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Presentation of
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Panel Discussion: "Telecommunications Deregulation -- A Threat to State & Local Land Use and Zoning Policies?"
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THE FCC'S APPROACH TO RIGHTS-OF-WAY ISSUES ARISING UNDER THE TELECOMMUNICATIONS ACT OF 1996

Telecommunications deregulation poses a challenge, rather than a threat, to state and local land use and zoning policies. This presentation will examine the efforts of the Federal Communications Commission ("the FCC") to fulfill its statutory obligations with respect to public rights-of-way issues arising under the Communications Act of 1934, as amended, and particularly those arising under the Telecommunications Act of 1996.[1]

The Telecommunications Act of 1996. With the 1966 Act, Congress sought to move from a communications marketplace dominated by a few, heavily regulated providers, to a marketplace defined by a "procompetitive, deregulatory national policy framework."[2]

The ultimate goal of the Act's opening of communications markets to competition was to make a variety of basic and advanced telecommunications services available to all Americans, at reasonable and affordable rates. To achieve the transition from monopoly regulation to competition, various provisions of the 1996 Act mandated the removal of both legal and economic barriers to entry.

Several provisions of the 1996 Act provide for preemption by the FCC, including section 253 (removal of barriers to entry), section 704 (rules for facilities siting; RF emissions standards), and section 207 (rules for restrictions on over-the-air-reception-devices or, as we call it,

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[1] 47 U.S.C. §§ 151, *et seq.*; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. §§ 151 *et seq*. ("the 1996 Act").

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Conference Report).

"OTARD").[3]

Chairman Kennard has recognized that the successful implementation of these provisions rests upon the joint efforts of the states and the federal government working together. He has advocated that, in achieving the common goals of the 1996 Act, the states and federal government be guided by three fundamental principles: "competition, community, and common sense." He has made clear that, "common sense means forging a relationship between the FCC and the states" that allows the FCC to find "practical solutions to problems."[4]

Section 253 Preemption. The principle of *constructive cooperation* to achieve common goals is nowhere more important than in the context of the grant of preemptive authority to the FCC under section 253 of the Act. Section 253 gives the FCC authority to preempt enforcement of any state or local government action that may inhibit the ability of an entity to compete effectively in providing telecommunications services. At the same time, section 253 recognizes the role of state and local authorities in managing the public rights-of-way used by telecommunications carriers to provide their services.

Congress thereby established a framework in which the FCC and state and local governments must work together to promote, not impede, competition. The FCC, in its role, has received, and continues to receive, petitions filed by private and public entities that seek preemption of state or local regulations that are alleged to impose undue burdens or excessive costs on telecommunications carriers, thus inhibiting their ability to compete effectively.

The Commission made the initial decision to evaluate these claims on a case-by-case basis. At the same time, in resolving these individual cases, it is attempting to establish a procompetitive framework for the provision and regulation of telecommunications services.

Section 253(a) declares that state and local governments are prohibited from imposing any legal requirement that may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[5]

This restraint of state and local regulatory authority is qualified by subsections (b) and (c). These provisions identify certain powers of state and local governments that are not affected by the restriction contained in subsection (a).

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[3] 47 U.S.C. §§ 253, 704, 207.

[4] Speech of FCC Chairman William E. Kennard to the Annual Convention of the National Association of Regulatory Utility Commissioners, November 10, 1997 (text version as prepared for delivery) <http://www.fcc.gov/Speeches/Kennard/spwek701.html>.

[5] 47 U.S.C. § 253(a).

Section 253(b) preserves the "authority of a State to impose, on a competitively neutral basis and consistent with section 254, 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."[6]

Section 253(c) preserves the "authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis., if the compensation required is publicly disclosed by such government."[7]

Section 253(d) directs the Commission, "after notice and an opportunity for public comment," to "preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency," if the Commission determines that a state or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b).[8]

The omission of explicit FCC preemption for violations of subsection (c) has given rise to a hotly contested debate over the Commission's jurisdiction to address and resolve any claim involving state and local actions that are characterized as "management of rights-of-way" regulations or requirements. This issue has not yet been resolved by the Commission.

FCC Actions Under Section 253. Between late 1996, and the end of 1997, the Commission acted in nearly 10 major proceedings involving claims under section 253. Some initial actions are currently subject to petitions for reconsideration. Yet others remain pending.

It is fair to characterize the Commission's approach to the preemption issue in each of these actions as cautious, measured, and mindful of the shared obligations of federal, state and local governments under the 1996 Act. In the specific proceedings, the Commission has heeded the statutory injunction to exercise its preemptive authority only "to the extent necessary to correct such violation or inconsistency."[9]

The most prominent examples of this measured approach to the exercise of its preemptive

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[6] 47 U.S.C. § 253(b).

[7] 47 U.S.C. § 253(c).

[8] 47 U.S.C. § 253(d).

[9] *See* 47 U.S.C. § 253(d).

authority are the *Classic*,[10] *Huntington Park*,[11] *Texas*,[12] and *Troy*[13] decisions.

Classic. In *Classic*, both the state and the local jurisdiction had the authority to establish entry requirements for telecommunications providers. The state granted Classic Telephone certificates to serve two communities. The local communities turned down Classic Telephone's franchise applications, partly on the ground that the cities were being served by another provider.

The FCC found that the manner in which two cities had implemented their telecommunications franchise requirements so as to deny the petitioner's franchises were preempted under section 253. The FCC stated that, at the very least, section 253(a) proscribes state and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular state or locality.

At the same time, the FCC affirmed the authority of a state as a general matter to franchise telecommunications providers, and to reasonably condition telecommunications providers' activities. The FCC also recognized the ability of a state to delegate any of its reserved powers under section 253(b) to local governments.

The FCC concluded that section 253 preempted the cities from enforcing their franchise requirements by denying Classic's application. But it declined the petitioner's request that enjoin the cities from taking any actions that would interfere with the petitioner's provision of telecommunications services. Instead, the FCC directed the cities to reconsider their franchise

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[10] *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, File No. CCBPol 96-10, 11 FCC Rcd 13082, 13103 (1996) ("*Classic*"); *Classic Telephone, Inc., Petition for Emergency Relief, Sanctions and Investigation*, CCBPol 96-10, *Memorandum Opinion and Order*, FCC 97-335 (released September 24, 1997), *petition for review held in abeyance, City of Bogue, Kansas and City of Hill City, Kansas v. FCC*, No. 96-1432 (D.C. Cir. Jan. 14, 1997)(denying petitioner's motion for writ of prohibition and *sua sponte* holding petition in abeyance).

[11] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCBPol 96-26, *Memorandum Opinion and Order*, FCC 97-251 (released July 17, 1997) ("*Huntington Park*").

[12] *The Public Utility Commission of Texas, The Competition Policy Institute, Intelcom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc., Teleport Communications Group, Inc., City of Abilene, Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, CCBPol 96-14, CCBPol 96-16, CCBPol 96-19, *Memorandum Opinion and Order*, FCC 97-346 (released Oct. 1, 1997) ("*Texas*"), *appeal pending*.

[13] *TCI CABLEVISION OF OAKLAND COUNTY, INC., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, CSR-4790, *Memorandum Opinion and Order*, FCC 97-331 (released Sept. 19, 1997) ("*Troy*"), *reconsideration pending*.

denials in accordance with the *Classic* decision, within 60 days. The FCC took this approach so as to not unnecessarily preempt the franchise requirements themselves. Unfortunately, the matter remains in litigation.

Huntington Park. In the *Huntington Park* proceeding, the FCC held that the petitioner, California Payphone Association, had not demonstrated that an ordinance of the City of Huntington Park prohibiting payphones on private property in the City's central business district (subject to certain exceptions) fell within the prohibition of section 253(a). The decision appears to have turned on whether the city had given competitors fair opportunities to compete in a given market.

The factual record before the FCC did not demonstrate that the challenged ordinance violated the statute. The FCC stated that the petition had failed to demonstrate that the ordinance *standing alone* "materially inhibit[ed] or limit[ed] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market" for payphone services in the city's central business district.[14]

Recognizing the need to proceed carefully in the arena of preemption, Commissioner Ness's Separate Statement emphasized the need for petitioner's seeking preemption to clearly "demonstrate, with particularity, precisely how the municipal or state action forecloses them or others from competing and what remedy will most effectively solve the problem."[15]

Texas. The *Texas* order is a consolidated decision that addressed several petitions challenging the validity, and seeking preemption of, many provisions of the Texas Public Utility Regulatory Act of 1995 ("PURA95"). That Texas statute pre-dated the 1996 Act, and so could not anticipate every aspect of the national framework later adopted.

The analysis in *Texas* was based on two distinct, but related standards: (1) the preemption directive of section 253; and (2) the federal statutory preemption where a conflict exists between federal and state law. The FCC's review of the specific provisions of PURA95 was informed by interpretations of the scope and meaning of specific provisions either advanced or applied by the Texas Public Utilities Commission.[16]

In granting in part, and denying in part, the petitioners' requests for preemption, the FCC observed that its mandate under section 253(d) is to preempt enforcement of a statute, regulation, or legal requirement "to the extent" necessary to correct a violation of section 253(a).

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[14] *Huntington Park*, at para. 42.

[15] *Huntington Park*, Separate Statement of Commissioner Susan Ness.

[16] *See Texas*, at para. 33.

Among other things, the *Texas* decision declined to exercise preemptive authority with respect to the Texas statute's prohibition on entry into telecommunications by Texas municipalities. The FCC determined that it could not preempt enforcement of this aspect of the Texas statute because the petitioner, City of Abilene, is not an "entity" separate and apart from the state of Texas for the purpose of applying section 253. It interpreted the language of the statute as prohibiting restrictions on market entry that apply to independent entities subject to state regulation, not to political subdivisions of the state itself.[17]

The FCC found that the "scope of authority delegated by a state to its political subdivisions is an area that traditionally has been within the purview of the states." To preempt enforcement of the municipal prohibition would insert the FCC into the relationship between the state of Texas and its political subdivisions in a manner not intended by Congress.[18]

In other areas, the FCC recognized that, where the relevant state agency construes its statute to avoid anti-competitive effects, it obviates the need for the FCC to preempt enforcement of the state statute. The few sections of the Texas statute that were preempted under the FCC's order were those where the Texas Commission had failed to give an interpretation that avoided conflict with section 253 or other federal law.

Another important aspect of the *Texas* decision was its articulation of the FCC's view of how reviews of state and local legal requirements under section 253 should proceed. The order stated that:[19]

" The FCC will first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If it finds such a violation of section 253(a) considered in isolation, the FCC will then determine whether the requirement is nevertheless permissible under section 253(b).

" If a requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), the FCC must preempt its enforcement.

" If, on the other hand, the challenged requirement satisfies subsection (b), the FCC may not preempt it under section 253, even if the requirement otherwise would violate the prohibition on barriers to entry in subsection (a) standing alone.

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[17] *Texas*, at para. 179.

[18] *Texas*, at paras. 179, 181.

[19] *Texas*, at para. 42.

Thus, the FCC appears to have interpreted subsection (b) as providing a safe harbor for state and local legal requirements concerning universal service, the public health, safety and welfare, etc., that satisfy the requirements of that provision.

Troy. In *Troy*, the cable operator, TCI, filed a petition challenging the actions of the City of Troy with respect to several TCI cable construction permits, It also broadly challenged the authority of Troy under federal and state law to impose a telecommunications franchise requirement upon a franchised cable operator.

The City of Troy had sought to include in cable construction permits, a condition to the effect that the facilities constructed not be used "for telecommunications purposes." TCI claimed the City's actions thereby raised the issue of whether the city interfered with the operation of a cable system in violation of sections 621 and 624 of Title VI (the Cable Act).

TCI's preemption claim under section 253 was based upon its assertion that the ordinance stood as a barrier to entry in violation of section 253(a), and exceeded the scope of Troy's authority to manage the public rights-of-way and obtain compensation for its use under section 253(c). In addition, TCI argued that when Congress drew a line between cable service franchising requirements set forth in Title VI, and telecommunications regulation (addressed in Title II), it relieved franchised cable operators of any telecommunications franchising requirement.

At the time it was considered, *Troy* was the only section 253 preemption case before the FCC that raised the question of the scope of a city's authority to manage the public rights-of-way and receive compensation for use of the public rights-of-way under section 253(c).

The *Troy* decision found that the city had violated section 621(b)(3)(B). That provision prohibits a franchising authority from imposing any requirement under Title VI that has the purpose or effect of prohibiting, limiting, restricting or conditioning the provision of a telecommunications service by a cable operator. The *Troy* decision found that the city's imposition of the "not for telecommunications purposes" limitation on TCI's cable construction permits was an action taken under the City's Title VI franchising authority, that violated the express language of the statute.[20] The City's request for reconsideration to this aspect of the *Troy* decision is currently pending before FCC.

Despite the existence of a fully developed record regarding TCI's section 253 claims, the FCC found that it could adequately resolve the actual controversy between TCI and the City on the basis of TCI's Title VI claims. The Commission exercised its discretion not to address TCI's

[20] *See Troy*, at para. 75.

additional claims of preemption under Title II.[21] The undisputed factual record plainly revealed that TCI was not then, and had no plans to begin, providing telecommunications service within the City.

In light of this fact, the *Troy* decision did not address the important issue raised by the parties as to whether a franchised cable operator can be required by a city to obtain a second franchise before providing telecommunications services in that locality. This is a particularly difficult issue as it involves the fundamental purpose of such franchises: are they business licenses or permits to use the rights-of-way to provide certain utility services, or are they both?

The FCC did decide to use the *Troy* proceeding to provide guidance on a number of the more significant issues raised under section 253. These include:[22]

" Recognition of the important role state and local governments play with respect to rights-of-way management activities.

" Stating concern that some local governments "appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third tier' of substantive telecommunications regulation on top of traditional state and federal regulation."

" Describing the "third tier" of local regulation as one that "aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which the telecommunications service is offered to the public." Noting that such substantive carrier common regulation would be difficult to justify as "within the scope of permissible local rights-of-way management authority or other traditional municipal concerns."

" Expressing concern that local telecommunications regulations will very likely discourage the development of competition. This particularly so given the potential for multiple, inconsistent obligations imposed on a community-by-community basis.

" Stating that, "[S]uch a patchwork quilt of differing local regulations may well discourage regional and national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies."

" Urging the states, in deciding which telecommunications regulatory powers to delegate to their political subdivisions and which regulatory powers to retain, to strive to avoid redundant layers of regulation, in keeping with the procompetitive, deregulatory intent of Congress in

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[21] *Troy*, at para. 99.

[22] *See Troy*, at paras. 102-110.

enacting the 1996 Act.

Another significant area of concern was identified with respect to the issue of the application of telecommunications franchising, and other legal requirements, only to new entrants. The *Troy* decision expressed the view that this would likely violate section 253's directive that legal requirements be nondiscriminatory and competitively neutral.

At the same time, the FCC is aware that the 1996 Act's movement from a monopoly or quasi-monopoly regime to a competitive market structure creates certain transitional market problems. The question of how to deal with the regulatory legacy of the "incumbent" provider is a prime example of such a transitional problem. Incumbents and new entrants generally commence providing service at different times, provide different types and combinations of service, in different locales, placing differing demands upon public rights-of-way. This situation poses substantial legal and policy challenges for federal, state and local government authorities.

In this regard, the *Troy* decision recognized that "interpreting the 1996 Act is not an easy task."[23] It a task that requires the combined efforts of state and local governments, as well as the FCC, if the goal of encouraging the development of competitive communications markets is to be achieved.

Proceeding to Watch. One of the more significant section 253 right-of-way cases currently pending before the FCC is the Minnesota Department of Transportation proceeding (Docket No. 98-1). The Minnesota Departments of Transportation and Administration have asked the FCC for a declaratory ruling that their "Connecting Minnesota" proposal -- under which they contracted with one private entity to develop and maintain a fiber optic network along Minnesota freeway rights-of-way -- was consistent with section 253.

The proceeding squarely raises issues under both sections 253(b) and (c). A sampling of the first round of comments in the proceeding indicates that incumbent and competitive local exchange carriers and cable television operators are urging the FCC to find that Minnesota has erected an impermissible barrier to entry with its decision to give only one entity exclusive access to freeway rights-of-way to build the network. In contrast, other state departments of transportation (*e.g.*, Calif.) are asking the Commission to confirm state authority over utility easements, including the right to receive in-kind payments for their use. The reply comments were filed on April 9, 1998, and review is currently underway in the FCC's Common Carrier Bureau.

OTARD. Several provisions of the 1996 Act provide for preemption by the FCC, including section 207 (rules for restrictions on over-the-air-reception-devices or, as we call it,

[23] *Troy*, at para. 110.

"OTARD"). Section 207 of the 1996 Act directed the FCC to enact regulations to prohibit governmental and non-governmental restrictions that impair a viewer's ability to receive video programming through devices and antennas designed for over-the-air reception of direct broadcast satellite services, multipoint distribution services, or television broadcast signals.[24]

The goal of the rules is to eliminate unnecessary restrictions on antennae placement and use while minimizing any interference cause to local governments and associations. This is a tough balance, but the purpose is to promote competition among video programming delivery providers and enhance consumer choice and assure wider access to alternative communications technologies.

The Commission adopted its initial rules implementing section 207 on August 6, 1996.[25] The rules are designed to promote two complementary federal objectives: (a) to ensure that consumers have access to a broad range of video programming services, and (b) to foster full and fair competition among different types of video programming services. The rules, codified at 47 C.F.R. § 1.4000, prohibit governmental restrictions such as zoning ordinances and building codes and non-governmental restrictions such as homeowner association covenants, deed restrictions, condominium declarations and townhome regulations that impair installation, maintenance or use of the types of antennas covered by the rule.

The OTARD rules apply to satellite dishes one meter or smaller in diameter and certain antennas one meter or smaller in diagonal measurement, and TV broadcast antennas of any size. The rules apply to antenna restrictions on property within the exclusive use or control of an antenna user who has a direct or indirect ownership interest in the property of a single family home, the backyard of a townhouse, or the balcony of a condominium.

The OTARD rules also require that safety concerns must be articulated in the restriction or in a readily available separate documents. These must be applied in a nondiscriminatory manner, and be no more burdensome to the affected antenna user than necessary to achieve the objectives described. Several petitions to reconsider the OTARD implementation order have been filed, and remain pending before the Commission.

At the same time the initial OTARD rules were adopted, the FCC issued a Further Notice of Proposed Rulemaking on, among other issues, how to treat rental property and common areas. This proceeding also remains pending. Among the issues under consideration are whether

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[24] 47 U.S.C. § 303 nt.

[25] *Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air-Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* IB Docket No. 95-59, CS Docket No. 96-83 (consolidated), 11 FCC Rcd 19276 (1996).

Congress gave the Commission the authority to remove restrictions, but not the authority to impose affirmative obligations on third parties so that a viewer could install a section 207 device.

Since October, 1996, the Cable Services Bureau, which is handling these matters, has received over 50 petitions for declaratory ruling and several petitions for waiver of the rules. In the past two months, the Bureau has experienced a significant uptick in filings. Of the 50 petitions, 8 have been addressed by order; 6 dismissed on jurisdictional grounds; 19 withdrawn or resolved informally; 16 currently under negotiation; and several others currently pending resolution before the Bureau Chief. In addition, Bureau staff have also been active in resolving disputes between antenna users and restricting entities before they reach the petition stage.

Meade. One of the more significant cases resolved by the Cable Services Bureau granted a petition seeking preemption of the Meade, Kansas ordinance regarding satellite dish placement.[26]

The *Meade* order preempted the city ordinance on the ground that it impaired the installation, maintenance or use of antennas covered by the Rule, by requiring permits and prior approval, which imposed unreasonable delay and expense on the end user. In addition, the ordinance was found defective by requiring compliance with unspecified setback requirements under penalty of a $500 a day fine. All of these requirements were found likely to deter, and thereby prevent, installation, maintenance and use of antennas.

Wireless Facilities Siting. It is widely recognized that the expansion of wireless facilities will provide one of the most important new sources of competition. Section 704 established a national policy for resolving wireless facilities siting issues.

As a general matter, the Act grants exclusive federal jurisdiction over the use of spectrum and its operation. It also expressly preserves the authority of state and local governments to decide land use issues, such as the placement, construction and modification of personal wireless facilities. With very limited exceptions, the federal government does not play a role in siting decisions.[27]

Under section 704, state and local governments are barred from unreasonably discriminating among providers of equivalent services; they may not base decisions on the environmental effects of radio frequency emissions if the RF complies with FCC regulations; and they may not take actions that prohibit or have the effect of prohibiting the provision of personal

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[26] *Star Lambert and Satellite Broadcasting and Communications Association of America, Petition for Declaratory Ruling Under Section 47 C.F.R. 1.4000*, CSR 4913-O, *Memorandum Opinion and Order*, DA 97-1554 (released July 22, 1997) ("*Meade*").

[27] *See* 47 U.S.C. § 332(c)(7) [codifying amendments to section 332(c) added by section 704 of the 1996 Act].

wireless services.[28]

The rules require that if a government denies an application: the denial is to be rendered in a reasonable time frame; in writing; and supported by substantial evidence in a written record.[29] The FCC is directed to provide support to the states to encourage them to make property available to wireless carriers for the placement of wireless facilities.[30]

The FCC's Wireless Telecommunications Bureau formed an agency Task Force in 1996, headed by Roz Allen, to serve as an information resource to state and local governments, industry and the public about issues raised by tower siting rules. The Task Force has made extensive outreach efforts and held meetings with various local government and industry groups, in an effort to work with local officials to resolve common problems.

Fact Sheets to help state and local governments as they deal with complex issues of facilities siting in their local communities are available on the Wireless Bureau's homepage, which can be accessed through the FCC's website: **http://www.fcc.gov.**

Petitions. Several petitions have been filed with the FCC regarding tower siting. CTIA has asked the FCC to decide to what extent localities can require operators to prove compliance with FCC radio frequency ("RF") emission requirements, and under what circumstances a request for a tower site approval can be denied based upon failure of the facility to satisfy federal standards.[31] CTIA has also requested that the FCC preempt all local moratoria on antenna siting. These petitions are before the FCC's Wireless Telecommunications Bureau.[32] Related requests have been filed with the FCC's Mass Media Bureau regarding digital television towers. The FCC has been asked to adopt rules to limit local authority to regulate the construction of broadcast

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[28] *See* 47 U.S.C. § 332(c)(7)(B)(i) & (iv).

[29] *See* 47 U.S.C. § 332(c)(7)(B)(iii).

[30] *See* 47 U.S.C. § 332 nt.

[31] *Petition for Rulemaking of the CTIA Concerning Amendment to the Commission's Rules to Preempt State and Local Regulation of CMRS Transmitting Facilities*, Public Notice, Supplemental Pleading Cycle Established for Comments on Petition for Declaratory Ruling of CTIA, FCC 97-264, DA 96-2140 (released July 28, 1997).

[32] *See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities*, WT Docket No. 97-192, ET Docket No. 93-62, RM-8577, *Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-303 (released August 25, 1997).

towers and the tower modifications required to implement digital TV.[33]

At the present time, it is Chairman Kennard's stated intention to resolve wireless facilities siting problems by working together with state and local officials to find solutions to the problems that all parties can with. As the Chairman recently stated, it is not his "intention of turning the FCC into a national zoning board," as that is neither in the FCC's interest, nor the industry's interest.[34]

As a consequence, the Commission is currently concentrating on facilitating discussions between industry organizations and the advisory committee established last year to collaborate with the FCC on these matters. That is the FCC's "Local and State Government Advisory Committee" or "LSGAC."

Two sets of siting issues are currently under discussion with the LSGAC:

" Timing and procedures for local authorization of antennae and tower structures (involving interpretations of sections 253, 332(c)(7), 332(c)(3) and consideration of the CTIA Moratoria Petition); and

" How local officials can determine whether personal wireless facilities comply with the federal RF emission guidelines, thereby triggering preemption of local regulation of these facilities based on the environmental effects of RF.

Considerable progress has occurred with respect to collaboration between the industry and LSGAC staff on the first set of issues. We expect that collaboration to result in a set "reasonable practices" in the near term, for both carriers and local zoning authorities in arriving at solutions for personal wireless tower siting problems.

The second area of RF compliance pulls in both personal wireless and Digital TV issues. Efforts to resolve these issues are involving not only LSGAC and the industry, but also FCC staff from several Bureaus and Offices, particularly the Mass Media and Wireless Bureaus. These efforts are not quite as far along as the timing and procedures efforts, but are making progress.

Outreach Efforts. The FCC expanded its outreach to local and state government when it created the LSGAC in early 1997. The purpose of the Advisory Committee was to facilitate

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[33] *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, Notice of Proposed Rule Making*, MM Docket No. 97-182 (released August 18, 1997).

[34] Remarks by William E. Kennard, Chairman, Federal Communications Commission, to WIRELESS 98, Atlanta, Ga., February 23, 1998 <http://www.fcc.gov/Speeches/Kennard/spwek805.html>.

on-going intergovernmental communication between state and local governments and the FCC. It is comprised of members on both the local level (mayors, city council members), the state level (legislators, PUC members and tribal organizations.

In its first year, LSGAC has provided valuable advice and information to the FCC on key issues that concern state and local governments. It has now communicated state and local government policy concerns regarding proposed Commission actions in eleven written policy "Recommendations," which may found on the FCC's Web Site for these matters.

The Web page is entitled: "FCC Focus on State and Local Government Issues." It can be reached through: **http://www.fcc.gov/statelocal.**

In addition to LSGAC's recommendations, this site contains information regarding pertinent FCC proceedings; the text of relevant speeches by FCC officials; a list of state and local government contacts; and information about how to participate in FCC proceedings.

Going Forward. We value LSGAC's written recommendations and are encouraged by LSGAC's efforts to play a greater role at the FCC with regard to matters of state and local importance. The LSGAC is taking an important and pro-active role in the area of wireless facilities tower siting, working with industry groups, the FCC and their constituents to arrive at solutions all can live with. We hope this effort will bear fruit in the near future.

We would also like to see similar efforts begun in the area of rights-of-way management, in either the form of draft model telecommunications ordinances, or perhaps in the form of a list of best practices that state and local governments can follow to keep their laws consistent with the statutory mandates.

Congress recognized the legitimate province of local governments to administer their police powers, but at the same time, it created new opportunities for competition by modifying the traditional relationship between the FCC and state and local governments.

The FCC shares with states and localities the goal of seeing as many people as possible benefit to the fullest extent possible from innovative new ways to disseminate messages and information. Clearly, consumers benefit from the rapid and efficient deployment of new facilities to enable the provision of new services.

This Commission seeks to engage state and local government officials in a new dialogue. By opening channels of communication, by coming to a common understanding of what outcomes are reasonable under the Communications Act, we believe we can provide useful guidance for both the affected industries and state and local government officials grappling with these issues on a day-to-day basis.

At the same time, this approach should minimize litigation and increase regulatory certainty. Under such a framework, all the interested parties know what to expect, and preemption need only be used rarely, and in a targeted fashion, against outliers, without needlessly restricting the overall ability of state and local governments to meet the needs of their citizens.