

FEDERAL COMMUNICATIONS COMMISSION  
LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE

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August 23, 2000

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VIA FEDERAL EXPRESS

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW, TW-B204  
Washington, D.C. 20554

Re: LSGAC Recommendation Nos. 22 and 23 / Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking; WT Docket No. 99-217; CC Docket No. 96-98

Dear Ms. Salas:

On behalf of the Commission's Local and State Government Advisory Committee, I am hereby submitting an original and two copies of the LSGAC's Advisory Recommendation Nos. 22 and 23 with respect to the referenced matter.

Very truly yours,

Kenneth S. Fellman  
Chairman, LSGAC

KSF/eaj  
Enclosure

cc: Honorable William E. Kennard, Chairman (w/encl)  
Honorable Harold Furchtgott-Roth, Commissioner (w/encl)  
Honorable Gloria Tristani, Commissioner (w/encl)  
Honorable Susan Ness, Commissioner (w/encl)  
Honorable Michael Powell, Commissioner (w/encl)  
LSGAC Members and Staff (w/encl; via email)

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List A B C D E

**FCC Local and State Government Advisory Committee  
Advisory Recommendation Number 22:**

**Notice of Proposed Rulemaking, Notice of Inquiry, and  
Third Further Notice of Proposed Rulemaking**  
**WT Docket No. 99-217, CC Docket No. 96-98**

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1. **Introduction.** The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in regard to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM"), Notice of Inquiry ("NOI"), and Third Further Notice of Proposed Rulemaking ("Third Notice") in WT Docket No. 99-217 and CC Docket No. 96-98. The LSGAC addresses only the issues raised in the NPRM in this Recommendation.

2. **Background.** State and local governments, like private-sector entities and the federal government, own and manage buildings. Thus, state and local governments have an immediate interest in ensuring that any rules regarding forced access to buildings by telecommunications companies respect the rights and interests of building owners. To some extent, these concerns parallel those of private building owners.

3. **Lack of Jurisdiction.** The Commission lacks jurisdiction to impose rules requiring access to buildings or to real property generally.

a. The mere ownership of property on which telecommunications facilities could be sited is not sufficient to bring that property, or its owner, within the Commission's jurisdiction.

b. The Commission's authority over pole attachments under 47 U.S.C. § 224 does not extend to facilities inside buildings, or to buildings or real property generally.

c. The Commission lacks authority to extend to telecommunications facilities its rules regarding over-the-air reception devices ("OTARD rules") for video. Even to the extent the OTARD rules are authorized by § 207 of the Telecommunications Act of 1996, Congress conspicuously declined to authorize such rules for any other types of communications facilities or equipment. Moreover, in § 601(c)(1) of the Act Congress specifically forbade any implied preemption of state or local law.

4. **Constitutional Issues.** Any rule requiring forced access to state or local government property raises constitutional issues in addition to those raised by forced access to private owners' property. Not only does the Fifth Amendment prohibition against uncompensated takings stand in the way of any rules that would hand over state or local property to telecommunications providers: the Tenth Amendment and the principle of federalism present additional barriers to any federal "commandeering" of

state or local property. The goal of advancing competition does not by itself authorize the Commission to impose unfunded mandates upon other levels of government.

5. **Special Features of Government Buildings.** Buildings owned and managed by state and local governments have unique features that require special consideration in any rules regarding access by telecommunications companies.

a. Multi-tenant buildings owned or managed by state and local governments include, for example, public housing; public buildings in which office or retail space is leased to third parties; airports; parks and recreation centers containing concession spaces; and “incubator” buildings designed to provide space and building services for startup businesses at a minimal cost.

b. Such public buildings may incorporate public safety communications systems (for example, a city hall that houses a police headquarters). It is particularly important that such systems be free of interference or disruption by other telecommunications systems. Communities must also safeguard building security, and may need to limit access by outside personnel, in such cases.

c. Such public buildings may be historic sites, unable to accommodate the kinds of telecommunications facilities that might be appropriate in more modern buildings.

d. Because such public buildings may be distributed throughout local neighborhoods, there is a particularly strong incentive for telecommunications carriers to seek out such buildings as hub or relay sites and hence to abuse any forced access rules the Commission might adopt. For example, in some communities there may be no non-residential buildings other than schools in certain residential areas.

e. Including public buildings within the scope of any potential federal regulation may lead to difficult definitional issues. For example, how would buildings leased by government agencies from private owners (as is the Portals) be treated? Should charter schools be included? Would a “safe house” leased by the CIA or NSA from a private owner be subject to a forced access requirement?

6. **No Basis in Record.** State and local governments already provide access to their real property through request for proposal (RFP) processes similar to those used by the General Services Administration. The record in this proceeding fails to establish that these existing processes have prevented or significantly impeded telecommunications competition.

7. **Limits on Applicability and Costs.** It appears that any rules contemplated by the Commission regarding forced access to buildings would be limited to cases where tenants of a multi-tenant building requested telecommunications services. It also appears that no such rules would require additional costs for building owners or managers; for example, no retrofitting of existing structures would be required. The

NPRM, however, is not entirely clear in this respect. It is essential that any rules adopted as a result of the NPRM make such limitations very clear and explicit. It should be noted that the specific concerns outlined in this Recommendation take for granted the limitations noted in this paragraph; if the Commission were to consider adopting more sweeping regulations, additional serious concerns would arise.

**RECOMMENDATIONS:** The Local and State Government Advisory Committee recommends:

a. The Commission should decline to require forced access to buildings.

b. The record in this proceeding indicates that the market is working and that multi-tenant office buildings are the most competitive portion of the telecommunications market today. Therefore, the Commission should rely in the first instance on the workings of the market and resist adopting unnecessary rules that will slow and confuse negotiations between building owners and competitive providers.

c. The Commission should not adopt any rules that affect the property rights of building owners to control access to or use of property. In particular, the Commission should acknowledge that simple permissive use of building property by one telecommunications provider, without specific legal intent by the owner to grant an easement or right-of-way, does not change the legal nature of that property or make it subject to Section 224.

d. In any case, the Commission should exclude buildings owned or managed by state or local governments from the scope of any forced access requirements it might adopt, so as to avoid imposing unfunded mandates or raising additional constitutional issues.

e. Any rules adopted by the Commission should take into account the unique features of state and local government property, as outlined above.

f. Any rules adopted by the Commission should include careful restrictions on any rights they may purport to grant, to as to prevent abuse by parties seeking to seize state or local property by expanding the scope of federal preemption.

Adopted by the LSGAC on August 23, 2000.



Kenneth S. Fellman  
Chairman

**FCC Local and State Government Advisory Committee  
Advisory Recommendation Number 23:**

**Notice of Proposed Rulemaking, Notice of Inquiry, and Third  
Further Notice of Proposed Rulemaking, WT Docket No. 99-217,  
CC Docket No. 96-98**

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1. The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in regard to the Federal Communication Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM"), Notice of Inquiry ("NOI"), and Third Further Notice of Proposed Rulemaking ("Third Notice") in WT Docket No. 99-217 and CC Docket No. 96-98. The LSGAC addresses only the issues raised in the NOI in this Recommendation.

2. State and Local governments have three vital interests in the matters addressed by the NOI.

a. First, state and local governments are the owners and managers of public property. As trustees for local taxpayers, state and local governments have a duty to assure the highest and best use of such property, including rights-of-way. In addition, any authorized use must not unnecessarily inconvenience, threaten the safety of, or impose uncompensated costs on citizens. Any Commission action that intrudes on right-of-way management authority will significantly harm state and local government efforts to fulfill these obligations.

b. Second, state and local governments have an obligation to protect the public investment in public rights-of-way and accompanying infrastructure, to balance competing demands on this public resource, and to charge fair and reasonable compensation for rights conveyed to privileged users of these public resources. Any Commission action that intrudes on right-of-way compensation authority will significantly harm state and local government efforts to fulfill these obligations.

c. Third, as the Commission stated in its NOI, "the assessment and collection of taxes and other fees is a vital function of State and local governments, indeed a necessary one to support all of those governments' other functions." NOI ¶ 81. Therefore, state and local governments have a significant interest in any Commission action that intrudes on traditional state and local taxing authority.

3. The LSGAC believes that there are multiple and appropriate legal restraints on the Commission's authority to intrude into the property relationships between State and local governments and telecommunications companies, or into state or local tax policy. These restraints include:

a. The Commission's authority under 47 U.S.C. § 253 is limited. That section does not preempt State and local government right-of-way regulations and compensation requirements as long as those regulations and requirements do not prohibit or have the effect of prohibiting the provision of a telecommunications service. Moreover, even right-of-way regulations and compensation arrangements that might prohibit or have the effect of prohibiting entry may not be preempted if they are competitively neutral and nondiscriminatory. And any decisions as to the latter conditions must be made by the courts, rather than by the Commission.

b. State and local governments enjoy significant constitutional protections from Federal intrusion.

- i. Federal appropriation of publicly owned property, whether the physical or regulatory, whether for the federal government's own benefit or for the benefit of favored private enterprises, raises significant and difficult 5<sup>th</sup> Amendment issues.
- ii. The 10<sup>th</sup> Amendment requires careful balancing of powers between national and state sovereigns.

c. The Commission has no discernible authority to preempt State or local tax provisions, or to otherwise interfere with the development and application of State and local fiscal policies. Nor is there any substantial support in the record in this proceeding for the claim that State and local tax policies are likely to have a significant adverse affect on the development of competitive markets for telecommunications service.

4. There is no evidence of record in this proceeding to suggest that any State or local government requirements identified by industry commentators are impeding competitive entry.

5. The LSGAC believes that there are also sound practical reasons for the Commission to leave public right-of-way issues to be addressed by State and local governments. These reasons include:

a. Lives are at stake and the Commission is without expertise. Improperly managed rights-of-way threaten real economic and personal injury -- even loss of life. Natural gas explosions and subterranean floods of retail space, disruption of water supplies, sewage systems and electrical service are significant safety and economic risks that attend the installation and maintenance of telecommunication and other utility facilities in public rights-of-way. State and local governments and their constituents bear these risks. Unless the federal government is inclined to underwrite those risks, local governments must have full authority to contain them.

b. Telecommunications providers are entering markets without regard to local right-of-way policies and practices, but rather based on market assessments that are not dependent on right-of-way management policies. Formerly passive management policies appropriate in the era of the historical monopoly environment are no longer adequate to protect other users of the rights-of-way or the facilities of the multiple telecommunications providers, or to protect the public safety and welfare.

c. Public right-of-way management is historically and properly a core function of local government. Each community has distinct and unique physical characteristics, local infrastructures, environmental concerns, and health and safety issues. A single nationwide right-of-way regulatory regime won't work and will cause great harm to the local right-of-way user. Only local regulations can address each necessary facet of right-of-way regulation, from construction and excavation to space allocation and facility relocation, restoration and fee requirements in a fashion that will meet local community needs.

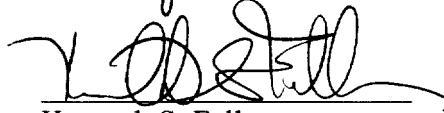
d. The comments submitted in this proceeding reveal the breadth and variety of issues confronting right-of-way management authorities. These issues are unique and local in nature. They cannot be addressed by a single national resolution and the Commission does not have the resources to substitute its own case-by-case evaluation of the myriad local requirements and concerns that are at stake.

6. National local government organizations such as the National League of Cities, the National Association of Counties, and other state and municipal organizations are working to develop voluntary "best practices" guidelines for right-of-way management by state and local governments. These guidelines will take into account the views of industry commenters. The Commission should rely on those most directly involved with right-of-way issues to draw from their experiences "in the field."

7. Many of the comments provided in this proceeding fail to identify the jurisdictions of which they complain and therefore do not allow the jurisdictions the opportunity to respond. The Commission recognized that a jurisdiction should be permitted an opportunity to respond to a petition that may result in the preemption of its regulations in October of 1999. In its Memorandum Opinion and Order, *In the matter of Amendment of 47 C.F.R. §1.120 et. Seq. Concerning Ex Parte Presentations in Commission Proceedings*, Released November 9, 1999, the Commission adopted rules that require a party filing preemption petition to serve a copy of the petition on each state and local jurisdiction to which the petition applies as well as those whose actions are identified as warranting preemption. Failure to serve such jurisdictions results in the dismissal of the petition without consideration. In keeping with this policy, the Commission should accord little weight to comments in this proceeding that do not identify the jurisdictions complained of and therefore do not permit them to respond.

RECOMMENDATION: The Local and State Government Advisory Committee recommends that the Commission take no regulatory action at this time with respect to the issues raised in the Notice of Inquiry.

Adopted by the LSGAC on August 23, 2000.

A handwritten signature in black ink, appearing to read "K. S. Fellman", written over a horizontal line.

Kenneth S. Fellman  
Chairman