

**FCC Local and State Government Advisory Committee
Advisory Recommendation Number 19:**

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

1. The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in response 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 only addresses the issues raised in the NPRM in this Recommendation.

2. The LSGAC has three vital interests in the matters addressed by the NPRM.

a. First, state and local governments own, operate and lease many public buildings in their capacity as property owners. Every year, state and local governments spend billions of taxpayer dollars to construct, operate, maintain and repair public buildings. Therefore, state and local governments have a significant interest in any proposed rule that may increase the costs of constructing and maintaining their property, or increase the intensity of its use by telecommunications carriers.

b. Second, state and local governments are responsible for protecting the health and safety of the general public, as well as ensuring that structures in their jurisdictions are consistent with land use plans and policies. For example, local governments enforce local building codes to ensure that the placement of telecommunications facilities on buildings does not jeopardize the safety of the public. Local governments also balance the placement of telecommunications facilities with other competing community concerns, such as the intrusiveness of a facility into a particular neighborhood. Local governments have a vital interest in any proposal that would give priority to telecommunications facilities when other concerns may be of greater importance to the community.

c. Third, state and local governments own and operate unique property such as parks, public housing, emergency facilities, fire stations, police stations, transportation facilities, museums, airports, ports, hospitals, recreational facilities, historic buildings, correctional facilities, clinics, nursing homes, courts, universities, schools, and military facilities. Each of these types of property raises unique considerations. State and local governments have a vital interest in retaining control over the placement and installation of telecommunications facilities on these types of property.

3. The Commission seeks comment on whether building owners who allow access to their premises to any provider of telecommunications services must be forced to make comparable access to their premises available to all such providers under nondiscriminatory rates, terms and conditions. NPRM, ¶53. The Commission also proposes to require all utilities governed by Section 224 to make ducts, conduits, and rights-of-way inside buildings available to competing telecommunications providers. NPRM, ¶¶ 41, 42. The Commission does not exclude public building owners, such as state and local governments, from the scope of any proposed rule. The Commission's proposals, if implemented, would impose a forced physical access requirement on public building owners. The LSGAC disagrees with the Commission's proposals for four reasons.

a. First, the LSGAC questions the Commission's authority to impose any forced physical access requirement on public building owners and their property. The Commission can only impose such a requirement if it can exercise jurisdiction over public building owners. However, public building owners do *not* fall within the Commission's statutorily granted jurisdiction. The Commission also lacks jurisdiction over the contractual obligations involving third parties, such as public building owners. *Regents of Univ. Sys. of Georgia v. Carroll*, 338 U.S. 586, 602 (1950). Further, the Commission's ancillary jurisdiction does *not* extend to public building owners.

b. Second, even if it is within the Commission's jurisdiction to impose such a forced physical access requirement, such a requirement would effect an unconstitutional taking of property under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Under relevant state law, states and cities own fee title to their buildings. The Fifth Amendment requires the United States to pay "just compensation" whenever it takes private property for public use. The Fifth Amendment applies with equal force to takings of state and local government property.

c. Third, property interests are created by state law, not federal law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Any grant of access to public buildings and their premises by the Commission would reduce the property rights enjoyed by public building owners and expand the property rights of telecommunications providers. The Commission would be creating property rights and deciding the scope of these rights. But such matters are purely questions of state law, not federal administrative interpretation.

d. Fourth, forced physical access would create a dilemma for state and local governments. State and local governments have a duty to ensure the safety and security of certain property and facilities that they own and operate. Yet any forced physical access requirement would compel state and local governments to place telecommunications interests above any other interests--even the safety and welfare of their citizens.

i. For example, state and local governments are responsible for operating correctional facilities, hospitals and schools. To protect their citizens, patients and students-- state and local governments impose severe restrictions, in some cases, on access to these facilities. State and local governments must be able to control physical access to these facilities. Compelling state and local correctional facilities to make their premises available to all providers of telecommunications services if they allow one such provider on their premises may jeopardize the safety of their citizens and employees.

ii. State governments are also responsible for operating military depots, national guard facilities and other sensitive military facilities. Again, state governments impose considerable barriers on access to these facilities. State governments must be able to protect sensitive facilities from access from outside parties including telecommunications carriers.

iii. Public building owners are responsible for ensuring compliance with fire, electrical, building, seismic and other safety codes. They are also responsible, under some circumstances, for the security of

their buildings, and their tenants and visitors. They must coordinate the interests of tenants, visitors, and other parties who want access to a building. And they must address the problem of limited physical space. Public building owners must be able to control physical access to their property: how installation work is scheduled, how the work is done, and what equipment is installed.

iv. Local governments are responsible for emergency 911 services, and maintain buildings devoted to emergency dispatch services. Any forced physical access to these 911 dispatch centers may jeopardize the power of local governments to deliver emergency services to their citizens.

v. Local governments also operate airport facilities. Airport officials must be able to control where telecommunications facilities are located, and how they are installed. Airport officials must be able to ensure that the welfare of citizens and travelers is not jeopardized.

4. The Commission seeks comment on whether it can preempt any State or local law or regulation that impairs the installation, maintenance, or use of antennas used to receive telecommunications services, services delivered via telecommunications, and other fixed wireless services based on its preemption of video receive antennas under Section 207 of the Telecommunications Act of 1996. NPRM, ¶69.

a. By its very terms, section 207 applies only to certain types of video programming; it does not apply to telecommunications antennas. Here, the Commission has *no* statutory basis for asserting authority to preempt state and local police powers over telecommunications antennas.

b. Far from unmistakably preempting state and local police powers over telecommunications antennas, the 1996 Act preserves local authority over telecommunications antennas, except in specifically enumerated areas. Congress expressly reaffirmed in section 704 of the 1996 Act its intent to preserve state and local police powers such as zoning. 47 U.S.C. § 332(c)(7)(A).

RECOMMENDATION: For the reasons discussed above, the LSGAC recommends:

That should the Commission adopt any rule addressing access to third party property, the Commission should clarify that such a rule does not:

1) Force public building owners to allow providers of telecommunications services access to public buildings, premises or other property; or

2) Preempt any State or local law or regulation that impairs the installation, maintenance, or use of antennas used to receive telecommunications services, services delivered via telecommunications, and other fixed wireless services.

Adopted by the LSGAC on this ____ day of October, 1999.

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Chairman