Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	WC Docket No. 11-59

COMMENTS OF SCAN

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SCAN files these comments in response to the Notice of Inquiry ("NOI"), released April 7, 2011, in the above-entitled matter. SCAN represents 350 telecommunications regulators and their advisors, primarily located in the states of California and Nevada, although we have members located around the country.

SCAN's members are largely the professional staff of local governments who are primarily responsible for right-of-way management as well as telecommunications planning and regulation.[1] Our members, and the governments they represent, have a substantial interest in the issues raised in the NOI.

[1] SCAN was formerly affiliated with NATOA, Inc., but is now a wholly independent entity.

I. LOCAL RIGHT-OF-WAY PRACTICES HAVE NOT UNREASONABLY DELAYED BROADBAND DEPLOYMENT.

The Commission wishes to learn "how rights-of-way and wireless facilities siting decisions influence build out and adoption of broadband and other communications services," and asks for comment on the benefits and costs of potential Commission actions.[2] As shown in many other filings in this proceeding,[3] there is clear evidence that shows that these local governments and their practices have not deterred or unreasonably delayed broadband deployment. Rather, it is the telecommunications carriers that pick and choose those areas they intend to serve even in light of right-of-way regulations, and ignore those areas that they chose to ignore that have no meaningful right-of-way regulations. SCAN supports the factual contentions in NLC Comments, as well as the Michigan Comments in this proceeding supporting local control over right-of-way management.

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[2] NOI ¶¶ 12, 36. This section also responds to NOI ¶ 16 (reasonableness of market-based fees) and ¶ 20 (recovery of fees via geographically averaged rates).

[3] See the "COMMENTS OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND THE AMERICAN PUBLIC WORKS ASSOCIATION" ("NLC Comments") and the "COMMENTS OF THE CITY OF DETROIT, MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, AND PROTEC" ("Michigan Comments") both filed on July 18, 2011.

II. LOCAL RIGHT-OF-WAY MANAGEMENT PRACTICES ADVANCE IMPORTANT LOCAL INTERESTS THAT CANNOT BE ADDRESSED AT THE NATIONAL LEVEL.

California has led the nation in right-of-way regulation of telecommunications carriers. This regulation dates back 160 years to when the state adopted its first right-of-way regulations of telegraph companies in 1850, and made its first general refinements to the law in 1857.[4] California's coherent and time-tested regulation of the rights-of-way has guided local governments regarding the principal of access to the right-of-way. Modernly, the California Legislature has adopted two codes that control right-of-way access throughout the state. First is California Utilities Code § 7901, which says:

> Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

The courts recognize wireless telephone providers such as AT&T Mobility, Sprint, and others as "telephone corporations" within the meaning of § 7901. *See*, *.e.g.*, *GTE Mobilnet v. San Francisco*, 440 F.Supp.2d 1097 (N.D. Cal. 2006).

Section 7901 does not grant unfettered access to rights-of-way in California. The California Legislature in 1991 adopted Public Utilities Code § 7901.1(a),

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[4] See Cal. Stats. 1850, p. 369; Stats. 1857, p. 171.

which reads in relevant part: “It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.” This subsection to § 7901 legally recognized what was obvious for over 150 years: That right-of-way management has to be performed at the local level, where the knowledge of local infrastructure, right-of-way conditions, and special knowledge is vested. That management cannot effectively be wielded from the state Capitol hundreds of miles away, much less from Washington, D.C. thousands of miles away.

SCAN believes that national broadband policy is a national concern, but when, how, and when access to the right-of-way is granted is a matter of local concern and local permitting and construction expertise. Unfettered or largely unrestricted access to the public right-of-way by broadband providers and wireless is an abdication of the sound management of the right-of-way which can as easily result in unreasonably limited or no access by to portions of the right-of-way by multiple other right-of-way users (which include lifeline service providers including wired telephone, power providers, residential and commercial gas providers, municipal sewers, flood-control agencies, and steam providers).

Some local governments, such as the City of Santa Monica, California, have been motivated by many such vital purposes when it adopted a right-of-way

management ordinance in 2004. As first recited and discussed in NLC Comments, (and as adopted by SCAN in these comments), Santa Monica's purposes clearly state:

- To preserve the structural integrity, reliability, performance, safety, ease of maintenance and aesthetic quality of the City's rights-of-way, including preserving view corridors, discouraging visual blight and clutter;
- To address the long-term management of the public rights-of-way;
- To address concerns about the City's public work contractors or others digging in the right-of-way encountering unknown utilities and the potential for damage to those facilities;
- To ensure that the manner in which the right-of-way is accessed minimizes disruption to the community, including vehicular traffic, pedestrian flow, public transit, on-street parking and business uses;
- To ensure utilities (including fiber-optic and wireless telecommunications companies) competitively neutral and non-discriminatory access to the right-of-way; and
- To ensure compliance with federal, state, county and local laws allowing access to the right-of-way.[5]

SCAN believes that local right-of-way regulations addressing local conditions and local goals is the proper 'on-the-ground' regulatory framework, and that this is the framework which has already allowed for the national deployment of wired and wireless telecommunications consistent with Congress's goal for

[5] Dave Britton, P.E., *Do the Right Thing in the Public Right-of-Way*, APWA Reporter (Sept. 2005).

broadband deployment on a national basis. Essentially, the right-of-way system in place already by and large works already and should not be wholesale countermanded by broad stroke rules and try and cram broadband deployment into a one-size-fits-all approach.

III. THE COMMISSION CAN HIGHLIGHT EFFECTIVE LOCAL PRACTICES, ENCOURAGE COOPERATION, AND ASSIST BY ADDRESSING ISSUES THAT LOCAL GOVERNMENTS CANNOT.

SCAN agrees with the NLC comments that describe why the Commission is not positioned to regulate local property management, but yet it can participate by providing leadership instead of new regulatory roadblocks. To that end, when the Commission asks whether it should address right-of-way practices "through educational efforts and voluntary activities" [6] we believe that answer is yes, in an advisory role. The Commission is best suited to providing a clearing house of best practices and useful information to promote the national broadband deployment without running over the necessary and valuable localism associated with efficient and knowledgeable right-of-way management.

[6] NOI at ¶ 37.

IV. ANY ATTEMPT BY THE COMMISSION TO REGULATE LOCAL RIGHTS-OF-WAY WOULD CONTRAVENE THE COMMUNICATIONS ACT AND THE CONSTITUTION.

The Commission has asked for public comment regarding whether it has the legal authority to regulate local right-of-way practices.[7] The Commission does not have that authority. Congress had made it clear that the Commission is not to engage in federal regulation of these local right-of-way practices through Section 224 of the Telecom Act. Section 224 grants limited Commission jurisdiction over certain utility right-of-way, poles or conduits, but that same section expressly excludes authority over right-of-way, poles or conduit owned by any State or its political subdivisions. In order to regulate these matters, the Commission would also require new additional and specific grant of authority as required in Section 601(c) of the Telecom Act. The Commission simply cannot expand its authority into areas preserved to States and local governments without specific new authority from Congress.

V. SECTION 253 EXPRESSLY PRESERVES LOCAL AUTHORITY TO IMPOSE REASONABLE COMPENSATION AND MANAGEMENT REQUIREMENTS.

In addition to only preempting local requirements that "prohibit" or have that "effect," Section 253(c) specifically preserves local authority to recover reasonable right-of-way compensation and to conduct right-of-way management.

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[7] NOI ¶¶ 51-58.

With respect to compensation for the use of the right-of-way, Congress recognized that "[t]he right-of-way is the most valuable of real estate the public owns."[8] That notwithstanding, California has adopted a state policy to permit telephone corporations a right to use the right-of-ways, which has been confirmed by state courts which have rules that under Public Utilities Code 7901 (and its predecessor Civil Code §532), "telephone companies have the right to use the public highways to install their facilities." [9] The decision as to whether a telephone company should granted a right to use the right-of-way without paying a compensation is a matter of state and local concern, and not one that the Commission should interfere with. The more extensive NLC comments make this point clearly. SCAN urges the Commission not to attempt to regulate in this area, which would clearly violate Congress's intent.

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[8] 141 Cong. Rec. S8134, *S8170 (statement of Sen. Feinstein).

[9] *Williams Commc'ns, LLC v. City of Riverside*, 114 Cal. App. 4th 642, 648, 8 Cal. Rptr. 3d 96, 99 (2003)

VI. SECTION 332(C)(7) PRESERVES STATE AND LOCAL AUTHORITY TO MANAGE THE PLACEMENT OF PERSONAL WIRELESS SERVICE FACILITIES.

With respect to the placement of personal wireless facilities in local communities, Congress adopted another preservation clause: Section 332(c)(7) of the Telecom Act.[10]

Unambiguously titled "Preservation of Local Zoning Authority," § 332(c)(7) subjects the State and local zoning process to five limitations, but sharply limits the authority of the FCC to address only one (environmental effects of radio frequency emissions). All other issues are left to the courts based on local facts and circumstances, each of which are specific to local controversies.

Presently, the Commission's self-assigned authority to adopt rules and made declaratory rulings under Section 332(c)(7) is under review before the Court of Appeals for the Fifth Circuit.[11] It would be premature for the Commission to take any action here until the court releases its decision and any appeals are decided.

Facially, Section 332(c)(7) sharply limits the Commission's authority in this area. Section 332(c)(7)'s plain language makes is clear that the Commission may *not* implement the statute through its general rulemaking powers. The statute

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[10] 47 U.S.C. § 332(c)(7).

11 *City of Arlington v. FCC,* Case No. 10-60039 (5th Circuit) (oral argument heard on June 8, 2011).

provides that except as provided in the balance of Section 332(c)(7) (with emphasis added):

> *[N]othing in this Act shall limit or affect* the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[12]

This language is clear and without room for misinterpretation: "nothing in this Act" overrules any perceived FCC authority to make rules in this area.

VII. COMMISSION REGULATION OF LOCAL RIGHT-OF-WAY PRACTICES WOULD BE UNCONSTITUTIONAL.

If the Commission were to regulate right-of-way practices, it would also raise serious constitutional issues.

If the federal government, rather than a state exercises its own constitution power, were to require a local government to place a wire on its property without compensation for that use, it would constitute an unlawful taking under the Fifth Amendment.[13] NLC's comments delve into this issue in depth, and SCAN concurs with the logic and position taken in those comments.

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[12] 47 U.S.C. § 332(c)(7)(A).

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

The preemption of local right-of-way practices by the Commission would also offend the Tenth Amendment and the Guarantee Clause of the Constitution.Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[14] As NLC notes, this is part of the system of "dual sovereignty" where the federal government "may not compel the States to enact or administer a federal regulatory program."[15] In the limited areas where the Constitution does permit a federal agency to regulate, the Constitution only authorizes the federal government to regulate individuals, not States (including their political subdivisions such as local governments).[16]

The Commission cannot not assume control over local rights-of-way practices or compel local governments to provide access to rights-of-way on federally-prescribed terms. That would be an unconstitutionally commandeering of the local administration of public property in service of a federal regulatory goal of broadband deployment. SCAN adopts the NLC's comments regarding the

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[14] U.S. CONST. AMEND. X.

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

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

Constitutional conflicts that will arise should the Commission attempt to exert its own regulatory scheme on the states and local governments. SCAN urges the Commission to avoid overreaching its well-defined and sharply confined regulatory authority in this area.

VIII. CONCLUSIONS

SCAN believes the Commission's best and highest value can be by providing national leadership, best practice and information sharing, and voluntary guidance to promote Congress's goals of broadband deployment. At the same time, it is vital to the proper management and preservation of local rights-of-way that the Commission refrain from imposing regulations that would defeat or change established practices that have been created to address local issues with local solutions.

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