcome the prospect of new telecommunications providers making expanded services available on a competitive basis. However, deregulation only increases the importance of local control over our streets because it brings many new companies seeking to install facilities in our streets.

City laws now require all street excavators—including telecommunications providers—to comply with nondiscriminatory local laws designed to preserve the public health and safety and minimize the costs to the public of repeated street excavation. Throughout the country, such local laws are tailored to the specific characteristics of each local community, including local geography, density of development and the age of public streets and facilities. The language of subsection (d) would severely undermine local government ability to apply such locally tailored requirements on a uniform basis.

Whenever application of routine local requirements interferes with the schedule or convenience of a telecommunications supplier, subsection (d) would authorize the company to seek FCC preemption. To identify just a few examples, my colleague city attorneys and I will have to send an attorney off to Washington every time a telecommunications company challenges our authority to:

(1) Regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize noise impacts;

(2) Require a company to relocate its facilities to accommodate a public improvement project, like the installation, repair or replacement of water, sewer or public transportation facilities;

(3) Require a company to place facilities in joint trenches owned by the City or another utility company in order to avoid repeated excavation of heavily traveled streets;

(4) Require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;

(5) Require a company to pay fees prior to installing any facilities to cover the costs of reviewing plans and inspecting excavation work;

(6) Require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;

(7) Require a company to use particular kinds of excavation equipment or techniques suited to local circumstances to minimize the risk of major public health and safety hazards;

(8) Enforce local zoning regulations; and

(9) Require a company to indemnify the City against any claims of injury arising from the company's excavation.

All of the requirements described above are routinely imposed by local governments in exercise of our responsibility to manage the public rights of way. Granting special favors to telecommunications suppliers, compared for example to other utility companies, will undermine the uniformity of local law and could dramatically increase the costs to local taxpayers of maintaining public streets.

In these times, when the federal government is asking state and local governments to take on many additional duties, the FCC should not be empowered to interfere in this area of classic local authority. This is especially true because, for many cities, the FCC is a remote, costly and burdensome arena in which to resolve disputes. The courts are well-suited to resolve any disputes that may arise from the "Removal of Barriers to Entry" language of Section 254 without placing heavy burdens on local governments.

I appreciate the leadership you have shown on this difficult issue. Please let me know if I can offer any further assistance with your efforts on behalf of cities.

Very truly yours,

LOUISE H. RENNE,

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I am honored to join my friend from California, Senator FEINSTEIN, in this amendment. This is not the first time we have teamed up together. I think perhaps our background as both being former mayors has allowed us to bring to this position some perspective to help us realize, with regard to local and State governments, how this Federal-State-local partnership really ought to be ordered.

The Senator from California was very helpful when we brought forward the bill, the Unfunded Mandates Reform Act of 1995, which the majority leader had designated Senate bill 1, and which allowed me to team up with the Senator from Ohio, JOHN GLENN. In March of this year, as you know, Mr. President, that unfunded mandates legislation was signed into law.

Part of that new law in essence says that Federal agencies must develop a process to enable elected and other officials of State, local, and tribal units of government to provide input when Federal agencies are developing regulations.

The conference report of that legislation passed overwhelmingly. In the Senate it was 91 to 9. In the House it was 394 to 28.

An overwhelming majority said in essence enough is enough, that the Federal Government must reestablish a partnership with local government. It is very straightforward. This movement toward local empowerment has consistently been expressed in the legislative reform occurring in both Houses of Congress. But I feel, as I think the Senator from California feels, that this provision in this telecommunications bill is causing a slippage back to our old habits. What we have before us in section 254 of the bill before us is a reversal of the positive progress that we have been making.

As the Senator from California pointed out, in subsection (d) the committee has added broad and ambiguous FCC preemption language that states, if the FCC "determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the FCC shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

We are going to give this power to the FCC over the jurisdictions of the local communities and the State governments. This is a disturbing directive that instructs the Federal Commission to invalidate duly adopted State laws and local ordinances that the independent Commission may deem inappropriate. This preemption would be generated by a commission that in a majority of cases would be thousands of miles away from the local government jurisdiction that would be affected by their decision.

I know of no one in local government who objects to the language which ensures nondiscriminatory access to the

public right of way. But what they do vigorously object to is that this proposed FCC preemption does not allow them the prerogative to manage their right of way in a manner that they deem to be appropriate and in the best interest of their community.

If I may, Mr. President, let me give you an example. When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.

I think one of the things that you hear so often if you are in local government or if you tune into the radio talk shows, is when a new street has been paved, within 6 months you see crews out there cutting into that new pavement, and they are putting in a new utility. That is expensive, and it is unnecessary if you can coordinate things. Surely, we do not think that an independent commission in Washington, DC, is going to be able to better coordinate that than the local government in San Francisco or the local government in Boise, ID. It just does not happen.

This proposed preemption is based on two assumptions. First, that it is the role of the Federal Government to tell others what to do; second, that local units of government are not capable or responsible enough to make the right decisions. I reject both of those presumptions.

Like the Senator from California, with the hands-on experience that she has had at the local government level, we realize that Federal solutions do not always meet local problems. You have to take into account the local conditions and the local innovations. These Federal solutions have not worked in the past. They are not working now. They will not work in the future.

So why would we step back with all of the progress that we have been making this congressional session in reordering the partnership between the Federal, the State and the local governments in a working partnership?

This language which introduces expanded FCC jurisdiction into the local decisionmaking process is ill-conceived, and it should not be included in the final language of this important legislation. Our amendment would strike the offending subsection in its entirety. This would leave control of local right of way matters with local elected officials, which is exactly where it belongs.

The goal of Congress in regulatory reform should be to remove existing Federal roadblocks that limit productivity and creativity and innovation. We should legislate in a manner that enhances Federal-local intergovernmental partnerships for mutually beneficial results. We should not be guilty of imposing new, unnecessary bureaucratic hurdles as has been done in this case.

So, again, I am so proud to join the Senator from California in this effort. We make a good team. This is a worthy effort to team up with because this present preemption needs to be removed from the telecommunications bill.

I yield the floor, Mr. President.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I would like to thank the Senator from Idaho for those excellent remarks. I think he hit the nail on the head with respect to the rights of local government, and the way in which this Congress is moving. This preemption sets all of our progress regarding the relationship between Federal and local government back, and hurts cities, counties, and States in the process.

So I want the Senator to know how much I enjoy working with him on this. I thank him very much.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I reluctantly rise in opposition to this amendment from two of my most respected colleagues in the Senate. The issue addressed in this amendment goes to the very heart of S. 652, eliminating barriers to market entry.

In the case of section 254, which I have here in front of me, entitled "Removal of Barriers to Entry," we do preempt any State or local regulation or statute or State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The actual authority granted to the FCC in subsection (d) is critical to ensuring that State and local authorities do not get in a way that precludes or has the effect of precluding new entry by firms providing new telecommunications services. At the same time, make no mistake about it, the authority granted in subsections (b) and (c) to the State and local authorities respectively in turn protect them. For example, in subsection (c) it says, "Nothing in this section affects the authority of local government to manage the public rights of way."

Mr. President, this is a particularly difficult problem because all of us want to leave authority with State and local government. But this is a deregulatory bill to allow companies to enter and to compete without barriers. If this section were allowed to fall, it could mean that certain requirements would be placed on companies, such as public service projects or certain types of payments of one sort or another for a local universal service, or whatever. We are trying to deregulate the telecommunications markets in the United States. I know it sounds great to say let every city and municipality have a virtual veto power over what is occurring in their area.

Now, it is my strongest feeling that sections (b) and (c) to the State and local authorities, respectively, are more than sufficient to deal in a fair-handed and balanced manner with legitimate concerns of State and local authority. Sections (b) and (c) take into account State and local government authority, (b) says:

State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 253, 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.

Section (c):

Local Government Authority. Nothing in this section affects the authority of a 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.

Now, the preemption clause (d) reads as follows:

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 or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The intent therefore is to leave protected State regulatory authority, to leave protected local government authority, but there have to be some cases of preemption or a certain city could impose a requirement of some sort or another that would be very anticompetitive, and that is where we come out.

I have joined in a lot of efforts here to ensure that our State and local authority be preserved. And I understand there will possibly be a second-degree amendment. We have worked closely with Senator HUTCHISON and the city, county, and State officials to achieve this balance. That is where the committee came out.

I feel very strongly that it is a fair balance. It takes into account State regulatory authority, takes into account local government authority. But it also recognizes the need to open up markets, the removal of barriers to entry. In many cases these do become barriers to entry, barriers to competition.

So I rise in reluctant opposition to the amendment.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, you have to be sure of foot to be opposing two distinguished former mayors. The Senator from California is the former mayor of San Francisco, and the distinguished Senator from Idaho is a former mayor of Boise. Both had outstanding records.

But let me suggest that what they have read into the preemption section is a requirement and an idea that just does not exist at all. I will have to agree with them in a flash that the Federal Communications Commission has no idea of coordinating, as the Senator from Idaho has outlined, the digging up in front of all of the sidewalks and stores and everything else, putting in the regular necessary conduit, refirming the soil and the sidewalks again in front. We have no idea of the FCC doing it.

Let us tell you how this comes about. Section 254 is the removal of the barriers to entry, and that is exactly the intent of the Congress, and it says no Government in Washington should, well, vote against it. But I think the two distinguished Senators are not objecting to the removal of the barriers to entry. What we are trying to do is say, now, let the games begin, and we do not want the States and the local folks prohibiting or having any effect of prohibiting the ability of any entity to enter interstate or intrastate telecommunications services. When we provided that, the States necessarily came and said, wait a minute, that sounds good, but we have the responsibilities over the public safety and welfare. We have a responsibility along with you with respect to universal service.

So what about that? How are we going to do our job with that overencompassing general section (a) that you have there. So we said, well, right to the point: "Nothing in this section shall affect the ability of a State to impose on a competitively neutral basis"—those are the key words there, the States on a competitively neutral basis, consistent with opening it up—"requirements necessary."

We did not want and had no idea of taking away that basic responsibility for protecting the public safety and welfare and also providing and advancing universal service. So that was written in at the request of the States, and they like it. The mayors came, as you well indicate, and they said we have our rights of way and we have to control—and every mayor must control the rights of way.

So then we wrote in there:

> Nothing shall affect the authority of a local government to manage the public rights of way or to acquire fair and reasonable compensation . . . on a competitively neutral and nondiscriminatory basis.

"Competitively neutral and nondiscriminatory basis." Then we said finally, indeed, if they do not do it on a competitively neutral or nondiscriminatory basis, we want the FCC to come in there in an injunction. We do not want a district court here interpreting here and a district court in this hometown and a Federal court in that hometown and another Federal court with a plethora of interpretations and different rulings and everything else. We are trying to get uniformity, understanding, open competition in interstate telecommunications—and intrastate, of course, telecommunications.

Now, that was the intent and that is how it is written. And if our distinguished colleagues have a better way to write it, we would be glad and we are open for any suggestion. But somewhere, sometime in this law when you say categorically you are going to remove all the barriers to entry, we went, I say to the Senator, with the experience of the cable TV. I sat around this town—I was in an advantaged section up near the cathedral. I had the cable TV service, but two-thirds of the city of Washington here did not have it for years on end because we know how these councils work. We know how in many a city the cable folks took care of just a couple of influential councilmen, and they would not give service or could give service or run up the price and everything else of that kind.

We have had experience here with the mayors coming and asking us. And this is the response. That particular section (c) is in response to the request of the mayors. If they do not do that, if they put it, not in a competitively neutral basis or if they put it in a discriminatory basis, then who is to enjoin? And we say the FCC should start it. Let us not go through the Administrative Procedures Act. Let us not go through every individual.

Yes, we want those mayors and all to come here and everybody to understand rules are rules and we are going to play by the rules and the rules protect those mayors to develop, to administer, to coordinate. I agree 100 percent, I say to the Senator from Idaho, that the FCC has never performed the job of a city mayor. But they shall and must perform this job here of removing the barriers to entry. And if we do not have them doing it, then I will yield the floor and listen to what suggestion they have. But do not overread the preemption section to other than centralizing the authority and responsibility in the FCC to make sure, like they have in administering all the other rules relative to communications here and all the other entities involved in telecommunications, they have that authority to make sure while the cities got their rights of way, while the States have got their public welfare and public interest sections to administer, that it is done on a nondiscriminatory basis.

Mr. KEMPTHORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I would like to respond to my two friends, the floor managers of this bill, and then I know the Senator from California would also like to respond.

They referenced, of course, section 254, which is removal of barriers to entry. That is the section and that is the key. They stated it:

> That no State, 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 services.

Period. Period. And nothing in this amendment alters that at all. We affirm that. It is my impression, Mr. President, that when it is referenced that section (b), State regulatory authority, yes, the States feel that that language is good; and section (c), local government authority, yes, mayors had something to do with the writing of that language. They feel good about that. But the problem is, then you go on to section (d) which, it is my understanding, came very late in the process. In section (d), there is this line that says: "The Commission shall immediately preempt * * *"

We see this so many times with Federal legislation: On the one hand, we give but, on the other hand, we take it away. In section (b) and section (c) we give, but, by golly, we have section (d) that then says that this Commission will immediately preempt. That is the problem. We are not saying that we should not be held accountable to this. That is why there is no language in this amendment to alter the opening statement of section 254. No problem. It is section (d) that then comes right along and, after everything has been said, preempts and pulls the plug, and that is wrong. We should not do this to our local and State partners. It is absolutely wrong.

I yield the floor.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, my colleague from Idaho took the words right out of my mouth. I think he is exactly right in his interpretation of this section. The barrier for entry is clearly done away with by this section. Nothing Senator KEMPTHORNE or I would do would change that. What we do change, however, is simply delete the ability of a remote technical commission to overturn a city decision and create an enormous hassle for cities all across this Nation.

I would like to just give you the exact wording of what the city attorney of Los Angeles said this section does. He says:

> It proposes sweeping review powers for the FCC and, in effect, converts a Federal administrative agency into a Federal administrative court. The FCC literally would have the power to review any local government action it wishes, either on its own or at the request of the industry.
>
> A Federal agency, with personnel who do not directly respond to the public, will be dictating in fine detail what rules local government and their citizens across the country shall have to follow. The FCC would be

given plenary power to decide what actions of local government are "inconsistent with" the very broad provisions in the bill and, without further review, hold the authority to nullify or preempt state and local governmental actions. That is an unprecedented and far-reaching authority for a Federal agency to have over local government.

I could not agree more. Senator KEMPTHORNE and I were both mayors at one time and we both understand that every city has different needs when it comes to cable television.

I remember as the mayor of San Francisco when Viacom came into the city. It wired just the affluent sections of the city. It refused to wire the poorer areas of the city. Unless local government had the right to require that kind of wiring, it was not going to be done at all. That is just one small area with which I think everyone can identify.

But when it comes to the rights-of-way and what is under city streets, the city must be in the position to set rules and regulations by which its street can be cut. This preemption gives the FCC the right to simply waive any local rulemaking and say that is not going to be the case. It gives the FCC the right to waive any local fee and say, "That's not the way it is going to be."

That is why countless cities and counties across the country, not just one or two, but virtually all of the big organizations, including the League of Cities, the national Governors, local officials and others, say, "Don't do this." If a cable company has a problem with anything we in local government do, let them go to court. Let a court in our jurisdiction settle the issue. I think that is the right way to go. For the life of me, I have a hard time understanding why people would want to preempt these local decisions with the technical, far-removed FCC agency.

So I think Senator KEMPTHORNE has well outlined the situation. I think we have made our case.

I thank the Chair.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, the distinguished colleague from Idaho said "came so late in the process." I want to correct that thought. I am referring back over a year ago to a bill with 19 cosponsors, this same language:

* * * the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this subsection, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

It did not come late in the process. We have been working with mayors and we have several former mayors who were cosponsors. That was S. 1822. So this is S. 652, which is, of course, over a year subsequent thereto.

Is it the language that is inconsistent with this subsection? Is that the bothersome part? It sort of bothers this Senator. I think if you are going to violate your authority with respect to being neutral and nondiscriminatory and you have to have somewhere this authority, in the entity of the FCC, to do it rather than the courts, each with a plethora of different interpretations and law, I would think if we could take that, maybe that would satisfy the distinguished Senator from California and the Senator from Idaho.

I yield the floor. I make that as a suggestion.

Mr. KEMPTHORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I appreciate the good efforts of the Senator from South Carolina, because I have always found him to be a gentleman whom I can work with and we can find areas on which we can see some common ground.

With regard to my comment that it came late in the process, this may be a concept that had been discussed quite a bit, but the mayors that the Senator from South Carolina referenced, it was local officials who told me that this particular language of (d) was not in the draft bill's language, it was not part of the draft bill when it came out. And it was really after Senator HUTCHISON from Texas, who raised this issue, had section (c) added that (d) then came back.

I do not know, it may have been something that has been discussed for some months, but as far as putting it in the bill, it was not there.

The other point then about how do we deal with this, again, Senator FEINSTEIN and I are in absolute agreement that with respect to this whole issue of removal of barriers to entry, if there are problems, if a cable company is getting a bad deal and being put off by a local government, they can go to court, but they go to court in that area, they do not have to come to Washington, DC.

The avenue for remedy already exists, so why do we then say, again, everyone must come to Washington, DC? That is expensive. I think it is unnecessary and these cable companies, if there had been particular problems and there is a trend, they can establish a precedence in the court, and I think the local communities are going to realize if there is something wrong, they will not do it again because they will lose in court. I think the spirit in which Senator FEINSTEIN and I have joined in this is on behalf of State and local governments, that they are going to own up to their responsibilities. Let us not make them come to Washington, DC, and not make every one of them subject to the FCC in Washington, DC.

I yield the floor.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I wanted to speak very briefly on this. I know our whip is here with some business.

First of all, I think we have to put this in context. As Senator HOLLINGS has pointed out, this section has been the result of hours and days of negotiations with city officials. It was in S. 1822 last year, and it is here. I think we have to take a step back and look at some of the cable deals and problems that have occurred in our cities. The cities have granted exclusive franchises in some cases and are not allowing competition. They have required certain programming be put on and other requirements on those companies.

Our States have granted, in the telephone area, certain exclusive franchises, not allowing competition. And the point is, if we are having deregulation here, removal of barriers to entry, we have to take this step. I think that is very important for us to considerate this point.

Now, section 254 goes to the very heart of this bill, because removal of barriers to entry is what we are trying to accomplish with this bill. We preempt any State or local regulation or statute or State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The authority granted to the FCC in subsection (d) is critical if we are going to open those markets, because a lot of States and cities and local governments may well engage in certain practices that encourage a monopoly or that demand certain things from the business trying to do business. That would not be in the public interest.

At the same time, make no mistake about it, Mr. President, the authority granted in subsection (b) and (c) to the State and local authorities, respectively, are more than sufficient to deal in a fairhanded and balanced manner with legitimate concerns of State and local authority. These were negotiated out with State and local authorities.

We have worked closely with Senator HUTCHISON and the city, county, and State officials to strike a balance. We have gone to great pains and length to deal with concerns of the cities, counties, and State governments that are legitimately raised. We dealt with the concerns in subsection (b) and (c), while at the same time setting up a procedure to preempt where local and State officials act in an anticompetitive way, by taking action which prohibits, or the effect of prohibiting, entry by new firms in providing telecommunications services.

Now, the real problem created by the amendment offered by my friends, Senators FEINSTEIN and KEMPTHORNE, is that the very certainty which we are trying to establish with this legislation is put at risk. Certainty. A company has to go out and wonder if that local city or State will put some requirement on it to provide some kind of programming, or even to do something in

the city to provide some service, or if it will grant an exclusive monopoly. What we are trying to get are barriers to entry, and we are reserving to the State and local governments certain authorities. So the certainty we are looking for we have taken away—no guarantee that entry barriers will be toppled and no guarantee of uniformity across the country.

The committee has dealt with federalism concerns throughout this legislation. Let me say that this debate goes to the heart of a technical detail of federalism and the Federal Government's relationship to State and local government. It is one of the most complicated areas of this bill. Believe me, it is hard to strike a balance. But if we strike this out, it gives every city in the country the right to put up barriers to entry. It lets every State have the right to have a monopoly unless they can extract something for the State in one way or another. I would not blame cities and States. If we do that, it goes to the very heart of this bill.

Now, I take a back seat to no one in advocating federalism principles. I like much power in the State and local government. It must be balanced with our other goal—removing the anticompetitive restrictions at the local level which restrict competition. Exclusive franchising in the cable and telephone markets is the very way that established monopolies in the past.

So, to conclude my statements on this, I understand that there may be a possible second-degree amendment to this tomorrow that would deal with the language on line 8 on page 55, "preemption," which would deal with the words, or is consistent with. But I am not certain that that second degree will be offered.

In any event, to conclude, this particular section of the bill goes to the heart of dealing with the federalism issue. Are we going to allow the cities and the State to put up barriers of entry to telecommunications firms? In the past, we have done so, with cable television. We have allowed cities not only to add a franchise fee, but also to require certain programming, and sometimes the companies do something else for the city as an incentive.

In telephones, we have allowed our States to set up a monopoly in the State and sometimes to collect certain things or to put certain requirements on. In this bill, S. 652, we are trying to deregulate, open up markets, and we are trying to let that fresh air of competition come forward. If our companies and our investors have the uncertainty of not knowing what every city will do, of not knowing what every State will do and each State legislature and each city council may change, the companies will be in the position of having to endlessly lobby city officials and State officials on these issues—not only that, at any time certainty is taken out.

This bill, S. 652—if we pass it—will provide a clear roadmap with certainty for competition. It will create an explosion of a new investment in telecommunications and new jobs and new techniques. And it will help consumers with lower telephone rates and lower cable rates. It has been carefully crafted and worked out in close to 90 nights of meetings, and on Saturdays and Sundays, plus last year, a whole year, plus a lot of Senators' input. I know it sounds good to give the power to the city and the State, and I am usually for that. In this case, we reserve powers to the city and State, but we very firmly say that the barrier to entry must be removed.

Mr. President, I wish to point out that I think there may be a second-degree amendment to this tomorrow at some point. I want to give Senators notice of that. There may not be. But I rise in opposition to the amendment.

Mr. LOTT. Mr. President, I do have some business to conduct, including the closing statement. At this juncture, I would like to do a couple of things, and if the Senator from Nebraska wants to make a statement, I will withhold on the closing unanimous consent.

CLOTURE MOTION

Mr. LOTT. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on S. 652, the Telecommunications Competition and Deregulation Act:

Trent Lott, Larry Pressler, Judd Gregg, Don Nickles, Rod Grams, Rick Santorum, Craig Thomas, Spencer Abraham, J. James Exon, Bob Dole, Ted Stevens, Larry E. Craig, Mike DeWine, John Ashcroft, Robert F. Bennett, Hank Brown, Conrad R. Burns.

The PRESIDING OFFICER. The acting majority leader.

REMOVAL OF INJUNCTION OF SECRECY—EXTRADITION TREATY WITH BELGIUM (TREATY DOCUMENT NO. 104–7); SUPPLEMENTARY EXTRADITION TREATY WITH BELGIUM TO PROMOTE THE REPRESSION OF TERRORISM (TREATY DOCUMENT NO. 104–8); AND EXTRADITION TREATY WITH SWITZERLAND (TREATY DOCUMENT NO. 104–9)

Mr. LOTT. Mr. President on behalf of the leader, as in executive session. I ask unanimous consent that the injunction of secrecy be removed from the following three treaties transmitted to the Senate on June 9, 1995, by the President of the United States:

Extradition Treaty with Belgium (Treaty Document No. 104–7);

Supplementary Extradition Treaty with Belgium to Promote the Repression of Terrorism (Treaty Document No. 104–8); and

Extradition Treaty with Switzerland (Treaty Document No. 104–9).

I further ask that the treaties be considered as having been read the first time; that they be referred, with accompanying papers, to the Committee on Foreign Relations and ordered to be printed; and that the President's messages be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The messages of the President are as follows:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Extradition Treaty Between the United States of America and the Kingdom of Belgium signed at Brussels on April 27, 1987. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Treaty.

This Treaty is designed to update and standardize the conditions and procedures for extradition between the United States and Belgium. Most significantly, it substitutes a dual-criminality clause for the current list of extraditable offenses, thereby expanding the number of crimes for which extradition can be granted. The Treaty also provides a legal basis for temporarily surrendering prisoners to stand trial for crimes against the laws of the Requesting State.

The provisions in this Treaty follow generally the form and content of extradition treaties recently concluded by the United States. Upon entry into force, it will supersede the Treaty for the Mutual Extradition of Fugitives from Justice Between the United States and the Kingdom of Belgium, signed at Washington on October 26, 1901, and the Supplementary Extradition Conventions to the Extradition Convention of October 26, 1901, signed at Washington on June 20, 1935, and at Brussels on November 14, 1963.

This Treaty will make a significant contribution to international cooperation in law enforcement. I recommend that the Senate give early and favorable consideration to the Treaty and give its advice and consent to ratification.

WILLIAM J. CLINTON.

THE WHITE HOUSE,

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium to Promote the Repression of Terrorism, signed at Brussels on April 27, 1987 (the "Supplementary Treaty"). Also transmitted for the information of the Senate is the report of the Department of State with respect to the Supplementary Treaty.

Exhibit B to NATOA's Reply Comments in WT Docket No. 16-421

Watts (OK)	Wyden	Zeliff
Wolf	Yates	Zimmer

NOT VOTING—29

Andrews	Maloney	Spratt
Bateman	McDade	Thurman
Collins (MI)	McIntosh	Towns
Condit	Moakley	Tucker
Cooley	Ortiz	Waxman
de la Garza	Owens	Williams
Filner	Rangel	Wilson
Hayes	Reynolds	Young (AK)
Herger	Rose	Young (FL)
Kaptur	Scarborough	

□ 0910

The Clerk announced the following pair:

On this vote:

Mr. Scarborough for, with Mr. Filner against.

Mr. GILMAN, Mr. STOKES, and Ms. FURSE changed their vote from "aye" to "no."

Messrs. JONES, KIM, MFUME, BARCIA, HEFNER, and JEFFERSON, Ms. WOOLSEY, Mrs. KELLY, and Ms. MCKINNEY changed their vote from "no" to "aye."

So the amendment was agreed to.

The result of the vote was announced as above recorded.

PERSONAL EXPLANATION

Mrs. MALONEY. Mr. Speaker, I inadvertently missed rollcall vote 627. Had I been present, I would have voted "yes."

The CHAIRMAN. It is now in order to consider amendment No. 2–1 printed in part 2 of House Report 104–223.

AMENDMENT NO. 2–1 OFFERED BY MR. STUPAK

Mr. STUPAK. Mr. Chairman, I offer an amendment, numbered 2–1.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment No. 2–1 offered by Mr. STUPAK: Page 14, beginning on line 8, strike section 243 through page 16, line 9, and insert the following (and conform the table of contents accordingly):

SEC. 243. REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL.—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 interstate or intrastate telecommunications services.

(b) STATE AND LOCAL AUTHORITY.—Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 247 (relating to universal service), 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) LOCAL GOVERNMENT AUTHORITY.—Nothing in this Act affects the authority of a 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 the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) EXCEPTION.—In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

The CHAIRMAN. Pursuant to the rule, the gentleman from Michigan [Mr. STUPAK] will be recognized for 5 minutes, and a Member opposed will be recognized for 5 minutes.

Does the gentleman from Virginia rise to claim the time?

Mr. BLILEY. Mr. Chairman, I do.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] will be recognized for 5 minutes.

The Chair recognizes the gentleman from Michigan [Mr. STUPAK].

Mr. STUPAK. Mr. Chairman, I am offering this amendment with the gentleman from Texas [Mr. BARTON] to protect the authority of local governments to control public rights-of-way and to be fairly compensated for the use of public property. I have a chart here which shows the investment that our cities have made in our rights-of-way.

□ 0915

Mr. Chairman, as this chart shows, the city spent about $100 billion a year on rights-of-way, and get back only about 3 percent, or $3 billion, from the users of the right-of-way, the gas companies, the electric company, the private water companies, the telephone companies, and the cable companies.

You heard that the manage's amendment takes care of local government and local control. Well, it does not. Local governments must be able to distinguish between different telecommunication providers. The way the manager's amendment is right now, they cannot make that distinction.

For example, if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings.

The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Stupak-Barton amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it simply is not fair to ask the taxpayers to continue to subsidize telecommunication companies.

In our free market society, the companies should have to pay a fair and reasonable rate to use public property. 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.

Mr. Chairman, I yield 2 minutes to the distinguished gentleman from Texas [Mr. BARTON], the coauthor of this amendment.

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Chairman, first I want to thank the gentleman from Virginia [Mr. BLILEY], the gentleman from Texas [Mr. FIELDS], and the gentleman from Colorado [Mr. SCHAEFER], for trying to work out an agreement on this amendment. We have been in negotiations right up until this morning, and were very close to an agreement, but we have not quite been able to get there.

I thank the gentleman from Michigan [Mr. STUPAK] for his leadership on this. This is something that the cities want desperately. As Republicans, we should be with our local city mayors, our local city councils, because we are for decentralizing, we are for true Federalism, we are for returning power as close to the people as possible, and that is what the Stupak-Barton amendment does.

It explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way.

It does not let the city governments prohibit entry of telecommunications service providers for pass through or for providing service to their community. This has been strongly endorsed by the League of Cities, the Council of Mayors, the National Association of Counties. In the Senate it has been put into the bill by the junior Republican Senator from Texas [KAY BAILEY HUTCHISON].

The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. 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. We should vote for the Stupak-Barton amendment.

Mr. BLILEY. Mr. Chairman, I yield 1½ minutes to the gentleman from Colorado [Mr. SCHAEFER].

Mr. SCHAEFER. Mr. Chairman, I rise in strong opposition to this Stupak amendment because it is going to allow the local governments to slow down and even derail the movement to real competition in the local telephone

market. The Stupak amendment strikes a critical section of the legislation that was offered to prevent local governments from continuing their longstanding practice of discriminating against new competitors in favor of telephone monopolies.

The bill philosophy on this issue is simple: Cities may charge as much or as little as they wanted in franchise fees. As long as they charge all competitors equal, the amendment eliminates that yet critical requirement.

If the consumers are going to certainly be looked at under this, they are going to suffer, because the cities are going to say to the competitors that come in, we will charge you anything that we wish to.

The manager's amendment already takes care of the legitimate needs of the cities and manages the rights-of-way and the control of these. Therefore, the Stupak amendment is at best redundant. In fact, however, it goes far beyond the legitimate needs of the cities.

Last night, just last night, we had talked about this in the author's amendment and we thought we worked out a deal, and we tried to work out a deal. All of a sudden I find that the gentleman, the author of the amendment, reneged on that particular deal, and now all of a sudden is saying well, we want 8 percent of the gross, the gross, of the people who are coming in. This is a ridiculous amendment. It should not be allowed, and we should vote against it.

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from Texas [Mr. FIELDS], the chairman of the subcommittee.

(Mr. FIELDS of Texas asked and was given permission to revise and extend his remarks.)

Mr. FIELDS of Texas. Mr. Chairman, thanks to an amendment offered last year by the gentleman from Colorado [Mr. SCHAEFER], and adopted by the committee, the bill today requires local governments that choose to impose franchise fees to do so in a fair and equal way to tell all communication providers. We did this in response to mayors and other local officials.

The so-called Schaefer amendment, which the Stupak amendment seeks to change, does not affect the authority of local governments to manage public rights-of-way or collect fees for such usage. The Schaefer amendment is necessary to overcome historically based discrimination against new providers.

In many cities, the incumbent telephone company pays nothing, only because they hold a century-old charter, one which may even predate the incorporation of the city itself. In many cases, cities have made no effort to correct this unfairness.

If local governments continue to discriminate in the imposition of franchise fees, they threaten to Balkanize the development of our national telecommunication infrastructure.

For example, in one city, new competitors are assessed up to 11 percent of gross revenues as a condition for doing business there. When a percentage of revenue fee is imposed by a city on a telecommunication provider for use of rights-of-way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anticompetitive.

The cities argue that control of their rights-of-way are at stake, but what does control of right-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.

Such large gross revenue assessments bear no relation to the cost of using a right-of-way and clearly are arbitrary. It seems clear that the cities are really looking for new sources of revenue, and not merely compensation for right-of-way.

We should follow the example of States like Texas that have already moved ahead and now require cities like Dallas to treat all local telecommunications equally. We must defeat the Barton-Stupak amendment.

Mr. STUPAK. Mr. Chairman, I yield such time as she may consume to the gentlewoman from California [Ms. PELOSI].

(Ms. PELOSI asked and was given permission to revise and extend her remarks.)

Ms. PELOSI. Mr. Chairman, I rise in strong support of the Stupak-Barton amendment, which is a vote for local control over zoning in our communities.

Mr. STUPAK. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Texas [Ms. JACKSON-LEE].

(Ms. JACKSON-LEE asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE. Mr. Chairman, I rise in support of Stupak-Barton, that would ensure cities and counties obtain appropriate authority to manage local right-of-way.

Mr. STUPAK. Mr. Chairman, I yield such time as he may consume to the gentleman from Michigan [Mr. CONYERS].

(Mr. CONYERS asked and was given permission to revise and extend his remarks.)

Mr. CONYERS. Mr. Chairman, I congratulate my colleague from Michigan [Mr. STUPAK] on this very important amendment.

Mr. STUPAK. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it. You have been for control. This is a local control amendment, supported by mayors, State legislatures, counties, Governors. Vote yes on the Stupak-Barton amendment.

Mr. BLILEY. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, first of all, let me say that I was a former mayor and a city councilman. I served as president of the Virginia Municipal League, and I served on the board of directors of the National League of Cities. I know you have all heard from your mayors, you have heard from your councils, and they want this. But I want you to know what you are doing.

If you vote for this, you are voting for a tax increase on your cable users, because that is exactly what it is. I commend the gentleman from Texas [Mr. BARTON], I commend the gentleman from Michigan [Mr. STUPAK] who worked tirelessly to try to negotiate an agreement.

The cities came back and said 10 percent gross receipts tax. Finally they made a big concession, 8 percent gross receipts tax. What we say is charge what you will, but do not discriminate. If you charge the cable company 8 percent, charge the phone company 8 percent, but do not discriminate. That is what they do here, and that is wrong.

I would hope that Members would defeat the amendment.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from Michigan [Mr. STUPAK].

The question was taken; and the Chairman announced that the ayes appeared to have it.

Mr. BLILEY. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from Michigan [Mr. STUPAK] will be postponed until after the vote on amendment 2–4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider amendment No. 2–2 offered by the gentleman from Michigan [Mr. CONYERS].

PARLIAMENTARY INQUIRY

Mr. NADLER. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. NADLER. Mr. Chairman, can the Chair simply state if it plans to roll other votes? Some of us were waiting around for this vote.

The CHAIRMAN. It is the intention of the Chair to roll the next two votes on the next two amendments, 2–2 and 2–3, until after a vote on 2–4. We will debate the first Markey amendment.

Mr. NADLER. Could the Chair use names, please?

The CHAIRMAN. We will roll the next two amendments, the Conyers and Cox-Wyden amendments, until after the vote on the first Markey amendment.

AMENDMENT 2–2 AS MODIFIED OFFERED BY MR. CONYERS

Mr. CONYERS. Mr. Chairman, I offer a modified amendment.

Exhibit C to NATOA's Reply Comments in WT Docket No. 16-421

Summary of Conversations and Responses from Communities

City of Newport Beach, California responding to Crown Castle

The rates the City of Newport Beach requires for use of its publicly owned property represent the fair market rental value for the use of City property, and allow the City to act in the public's interest by recovering a fair market value return on the use of public property. The rates are consistent with federal statutes, case law, and City policy, and the City is acting within its rights as the legal owner and landlord in the rental of its property. To charge less than fair market value may constitute a regulatory taking, or constitute a prohibited gift of public resources, and provides favorable treatment to one industry. Further, the City engages with wireless broadband entities prior to application submittal to discuss any concerns over the installation of new infrastructure in the public right-of-way. These concerns not only include aesthetics, but also safety and access issues resulting from the construction of additional infrastructure in the public right-of-way. Such considerations are applied in a fair and consistent manner as to other applications discussed with, or submitted to, the City.

Prince William County, Virginia responding to Competitive Carriers Association

The Board of County Supervisors of Prince William County, which is the County's siting authority for the purposes of section 6409(a), has not and does not insert conditions into approvals requiring applicants to reduce applied-for structure heights by 10 percent or 20 feet as claimed by the Competitive Carriers Association in footnote 64 of their comments.

On October 13, 2015, our Board of County Supervisors held a public hearing on an application for a 145-foot stealth monopole submitted by Community Wireless Structures. Public comments at the hearing noted that with the extension permitted by 6409(a), the monopole height could eventually reach 165 feet. After concerns about the height were raised by members of the Board of County Supervisors (note: the discussion centered on visual impacts to Manassas National Battlefield Park), the applicant's representative, and not the Board, suggested the possibility of reducing the height by 20 feet to alleviate these concerns. The matter was deferred until November 17, 1015, at which time the Board of County Supervisors approved the special use permit for the monopole at the applied-for height of 145 feet. At no time in that application process, or in any other, have members of the Board inserted, or even attempted to insert, conditions requiring an applicant to reduce the applied-for height by 10 percent or 20 feet. Video of that public hearing is available as item 14-D here (the applicant makes the above-described suggestion just after the 5:10:00 mark):

http://pwcgov.granicus.com/MediaPlayer.php?view_id=23&clip_id=2032

City of Mercer Island, Washington responding to Crown Castle

The assertion in their comment is incorrect. Under the Crown Castle's franchise agreement with Mercer Island, they are required to obtain right-of-way (row) permits to install the small cell nodes. And under the row permit requirements, notices are given to surrounding properties. People can submit comments in response to the notices, which are reviewed, shared with Crown Castle and addressed to the extent feasible. No denial has been based on neighbor comments and neighbor consent is not required.