

RESOUNDING SILENCE:

THE NEED FOR LOCAL INSIGHTS IN
FEDERAL BROADBAND POLICYMAKING

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ABSTRACT

This paper provides an overview of the Federal Communications Commission's general rulemaking process and considers how soliciting community-based insights could improve federal broadband policies. The paper examines two dockets that have significantly impacted communities, detailing how those communities responded and analyzing whether or not the Commission incorporates local perspectives into the final orders. This report concludes with suggestions for actions the Commission can take to increase community outreach, ultimately boosting local participation in future policy-making. Recommendations include fully staffing the Office of Intergovernmental Affairs, increasing participation in Commission advisory groups, and making informative materials about how to file comments more accessible to local government officials.

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I. Introduction

Since 1934, the Federal Communications Commission (“FCC” or “Commission”) has been responsible for developing and regulating a rapid, efficient, nationwide communications system.¹ The public comment process is one of the most important ways individuals, states, municipalities, and other federal officials can engage in the rulemaking process. Formal comments require a significant investment of time and resources that many local governments do not have. Even though an express comment option is available, it has not always been treated with the same deference as a standard filing in a proceeding.

This paper examines the public comment process at the FCC and whether municipal filers ultimately influence the Commission’s decisions. First, the report will unpack the general notice and comment process. Second, it will document how local voices played in two impactful FCC proceedings: the *Small Cell* and *Improving Competition in Multi-Tenant Environments* proceedings. The analysis notes local participation in these proceedings and the response, if any, that the FCC provided. Finally, the recommendations detail ways the Commission can ensure that the nineteen thousand plus municipalities nationwide can have a voice in federal broadband policy-making.

In the past, the Commission has made sweeping changes that have impacted communities without local input. The federal government is now poised to do the same again. The Infrastructure Investment and Jobs Act² provides an incredible amount of investments in broadband. As the FCC, National Telecommunications and Information Administration, and states begin to develop plans and strategies to deploy these funds, we must ensure that missteps of the past are not repeated and listen to the communities that understand how to best connect their residents. Without meaningful changes in the way the Commission interacts and collaborates with municipalities nationwide, federal broadband policy will continue to fall short of community-based needs.

II. Municipalities Often Lack the Capacity to Participate in the FCC’s Notice and Comment Process.

The Administrative Procedure Act (“APA”)³ established a classification for different types of agency decision-making and their respective procedural rules.⁴ When an agency promulgates rules based on congressionally delegated authority, its rulemaking procedures are governed by the APA.⁵

¹ Brian Caterino, *Federal Communications Commission*, The First Amendment Encyclopedia, <https://www.mtsu.edu/first-amendment/article/804/federal-communications-commission#:~:text=The%20Federal%20Communications%20Commission> (last visited July 20, 2020).

² See generally Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2022).

³ 5 U.S.C. §§ 551-559.

⁴ Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 Fordham Envtl. L. Rev. 207 at 207-08(2016).

⁵ 5 U.S.C. § 553.

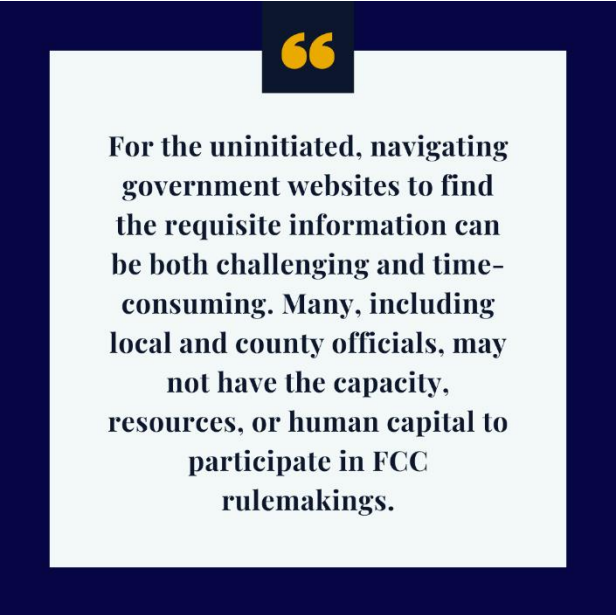
General notice of the FCC’s proposed rulemakings must be published in the federal register.⁶ This disclosure must contain a statement of the time, place, and nature of the public rulemaking proceeding, reference to the legal authority under which the rule is proposed, and the substance of the proposed rule or a description of the subjects and issues involved.⁷

Following the publication of such a notice in the Federal Register, the agency must give interested parties an opportunity to participate in the proceeding using written data, views, or arguments.⁸ This is better known as the comment period, which can range from 30 to 60 days or more, depending on the complexity of the item. Once the comment period has closed, under the APA, agencies must consider the “relevant matter presented” and incorporate into the adopted rule a “concise general statement” of the “basis and purpose” of the final rule.⁹

The FCC provides a summary of the rulemaking process on its website, noting that the summary has been prepared for individuals, small businesses, and others who do not participate in the process on a regular basis.¹⁰ In addition to highlighting APA requirements, the webpage explains under what circumstances the FCC may undertake a rulemaking, where the FCC derives its authority to issue legislative rules, and how it may supplement APA rulemakings, among other topics.¹¹

The Commission also explains where consumers can find Notices of Proposed Rulemakings, final rules, and comments filed by other parties. What may be most important is the Commission’s choice to include a section entitled, “How do I prepare effective comments?”¹² This section addresses the basics of what must be included in a potential FCC filing. It also suggests lines of reasoning and topic areas that may be explored by commenters.¹³

For the uninitiated, navigating government websites to find the requisite information can be both challenging and time-consuming. Many, including local and county officials, may not have the capacity, resources, or human capital to participate in FCC rulemakings. Being under-resourced



⁶ *Id.* at § 553(b).

⁷ *Id.* at § 553(b)(1-3).

⁸ *Id.* at § 553(c).

⁹ *Id.*

¹⁰ Federal Communications Commission, *Rulemaking Process*, <https://www.fcc.gov/about-fcc/rulemaking-process> (last accessed July 25, 2022).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

stands as a de facto barrier that can prevent otherwise important ideas and opinions from being memorialized in the record.

III. Proceedings With Significant Community-Level Impacts, Community Response, and Commission Action.

In 2021, the FCC published 137 Notices of Proposed Rulemaking in the Federal Register. Many of these proceedings had a significant impact on communities nationwide, regardless of whether the communities themselves weighed in on the proceeding. Two major FCC proceedings illustrate how FCC decision-making impacted communities, how municipalities responded, and the outcomes. While this paper will not analyze every aspect of these proceedings, it will take a nuanced look at some of the most significant impacts on communities. The key takeaways inform how the FCC’s policies on broadband deployment and telecommunications technologies could be strengthened with local perspectives.

A. The Small Cell Proceeding Illustrated Why Communities Are Critical for Broadband Deployment, but Not Trusted to See It Through.

One of the most significant proceedings the FCC has undertaken to increase the ability for providers to deploy wireless connectivity infrastructure was 2017’s Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (“Small Cell Proceeding”). In essence, the Commission evaluated ways to reduce barriers while promoting 5G deployment in communities nationwide.¹⁴ Specifically, the Commission explored shot clocks, moratoria on wireless deployments, and other potential reforms for pole replacements, rights of way, and collocations.¹⁵ However, even with ample municipal input, the Commission’s decisions disadvantaged communities nationwide.

The FCC proposed to shorten the time frames for review of facility deployments by harmonizing shot clocks for applications that are not subject to the Spectrum Act with those that are.¹⁶ In effect, this would shorten collocation applications from 90 days to 60.¹⁷ Additionally, commenters were asked to suggest other presumptively reasonable time frames for resolving applications for a narrowly defined class of deployments mainly focused on the construction of new structures.¹⁸

The Commission also explored whether state and local moratoria on processing wireless deployment applications contravened the *2014 Infrastructure Order*,¹⁹ which stated that shot clock deadlines for applications would continue to run regardless of a moratorium.²⁰ This question was

¹⁴ Accelerating Wireless Broadband Deployment by Removing barriers to Infrastructure Investment, WT Docket No. 17-79, *Notice of Proposed Rulemaking and Notice of Inquiry*, 32 FCC Rcd 3330 (WTB 2017) at 2 (*hereinafter Small Cell NPRM*).

¹⁵ *Id.*

¹⁶ Small Cell NPRM at 8.

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ *2014 Infrastructure Order*, 29 FCC Rcd at 12971, para. 265.

²⁰ *Id.* at 10.

supported by a conclusion that the *2009 Declaratory Ruling* specified the conditions for tolling and did not make any provisions for moratoria.

i. Municipalities Elevated Concerns that FCC Action Would Slow Deployment and Subvert Local Authority.

Communities responded to these proposed rules in force. Each shared that they understood how crucial wireless broadband services are and how critical infrastructure deployment is to continued growth.²¹ However, municipal commenters urged the Commission not to adopt shorter shot clocks. For example, the City of Philadelphia specified that the shot clocks mandated by the FCC were already too short but doable, notwithstanding limited resources.²² Washington cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo (“Washington Cities”) correctly pointed out that just because a facility is small does not mean that the review time frame should be shorter.²³

The Washington Cities explained that because many Small Wireless Facilities are predominantly in the public rights-of-way, there is a heightened level of review to adequately account for increased public safety concerns.²⁴ They also pointed out that the FCC should trust the expertise of local governments, who have unique insight into what their communities need. For example, many local jurisdictions require franchise fees or leases for usage of the rights-of-way when processing applications for wireless facilities on public property.²⁵ Often, this requires council action and cannot simply be granted by a local employee.²⁶

Further, the City of Chicago, Illinois, agreed that the FCC should maintain the existing federal shot clock deadlines.²⁷ The City explained that changing that framework would fail to account for the highly fact-specific scenarios that a locality acting in good faith could face in complying with

²¹ Joint Comments of League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities, WT Docket No. 17-79 at 1, (available at [https://www.fcc.gov/ecfs/file/download/DOC-572bab61c2c00000-A.pdf?file_name=joint%20comments%20AZCT%20CACities%20ORCities%20\(wt%20docket%20no%2017-79\)%20signed.pdf](https://www.fcc.gov/ecfs/file/download/DOC-572bab61c2c00000-A.pdf?file_name=joint%20comments%20AZCT%20CACities%20ORCities%20(wt%20docket%20no%2017-79)%20signed.pdf)); Comments of the City of Austin, WT Docket No. 17-79 at 6-7 (available at https://www.fcc.gov/ecfs/file/download/DOC-572b614bbd000000-A.pdf?file_name=FINALAustin%20FCC%20Comments%20June%202017.pdf); Comments of the City of Philadelphia, WT Docket No. 17-79 at 1 (available at https://www.fcc.gov/ecfs/file/download/DOC-572b62643ec00000-A.pdf?file_name=Philadelphia%20Comments%20-%20FCC%20-%20WT%20Docket%2017-79.pdf); Comments of the Mayor of Lansing, Michigan, WT Docket No. 17-79 at 1 (available at https://www.fcc.gov/ecfs/file/download/DOC-572b334688c00000-A.pdf?file_name=FCC%20Letter%20Final.pdf).

²² *Id.*

²³ Comments of the Washington Cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo, WT Docket No. 17-79 at 7 (available at [https://www.fcc.gov/ecfs/file/download/DOC-597bb9e20c000000-A.pdf?file_name=Comments%20Re%20FCC%20Draft%20Declaratory%20Ruling%20and%20Third%20Report%20and%20Order%20\(1787936x7ACF2\).pdf](https://www.fcc.gov/ecfs/file/download/DOC-597bb9e20c000000-A.pdf?file_name=Comments%20Re%20FCC%20Draft%20Declaratory%20Ruling%20and%20Third%20Report%20and%20Order%20(1787936x7ACF2).pdf)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Comments of the City of Chicago, WT Docket No. 17-79 at 2 (available at https://www.fcc.gov/ecfs/file/download/DOC-572bb2ae5d800000-A.pdf?file_name=Chicago_Wireless_NPRM%20and%20%20NOI_Comments.pdf).

deadlines.²⁸ Chicago also noted that decreasing the time a community has to review an application could potentially threaten public safety and can disrupt the ongoing operation of complex communications systems that the community or other providers are using to serve existing consumers.²⁹

Review processes for siting applications vary across cities. Chicago, for example, utilizes its Department of Transportation to review wireless siting applications in rights-of-way and on city proprietary property such as municipal light poles and traffic signals.³⁰ However, wireless siting



applications for locations that are not in the right-of-way are approved by the City’s Departments of Buildings and Planning and Development.³¹ Utilizing three different departments allows Chicago to review and respond to wireless siting applications more effectively.

Finally, New Orleans, Louisiana, explained a crucial point. There is a fundamental difference between a municipality receiving an application for a single 175-foot- tower versus dozens of small cells across a target city.³² New Orleans officials argued that the Commission’s desire to eliminate a “case-by-case” approach and establish a one-size-fits-all approach ignored the reality that not all applications and geographic areas are the same.³³

While many large cities may have the resources, staff, and capacity to utilize different departments, many small and medium-sized municipalities may rely on a single department or even a single person to handle siting applications. For example, the City of Blue Spring, Missouri, a city of just over 50,000 people, experienced an increase in permit application volume and severely limited staff capacity, delaying permit request responses.³⁴ A federal shot clock does nothing to address the underlying issues behind those delays, and on the other hand, diverts resources that could be used to process requests more expeditiously instead toward risk mitigation.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 5.

³² Comments of The City of New Orleans, Louisiana, WT Docket No. 17-79 at 2-3 (available at https://www.fcc.gov/ecfs/file/download/DOC-572ba5555cc00000-A.pdf?file_name=New%20Orleans%20Comments%20In%20Broadband%20Deployment%20Proceeding%20-%206-15-2017.pdf).

³³ *Id.*

³⁴ See Blue Springs, Missouri, *Building Permits*, <http://bluespringsgov.com/463/Building-Permits> (last visited Aug. 15, 2022); See Blue Springs Missouri, *PERMIT & APPLICATION CENTER*, <http://bluespringsgov.com/1603/Permit-Application-Center> (last visited Aug. 15, 2022).

The Small Cell Proceeding was expected to have a remarkable impact on local government autonomy. Still, the FCC missed or declined opportunities to solicit and incorporate community-based perspectives. Aside from the comment and reply comment periods, the absence of ex parte meeting documentation confirms that there was little interaction between the FCC and municipalities. The reasoning behind this is difficult to glean. However, the lack of capacity, resources, or knowledge to schedule these meetings may have eliminated a critical advocacy tool for local governments.

ii. The Commission’s Decision Confirmed Municipal Fears.

The FCC released the Declaratory Ruling and Third Report and Order.³⁵ Even though municipal filers expressed concerns and detailed implementation hurdles, the Commission shortened the shot clocks for review of wireless siting applications to 60 and 90 days for collocation and small wireless facility applications, respectively.³⁶ It cited telecommunications industry comments, which claimed that shot clocks would address their need for expedited review of wireless siting applications.³⁷

Similarly, the Commission concluded that the existing shot clocks did not reflect the evolution of the application review process. Its analysis was based on the assumption that localities could complete reviews more quickly than they could when it adopted the original shot clocks,³⁸ citing industry comments which argued that local governments have gained significant experience in processing wireless siting applications.³⁹ Rather than identifying whether collocation applications are more difficult to process, the Commission justified its decision to shorten shot clocks by stating that “community impact is likely to be smaller.”⁴⁰

The FCC’s conclusion did not reflect the reality that shorter shot clocks did not consider the varied and unique climate, historic architecture, and volume of siting applications that municipalities



³⁵ *Accelerating Wireless Broadband Deployment by Removing barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 & WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2017) (*DR & T R&O*) (available at <https://www.fcc.gov/document/fcc-facilitates-wireless-infrastructure-deployment-5g>).

³⁶ *Id.* at para. 104.

³⁷ *Id.* at para. 106.

³⁸ *Id.*

³⁹ *Id.* at para. 106 FN 302 (citing the comments of T-Mobile and Crown Castle).

⁴⁰ *Id.* at para. 107.

face.⁴¹ Instead, it reasoned that allowing municipalities to rebut the shot clock's presumed reasonableness would eliminate any nuanced issues they face. Unfortunately, this moved the issue from the FCC's purview to the judiciary's, neither of which are as versed in local challenges as the municipality itself. This imposed a new burden on communities because permitting officials are not attorneys, and city attorneys simply do not have the resources to be involved in the permitting process or undertake extensive permitting litigation.⁴²

In effect, this decision further distanced the Commission from the municipalities that are impacted by its decisions. Failing to address municipal concerns that are well-documented on the record reduces the likelihood that they will participate in future proceedings or the belief that local voices are being heard.

B. Local Government Pleas to Improve Competitive Broadband Access to Multiple Tenant Environments Have Been Only Partially Addressed.

Apartments and other multi-tenant environments are essential to many communities' residential and business growth. In fact, nearly 36% of renters in the United States call an apartment home.⁴³ Living or doing business in an apartment complex or office buildings comes with its own challenges to receiving broadband service. First and foremost, to provide service to these buildings, providers need access to the building to install the relevant infrastructure. Second, in the past, landlords have exploited this need for access by entering into exclusive agreements with one provider rather than allowing tenants to choose a provider.⁴⁴ The Commission outlawed these exclusive agreements in 2008.⁴⁵ However, the Commission did not outlaw other avenues for property owners to limit provider access to their buildings.

In 2021, the Wireline Competition Bureau published a public notice inviting public comments to refresh the record on a range of common practices in MTEs including exclusive revenue sharing, wiring, and marketing agreements.⁴⁶ The Commission sought to refresh the record on whether it should restrict some or all of these types of agreements, and how each impacted the prices that

⁴¹ *Id.* at para. 109.

⁴² See Association of Washington Cities, Small City Resource Manual at 7 (2018), <https://wacities.org/docs/default-source/resources/smallcityresourcemanual.pdf?sfvrsn=4>; See City of Rockville, Maryland, *CITY ATTORNEY*, <https://www.rockvillemd.gov/127/City-Attorney#:~:text=As%20legal%20advisor%20to%20the,prepares%20and%20For%20reviews%20ordinances%2C> (last visited Aug. 18, 2022) (highlighting that city attorney positions are not involved in the permitting process and permitting offices are not involved in city legal proceedings).

⁴³ National Multifamily Housing Council, *Quick Facts: Resident Demographics*, <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/> (last visited Sept. 7, 2022).

⁴⁴ Jenna Leventoff, *Your Landlord Might Be Making Deals With Broadband Providers. We Want Them to Stop.*, Public Knowledge (Sept. 10, 2019), <https://publicknowledge.org/your-landlord-might-be-making-deals-with-broadband-providers-we-want-them-to-stop/>.

⁴⁵ Press Release, FCC, *Fcc Bans Exclusive Contracts for Telecommunications Services in Apartment Buildings* (Mar. 19, 2008), <https://docs.fcc.gov/public/attachments/DOC-280908A1.pdf>.

⁴⁶ See *Wireline Competition Bureau Seeks to Refresh Record On Improving Competitive Broadband Access to Multiple Tenant Environments*, 36 FCC Rcd 13441 (2021).

tenants ultimately pay for service.⁴⁷ It also sought to determine the competitive effects of each of the types of agreements, if an MTE would have a legitimate reason for entering into such agreements, and whether the drawbacks of any such agreements would outweigh the benefits.⁴⁸ Finally, the Commission sought comment on the definition of MTEs, whether the size of an MTE should affect the rules adopted, and whether there are any other contractual or non-contractual practices that affect competition or limit tenant choice, or influence prices.⁴⁹

i. Community Responses Were Unified in Support of a Universal Restriction on Exclusive Agreements.

While a small percentage of communities responded to the Commission's public notice, those who did spoke with a unified voice. Municipal commenters agreed that exclusive revenue sharing, wiring, and marketing agreements negatively affect competition, raise new providers' entry barriers, and limit consumer choice in MTEs.

For example, the City of Boston highlighted that revenue sharing agreements contribute to the barriers to entry for competitors and discourage broadband deployment.⁵⁰ Boston continued by noting that exclusive wiring agreements do not ensure that state-of-the-art wiring will be deployed but instead has no bearing on a provider's willingness to install, upgrade, or maintain facilities.⁵¹ Similarly, Boston explained that exclusive marketing agreements prevent new entrants and limit consumer choice. Boston noted that these types of agreements do not completely limit a consumer's choice of broadband provider, but it is a de facto restriction as the choice is made more difficult to make when only one company is permitted to market its services.⁵²

The City of Longmont, Colorado, also documented its concerns in public comments.⁵³ Longmont urged the Commission to prohibit all forms of arrangements between MTE owners and ISPs that have the practical effects of an exclusivity agreement.⁵⁴ In addition to explaining the negative outcomes exclusivity agreements have had in Longmont, the comments also explained how the current rules surrounding arrangements negate the intent of the Emergency Broadband Benefit

⁴⁷ *Id.*

⁴⁸ *Id.* at 2-3, 5-6, 6-7.

⁴⁹ *Id.* at 7-8.

⁵⁰ Comments of the City of Boston, Massachusetts, GN Docket No. 17-142 at 4, https://www.fcc.gov/ecfs/file/download/DOC-5f27c3cf27400000-A.pdf?file_name=COMMENTS-BOSTON%20MA.pdf.

⁵¹ *Id.* at 5

⁵² *Id.* at 7

⁵³ See generally Comments of the City of Longmont, Colorado, GN Docket No. 17-142, [https://www.fcc.gov/ecfs/file/download/DOC-5f27c7bcfec00000-A.pdf?file_name=Longmont%20MTE%20Comment%20\(10.20.2021\).pdf](https://www.fcc.gov/ecfs/file/download/DOC-5f27c7bcfec00000-A.pdf?file_name=Longmont%20MTE%20Comment%20(10.20.2021).pdf).

⁵⁴ *Id.* at 2.

Program (“EBB”).⁵⁵ The EBB was designed to provide low-cost Internet access to eligible households. However, the Commission’s exclusivity agreement rules effectively prohibited residents of MTEs with these agreements in place from fully receiving the intended benefits of EBB.⁵⁶

Finally, the City of Seattle also weighed-in on the Commission’s exclusive agreement rules.⁵⁷ Seattle indicated that since 2015 86% of new housing units completed in Seattle are MTEs, and a 2017 survey showed that MTE residents highly prioritized broadband access and choice.⁵⁸ Unlike the other cities that commented, Seattle did not directly call for a ban on the exclusivity agreements the FCC named. Instead, its research indicates building owners reported a lack of knowledge as to what could be achieved with access agreements and had persistent doubts about what the best options for infrastructure or access decisions could be.⁵⁹ Seattle then called for the FCC to act as a credible source of information to confirm or deny claims from service providers.⁶⁰ This type of informational resource would help balance MTE owners’ incentives to maximize return on investment, and MTE residents’ need for competitive choice from ISPs.⁶¹

ii. The Commission’s Decision Favored Municipalities but Did Not Address the Bulk of Their Concerns.

In its Report and Order, the Commission addressed some, but not all, of the issues expressed by municipal filers.⁶² It adopted rules prohibiting providers from entering into or enforcing exclusive revenue sharing agreements or graduated revenue sharing agreements with an MTE owner.⁶³ While the Commission agreed with the sentiments of municipal filers, it did not cite them, stating that exclusive revenue sharing agreements serve no purpose other than to inhibit new entry.⁶⁴ The Commission rightly concluded that, as subscribers switch away from an incumbent to a competitive provider, the compensation paid to the MTE owner would decrease, and thus the MTE owner has an incentive to block alternative providers’ access to the building.⁶⁵ It also agreed with municipal filers in prohibiting graduated revenue sharing agreements as well.⁶⁶

⁵⁵ *Id.* at 5.

⁵⁶ *Id.*

⁵⁷ Comments of Seattle Information Technology, GN Docket No. 17-142,

https://www.fcc.gov/ecfs/file/download/DOC-5f4ee279f7000000-A.pdf?file_name=SeattleIT_FCC_ReplyComments_BroadbandCompetitionMTEs_GN%20Docket%2017-142.pdf.

⁵⁸ *Id.* at 1-2.

⁵⁹ *Id.* at 2

⁶⁰ *Id.*

⁶¹ *Id.* 2-3.

⁶² *See generally Improving Competitive Broadband Access to Multiple Tenant Environments*, Report and Order and Declaratory Ruling, FCC No. 22-12 (2022) (MTE R&O).

⁶³ *Id.* at para. 16-17.

⁶⁴ *Id.* at para. 20.

⁶⁵ *Id.* at para. 21.

⁶⁶ *Id.* at para. 24 FN 84.

The FCC did not go so far as to outright prohibit exclusive marketing agreements.⁶⁷ Instead, it decided that disclosure of an exclusive marketing agreement would be enough to remedy any confusion MTE residents had about available provider options.⁶⁸ The Commission agreed with the City of Longmont, Colorado, and Boston, Massachusetts, that exclusive marketing agreements can have the effect of being exclusive service agreements because consumers may be unaware of competitive service offerings.⁶⁹ However, this solution differs from what was proposed by the cities.

Additionally, the Commission clarified that sale-and-leaseback agreements are explicitly prohibited.⁷⁰ It agreed with the previous comments of the City of San Francisco, California,⁷¹ that such practices were antithetical to the Commission's regulations.⁷² However, the Commission did not prohibit any other form of exclusive wiring agreement in MTEs.

Finally, the Commission concluded that it had the authority to adopt its rules under sections 201(b) and 628(b) of the Communications Act.⁷³ Section 201(b) provides that "all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."⁷⁴ It relied on Section 201(b) for its rules on exclusive access contracts between MTE owners and telecommunications carriers in the past, and that, as a result, it could do so again here.⁷⁵

The Commission also found authority to regulate Multichannel Video Programming Distributors ("MVPD") under section 628(b), which makes unlawful "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder or prevent any MVPD from providing satellite cable programming or broadcast satellite programming to subscribers or consumers."⁷⁶ It argued that because this provision was the basis for its previous prohibition on exclusive access contracts between covered MVPDs and residential MTE owners, it would be able

⁶⁷ *Id.* at para. 33-42.

⁶⁸ *Id.* at para. 36.

⁶⁹ *Id.* at para. 36 FN 127, para. 37 FN 131.

⁷⁰ *Id.* at para 54.

⁷¹ Comments of the City of San Francisco, California were not analyzed here as they were a part of a prior proceeding.

⁷² MTE R&O at para. 52.

⁷³ *Id.* at para. 43.

⁷⁴ 47 U.S.C § 201(b).

⁷⁵ MTE R&O at para. 43.

⁷⁶ 47 U.S.C. § 548(b).

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Notably, the Commission did not address the authority concerns that were raised by the Cities of Boston, Massachusetts; Portland, Oregon; and Ontario, California.

to do so again.⁷⁷ Notably, the Commission did not address the authority concerns that were raised by the Cities of Boston, Massachusetts; Portland, Oregon; and Ontario, California.⁷⁸

Even when proceedings have concluded favorably for municipalities, there have been too many occasions in which the Commission’s reasoning remains silent on explicit concerns raised by local governments. Much like *Small Cell Proceeding*, the FCC failure to address local concerns help erode local government authority, regardless of intent. The FCC must work to ensure that communities have the resources and information needed to elevate concerns outside of

the public comment process, tactics that industry lobbyists have perfected.

IV. Community Input Should Be the Cornerstone of the FCC’s Decision-Making.

The *Small Cell Order* came out unfavorably for municipal officials. However, communities were able to offer significantly nuanced information providing the Commission with critical information about how policy changes would affect broadband deployment in their areas. Municipalities often have the best view of the challenges and assets they have when it comes to broadband deployment. That said, the shortening of shot clocks was directly antithetical to the needs of communities nationwide. A clear example of this is the permitting slowdown that occurred during the COVID-19 pandemic.⁷⁹

The Commission also moved review of missed deadlines away from the municipality and to the judiciary, a decision that requires resources, time, and effort that many communities do not have to spend. In the *Small Cell Proceeding*, municipalities made it clear that such changes would stifle their ability to provide adequate services both to the providers they work with and to their residents. Nevertheless, local arguments

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Even when proceedings have concluded favorably for municipalities, there have been too many occasions in which the Commission’s reasoning remains silent on explicit concerns raised by local governments.

⁷⁷ MTE R&O at para. 44.

⁷⁸ *Reply Comments of The Cities of Boston, Massachusetts; Portland, Oregon; and Ontario, California* GN Docket No 17-142 at 14-17.

⁷⁹ WIA Staff, *COVID-19 Could Change Permitting Processes with Municipalities*, WIA (June 4, 2020), <https://wia.org/covid-19-could-change-permitting-processes-with-municipalities/>.

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In 2017, when the Small Cell Order was adopted, only one local official was serving on the BDAC. Even now, Commission advisory committees have less than a dozen municipal officials serving.

were dismissed by the Commission in favor of perceived rapid deployment of new wireless technologies.

Further, even though the *MTE* proceeding concluded somewhat favorably for municipalities, the Commission overlooked critical portions of municipal comments that could have changed the outcome. For example, when establishing the Commission’s authority to adopt new rules governing broadband deployment, the Commission failed to address the concerns of the City of Boston, Massachusetts. Boston highlighted several factors, such as the reclassification of broadband, that differed from the Commission’s previous order in 2008. Instead, the Commission relied on a “we’ve

done it before, we’ll do it again” style approach that did not address a very real legal concern raised by a municipality.

Additionally, the Commission did not address concerns that outright prohibitions of exclusive wiring and marketing agreements would likely prove more impactful than the adopted rules. The examples of behavior that providers used to defend an exclusive marketing contract cited by the City of Longmont, Colorado, cast significant doubt on whether a simple disclosure would prove to consumers they had a choice in broadband providers.⁸⁰

The Commission relies extensively on the work done by the Broadband Deployment Advisory Committee (“BDAC”). In 2017, when the *Small Cell Order* was adopted, only one local official was serving on the BDAC.⁸¹ Even now, Commission advisory committees have less than a dozen municipal officials serving.⁸² Additionally, the BDAC was charged with developing model state and municipal codes. How could the Commission trust that these committees could draft model codes that served the public interest without including any of the municipalities that would be charged with enforcing them?⁸³

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⁸⁰ Comments of the City of Longmont, Colorado, GN Docket No. 17-142 at 4.

⁸¹ FCC Announces the Membership and First Meeting of the Broadband Deployment Advisory Committee, Public Notice, DA 17-328 (2017) (available at <https://www.fcc.gov/document/broadband-deployment-advisory-committee-members-and-meeting>).

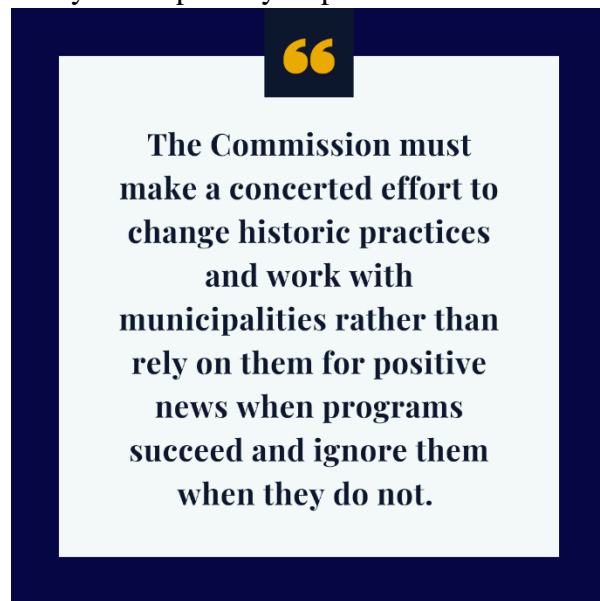
⁸² Analysis of current Advisory Committee Membership lists shows that there are less than a dozen municipal officials serving.

⁸³ *Id.*

What is critically important to note is that this problem has persisted across administrations. For the few municipalities that are able to participate on FCC advisory committees, they often find themselves overlooked or ignored regardless of which political party is in office. The Commission must make a concerted effort to change historic practices and work with municipalities rather than rely on them for positive news when programs succeed and ignore them when they do not.

V. The FCC Must Improve Its Community Outreach.

When it comes to broadband deployment, bringing public and private stakeholders together will always be especially important due to the nuanced and case-by-case circumstances that must be addressed. Striking a balance between what is achievable and what is needed is essential.



As the previous examples have shown, regardless of the composition of the FCC, communities are often frequently underrepresented in the docket, and in Commission decisions. If the commission is to level the playing field, there are several steps it can take to increase municipal access to federal regulatory processes.

Increased community insight would benefit the FCC and residents across the board. Even the U.S. Government Accountability Office (GAO) has issued several reports that detail areas in which the FCC could improve its outreach efforts, including outreach for the National

Verifier Process, tribal broadband strategy, its rulemaking process generally, 5G deployment planning, and assisting those with hearing or speech disabilities.⁸⁴

A. Fully Staff the Office of Intergovernmental Affairs Housed Within the Consumer and Governmental Affairs Bureau.

The Commission can ensure that the Office of Intergovernmental Affairs (“OIA”) is fully staffed and able to carry out intended outreach. Currently, the OIA is led by an acting chief and an associate chief.⁸⁵ Without permanent leadership, the OIA may not have the capacity to undertake

⁸⁴ See generally, Government Accountability Office, Tribal Broadband: National Strategy and Coordination Framework Needed to Increase Access (2022), <https://www.gao.gov/products/gao-22-104421>; Government Accountability Office, Selected Agencies Should Fully Describe Public Comment Data and Their Limitations (2021), <https://www.gao.gov/products/gao-21-103181>; Government Accountability Office, FCC Has Implemented the Lifeline National Verifier but Should Improve Consumer Awareness and Experience (2021), <https://www.gao.gov/products/gao-21-235>; Government Accountability Office, 5G Deployment: FCC Needs Comprehensive Strategic Planning to Guide Its Efforts (2020), <https://www.gao.gov/products/gao-20-468>; Government Accountability Office, FCC Should Strengthen Its Management of Program to Assist Persons with Hearing or Speech Disabilities (2015), <https://www.gao.gov/products/gao-15-409>.

⁸⁵ Federal Communications Commission, *Consumer and Governmental Affairs Bureau* (June 22, 2022), <https://www.fcc.gov/sites/default/files/cgb-org-chart.pdf>.

projects outside of their oversight of the Intergovernmental Advisory Committee and Hospital Robocall Protection Group. The OIA's purpose is to provide outreach to state and local governments and to promote understanding of FCC programs, policies, rules, and decisions.⁸⁶

Appointing a permanent chief and the necessary associate and deputy chiefs will give the OIA the leadership to plan and execute the outreach programs needed to spread awareness of FCC programs.⁸⁷ Without long-term leadership, OIA programming will continually underperform.

For instance, on the FCC OIA webpage, the OIA has not hosted an outreach webinar since 2018.⁸⁸ Recently, much of the outreach and explanation of new FCC programs have fallen to the Commissioner's offices and the Consumer and Governmental Affairs Bureau writ large. In the past, Next Century Cities has advocated that local officials reach out to the OIA to partner and inquire about FCC programs.⁸⁹ However, this solution only works if the office has the staff and resources necessary to address the tasks and challenges set before it by the Commission.

B. Appoint More Local Officials to Commission Advisory Committees.

The Commission often utilizes Advisory Committees to help develop recommendations, proposed rules, and definitions of important terms and conditions. Currently, the FCC has twelve active advisory committees and task forces.⁹⁰ Aside from the Intergovernmental Advisory Committee, which has its municipal membership set, no other advisory committee or task force has more than one municipal official appointed to it.⁹¹ Of the eleven remaining advisory committees and task

⁸⁶ Federal Communications Commission, *Office of Intergovernmental Affairs*, <https://www.fcc.gov/consumer-and-governmental-affairs/office-intergovernmental-affairs> (last visited Aug. 4, 2022).

⁸⁷ See Commons Sense Comments, WC Docket No. 21-450 at 2-3 (July 25, 2021); City of Los Angeles Reply Comments, WC Docket No. 21-450 at 1 (April 18, 2022).

⁸⁸ Federal Communications Commission, Office of Intergovernmental Affairs, <https://www.fcc.gov/consumer-and-governmental-affairs/office-intergovernmental-affairs> (last visited Aug. 19, 2022).

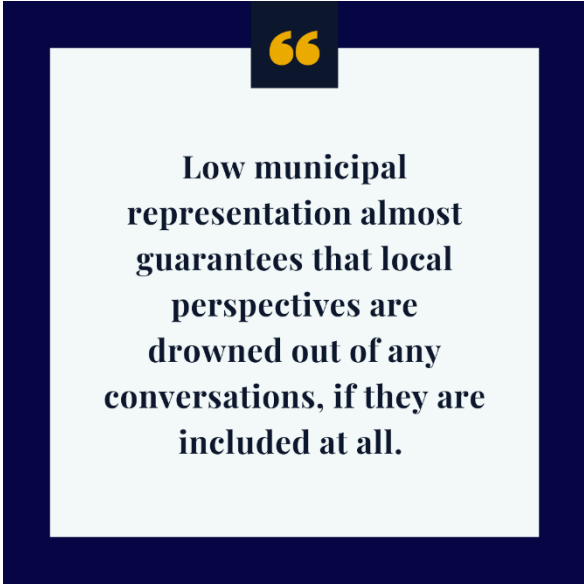
⁸⁹ Ryan Johnston, *There Are Various Ways for Local Leaders to Get Involved in Federal Broadband Policy Making*, Next Century Cities (Nov. 19, 2021), <https://nextcenturycities.org/there-are-various-ways-for-local-leaders-to-get-involved-in-federal-broadband-policy-making/>.

⁹⁰ Federal Communications Commission, *Advisory Committees of the FCC*, <https://www.fcc.gov/about-fcc/advisory-committees-fcc> (last visited Sept. 16, 2022).

⁹¹ See Federal Communications Commission, *WRC-32 Advisory Committee Membership List*, <https://www.fcc.gov/wrc-23-advisory-committee-membership-list> (last visited Oct. 2, 2022); Federal Communications Commission, *Technology Advisory Council Members*, <https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/technological-advisory-council-tac> (last visited Oct. 2, 2022); Federal Communications Commission, *Communications Security, Reliability, and Interoperability Council VIII Membership*, <https://www.fcc.gov/file/23761/download> (last visited Oct. 2, 2022); Federal Communications Commission, *Disability Advisory Committee Fourth Term Members*, <https://www.fcc.gov/file/23775/download> (last visited Oct. 2, 2022); FCC Announces the Membership of the Working Groups of the Task Force for Reviewing the Connectivity and Technology Needs of Precision Agriculture in the United States, Public Notice, DA 22-168 (Feb. 17, 2022); FCC Announces Working Group Members of the Communications Equity and Diversity Council, Public Notice, DA 22-41 (Jan. 13, 2022); FCC Announces Membership of the Rechartered North American Numbering Council and the Date of its First Meeting, Public Notice, DA 21-928 (July 29, 2021); FCC Consumer Advisory Committee Renewal of Charter, Appointment of Chair and Vice Chair, Appointment of Membership, and Next Meeting Date and Time, Public Notice, DA 20-1427 (Dec. 1, 2020).

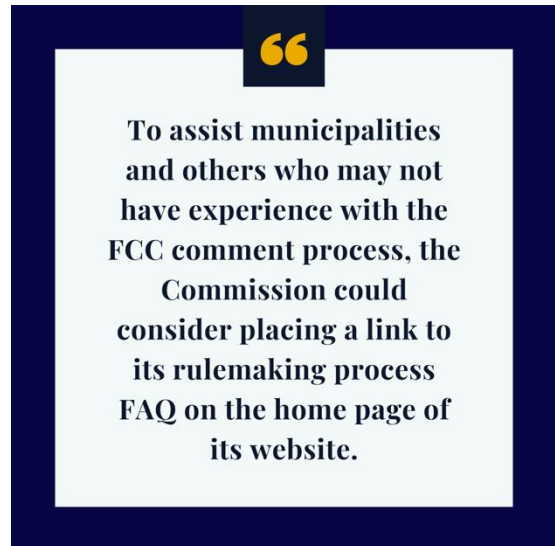
forces, there are four municipal officials appointed. Low municipal representation almost guarantees that local perspectives are drowned out of any conversations, if they are included at all.

To combat this critical oversight, the Commission could organize advisory committees in much the same way they have the Intergovernmental Advisory Committee. Ensuring that there are a designated number of seats available for industry, state, local, Tribal, and other potential stakeholders could increase the likelihood that all opinions can be heard and considered fairly, so no single group of entities drowns out any other. Instead, cross-sector committee members could work collaboratively toward solutions that benefit communities with varying needs.



C. Provide Direction on the Substantive and Procedural Requirements for Filing Comments.

While the FCC does have a link to an FAQ on how to file comments, this link is not easily accessible to users unfamiliar with the FCC site. From the “About the FCC” drop-down window, a potential filer must navigate to the “Rulemaking Process” tab and scan a lengthy list of questions until they find the questions related to filing and preparing comments.⁹² Unfortunately, the answers to these questions are not clear to the uninitiated. To assist municipalities and others who may not



have experience with the FCC comment process, the Commission could consider placing a link to its rulemaking process FAQ on the home page of its website. This will guarantee that it is easily accessible and not overlooked by those who are unfamiliar with the site.

Second, the Commission could create materials or host webinars that give step-by-step instructions on how to file comments. NCC created a similar document⁹³ to help its members but having an official explainer available via the Commission’s site to the general public would reach a greater number of potential filers. In addition, the Commission could produce a document, such as a template, highlighting

⁹² Navigating to the FCC’s Rulemaking FAQ, <https://www.fcc.gov/> (follow “About the FCC” hyperlink; then select “Rulemaking Process” and select the appropriate question to expand it).

⁹³ Ryan Johnston, *How to Submit Comments to the Federal Communications Commission?*, Next Century Cities (Jan. 25, 2021), <https://nextcenturycities.org/how-to-submit-comments-to-the-federal-communications-commission-2/>.

the best way in which to prepare a filing. It would be helpful to include narrative recommendations that inform content in addition to formatting requirements such as font, text size, and citation preferences.

Many communities unfamiliar with the process may struggle to understand whether the letter they intend to submit will be considered due to improper formatting. A brief explanation of what is expected could help ameliorate those potential concerns.

These recommendations combined help to ensure that the Commission uses its administrative resources to conduct necessary outreach and fulfills its promise to collaborate with communities nationwide. Bringing municipal officials onto advisory committees will help reshape an often provider-dominated process and encourage new, locally-centered ideas to take root. Producing primers on the commenting process will open the door to many who may have had trouble navigating the filing process.

Collecting more comments from municipal filers will show that not only large cities with adequate staffing have a story to share. Every town, village, and community does as well. Decisive administrative action coupled with increased engagement can provide the Commission with a wealth of knowledge about how federal policies function on the ground. Most importantly, it could shift the conversation from telling municipalities what to do to asking them how to get broadband into every community.

VI. Conclusion

The public comment process is an incredibly important part of how federal broadband policy is made in the United States. It provides an opportunity for stakeholders from every side of an issue to participate and make their voices heard. However, when significant opinions are overlooked or omitted from agency decision-making, it has the long-term effect of decreasing trust in federal policymaking while ostracizing potential stakeholders from participating in future rulemakings. The Commission has an opportunity and obligation to increase municipal participation in broadband policymaking. It is an essential for local officials to regain some of the trust in the FCC that has been lost due to years of deregulatory and preemptive policies.

**THE NEED FOR LOCAL INSIGHTS IN
FEDERAL BROADBAND POLICYMAKING**

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