UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CITY OF SAN JOSE, CALIFORNIA; et al., Petitioners, v. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION Respondents. --- CTIA – THE WIRELESS ASSOCIATION, et al., Intervenors – Respondents.	Case No. 18-9568 (MCP No. 155)
CITY OF SEATTLE, WASHINGTON, et al., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents. --- CITY OF BAKERSFIELD, CALIFORNIA, et al., Intervenors – Petitioners.	Case No. 18-9571 (MCP No. 155)

CITY OF HUNTINGTON BEACH,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

THE CITY OF SAN JOSE, CALIFORNIA, et al.,

Intervenors – Petitioners.

Case No. 18-9572 (MCP No. 155)

MOTION TO STAY FCC ORDER PENDING APPEAL

Petitioners in *San Jose v. FCC*, No. 18-9568; *Seattle v. FCC*, No. 18-9571; and *Huntington Beach v. FCC*, No. 18-9527 jointly request the Court stay the Federal Communications Commission's Declaratory Ruling and Third Report and Order, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, FCC 18-133, WT Docket No. 17-79, WC Docket No. 17-84, 85 FR 51867 (Sept. 27, 2018) (the "Order") (App-1-116), pending review. On October 31, 2018, Petitioners and others requested a stay from the Commission, denied on December 10,

2018.[1] Action is urgently required on this Motion, as the Order will be effective in part on January 14, 2019.

The Order is subject to seven unconsolidated appeals pending before this Court. All participants have been contacted about the motion. [2]

This Court has jurisdiction to review the Commission's actions under 47 U.S.C. §402(a) and 28 U.S.C. §2342(1), and to stay the matter pending appeal pursuant to F.R.A.P. Rules 8 and 18.

STANDARD OF REVIEW

This Court may grant this Motion if it finds (1) a likelihood that the Petitioners will succeed on the merits; (2) that Petitioners will suffer irreparable injury absent a stay; (3) that a stay will not harm other interested parties; and (3) the public interest supports a stay. "The first two factors . . . are the most critical."[3]

[1] The Commission concluded that movants failed to show a stay was warranted, Order Denying Motion for Stay, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, DA 18-140, WT Docket No. 17-79, WC Docket No. 17-84 (Dec. 10, 2018) ("Denial Order") (App-117-126).

[2] The others are: *Puerto Rico Tel. Co., Inc. v. FCC*, No. 18-2063 (1st Cir. Oct. 25, 2018); *Verizon v. FCC*, No. 18-3255 (2nd Cir. Oct. 25, 2018); *Sprint Corp. v. FCC*, No. 18-9563 (10th Cir. Oct. 25, 2018); *Montgomery Cnty. v. FCC*, No. 18-2448 (4th Cir. Dec. 5, 2018). All local government parties and intervenors support the motion. The United States takes no position. All others oppose.

[3] *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

ARGUMENT

The Order dramatically changes the *status quo* that the Commission concedes works well in many places,[4] conflicts with the plain language in the Communications Act and that raises significant constitutional issues. A stay will allow deployment to proceed while avoiding significant delays and irreversible harms that would result from nationwide regulatory whiplash as the Order takes effect in stages and potentially changes after judicial review.

I. PETITIONERS LIKELY WILL PREVAIL ON THE MERITS

To demonstrate a likelihood that Petitioners will prevail on the merits, it is enough that the appeal "raises serious legal questions, or has a reasonable probability or fair prospect of success."[5]

Review on the merits begins with whether the Congress left a statutory ambiguity for the Commission to interpret and, if so, whether the Commission's interpretation is based on a permissible statutory construction.[6] Furthermore, this Court must set aside agency action that is arbitrary or capricious or contrary to law.[7] "One of the basic procedural requirements of administrative rulemaking is

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[4] Order, ¶5 (App-2).
[5] *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012); *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981).
[6] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[7] 5 U.S.C. §706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

that an agency must give adequate reasons for its decisions."[8] The Order fails these standards.

A. The Order Rests on A Series of Determinations Inconsistent with Plain Statutory Language and Precedent.

The Order relies heavily on 47 U.S.C. §253[9] notwithstanding the express language of §332(c)(7)(A): "Except as provided in this *paragraph*, nothing in this *chapter* shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." The Commission cursorily attempts to justify extending Section 253 to wireless by arguing the Order's requirements do not preempt "decisions."[10] The justification fails as a matter of statutory interpretation and would render the Order nonsensical. Section 332(c)(7) prevents the Commission from using Section 253 from "limiting or affecting" authority over decisions, and restrictions on state and local statutes, regulations and other legal requirements by definition limit or affect authority. And if the Order truly means that site-by-site "decisions" are outside the purview of the Order, then the Order can have no effect.

[8] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[9] Cited over 300 times.
[10] Order, n.83 (App-16) The Commission's reference to Section 332(c)(3) is no more helpful, as it is not encompassed by the limitation in subsection (7).

The Order resorts to Section 253 because to limit compensation for occupancy of public property, it needs the "reasonableness" standard in Section 253(c) as a hook (albeit a mistaken one) for Commission authority. Section 332(c)(7) has no reference to compensation comparable to that in Section 253(c) for the obvious reason that Section 332(c)(7) was intended by Congress to preempt only inappropriate use of regulatory authority over land use, and not to affect local or state authority to control siting on their own property.

The Order rests on legal error and cannot stand even if the Commission argues it could reach the same conclusions interpreting only Section 332(c)(7).[11]

Even if Section 253 is applicable to regulations of state and local land use authority, the Order remains riddled with one *ultra vires* determination after another:

1. The Order purports to adopt a definitive test for what constitutes a "prohibition" or "effective prohibition" based upon the standard the Commission adopted in *In re California Payphone Ass'n*, 12 F.C.C. Rcd. 14191, 14206 (1997). Yet, the Order's test cannot be squared with that case, or the statute.

Payphone holds that in reviewing a Section 253(a) claim, the Commission considers whether a regulation "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and

[11] The Commission cannot invent a basis for its Order on judicial review. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

regulatory environment" explains that a regulation "would have to actually prohibit or effectively prohibit the ability of a…service provider to provide services" under that test.[12] The Eighth and Ninth Circuits citing *Payphone,* found the unambiguous "plain language" in Section 253(a) compelled "actual prohibition" test.[13] Under *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005), the Commission must apply that standard.

Instead, the Commission alters *Payphone* to find prohibition whenever an entity is prevented from "improving" service or when regulation imposes costs on deployment (on the theory that providers *might* offer additional services if they were richer).[14] This reinterpretation does not require any meaningful "prohibition" as required by the statute, this Court's precedents or *Payphone*. The disregard for the "actual prohibition" requirement alone justifies reversal.[15] .

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[12] 12 F.C.C. Rcd.14206, ¶31. This Circuit cited *Payphone* in *Qwest v. Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) finding prohibition where evidence showed that the City's new pricing model would result in a massive cost increases, and there was no countervailing evidence.

[13] *Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008); *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 523 (8th Cir. 2007). In the Denial Order, ¶8, the Commission dismisses these cases to the extent that they purport to require a "complete prohibition." They do not, but they do require an "actual" prohibition, and *Brand X* requires application of that standard.

[14] Order, ¶37 (App-17-18).

[15] Even if not resolved by "plain language" the departure from its prior standard means the decision is due less deference under *Chevron. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993).

2. The disconnect between the Commission's new standard, the statute, and precedent is illustrated by its approach to aesthetics. The Commission finds that compliance with subjective aesthetic standards increases the cost of deployment, and are therefore prohibitory unless they are, *inter alia*, "objective" and equally applied to "other infrastructure."[16] It never explains why a standard that treats wireless different from other infrastructure, such as electrical systems, denies wireless providers a fair playing field. It never explains why the cost associated with compliance of "subjective standards" is actually prohibitory, especially as the decision itself makes clear that providers (while complaining) can and do comply with them. While complying with aesthetic standards may involve costs, courts have noted that consideration of "subjective" aesthetic standards is common in a zoning context.[17] Congress could not have intended to preserve local zoning except in those cases where it did not involve "subjective" choices. The deferential "substantial evidence" standard[18] for local permit denials would be superfluous if Congress envisioned wholly objective zoning standards. The Commission's interpretation is a result Congress manifestly did not intend.[19]

[16] Order, ¶87 (App-45).
[17] *Wireless Towers, LLC v. City of Jacksonville, Fla.*, 712 F. Supp. 2d 1294, 1305 (M.D. Fla. 2010).
[18] 47 U.S.C. §332(c)(7)(B)(iii).
[19] *State Farm*, 463 U.S. at 43.

Compounding the problems, the Commission reverses the almost uniform holding of Courts of Appeal that an entity must show it has adopted the "least intrusive alternative" consistent with local standards as part of an effective prohibition claim. The requirement ensures that local standards are adhered to as closely as possible, and logically, where there is a deployment alternative there is no prohibition. The Commission never justifies elimination of this standard.[20]

3. The same disconnect results appears in the discussion of rents for use of government-owned rights-of-way and other property in the right-of-way like street lights and traffic signals. Those are declared prohibitory unless limited to "direct costs."[21]

The problem is not that deployments are prohibited in any localities that charge more than cost. The record showed the reverse.[22] But, according to the Commission, when New York City charges fair-market rents, it "prohibits" deployment in rural North Dakota, because if providers had more money, they

[20] Order, nn. 75, 95 (App-15, 20), (citing Court of Appeals cases and rejecting standard).

[21] In the Denial Order, the Commission suggests localities can recover *any* cost associated with use of public facilities by wireless facilities. The Order states that localities only may recover costs "for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities." Order, n.217 (App-39).

[22] Comments of the Smart Communities and Special Districts Coalition, WC Docket No. 17-84, Exh. 1, Declaration of Alan Pearce (Jun. 15, 2017) (App-127-30); *Id.* Exh. 2, An Engineering Analysis of Public Rights-of-Way Processes in the Context of Wireline Network Design and Construction (App-131-35).

might (the Commission wishfully concludes) deploy in otherwise unviable markets.[23] The only support for this proposition is a single industry-funded whitepaper submitted after comment periods closed that concludes the industry could (not would) use their windfall in economically viable markets to subsidize operations in communities without a business case to support the capital investment in network facilities.[24] Neither the Commission's prior orders nor economic theory suggests that an entity could or would voluntarily cross-subsidize a non-remunerative market with profits from a competitive market.[25]

4. Going further, the Commission reads the right-of-way compensation savings clause in Section 253(c), out of existence. It finds that only charges that

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[23] Order ¶60-63 (App-31-32).

[24] Letter from Corning Inc., WT Docket No. 17-79, (Sep. 5, 2018) (App-142-47).

[25] The Denial Order suggests that the Commission had economic support for its conclusion. It did not. The study relied upon indicated that if providers had more money they *could* cross-subsidize and deploy in unviable remote areas, and if rents were reduced in marginally viable areas, those areas might become viable. *See* Order, fn.169 (App-31) The first point is not supported by economic theory or practice. *See* Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, Declaration of Dr. Kevin E. Cahill, Ph.D (Jun. 15, 2017) (App-139-41); Comments of the Smart Communities and Special Districts Coalition, WC Docket No. 17-84, Exh. 3, Effect on Broadband Deployment of Local Government Right-of-way Fees and Practices (App-136-38); *Id.* at fn64 (citing Comments of NATOA, et. al., GN Docket No. 09-51, Report of Ed Whitelaw (Nov. 6, 2009) (App-148-50)); Letter from the Coalition for Local Internet Choice, WT Docket No. 17-79 (Sep. 18, 2018) (App-151-56); Letter from the City of Eugene, Oregon, WT Docket No. 17-79 (Sep. 19, 2018) (App-157-62). The second was unsupported by any showing that in "marginally viable" markets, communities were overcharging. To the extent the record addressed the point, it showed the reverse. *Id.* (App-159-60)

exceed direct costs are prohibitory under 253(a), but then finds that only charges limited to direct costs are protected by the "compensation savings clause in Section 253(c).[26] The legislative history is actually clear that Congress meant for the savings clause to secure state and local rights to charge for property. Congressman Barton, led successful efforts to remove provisions from the law that would have significantly limited state and local rights to charge fees (partially because the transfer of value from localities to private companies would be an unfunded mandate). He explained the clause "explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way.... The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way." [27] And, contrary to the Commission's claims, court cases do not support a contrary interpretation, or even find that Section 253(c) gives the Commission authority to regulate rates. [28] The broad

[26] Order, ¶55-56 (App-28-29).
[27] 141 Cong. Rec. 22036 (1995).
[28] In *Puerto Rico Tel. Co. v. Mun. of Guayanilla*, 450 F.3d 9 (2006), the court found a particular fee was not saved by Section 253(c) standard because the municipality provided insufficient evidence to support it, but the court noted specifically that it was not saying compensation was limited to direct costs, and its concern about "costs" are discussed in the context of unrebutted arguments that the locality had monopoly pricing power. There is nothing to suggest that localities have monopoly power over poles, buildings or other vertical structures to which small cells are attached. The discussion in these cases about fees being unreasonable if they are not "based on the use of the rights-of-way" derives from

conclusion that any time a locality charges more than cost, it is prohibitory, or an actual prohibition is occur whenever there is a subjective zoning standard is not plausible, and inconsistent with the case-by-case court review of charges envisioned by 47 U.S.C. 253(d) – even assuming Section 253 applies at all.

5. As if this were not enough, the Commission reverses its precedent and court decisions, and finds that Section 253 and Section 332 permit the Commission to preempt and regulate local and state authority over proprietary property. The Commission thus now claims the authority over access to municipal utility poles specifically foreclosed by 47 U.S.C. §224, [29] Its powers (it claims) extends to states where Section 224 "reverse preempts" its authority. It sets presumptively

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an early Telecommunications Act case that was not referring at all to barring revenue-based fees or limiting fees to costs. *AT&T Communications., Inc. v. City of Dallas* 8 F. Supp. 2d 582 (N.D. Tex. 1998). In that case the court was troubled not by a revenue-based fee but by a revenue-based fee to the extent it included in its revenue calculation revenue from sources other than the activities conducted using the infrastructure in the rights-of-way. There was no revenue-based fee at issue *in Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (indeed the court indicated it was inclined to approve the fee in question there had the relevant ordinance not been invalidated on other grounds 146 F. Supp. 2d 1081 at 1101). In *N.J. Payphone Ass'n Inc. v. Town of West York,* 130 F. Supp. 2d 631 (D.N.J. 2001), the court specifically stated that it did not need to decide the issue of whether revenue-based fees are valid because it invalidated the local government process on other grounds ("The Court need not choose between these competing views of 'fair and reasonable compensation' in this case." 130 F. Supp. 2d 631at 638).

[29] Order, n.253 (App-47).

reasonable rates based on the pole attachment formula it could not apply under Section 224.[30]

Essentially, the Commission finds that Congress meant *sub silentio* to undo the limits established by Section 224. That is implausible. First, Section 224 was amended when Section 253 was adopted, and if Congress meant to expand Commission authority, it would have said so. It is an impermissible reading in light of the well-established, and constitutionally based rule that "recognize[s] a distinction between regulation and actions a state takes in a proprietary capacity."[31] The latter are not subject to preemption.[32]

Moreover, agreeing with the courts that found Sections 253 and 332 do not extend to proprietary actions,[33] the Commission had previously confirmed that "lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property" are not subject to preemption.[34]

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[30] Order, ¶79 (App-42). The $270 per annum per pole rate is, however, not remotely compensatory, as it includes (as commercial pole fees do not) the right of access to a pole, and the right of access to any other right-of-way required to reach the pole.

[31] *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 691 (5th Cir. 1999).

[32] *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993).

[33] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004).

[34] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 F.C.C. Rcd. 12865 (2014)

There is no reasoned explanation for the departure from prior precedent.[35] The Commission simply declares that a locality's control over any of its property in the right-of-way is regulatory because it involves "managing or controlling access" to that property. If there is one quintessential proprietary activity, it is "managing and controlling access."

B. The Commission's Assertion of Regulatory Authority Raises Significant Tenth and Fifth Amendment Issues.

Even in the unlikely result that none of the numerous statutory limits described above would invalidate the Order, the Order raises serious federal Constitutional concerns, under the Fifth and Tenth Amendments.

The Commission attempts to avoid those issues by arguing that it does not compel localities to grant access to any particular site.[36] But it does: the Order makes clear that denials are subject to a challenge as prohibitions, and courts may require issuance of leases (and presumably, define what terms may be included for access to light poles, traffic signals, conduit, and other proprietary infrastructure).[37] The locality cannot (as a property owner normally could) ignore a request for access. Under the Order, the locality must respond with a full lease within 60 days, or be

[35] The Commission merely noted that its prior decision dealt with 47 U.S.C. Sec. 1455, but the Commission was applying principles to that section because it saw no distinction between it, and Section 253 and 332.
[36] Order, n.217 (App-39); Denial Order, ¶12 (App-121).
[37] Order, n.217 (App-39).

deemed to have prohibited entry, and the Court may order access.[38] That is, governments must respond to requests, and a failure to act results in the courts taking control of property. That is compelled access, and the duty to respond, or lose control, is at least as intrusive as requirements found unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992).

The scheme created is not prescriptive, not preemptive. Section 253 or 332 cannot be read to countenance a federal scheme for dictating and reviewing contractual terms; such a reading is particularly troubling where, as is the case with traffic signals and street lights, the record shows that there can be highly complex technical issues presenting significant operational and safety risks.[39]

Likewise, the Order creates significant 5th Amendment issues. The Commission recognizes that in the case of a compelled taking, the compensation standard is generally fair market value.[40] It argues, however, that "there is no "market value" of assets that are not freely bought and sold in a free "market"; and

[38] Order, ¶136 (App-70).

[39] Motion for Stay of the National League of Cities et al., WT Docket No. 17-79, Affidavit of Andrew Strong, Interim Asset Management and Large Projects Director, Seattle City Light (Oct. 312018) ("Seattle Aff.") (App-185-87); Comments of the City and County of San Francisco, WT Docket No. 17-79, at 8 (Jun. 15, 2017)("S.F. Comments") (App-165); Reply Comments of the City and County of San Francisco, WT Docket No. 17-79, at 13 (Jul. 17, 2017) ("S.F. Reply Comments") (App-169).

[40] The cases are clear on this point: *U.S. v. Carmack*, 329 U.S. 230, 242 (1946); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

in such cases, use of actual costs or other readily-discernable amounts are not unreasonable proxies for estimating what would be "fair" if a market existed.[41] However, the Commission had no basis for finding that there was not a "market" for access to the sorts of structures to which it compels access. Fair market value is the proper standard here, and in any case, the Commission cannot contend that its limit of compensation to $270 will reliably mimic either cost or fair market value given the rights it purports to grant.[42] The Commission requires the locality, if it wishes more than this nominal amount to prove up "costs" in court (while precluding proving up "fair market value" in court).[43]

The Commission's reliance on *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002)[44] is misplaced. The Eleventh Circuit found a cost-based standard was appropriate where Congress had specifically compelled statutory access, and expressly gave the Commission the right to set rates. In 47 U.S.C. Section 224 (the section at issue in *Alabama Power)*, the Commission was denied the power it now claims. The court suggested compelled access was permissible based on a Congressional determination that utilities had monopoly control over a bottleneck facility. No such determination was or could be made for street lights or traffic

[41] *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979).
[42] *See*, n.29, *supra.*
[43] The Commission does not state that the cost of "proving up" costs would be recoverable under its scheme. A utility, of course, may recover its cost of regulation.
[44] Order, n.217(App-39).

signals, or government buildings.[45] The court also concluded that a cost basis was permissible where the attachment of wireline facilities to utility poles did not generally affect the utility of those poles, or create other issues for use. It concluded that in cases where a problem was created, recovery could not be limited to costs. In this case, the only evidence on the record is that attachment to structures owned by localities can be extremely complex, and places at risk millions of dollars in investments made to beautify and secure communities, and can reduce property values.[46] The failure of the Commission to even consider those impacts is fatal under the APA and the Constitution. [47]

C. New Shot Clocks Are Unreasonable.

The Commission makes four significant changes to its existing shot clocks: (1) action on applications for small wireless facilities must be completed in 60 days for attachment to an existing structure, and 90 days otherwise;[48] (2) an unlimited number of applications may be submitted simultaneously;[49] (3) shot clocks apply to "any and all permits necessary for the construction of the proposed wireless

[45] Small cells can be placed on a variety of structures on and off the rights-of-way, so there are literally thousands of alternatives.
[46] S.F. Comments at 8 (App-165); S.F. Reply Comments at 13 (App-169); Letter from the City of Myrtle Beach, South Carolina, WT Docket No. 17-79, at 1 (Mar. 14, 2018) (App-171); Seattle Aff. (App-186).
[47] The fact that the decision may expose the Treasure to Tucker Act claims is reason to question its validity. *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994).
[48] 47 C.F.R. §1.6003(c).
[49] Order, ¶13 (App-5).

facility…" including permits or leases for use of publicly owned facilities;[50] (4) missing the "presumptively unlawful" shot clock is a prohibition, and absent "exceptional" circumstances a reviewing court should direct issuance of all permits, contracts, licenses, and the like.[51]

There was no basis for concluding that the new 60/90 days is sufficient to complete a discretionary land use process, preserved by Section 332, much less issue all required permits, or respond to dozens of applications. The Commission relies on state laws that replace typical land use hearings with administrative processes. [52] Those times are irrelevant to the time required where a variance or similar process applies, as procedures for appeal and for public participation may make compliance impossible.[53] The Commission cannot set a deadline that requires abandonment of public land use processes. Moreover, the state laws relied upon for support, among other things, limit the number of applications that

[50] Order, ¶136 (App-70). The record showed it was impossible to act on some of these applications within 60 days of a wireless filing. Letter from Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Sep. 19, 2018) (App-174-76).
[51] Order, ¶120 (App-62).
[52] MN. Stat. 237.163 (2016); TX. Loc. Gov't Code 284.101; Colo. Rev. Stat. 29-27-404 (3) (2017).
[53] *See*, SC Code Sec. 6-29-800 (B) (setting normal time for appeal from administrative officer to Board established by localities at 30 days from the decision); Letter from the City of Gaithersburg, WT Docket No. 17-79 (Sep. 18, 2018) ("Gaithersburg Letter") (App-179-80).

can be filed at any time;[54] and distinguish between land use permits (the authorization to locate a small cell at a particular location) and the other permits that may be associated with those installations. The Commission ignores those critical distinctions.

The Commission also suggests that because localities now meet a 60-day standard applicable to modifications of existing facilities, under 47 U.S.C. §1455, the new standards are no burden. But the applications are not comparable: the latter typically does not involve application of discretionary considerations, and are not submitted in unlimited batches.

II. MOVANTS WILL SUFFER IRREPARABLE HARM WITHOUT A STAY

Irreparable harm justifies a stay when it is certain, great, imminent and cannot be adequately compensated by money damages.

When an alleged deprivation of a constitutional right is involved no further showing of irreparable injury is necessary.[55] No remedy can correct the immediate harms caused by requiring localities to respond to requests for access to publicly owned assets, or be presumed to have violated the law.

Where consequences from a regulation's continued enforcement during a pending challenge making return to the *status quo ante* difficult there is

[54] *Supra*, n.50.
[55] *See*, 11A Fed. Prac. & Proc. Civ. §2948.1 (3d ed.); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

irreparable harm.[56] If localities are forced to process and issue permits under the Commission's new standards, the harm cannot be remedied – after installation, restoration of the "*status quo*" requires removal, with attendant costs and disruption of public and private infrastructure.[57]

Nor is it clear that a locality could recover costs associated with work required to comply with the Order, which the record showed could total over a hundred thousand dollars a year for smaller communities.[58] The 60-day shot clock and the new aesthetic requirements force those costs to be incurred *prior* to applications being received, and there is no obvious way to recover them. Those unrecoverable costs amount to irreparable harm.

III. The Stay Will Not Harm the Other Parties

This case can be briefed on an expedited schedule within a matter of months. The delay is not likely to cause harm to other parties. Harm necessarily presumes that providers are (a) have substantially changed deployment plans based on the Order; (b) there is a widespread problem with deployment across the nation; and (c) a change in the *status quo* is less disruptive than maintaining the *status quo* while the appeal is heard.

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[56] *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929).
[57] *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
[58] Gaithersburg Letter (App-179-80).

Harm to other parties is unlikely when the *status quo* would be preserved by a stay but substantially altered by a denial.[59] Moreover, the equities favor a stay when the respondent "might have exaggerated" the problem the challenged action purports to resolve.[60]

Here, the record shows that the existing regulatory framework does not prohibit personal wireless services, or broadband infrastructure investment.[61] Only the former is relevant for the third and fourth prong, as Section 332 and Section 253 only protect common carriers services, not the sort of data and broadband services on which the Order and Denial Order rely to support the need for immediate action.[62] Nonetheless, there is no reason to fear *any* deployment will suffer materially. Seattle has licensed infrastructure to service providers since 2005 and Verizon named Seattle City Light its 2017 "Partner of the Year."[63] The Commission recognized that "[m]any states and localities have acted to update and

[59] *See O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002).
[60] *Pierce*, 253 F.3d at 1251–52.
[61] *See, e.g.*, Order, Dissenting Statement of Commissioner Rosenworcel, (App-114-15).
[62] Section 332 only protects common carrier services (personal wireless services), not other services. For purposes of the third and fourth prong, only the impact on personal wireless services is relevant; the Commission's Order and Denial Order, which rely on impacts on data services and services other than personal wireless services, are mistaken.
[63] Letter from the City of Seattle, WT Docket No. 17-79 (Sep. 18, 2018) (App-188).

modernize their approaches to…promote deployment . . . ."[64] On calls with investors after the Commission adopted the Order, Verizon confirmed:

> …we were glad to see the FCC rules around the small cell adoption, ... But I don't see [the Order] having a material impact to our build out plans.[65]

IV. The Stay Will Serve the Public Interest

A stay will serve the public's strong interest in "preserving the status quo ante litem until the merits of a serious controversy can be fully considered."[66] Although investments in broadband infrastructure serve the public interest, the Order will necessarily result in large-scale regulatory compliance efforts by local public agencies. These efforts will alter the frameworks under which communications providers have thus far flourished and may be ultimately wasted if this Court invalidates the Order in whole or in part. At least until the Petition is resolved, the public interest is best served by a stay that maintains the *status quo*.

CONCLUSION

For the foregoing reasons, the Court should stay the Order.

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[64] Order, ¶5 (App-2).
[65] Verizon Communications Inc. Q3 2018 Earnings Call Transcript (Oct. 23, 2018) (App-182); *see also* Crown Castle International Corp. Q3 2018 Earnings Call Transcript (Oct. 18, 2018) (App-184).
[66] *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980).

Dated: December 17, 2018

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STATUTORY APPENDIX

47 U.S. Code § 402 - Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide inter LATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

(June 19, 1934, ch. 652, title IV, § 402, 48 Stat. 1093; May 20, 1937, ch. 229, §§ 11–13, 50 Stat. 197; May 24, 1949, ch. 139, § 132, 63 Stat. 108; July 16, 1952, ch. 879, § 14, 66 Stat. 718; Pub. L. 85–791, § 12, Aug. 28, 1958, 72 Stat. 945; Pub. L. 97–259, title I, §§ 121, 127(b), Sept. 13, 1982, 96 Stat. 1097, 1099; Pub. L. 98–620, title IV, § 402(50), Nov. 8, 1984, 98 Stat. 3361; Pub. L. 104–104, title I, § 151(b), Feb. 8, 1996, 110 Stat. 107; Pub. L. 111–260, title I, § 104(d), Oct. 8, 2010, 124 Stat. 2762.)

28 U.S. Code § 2342 - Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

(Added Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622; amended Pub. L. 93–584, § 4, Jan. 2, 1975, 88 Stat. 1917; Pub. L. 95–454, title II, § 206, Oct. 13, 1978, 92 Stat. 1144; Pub. L. 96–454, § 8(b)(2), Oct. 15, 1980, 94 Stat. 2021; Pub. L. 97–164, title I, § 137, Apr. 2, 1982, 96 Stat. 41; Pub. L. 98–554, title II, § 227(a)(4), Oct. 30, 1984, 98 Stat. 2852; Pub. L. 99–336, § 5(a), June 19, 1986, 100 Stat. 638; Pub. L. 100–430, § 11(a), Sept. 13, 1988, 102 Stat. 1635; Pub. L. 102–365, § 5(c)(2), Sept. 3, 1992, 106 Stat. 975; Pub. L. 103–272, § 5(h), July 5, 1994, 108 Stat. 1375; Pub. L. 104–88, title III, § 305(d)(5)–(8), Dec. 29, 1995, 109 Stat. 945; Pub. L. 104–287, § 6(f)(2), Oct. 11, 1996, 110 Stat. 3399; Pub. L. 109–59, title IV, § 4125(a), Aug. 10, 2005, 119 Stat. 1738; Pub. L. 109–304, § 17(f)(3), Oct. 6, 2006, 120 Stat. 1708.)

47 U.S. Code § 253 - Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, 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.

(c) State and local government authority

Nothing in this section affects 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.

(d) Preemption

If, after notice and an opportunity for public comment, 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), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural marketsIt shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

(June 19, 1934, ch. 652, title II, § 253, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 70.)

47 U.S. Code § 332 - Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5 or section 1342 of title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the

extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems

necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

(June 19, 1934, ch. 652, title III, § 332, formerly § 331, as added Pub. L. 97–259, title I, § 120(a), Sept. 13, 1982, 96 Stat. 1096; renumbered § 332, Pub. L. 102–385, § 25(b), Oct. 5, 1992, 106 Stat. 1502; amended Pub. L. 103–66, title VI, § 6002(b)(2)(A), Aug. 10, 1993, 107 Stat. 392; Pub. L. 104–104, § 3(d)(2), title VII, §§ 704(a), 705, Feb. 8, 1996, 110 Stat. 61, 151, 153.)

47 U.S. Code § 1455 - Wireless facilities deployment

(a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities requestFor purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) Applicability of environmental laws

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act [1] or the National Environmental Policy Act of 1969.

(b) Federal easements and rights-of-way

(1) Grant

If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) Application

The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) Fee

(A) In general

Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) Exceptions

The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)—

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) Use of fees collected

Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) Master contracts for wireless facility sitings

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after February 22, 2012, the Administrator of General Services shall—

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) Applicability

The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) Application

The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications under this subsection for all executive agencies that shall be used by applicants with respect to the buildings and other property of each such agency.

(d) Executive agency defined

In this section, the term “executive agency” has the meaning given such term in section 102 of title 40.

(Pub. L. 112–96, title VI, § 6409, Feb. 22, 2012, 126 Stat. 232.)

CERTIFICATE OF WORD COUNT AND VIRUS SOFTWARE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), this motion, produced using a computer, contains 5,183 words.

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December 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018 I filed the foregoing Motion to Transfer with the Clerk of the United States Court of Appeals for the Tenth Circuit through the CM/ECF system. Participants in the cases are all registered CM/ECF and will be served by the CM/ECF system.

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December 17, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CITY OF SAN JOSE, CALIFORNIA; et al., Petitioners, v. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION Respondents. --- CTIA – THE WIRELESS ASSOCIATION, et al., Intervenors – Respondents.	Case No. 18-9568 (MCP No. 155)
CITY OF SEATTLE, WASHINGTON, et al., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Respondents. --- CITY OF BAKERSFIELD, CALIFORNIA, et al., Intervenors – Petitioners.	Case No. 18-9571 (MCP No. 155)

CITY OF HUNTINGTON BEACH,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

THE CITY OF SAN JOSE, CALIFORNIA, et al.,

Intervenors – Petitioners.

Case No. 18-9572 (MCP No. 155)

APPENDIX TO MOTION TO STAY FCC ORDER PENDING APPEAL

The City of San Jose, California, et al. v. U.S and FCC,
Tenth Circuit Court of Appeals, Case Nos. 18-9568, 18-9571, 18-9572 (MCP No. 155)

APPENDIX

Vol. No.	Tab No.	Date	Description	Page
1	18.	10/31/2018	Motion for Stay of the National League of Cities et al., WT Docket No. 17-79, Affidavit of Andrew Strong, Interim Asset Management and Large Projects Director, Seattle City Light (Oct. 312018) ("Seattle Aff."); https://ecfsapi.fcc.gov/file/1031130914980/ERRATA_MOTION%20FOR%20STAY.pdf	185-187
1	19.	09/18/2018	Letter from the City of Seattle, WT Docket No. 17-79 (Sep. 18, 2018); https://ecfsapi.fcc.gov/file/109191163507187/City%20of%20Seattle%20FCC%20Ex%20Parte%20Letter.pdf	188-190

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

DECLARATORY RULING AND THIRD REPORT AND ORDER

Adopted: September 26, 2018 **Released: September 27, 2018**

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement.

TABLE OF CONTENTS

I. INTRODUCTION

1. America is in the midst of a transition to the next generation of wireless services, known as 5G. These new services can unleash a new wave of entrepreneurship, innovation, and economic opportunity for communities across the country. The FCC is committed to doing our part to help ensure the United States wins the global race to 5G to the benefit of all Americans. Today's action is the next step in the FCC's ongoing efforts to remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services. We proceed by drawing on the balanced and commonsense ideas generated by many of our state and local partners in their own small cell bills.

2. Supporting the deployment of 5G and other next-generation wireless services through smart infrastructure policy is critical. Indeed, upgrading to these new services will, in many ways, represent a more fundamental change than the transition to prior generations of wireless service. 5G can enable increased competition for a range of services—including broadband—support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs. It is estimated that wireless providers will invest $275 billion[1] over the next decade in next-generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation's GDP by half a trillion dollars.[2] Moving quickly to enable this transition is important, as a new report forecasts that speeding 5G infrastructure deployment by even one year would unleash an additional $100 billion to the U.S. economy.[3] Removing barriers can also ensure that every community gets a fair shot at these deployments and the opportunities they enable.

3. The challenge for policymakers is that the deployment of these new networks will look different than the 3G and 4G deployments of the past. Over the last few years, providers have been increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack. From a regulatory perspective, these raise different issues than the construction of large, 200-foot towers that marked the 3G and 4G deployments of the past. Indeed, estimates predict that upwards of 80 percent of all new deployments will be small cells going forward.[4] To support advanced 4G or 5G offerings, providers must build out small cells at a faster pace and at a far greater density of deployment than before.

4. To date, regulatory obstacles have threatened the widespread deployment of these new services and, in turn, U.S. leadership in 5G. The FCC has lifted some of those barriers, including our decision in March 2018, which excluded small cells from some of the federal review procedures designed for those larger, 200-foot towers. But as the record here shows, the FCC must continue to act in partnership with our state and local leaders that are adopting forward leaning policies.

5. Many states and localities have acted to update and modernize their approaches to small cell deployments. They are working to promote deployment and balance the needs of their communities. At the same time, the record shows that problems remain. In fact, many state and local officials have urged the FCC to continue our efforts in this proceeding and adopt additional reforms. Indeed, we have

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[1] *See* Accenture Strategy, Accelerating Future Economic Value from the Wireless Industry at 2 (2018) (Accelerating Future Economic Value Report), https://www.ctia.org/news/accelerating-future-economic-value-from-the-wireless-industry, attached to Letter from Scott K. Bergmann, Senior Vice Pres., Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed July 19, 2018).

[2] *See* Accenture Strategy, Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities, (2017) http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrantsmart-cities-accenture.pdf; attached to Letter from Scott Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, (filed Jan. 13, 2017).

[3] Accelerating Future Economic Value Report at 2.

[4] Letter from John T. Scott, Counsel for Mobilitie, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed Sept. 12, 2018).

heard from a number of local officials that the excessive fees or other costs associated with deploying small scale wireless infrastructure in large or otherwise "must serve" cities are materially inhibiting the buildout of wireless services in their own communities.

6. We thus find that now is the appropriate time to move forward with an approach geared at the conduct that threatens to limit the deployment of 5G services. In reaching our decision today, we have benefited from the input provided by a range of stakeholders, including state and local elected officials.[5] FCC leadership spent substantial time over the course of this proceeding meeting directly with local elected officials in their jurisdictions. In light of those discussions and our consideration of the record here, we reach a decision today that does not preempt nearly any of the provisions passed in recent state-level small cell bills. We have reached a balanced, commonsense approach, rather than adopting a one-size-fits-all regime. This ensures that state and local elected officials will continue to play a key role in reviewing and promoting the deployment of wireless infrastructure in their communities.

7. Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches.[6] We have carefully considered these views, but nevertheless find our actions here necessary and fully supported. By building on state and local ideas, today's action boosts the United States' standing in the race to 5G. According to a study submitted by Corning, our action would eliminate around $2 billion in unnecessary costs, which would stimulate around $2.4 billion of additional buildouts.[7] And that study shows that such new service would be

[5] *See, e.g.*, Letter from Brian D. Hill, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 31, 2018) ("While the FCC and the Ohio Legislature have worked to reduce the timeline for 5G deployment, the same cannot be said for all local and state governments. Regulations written in a different era continue to dictate the regulatory process for 5G infrastructure"); Letter from Maureen Davey, Commissioner, Stillwater County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) ("[T]he Commission's actions to lower regulatory barriers can enable more capital spending to flow to areas like ours. Reducing fees and shortening review times in urban areas, thereby lowering the cost of deployment in such areas, can promote speedier deployment across all of America."); Letter from Board of County Commissioners, Yellowstone County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 21, 2018) ("Reducing these regulatory barriers by setting guidelines on fees, siting requirements and review timeframes, will promote investment including rural areas like ours."); Letter from Board of Commissioners, Harney County, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 5, 2018) ("By taking action to speed and reduce the costs of deployment across the country, and create a more uniform regulatory framework, the Commission will lower the cost of deployment, enabling more investment in both urban and rural communities."); Letter from Niraj J. Antani, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 4, 2018) ("[T]o truly expedite the small cell deployment process, broader government action is needed on more than just the state level."); Letter from Michael C. Taylor, Mayor, City of Sterling Heights, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 30, 2018) ("[T]here are significant, tangible benefits to having a nation-wide rule that promotes the deployment of next-generation wireless access without concern that excessive regulation or small cell siting fees slows down the process.").

[6] *See, e.g.*, Letter from Linda Morse, Mayor, City of Manhattan, KS to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 13, 2018) (City of Manhattan, KS Sept. 13, 2018 *Ex Parte* Letter); Letter from Ronny Berdugo, Legislative Representative, League of California Cities to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) (Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter); Letter from Damon Connolly, Marin County Board of Supervisors to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 17, 2018) (Damon Connolly Sept. 17, 2018 *Ex Parte* Letter).

[7] *See* Letter from Thomas J. Navin, Counsel to Corning, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1, Attach. A at 2-3 (filed Sept. 5, 2018) (Corning Sept. 5, 2018 *Ex Parte* Letter).

deployed where it is needed most: 97 percent of new deployments would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide.[8]

8. The FCC will keep pressing ahead to ensure that every community in the country gets a fair shot at the opportunity that next-generation wireless services can enable. As detailed in the sections that follow, we do so by taking the following steps.

9. In the Declaratory Ruling, we note that a number of appellate courts have articulated different and often conflicting views regarding the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332. We thus address and reconcile this split in authorities by taking three main actions.

10. First, we express our agreement with the U.S. Courts of Appeals for the First, Second, and Tenth Circuits that the "materially inhibit" standard articulated in 1997 by the Clinton-era FCC's *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332.

11. Second, we note, as numerous courts and prior FCC cases have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision.[9] Namely, fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs. In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation over fees.

12. Third, we focus on a subset of other, non-fee provisions of local law that could also operate as prohibitions on service. We do so in particular by addressing state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities, recognizing that certain reasonable aesthetic considerations do not run afoul of Sections 253 and 332. This responds in particular to many concerns we heard from state and local governments about deployments in historic districts.

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[8] *Id.*

[9] "Small Wireless Facilities," as used herein and consistent with section 1.1312(e)(2), encompasses facilities that meet the following conditions:

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

13. Next, we issue a Report and Order that addresses the "shot clocks" governing the review of wireless infrastructure deployments. We take three main steps in this regard. First, we create a new set of shot clocks tailored to support the deployment of Small Wireless Facilities. In particular, we read Sections 253 and 332 as allowing 60 days for reviewing the application for attachment of a Small Wireless Facility using an existing structure and 90 days for the review of an application for attachment of a small wireless facility using a new structure. Second, while we do not adopt a "deemed granted" remedy for violations of our new shot clocks, we clarify that failing to issue a decision up or down during this time period is not simply a "failure to act" within the meaning of applicable law. Rather, missing the deadline also constitutes a presumptive prohibition. We would thus expect any locality that misses the deadline to issue any necessary permits or authorizations without further delay. We also anticipate that a provider would have a strong case for quickly obtaining an injunction from a court that compels the issuance of all permits in these types of cases. Third, we clarify a number of issues that are relevant to all of the FCC's shot clocks, including the types of authorizations subject to these time periods.

II. BACKGROUND

A. Legal Background

14. In the Telecommunications Act of 1996 (the 1996 Act), Congress enacted sweeping new provisions intended to facilitate the deployment of telecommunications infrastructure. As U.S. Courts of Appeals have stated, "[t]he [1996] Act 'represents a dramatic shift in the nature of telecommunications regulation.'"[10] The Senate floor manager, Senator Larry Pressler, stated that "[t]his is the most comprehensive deregulation of the telecommunications industry in history."[11] Indeed, the purpose of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."[12] The conference report on the 1996 Act similarly indicates that Congress "intended to remove all barriers to entry in the provision of telecommunications services."[13] The 1996 Act thus makes clear Congress's commitment to a competitive telecommunications marketplace unhindered by unnecessary regulations, explicitly directing the FCC to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[14]

15. Several provisions of the 1996 Act speak directly to Congress's determination that certain state and local regulations are unlawful. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[15] Courts have observed that Section 253 represents a "broad preemption of laws that inhibit competition."[16]

16. The Commission has issued several rulings interpreting and providing guidance regarding the language Congress used in Section 253. For instance, in the 1997 *California Payphone* decision, the Commission, under the leadership of then Chairman William Kennard, stated that, in determining whether a state or local law has the effect of prohibiting the provision of telecommunications services, it

[10] *Sprint Telephony PCS LP v. County of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (en banc) (*County of San Diego*) (quoting *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999)).

[11] 141 Cong. Rec. S8197 (daily ed. June 12, 1995).

[12] H.R. Conf. Rep. No. 104–458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (100 Stat. 5) 124.

[13] S. Rep. No. 104-230, at 126 (1996) (Conf. Rep.).

[14] Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (noting that the 1996 Act "fundamentally restructures local telephone markets" to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) ("The Telecommunications Act was an unusually important legislative enactment . . . designed to promote competition.").

[15] 47 U.S.C. § 253(a).

[16] *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 11 n.7 (1st Cir. 1999).

"consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[17]

17. Similar to Section 253, Congress specified in Section 332(c)(7) that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[18] Clause (B)(ii) of that section further provides that "[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request."[19] Section 332(c)(7) generally preserves state and local authority over the "placement, construction, and modification of personal wireless service facilities" but with the important limitations described above.[20] Section 332(c)(7) also sets forth a judicial remedy, stating that "[a]ny person adversely affected by any final action or failure to act by a State or local government" that is inconsistent with the requirements of Section 332(c)(7) "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[21] The provision further directs the court to "decide such action on an expedited basis."[22]

18. The Commission has previously interpreted the language Congress used and the limits it imposed on state and local authority in Section 332. For instance, in interpreting Section 332(c)(7)(B)(i)(II), the Commission has found that "a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)."[23] In adopting this interpretation, the Commission explained that its "construction of the provision achieves a balance that is most consistent with the relevant goals of the Communications Act" and its understanding that "[i]n promoting the construction of nationwide wireless networks by multiple carriers, Congress sought ultimately to improve service quality and lower prices for consumers."[24] The Commission also noted that an alternative interpretation would "diminish the service provided to [a wireless provider's] customers."[25]

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[17] *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*).

[18] 47 U.S.C. § 332(c)(7)(B)(i).

[19] 47 U.S.C § 332(c)(7)(B)(ii).

[20] 47 U.S.C. § 332(c)(7)(A) (stating that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities"). The statute defines "personal wireless services" to include CMRS, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. § 332(c)(7)(C). In 2012, Congress expressly modified this preservation of local authority by enacting Section 6409(a), which requires local governments to approve certain types of facilities siting applications "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law." Spectrum Act, 47 U.S.C. § 6409(a)(1).

[21] 47 U.S.C. § 332(c)(7)(B)(v).

[22] 47 U.S.C. § 332(c)(7)(B)(v).

[23] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) (*City of Arlington*), *aff'd*, 569 U.S. 290 (2013).

[24] *2009 Declaratory Ruling*, 24 RCC Rcd at 14017-18, para. 61.

[25] *Id*.

19. In the *2009 Declaratory Ruling*, the Commission acted to speed the deployment of then-new 4G services and concluded that, "[g]iven the evidence of unreasonable delays [in siting decisions] and the public interest in avoiding such delays," it should offer guidance regarding the meaning of the statutory phrases "reasonable period of time" and "failure to act" "in order to clarify when an adversely affected service provider may take a dilatory State or local government to court."[26] The Commission interpreted "reasonable period of time" under Section 332(c)(7)(B)(ii) to be 90 days for processing collocation applications and 150 days for processing applications other than collocations.[27] The Commission further determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days.[28] In litigation involving the 90-day and 150-day time frames, the locality may attempt to "rebut the presumption that the established timeframes are reasonable."[29] If the agency fails to make such a showing, it may face "issuance of an injunction granting the application."[30] In its *2014 Wireless Infrastructure Order*,[31] the Commission clarified that the time frames under Section 332(c)(7) are presumptively reasonable and begin to run when the application is submitted, not when it is found to be complete by a siting authority.[32]

20. In 2012, Congress adopted Section 6409 of the Middle Class Tax Relief and Job Creation Act (the Spectrum Act), which provides further evidence of Congressional intent to limit state and local laws that operate as barriers to infrastructure deployment. It states that, "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified as 47 U.S.C. § 332(c)(7)] or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[33] Subsection (a)(2) defines the term "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.[34] In implementing Section 6409 and in an effort to "advance[e] Congress's goal

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[26] *Id.* at 14008, para. 37; *see also id.* at 14029 (Statement of Chairman Julius Genachowski) ("[T]he rules we adopt today . . . will have an important effect in speeding up wireless carriers' ability to build new 4G networks--which will in turn expand and improve the range of wireless choices available to American consumers.").

[27] *Id.* at 14012, para. 45.

[28] *Id.* at 14005, 14012, paras. 32, 45.

[29] *Id.* at 14008-10, 14013-14, paras. 37-42, 49-50.

[30] *Id.* at 14009, para. 38; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional tort damages).

[31] Specifically, the Commission determined that once a siting application is considered complete for purposes of triggering the Section 332(c)(7) shot clocks, those shot clocks run regardless of any moratoria imposed by state or local governments, and the shot clocks apply to DAS and small-cell deployments so long as they are or will be used to provide "personal wireless services." *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12966, 12973, paras. 243, 270, (2014) (*2014 Wireless Infrastructure Order*), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015) (*Montgomery County*); *see also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3339, para. 22 (2017) (*Wireless Infrastructure NPRM/NOI*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 and WT Docket No. 17-79, FCC 18-111, paras. 140-68 (rel. Aug. 3, 2018) (*Moratoria Declaratory Ruling*).

[32] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 258. ("Accordingly, to the extent municipalities have interpreted the clock to begin running only after a determination of completeness, that interpretation is incorrect.").

[33] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6409(a)(2), 126 Stat. 156 (2012).

[34] *Id*.

of facilitating rapid deployment,"[35] the Commission adopted rules to expedite the processing of eligible facilities requests, including documentation requirements and a 60-day period for states and localities to review such requests.[36] The Commission further determined that a "deemed granted" remedy was necessary for cases in which the reviewing authority fails to issue a decision within the 60-day period in order to "ensur[e] rapid deployment of commercial and public safety wireless broadband services."[37] The Fourth Circuit, affirming that remedy, explained that "[f]unctionally, what has occurred here is that the FCC—pursuant to properly delegated Congressional authority—has preempted state regulation of wireless towers."[38]

21. Consistent with these broad federal mandates, courts have recognized that the Commission has authority to interpret Sections 253 and 332 of the Act to further elucidate what types of state and local legal requirements run afoul of the statutory parameters Congress established.[39] For instance, the Fifth Circuit affirmed the *2009 Declaratory Ruling* in *City of Arlington*. The court concluded that the Commission possessed the "authority to establish the 90– and 150–day time frames" and that its decision was not arbitrary and capricious.[40] More generally, as the agency charged with administering the Communications Act, the Commission has the authority, responsibility, and expert judgement to issue interpretations of the statutory language and to adopt implementing regulations that clarify and specify the scope and effect of the Act. Such interpretations are particularly appropriate where the statutory language is ambiguous, or the subject matter is "technical, complex, and dynamic," as it is in the Communications Act, as recognized by the Supreme Court.[41] Here, the Commission has ample experience monitoring and regulating the telecommunications sector. It is well-positioned, in light of this experience and the record in this proceeding, to issue a clarifying interpretation of Sections 253 and 332(c)(7) that accounts both for the changing needs of a dynamic wireless sector that is increasingly reliant on Small Wireless Facilities and for state and local oversight that does not materially inhibit wireless deployment.

22. The congressional and FCC decisions described above point to consistent federal action, particularly when faced with changes in technology, to ensure that our country's approach to wireless infrastructure deployment promotes buildout of the facilities needed to provide Americans with next-generation services. Consistent with that long-standing approach, in the 2017 *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether the FCC should again update its approach to infrastructure deployment to ensure that regulations are not operating as prohibitions in violation of Congress's decisions and federal policy.[42] In August 2018, the Commission concluded that state and local moratoria on telecommunications services and facilities deployment are barred by Section 253(a).[43]

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[35] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12872, para. 15.

[36] *Id.* at 12922, 12956-57, paras. 135, 214-15.

[37] *Id*. at 12961-62, paras. 226, 228.

[38] *Montgomery County*, 811 F.3d at 129.

[39] *See, e.g.*, *City of Arlington*, 668 F.3d at 253-54; *County of San Diego*, 543 F.3d at 578; *RT Commc'ns., Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000).

[40] *City of Arlington*, 668 F.3d at 254, 260-61.

[41] *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 328 (2002); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (recognizing "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated"); s*ee also, e.g.*, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-986 (2005) (Commission's interpretation of an ambiguous statutory provision overrides earlier court decisions interpreting the same provision).

[42] *See generally Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-39, paras. 4-22.

[43] *See generally Moratoria Declaratory Ruling*, FCC 18-111, paras. 140-68.

B. The Need for Commission Action

23. In response to the opportunities presented by offering new wireless services, and the problems facing providers that seek to deploy networks to do so, we find it necessary and appropriate to exercise our authority to interpret the Act and clarify the preemptive scope that Congress intended. The introduction of advanced wireless services has already revolutionized the way Americans communicate and transformed the U.S. economy. Indeed, the FCC's most recent wireless competition report indicates that American demand for wireless services continues to grow exponentially. It has been reported that monthly data usage per smartphone subscriber rose to an average of 3.9 gigabytes per subscriber per month, an increase of approximately 39 percent from year-end 2015 to year-end 2016.[44] As more Americans use more wireless services, demand for new technologies, coverage and capacity will necessarily increase, making it critical that the deployment of wireless infrastructure, particularly Small Wireless Facilities, not be stymied by unreasonable state and local requirements.

24. 5G wireless services, in particular, will transform the U.S. economy through increased use of high-bandwidth and low-latency applications and through the growth of the Internet of Things.[45] While the existing wireless infrastructure in the U.S. was erected primarily using macro cells with relatively large antennas and towers, wireless networks increasingly have required the deployment of small cell systems to support increased usage and capacity. We expect this trend to increase with next-generation networks, as demand continues to grow, and providers deploy 5G service across the nation.[46] It is precisely "[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies" that the Commission has acknowledged "an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise."[47] As explained below, the need to site so many more 5G-capable nodes leaves providers' deployment plans and the underlying economics of those plans vulnerable to increased per site delays and costs.

25. Some states and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure, looking to bring greater connectivity to their communities through forward-looking policies. Leaders in these states are working hard to meet the needs of their communities and balance often competing interests. At the same time, outlier conduct persists. The record here suggests that the legal requirements in place in other state and local jurisdictions are materially impeding that deployment in various ways.[48] Crown Castle, for example, describes "excessive and unreasonable" "fees

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[44] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Twentieth Report, 32 FCC Rcd 8968, 8972, para. 20 (2017) (*Twentieth Wireless Competition Report*).

[45] *See Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 1.

[46] *See, e.g.*, Letter from Brett Haan, Principal, Deloitte Consulting, U.S., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 17, 2018) ("Significant investment in new network infrastructure is needed to deploy 5G networks at-scale in the United States. 5G's speed and coverage capabilities rely on network densification, which requires the addition of towers and small cells to the network. . . . This requires carriers to add 3 to 10 times the number of existing sites to their networks. Most of this additional infrastructure will likely be built with small cells that use lampposts, utility phones, or other structures of similar size able to host smaller, less obtrusive radios required to build a densified network." (citation omitted)); *see also* Deloitte LLP, 5G: The Chance to Lead for a Decade (2018) (Deloitte 5G Paper), *available at* https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5gdeployment-imperative.pdf.

[47] *See Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 2.

[48] *See, e.g.,* Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 10, 2018) ("Unfortunately, many municipalities are unable, unwilling, or do not make it a priority to act on applications within the shot clock period."); Letter from Keith Buell, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Aug. 13, 2018) (Sprint Aug. 13, 2018 *Ex Parte* Letter); Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21,

to access the [rights-of-way] that are completely unrelated to their maintenance or management." It also points to barriers to market entry "for independent network and telecommunications service providers," including municipalities that "restric[t] access to the [right-of-way] only to providers of commercial mobile services" or that impose "onerous zoning requirements on small cell installations when other similar [right of way] utility installations are erected with simple building permits."[49] Crown Castle is not alone in describing local regulations that slow deployment. AT&T states that localities in Maryland, California, and Massachusetts have imposed fees so high that it has had to pause or decrease deployments.[50] Likewise, AT&T states that a Texas city has refused to allow small cell placement on any structures in a right-of-way (ROW).[51] T-Mobile states that the Town of Hempstead, New York requires service providers who seek to collocate or upgrade equipment on existing towers that have been properly constructed pursuant to Class II standards to upgrade and certify these facilities under Class III standards that apply to civil and national defense and military facilities.[52] Verizon states that a Minnesota town has proposed barring construction of new poles in rights-of-way and that a Midwestern suburb where it has been trying to get approval for small cells since 2014 has no established procedures for small cell approvals.[53] Verizon states that localities in New York and Washington have required special use permits involving multiple layers of approval to locate small cells in some or all zoning districts.[54] While some localities dispute some of these characterizations, their submissions do not persuade us that there is no basis or need for the actions we take here.

26. Further, the record in this proceeding demonstrates that many local siting authorities are not complying with our existing Section 332 shot clock rules.[55] WIA states that its members routinely face lengthy delays and specifically cite localities in New Jersey, New Hampshire, and Maine as being

(Continued from previous page)
2018) ("[L]ocal permitting delays continue to stymie deployments."); Letter from Kenneth J. Simon, Crown Castle, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018); Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 30, 2018) (CTIA Aug. 30, 2018 *Ex Parte* Letter).

[49] Crown Castle Comments at 7; *see also* Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 19, 2018) ("In Hillsborough, California, Crown Castle submitted applications covering 16 nodes, and was assessed $60,000 in application fees. Not only did Hillsborough go on to deny these applications, following that denial it also then sent Crown Castle an invoice for an additional $351,773 (attached as Exhibit A), most of which appears to be related to outside counsel fees—all for equipment that was not approved and has not yet been constructed.").

[50] Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 6, 2018) (AT&T Aug. 6, 2018 *Ex Parte* Letter).

[51] AT&T Comments at 6-7.

[52] T-Mobile Reply Comments at 7-9; *see also* CCA Reply Comments at 12; CTIA Reply Comments at 18; WIA Reply Comments at 22-23.

[53] *See* Verizon Comments at 7.

[54] *See* Verizon Comments at 35.

[55] *See, e.g.*, T-Mobile Comments at 8 (stating that "roughly 30% of all of its recently proposed sites (including small cells) involve cases where the locality failed to act in violation of the shot clocks."). According to WIA, one of its members "reports that 70% of its applications to deploy Small Wireless Facilities in the public ROWs during a two-year period exceeded the 90-day shot clock for installation of Small Wireless Facilities on an existing utility pole, and 47% exceeded the 150-day shot clock for the construction of new towers." WIA Comments at 7. A New Jersey locality took almost five years to deny a Sprint application. *See Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d 381, 383, 387 (D.N.J. 2014), *aff'd*, 606 Fed. Appx. 669 (3d Cir. 2015). Another locality took almost three years to deny a Crown Castle application to install a DAS system. *See Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 WL 3357169, *6-8 (S.D.N.Y. 2013), *aff'd*, 552 Fed. Appx. 47 (2d Cir. 2014).

problematic.[56] Similarly, AT&T identified an instance in which it took a locality in California 800 days to process an application.[57] GCI provides an example in which it took an Alaska locality nine months to decide an application.[58] T-Mobile states that a community in Colorado and one in California have lengthy pre-application processes for all small cell installations that include notification to all nearby households, a public meeting, and the preparation of a report, none of which these jurisdictions view as triggering a shot clock.[59] Similarly, Lightower provides examples of long delays in processing siting applications.[60] Finally, Crown Castle describes a case in which a "town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even 'deem complete' Crown Castle's application."[61]

27. Our Declaratory Ruling and Third Report and Order are intended to address these issues and outlier conduct. Our conclusions are also informed by findings, reports, and recommendations from the FCC Broadband Deployment Advisory Committee (BDAC), including the Model Code for Municipalities, the Removal of State and Local Regulatory Barriers Working Group report, and the Rates and Fees Ad Hoc Working Group report, which the Commission created in 2017 to identify barriers to deployment of broadband infrastructure, many of which are addressed here.[62] We also considered input from numerous state and local officials about their concerns, and how they have approached wireless deployment, much of which we took into account here. Our action is also consistent with congressional efforts to hasten deployment, including bi-partisan legislation pending in Congress like the STREAMLINE Small Cell Deployment Act and SPEED Act. The STREAMLINE Small Cell Deployment Act proposes to streamline wireless infrastructure deployments by requiring siting agencies to act on deployment requests within specified time frames and by limiting the imposition of onerous

[56] WIA Comments at 8. WIA states that one of its "member reports that the wireless siting approval process exceeds 90 days in more than 33% of jurisdictions it surveyed and exceeds 150 days in 25% of surveyed jurisdictions." WIA Comments at 8. In some cases, WIA members have experienced delays ranging from one to three years in multiple jurisdictions—significantly longer than the 90- and 150-day time frames that the Commission established in 2009.

[57] *See* WIA Comments at 9 (citing and discussing AT&T's Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

[58] GCI Comments at 5-6.

[59] T-Mobile Comments at 21.

[60] Lightower submits that average processing timeframes have increased from 300 days in 2016 to approximately 570 days in 2017, much longer than the Commission's shot clocks. Lightower states that "forty-six separate jurisdictions in the last two years had taken longer than 150 days to consider applications, with twelve of those jurisdictions—representing 101 small wireless facilities—taking more than a year." Lightower Comments at 5-6. *See also* WIA Comments at 9 (citing and discussing Lightower's Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

[61] WIA Comments at 8 (citing and discussing Crown Castle's Comments in 2016 Streamlining Public Notice, WT Docket No. 16-421).

[62] BDAC Report of the Removal of State and Local Regulatory Barriers Working Group, https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-01232018.pdf (approved by the BDAC on January 23, 2018) (BDAC Regulatory Barriers Report); Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC, https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-rates-fees-wg-report-07242018.pdf (July 26, 2018) (Draft BDAC Rates and Fees Report); BDAC Model Municipal Code (Harmonized), https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-harmonization-wg-model-code-muni.pdf (approved July 26, 2018) (BDAC Model Municipal Code). The Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC was presented to the BDAC on July 26, 2018 but has not been voted by the BDAC as of the adoption of this Declaratory Ruling. Certain members of the Removal of State and Local Barriers Working Group also submitted a minority report disagreeing with certain findings in the BDAC Regulatory Barriers Report. *See* Minority Report Submitted by McAllen, TX, San Jose, CA, and New York, NY, GN Docket No. 17-83 (Jan 23, 2018); Letter from Kevin Pagan, City Attorney of McAllen to Marlene Dortch, Secretary, FCC (filed September 14, 2018).

conditions and fees.[63] The SPEED Act would similarly streamline federal permitting processes.[64] In the same vein, the Model Code for Municipalities adopts streamlined infrastructure siting requirements while other BDAC reports and recommendations emphasize the negative impact of high fees on infrastructure deployments.[65]

28. As do members of both parties of Congress and experts on the BDAC, we recognize the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G.[66] State government officials also have urged us to act to expedite the deployment of 5G technology, in particular, by streamlining overly burdensome regulatory processes to ensure that 5G technology will expand beyond just urban centers. These officials have expressed their belief that reducing high regulatory costs and delays in urban areas would leave more money and encourage development in rural areas.[67] "[G]etting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure."[68] State officials have acknowledged that current regulations are "outdated" and "could hinder the timely arrival of 5G throughout the country," and urged the FCC "to push for more reforms that will streamline infrastructure rules from coast to coast."[69] Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches, arguing, among other points,

[63] *See, e.g.*, STREAMLINE Small Cell Deployment Act, S.3157, 115th Congress (2017-2018).

[64] *See, e.g.*, Streamlining Permitting to Enable Efficient Deployment of Broadband Infrastructure Act of 2017 (SPEED Act), S. 1988, 115th Cong. (2017).

[65] *See* BDAC Model Municipal Code; Draft BDAC Rates and Fees Report; BDAC Regulatory Barriers Report.

[66] *See, e.g.*, Letter from Patricia Paoletta, Counsel to Deloitte Consulting LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) ("Deloitte noted that, as with many technology standard evolutions, the value of being a first-mover in 5G will be significant. Being first to LTE afforded the United States macroeconomic benefits, as it became a test bed for innovative mobile, social, and streaming applications. Being first to 5G can have even greater and more sustained benefits to our national economy given the network effects associated with adding billions of devices to the 5G network, enabling machine-to-machine interactions that generates data for further utilization by vertical industries").

[67] Letter from Montana State Senator Duane Ankney to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Duane Ankney July 31, 2018 *Ex Parte* Letter); Letter from Fred A. Lamphere, Butte County Sheriff, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 11, 2018) (Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter); Letter from Todd Nash, Susan Roberts, Paul Catstilleja, Wallowa County Board of Commissioners, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 20, 2018); Letter from Lonnie Gilbert, First Responder, National Black Growers Council Member, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 12, 2018); Letter from Jason R. Saine, North Caroline House of Representatives, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1(filed Sept. 14, 2018) (Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter) (minimal regulatory standard across the United States is critical to ensure that the United States wins the race to the 5G economy).

[68] Letter from LaWana Mayfield, City Council Member, Charlotte, NC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (LaWana Mayfield July 31, 2018 *Ex Parte* Letter); *see also* Letter from South Carolina State Representative Terry Alexander to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed August 7, 2018) ("[P]olicymakers at all levels of government must streamline complex siting stipulations that will otherwise slow down 5G buildout for small cells in particular."); Letter from Sal Pace, Pueblo County Commissioner, District 3, CO, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 30, 2018) (Sal Pace July 30, 2018 *Ex Parte* Letter) ("[T]he FCC should ensure that localities are fully compensated for their costs . . . Such fees should be reasonable and non-discriminatory, and should ensure that localities are made whole. Lastly, the FCC should set reasonable and enforceable deadlines for localities to act on wireless permit applications. . . . The distinction between siting large macro-towers and small cells should be reflected in any rulemaking.")

[69] Letter from Dr. Carolyn A. Prince, Chairwoman, Marlboro County Council, SC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter)

that the FCC lacks authority to take certain actions.[70] We have carefully considered these views, but nevertheless find our actions here necessary and fully supported.

29. Accordingly, in this Declaratory Ruling and Third Report and Order, we act to reduce regulatory barriers to the deployment of wireless infrastructure and to ensure that our nation remains the leader in advanced wireless services and wireless technology.

III. DECLARATORY RULING

30. In this Declaratory Ruling, we note that a number of appellate courts have articulated different and often conflicting views regarding the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332. In light of these diverging views, Congress's vision for a consistent, national policy framework, and the need to ensure that our approach continues to make sense in light of the relatively new trend towards the large-scale deployment of Small Wireless Facilities, we take this opportunity to clarify and update the FCC's reading of the limits Congress imposed. We do so in three main respects.

31. First, in Part III.A, we express our agreement with the views already stated by the First, Second, and Tenth Circuits that the "materially inhibit" standard articulated in 1997 by the Clinton-era FCC's *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332.

32. Second, in Part III.B, we note, as numerous courts have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can effectively prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they represent a reasonable approximation of the local government's objectively reasonable costs, and are non-discriminatory.[71] In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation, while recognizing that it is the standard itself, not the particular, presumptive fee levels we articulate, that ultimately will govern whether a particular fee is allowed under Sections 253 and 332. So fees above

[70] *See, e.g.*, City of Manhattan, KS Sept. 13, 2018 *Ex Parte* Letter at 1-2; Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 1-2; Damon Connolly Sept. 17, 2018 *Ex Parte* Letter at 1-2.

[71] Fees charged by states or localities in connection with Small Wireless Facilities would be "compensation" for purposes of Section 253(c). This Declaratory Ruling interprets Section 253 and 332(c)(7) in the context of three categories of fees, one of which applies to all deployments of Small Wireless Facilities while the other two are specific to Small Wireless Facilities deployments inside the ROW. (1) "Event" or "one-time" fees are charges that providers pay on a non-recurring basis in connection with a one-time event, or series of events occurring within a finite period. The one-time fees addressed in this Declaratory Ruling are not specific to the ROW. For example, a provider may be required to pay fees during the application process to cover the costs related to processing an application building or construction permits, street closures, or a permitting fee, whether or not the deployment is in the ROW. (2) Recurring charges for a Small Wireless Facility's use of or attachment to property inside the ROW owned or controlled by a state or local government, such as a light pole or traffic light, is the second category of fees addressed here, and is typically paid on a per structure/per year basis. (3) Finally, ROW access fees are recurring charges that are assessed, in some instances, to compensate a state or locality for a Small Wireless Facility's access to the ROW, which includes the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property (including when such property is government-owned). A ROW access fee may be charged even if the Small Wireless Facility is not using government owned property within the ROW. AT&T Comments at 18 (describing three categories of fees); Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 11 (filed Aug. 10, 2018) (Verizon Aug. 10, 2018 *Ex Parte* Letter) (characterizing fees as recurring or non-recurring); *see also* Draft BDAC Rates and Fees Report at p. 15-16. Unless otherwise specified, a reference to "fee" or "fees" herein refers to any one of, or any combination of, these three categories of charges.

those levels would be permissible under Sections 253 and 332 to the extent a locality's actual, reasonable costs (as measured by the standard above) are higher.

33. Finally, in Part III.C, we focus on a subset of other, non-fee provisions of state and local law that could also operate as prohibitions on service. We do so in particular by addressing state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities. We note that the Small Wireless Facilities that are the subject of this Declaratory Ruling remain subject to the Commission's rules governing Radio Frequency (RF) emissions exposure.[72]

A. Overview of the Section 253 and Section 332(c)(7) Framework Relevant to Small Wireless Facilities Deployment

34. In Sections 253(a) and 332(c)(7)(B) of the Act, Congress determined that state or local requirements that prohibit or have the effect of prohibiting the provision of service are unlawful and thus preempted.[73] Section 253(a) addresses "any interstate or intrastate telecommunications service," while Section 332(c)(7)(B)(i)(II) addresses "personal wireless services."[74] Although the provisions contain identical "effect of prohibiting" language, the Commission and different courts over the years have each employed inconsistent approaches to deciding what it means for a state or local legal requirement to have the "effect of prohibiting" services under these two sections of the Act. This has caused confusion among both providers and local governments about what legal requirements are permitted under Sections 253 and 332(c)(7). For example, despite Commission decisions to the contrary construing such language under Section 253, some courts have held that a denial of a wireless siting application will "prohibit or have the effect of prohibiting" the provision of a personal wireless service under Section 332(c)(7)(B)(i)(II) only if the provider can establish that it has a significant gap in service coverage in the

[72] *See* 47 CFR §§ 1.1307, 1.1310. We disagree with commenters who oppose the Declaratory Ruling on the basis of concerns regarding RF emissions. *See, e.g.*, Comments from Judy Aizuss, Comments from Jeffrey Arndt, Comments from Jeanice Barcelo, Comments from Kristin Beatty, Comments from James M. Benster, Comments from Terrie Burns, Comments from EMF Safety Network, Comments from Kate Reese Hurd, Comments from Marilynne Martin, Comments from Lisa Mayock, Comments from Kristen Moriarty Termunde, Comments from Sage Associates, Comments from Elizabeth Shapiro, Comments from Paul Silver, Comments from Natalie Ventrice. The Commission has authority to adopt and enforce RF exposure limits, and nothing in this Declaratory Ruling changes the applicability of the Commission's existing RF emissions exposure rules. *See, e.g.,* Section 704(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104 (directing Commission to "prescribe and make effective rules regarding the environmental effects of radio frequency emissions" upon completing action in then-pending rulemaking proceeding that included proposals for, *inter alia*, maximum exposure limits); 47 U.S.C. § 332(c)(7)(B)(iv) (recognizing legitimacy of FCC's existing regulations on environmental effects of RF emissions of personal wireless service facilities, by proscribing state and local regulation of such facilities on the basis of such effects, to the extent such facilities comply with Commission regulations concerning such RF emissions); 47 U.S.C. § 151 (creating the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service, . . . for the purpose of [*inter alia*] promoting safety of life and property through the use of wire and radio communications"). *See also* H.R. Rep. No. 204(I), 104th Cong., 1st Sess. 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61 (1996) (in legislative history of Section 704 of 1996 Telecommunications Act, identifying "adequate safeguards of the public health and safety" as part of a framework of uniform, nationwide RF regulations); ; *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, First Report and Order, Further Notice of Proposed Rulemaking and Notice of Inquiry, 28 FCC Rcd 3498, 3530-31, para. 103, n.176 (2013).

[73] 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

[74] *Id.* The actions in this proceeding update the FCC's approach to Sections 253 and 332 by addressing effective prohibitions that apply to the deployment of services covered by those provisions. Our interpretations in this proceeding do not provide any basis for increasing the regulation of services deployed consistent with Section 621 of the Cable Communications Policy Act of 1984.

area and a lack of feasible alternative locations for siting facilities.[75] Other courts have held that evidence of an already-occurring or complete inability to offer a telecommunications service is required to demonstrate an effective prohibition under Section 253(a).[76] Conversely, still other courts like the First, Second, and Tenth Circuits have endorsed prior Commission interpretations of what constitutes an effective prohibition under Section 253(a) and recognized that, under that analytical framework, a legal requirement can constitute an effective prohibition of services even if it is not an insurmountable barrier.[77]

35. In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*, namely, that a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[78] We then explain how this "material inhibition" standard applies in the context of state and local fees and aesthetic requirements. In doing so, we confirm the First, Second, and Tenth Circuits' understanding that under this analytical framework, a legal requirement can "materially inhibit" the provision of services even if it is not an insurmountable barrier.[79] We also resolve the conflicting court interpretations of the

[75] Courts vary widely regarding the type of showing needed to satisfy the second part of that standard. The First, Fourth, and Seventh Circuits have imposed a "heavy burden" of proof on applicants to establish a lack of alternative feasible sites, requiring them to show "not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try." *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); *accord New Cingular Wireless PCS, LLC v. Fairfax County*, 674 F.3d 270, 277 (4th Cir. 2012); *T-Mobile Northeast LLC v. Fairfax County*, 672 F.3d 259, 266-68 (4th Cir. 2012) (*en banc*); *Helcher v. Dearborn County*, 595 F.3d 710, 723 (7th Cir. 2010) (*Helcher*). The Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the "least intrusive means" for filling a coverage gap in light of the aesthetic or other values that the local authority seeks to serve. *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (*Willoth*); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999) (*APT*); *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-99 (9th Cir. 2009) (*City of Anacortes*).

[76] *See, e.g.*, *County of San Diego*, 543 F.3d at 579-80; *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533-34 (8th Cir. 2007) (*City of St. Louis*).

[77] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (*Municipality of Guayanilla*); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (*City of White Plains*); *RT Communications v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) ("[Section] 253(a) forbids any statute which prohibits or has 'the effect of prohibiting' entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.") (*RT Communications*) (*affirming Silver Star Tel. Co. Petition for Preemption and Declaratory Ruling*, 12 FCC Rcd 15639 (1997)).

[78] *California Payphone*, 12 FCC Rcd at 14206, para. 31. A number of circuit courts have cited *California Payphone* as the leading authority regarding the standard to be applied under Section 253(a). *See, e.g.*, *County of San Diego*, 543 F.3d at 578; *City of St. Louis*, 477 F.3d at 533; *Municipality of Guayanilla*, 450 F.3d at 18; *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (*City of Santa Fe*); *City of White Plains*, 305 F.3d at 76. Crown Castle argues that the Eighth and Ninth Circuit cited the FCC's *California Payphone* decision,but read the standard in an overly narrow fashion. *See, e.g.*, Letter from Kenneth J. Simon, Senior Vice Pres. and Gen. Counsel, Crown Castle, *et al*., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 12 (filed June 7, 2018) (Crown Castle June 7, 2018 *Ex Parte* Letter); *see also* Smart Communities Comments at 60-61 (describing circuit split). Some commenters cite selected dictionary definitions or otherwise argue for a narrow definition of "prohibit." *See, e.g.*, Smart Communities Reply at 53. But because they do not go on to dispute the validity of the *California Payphone* standard that has been employed not only by the Commission but also many courts, those arguments do not persuade us to depart from the *California Payphone* standard here.

[79] *See, e.g.*, *City of White Plains*, 305 F.3d at 76; *Municipality of Guayanilla*, 450 F.3d at 18; *see also, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 12. Because the clarifications in this order should reduce uncertainty regarding the application of these provisions for state and local governments as well as stakeholders, we are not persuaded by some commenters' arguments that an expedited complaint process is required. *See, e.g.*, AT&T Comments at 28; CTIA Reply at 21. We do not address, at this time, recently-filed petitions for reconsideration of our August 2018 *Moratoria Declaratory Ruling*. *See, e.g.,* Smart Communities Petition for Reconsideration, WC

'effective prohibition' language so that continuing confusion on the meaning of Sections 253 and 332(c)(7) does not materially inhibit the critical deployments of Small Wireless Facilities and our nation's drive to deploy 5G.[80]

36. As an initial matter, we note that our Declaratory Ruling applies with equal measure to the effective prohibition standard that appears in both Sections 253(a) and 332(c)(7).[81] This ruling is consistent with the basic canon of statutory interpretation that identical words appearing in neighboring provisions of the same statute generally should be interpreted to have the same meaning.[82] Moreover, both of these provisions apply to wireless telecommunications services[83] as well as to commingled services and facilities.[84]

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Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018); New York City Petition for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018). Nor do we address requests for clarification and/or action on other issues raised in the record beyond those expressly discussed in this order. These other issues include arguments regarding other statutory interpretations that we do not address here. *See, e.g.*, CTIA Reply at 23 (raising broader questions about the precise interplay of Section 253 and Section 332(c)(7)); Crown Castle June 7, 2018 *Ex Parte* Letter at 16-17 (raising broader questions about the scope of "legal requirements" under Section 253(a)). Consequently, this order should not be read as impliedly taking a position on those issues.

[80] *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 11-12 (arguing that "[d]espite the Commission's efforts to define the boundaries of federal preemption under Section 253, courts have issued a number of conflicting decisions that have only served to confuse the preemption analysis sunder section 253" and that "the Commission should clarify that the *California Payphone* standard as interpreted by the First and Second Circuits is the appropriate standard going forward"); *see also* BDAC Regulatory Barriers Report at p. 9 ("The Commission should provide clarity on what actually constitutes an "excessive" fee for right-of-way access and use. The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not "fair and reasonable." The Commission should specifically clarify that "fair and reasonable" compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard."). Because our decision provides clarity by addressing conflicting court decisions and reaffirming that the "materially inhibits" standard articulated in the Commission's *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as an effective prohibition within the meaning of Sections 253 and 332, we reject arguments that our action will increase conflicts and lead to more litigation. *See e.g.*, Letter from Michael Dylan Brennan, Mayor, City of University Heights, Ohio, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 19, 2018) (stating that "…this framing and definition of effective prohibition opens local governments to the likelihood of more, not less, conflict and litigation over requirements for aesthetics, spacing, and undergrounding").

[81] *See infra* Part III.A, B.

[82] *See County of San Diego*, 543 F.3d at 579 ("We see nothing suggesting that Congress intended a different meaning of the text 'prohibit or have the effect of prohibiting' in the two statutory provisions, enacted at the same time, in the same statute. * * * * * As we now hold, the legal standard is the same under either [Section 253 or 332(c)(7)]."); *see also, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning); *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam) ("[S]imilarity of language . . . is . . . a strong indication that the two statutes should be interpreted *pari passu*"); Verizon Comments at 9-10; AT&T Reply at 3-4; Crown Castle June 7, 2018 *Ex Parte* Letter at 15.

[83] Common carrier wireless services meet the definition of "telecommunications services," and thus are within the scope of Section 253(a) of the Act. *See, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, para 142 n.523; *see also, e.g.*, League of Minnesota Cities Comments at 11; Verizon Reply at 9-10. While some commenters cite certain distinguishing factual characteristics between wireline and wireless services, the record does not reveal why those distinctions would be material to whether wireless telecommunications services are covered by Section 253 in the first instance. *See, e.g.*, City of San Antonio *et al*. Comments, Exh. A at 13; Virginia Joint Commenters Comments at 5, Exh. A at 45-46. To the contrary, Section 253(e) expressly preserves "application of section 332(c)(3) of this title to commercial mobile service providers" notwithstanding Section 253—a provision that would be meaningless if wireless telecommunications services already fell outside the scope of Section 253. 47 U.S.C. § 253(e). For this same reason, we also reject claims that the existence of certain protections for personal wireless services in Section 332(c)(7), or the phrase "nothing in this chapter" in Section 332(c)(7)(A), demonstrate that states' or localities'

37. As explained in *California Payphone* and reaffirmed here, a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service.[85] This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service

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regulations affecting wireless telecommunications services must fall outside the scope of Section 253. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at iii, 45-46; Smart Communities Comments at 56. Even if, as some parties argue, the phrase "nothing in this chapter" could be construed as preserving state or local decisions on the placement, construction, or modification of personal wireless service facilities from preemption by other sections of the Communications Act, Section 332(c)(7)(A) goes on to make clear that such state or local decisions are *not* immune from preemption if they violate any of the standards set forth in Section 332(c)(7)(B)--including Section 332(c)(7)(B)(i)(II)'s ban of requirements that "prohibit or have the effect of prohibiting" the provision of service, which is identical to the preemption provision in Section 253(a). Thus, states and localities may charge fees and dispose of applications relating to the matters subject to Section 332(c)(7) in any manner they deem appropriate, so long as that conduct does not amount to a prohibition or effective prohibition, as interpreted in this Declaratory Ruling or otherwise run afoul of federal or state law; but because Sections 332(c)(7)(B)(i)(II) and 253(a) use identical "effective prohibition" language, the standard for what is saved and what is preempted is the same under both provisions.

[84] *See infra* para. 40 (discussing use of small cells to close coverage gaps, including voice gaps); *see also, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, para 145 n.531; *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 425, para. 190 (2018); Letter from Andre J. Lachance, Associate General Counsel, Verizon to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 3 (filed Sept. 19, 2018) (confirming that "telecommunications services can be provided over small cells and Verizon has deployed Small Wireless Facilities in its network that provide telecommunications services."); Letter from David M. Crawford, Senior Corporate Counsel, Fed. Reg. Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 19, 2018) (stating that "small wireless facilities are a critical component of T-Mobile's network deployment plans to support both the 5G evolution of wireless services, as well as more traditional services such as mobile broadband and even voice calls. T-Mobile, for example, uses small wireless facilities to densify our network to provide better coverage and greater capacity, and to provide traditional services such as voice calls in areas where our macro site coverage is insufficient to meet demand."); Letter from Henry G. Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) ("AT&T has operated and continues to operate commercial mobile radio services as well as information services from small wireless facilities..."); *see also, e.g.*, *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to Section 253(a) where the advertising was a material factor in the provider's ability to provide the payphone service itself). The fact that facilities are sometimes deployed by third parties not themselves providing covered services also does not place such deployment beyond the purview of Section 253(a) or Section 332(c)(7)(B)(i) insofar as the facilities are used by wireless service providers on a wholesale basis to provide covered services (among other things). *See, e.g.*, T-Mobile Comments at 26. Given our conclusion that neither commingling of services nor the identity of the entity engaged in the deployment activity changes the applicability of Section 253(a) or Section 332(c)(7)(B)(i)(II) where the facilities are being used for the provisioning of services within the scope of the relevant statutory provisions, we reject claims to the contrary. *See, e.g.*, Colorado Communications and Utility Alliance *et al*. Comments at 15-16; City of San Antonio *et al*. Comments, Exh. A at 12; *id*., Exh. C at 13-15. Because local jurisdictions do not have the authority to regulate these interstate services, there is no basis for local jurisdictions to conduct proceedings on the types of personal wireless services offered over particular wireless service facilities or the licensee's service area, which are matters within the Commission's licensing authority. Furthermore, local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network. See 47 U.S.C. § 332(c)(3)(A); *see also Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000).

[85] By "covered service" we mean a telecommunications service or a personal wireless service for purposes of Section 253 and Section 332(c)(7), respectively.

capabilities.[86] Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.[87]

38. Our reading of Section 253(a) and Section 332(c)(7)(B)(i)(II) reflects and supports a marketplace in which services can be offered in a multitude of ways with varied capabilities and performance characteristics consistent with the policy goals in the 1996 Act and the Communications Act. To limit Sections 253(a) and 332(c)(7)(B)(i)(II) to protecting only against coverage gaps or the like would be to ignore Congress's contemporaneously-expressed goals of "promot[ing] competition[,] . . . secur[ing] . . . higher quality services for American telecommunications consumers and encourage[ing] the rapid deployment of new telecommunications technologies."[88] In addition, as the Commission recently explained, the implementation of the Act "must factor in the fundamental objectives of the Act, including the deployment of a 'rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges' and 'the development and rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays[, and] efficient and

[86] *See, e.g.*, Crown Castle Comments at 54-55; Free State Foundation Comments at 12; T-Mobile Comments at 43-45; CTIA Reply at 14; WIA Reply at 26; Crown Castle June 7, 2018 *Ex Parte* Letter at 13-14; Letter from Kara Romagnino Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 8-9 (filed June 27, 2018) (CTIA June 27, 2018 *Ex Parte* Letter). As T-Mobile explains, for example, a provider might need to improve "signal strength or system capacity to allow it to provide reliable service to consumers in residential and commercial buildings." T-Mobile Comments at 43; *see also, e.g.*, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, *et al.*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14253, para. 38 (2013) (observing that "DAS and small cell facilities[ ] are critical to satisfying demand for ubiquitous mobile voice and broadband services"). The growing prevalence of smart phones has only accelerated the demand for wireless providers to take steps to improve their service offerings. *See, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 9011-13, paras. 62-65.

[87] Our conclusion finds further support in our broad understanding of the statutory term "service," which, as we explained in our recent *Moratoria Declaratory Ruling*, means "any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities." *Moratoria Declaratory Ruling*, FCC 18-111, para. 162 n.594; *see also Public Utility Comm'n of Texas Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3496, para. 74 (1997) (*Texas PUC Order)* (interpreting the scope of 'telecommunications services' covered by Section 253(a) and clarifying that it would be an unlawful prohibition for a state or locality to specify "the means or facilities" through which a service provider must offer service); Crown Castle June 7, 2018 *Ex Parte* Letter at 10-11 (discussing this precedent). We find this interpretation of "service" warranted not only under Section 253(a), but Section 332(c)(7)(B)(i)(II)'s reference to "services" as well.

[88] Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996). Consequently, we reject arguments suggesting that the provision of some level of wireless service in the past necessarily demonstrates that there is no effective prohibition of service under the state or local legal requirements that applied during those periods or that an effective prohibition only is present if a provider can provide no covered service whatsoever. *See, e.g.*, City and County of San Francisco Comments at 25-26; Virginia Joint Commenters Comments, Exh. A at 31-33. Nor, in light of these goals, do we find it reasonable to interpret the protections of these provisions as doing nothing more than guarding against a monopoly as some suggest. *See, e.g.*, Smart Communities Comments, WC Docket No. 17-84, at 8-9 (filed June 15, 2017) cited in Smart Communities Comments at 57 n.141.

intensive use of the electromagnetic spectrum.'"[89] These provisions demonstrate that our interpretation of Section 253 and Section 332(c)(7)(B)(i)(II) is in accordance with the broader goals of the various statutes that the Commission is entrusted to administer.

39. *California Payphone* further concluded that providers must be allowed to compete in a "fair and balanced regulatory environment."[90] As reflected in decisions such as the Commission's *Texas PUC Order*, a state or local legal requirement can function as an effective prohibition either because of the resulting "financial burden" in an absolute sense, or, independently, because of a resulting competitive disparity.[91] We clarify that "[a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the disfavored facilities will experience prohibition."[92] This conclusion is consistent with both Commission and judicial precedent recognizing the prohibitory effect that results from a competitor being treated materially differently than similarly-situated providers.[93] We provide our authoritative interpretation below of the circumstances in which a "financial burden," as described in the *Texas PUC Order*, constitutes an effective prohibition in the context of certain state and local fees.

40. As we explained above, we reject alternative readings of the effective prohibition language that have been adopted by some courts and used to defend local requirements that have the effect of prohibiting densification of networks. Decisions that have applied solely a "coverage gap"-based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace.[94] Those cases, including some that formed the foundation for

[89] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, FCC 18-30, para. 62 (rel. Mar. 30, 2018) (*Wireless Infrastructure Second R&O*) (quoting 47 U.S.C. §§ 151, 309(j)(3)(A), (D)).

[90] *California Payphone*, 12 FCC Rcd at 14206, para. 31.

[91] *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; *see also, e.g.*, Crown Castle June 7, 2018 *Ex Parte* at 10-11, 13.

[92] Crown Castle June 7, 2018 *Ex Parte* Letter at 13.

[93] *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities*, Declaratory Ruling, 15 FCC Rcd 15168, 15173, paras. 12-13 (2000) (*Western Wireless Order*); *Pittencrieff Communications, Inc. Petition for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, para. 32 (1997) (*Pittencrieff*), *aff'd*, *Cellular Telecomm. Indus. Ass'n v. FCC*, 168 F.3d 1332 (5th Cir. 1999); *City of White Plains*, 305 F.3d at 80.

[94] Smart Communities seeks clarification of whether this Declaratory Ruling is meant to say that the "coverage gap" standard followed by a number of courts should include consideration of capacity as well as coverage issues. Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Att. at 17 (Sept. 19, 2018) (Smart Communities Sept. 19 *Ex Parte* Letter). We are not holding that prior "coverage gap" analyses are consistent with the standards we articulate here as long as they also take into account "capacity gaps"; rather, we are articulating here the effective prohibition standard that should apply while, at the same time, noting one way in which prior approaches erred by requiring coverage gaps. Accordingly, we reject both the version of the "coverage gap" test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show "not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try") and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the "least intrusive means" for filling a coverage gap) *See supra* n. 75. We also note that some courts have expressed concern about alternative readings of the statute that would lead to extreme outcomes—either always requiring a grant under some interpretations, or never preventing a denial under other interpretations. *See, e.g.*, *Willoth*, 176 F.3d at 639-41; *APT*, 196 F.3d at 478-79; *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (*City Council of Virginia Beach*); *see also, e.g.*, Greenling Comments at 2; City and County of San Francisco Reply

"coverage gap"-based analytical approaches, appear to view wireless service as if it were a single, monolithic offering provided only via traditional wireless towers.[95] By contrast, the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies.[96] As Crown Castle explains, coverage gap-based approaches are "simply

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at 16. Our interpretation avoids those concerns while better reflecting the text and policy goals of the Communications Act and 1996 Act than coverage gap-based approaches ultimately adopted by those courts. Our approach ensures meaningful constraints on state and local conduct that otherwise would prohibit or have the effect of prohibiting the provision of personal wireless services. At the same time, our standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities, as explained below. *See infra* III.B, C.

[95] *See, e.g.*, *Willoth*, 176 F.3d at 641-44; *360 Degrees Commc'ns Co. v.Board of Supervisors of Albemarle County*, 211 F.3d 79, 86-88 & n.1 (4th Cir. 2000) (*Albemarle County*); *see also, e.g.*, ExteNet Comments at 29; T-Mobile Comments at 42; Verizon Comments at 18; WIA Comments at 38-40. Even some cases that implicitly recognize the limitations of a gap-based test fail to account for those limitations in practice when applying Section 332(c)(7)(B)(i)(II). *See, e.g.*, *Second Generation Properties v. Town of Pelham*, 313 F.3d 620, 633 n.14 (4th Cir. 2002) (discussing scenarios where a carrier has coverage but insufficient capacity to adequately handle the volume of calls or where new technology emerges and a carrier would like to use it in areas that already have coverage using prior-generation technology). Courts that have sought to identify limited set of characteristics of personal wireless services covered by the Act essentially allow actual or effective prohibition of many personal wireless services that providers wish to offer with additional or more advanced characteristics. *See, e.g.*, *Willoth*, 176 F.3d at 641-43 (drawing upon certain statutory definitions); *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) (*Borough of Ho-Ho-Kus*) (concluding that it should be up to state or local authorities to assess and weigh the benefits of differing service qualities); *Albemarle County*, 211 F.3d at 87 (citing 47 CFR §§ 22.99, 22.911(b) as noting the possibility of some 'dead spots'); *cf. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006) (describing as a "dubious proposition" the argument that a denial of a request to construct a tower resulting in "less than optimal" service quality could be an effective prohibition). An outcome that allows the actual or effective prohibition of some covered services is contrary to the Act. Section 253(a) applies to any state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing "any" interstate or intrastate telecommunications service, 47 U.S.C. § 253(a). Similarly, Section 332(c)(7)(B)(i)(II) categorically precludes state or local regulation of the placement, construction, or modification of personal wireless service facilities that prohibits or has the effect of prohibiting the provision of personal wireless "services." 47 U.S.C. § 332(c)(7)(B)(i)(II). We find the most natural interpretation of these sections is that any service that meets the definition of "telecommunications service" or "personal wireless service" is encompassed by the language of each provision, rather than only some subset of such services or service generally. The notion that such state or local regulation permissibly could prohibit some personal wireless services, so long as others are available, is at odds with that interpretation. In addition, as we explain above, a contrary approach would fail to advance important statutory goals as well as the interpretation we adopt. Further, the approach reflected in these court decisions could involve state or local authorities "inquir[ing] into and regulat[ing] the services offered—an inquiry for which they are ill-qualified to pursue and which could only delay infrastructure deployment." Crown Castle June 7, 2018 *Ex Parte* Letter at 14. Instead, our effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.

[96] *See generally, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 8968; *see also, e.g.*, T-Mobile Comments at 42-43; AT&T Reply at 4-5; CTIA Reply at 13-14; WIA Reply at 23-24; Crown Castle June 7, 2018 *Ex Parte* Letter at 15. We do not suggest that viewing wireless service as if it were a single, monolithic offering provided only via traditional wireless towers would have reflected an accurate understanding of the marketplace in the past, even if it might have been somewhat more understandable that courts held such a simplified view at that time. Rather, the current marketplace conditions highlight even more starkly the shortcomings of coverage gap-based approaches, which do not account for other characteristics and deployment strategies. *See, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 8974-75, para. 12 (observing that "[p]roviders of mobile wireless services typically offer an array of mobile voice and data services," including "interconnected mobile voice services"); *id*. at 8997-97, paras. 42-43 (discussing various types of wireless infrastructure deployment to, among

incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage."[97] Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings.[98]

41. Likewise, we reject the suggestion of some courts like the Eighth and Ninth Circuits that evidence of an existing or complete inability to offer a telecommunications service is required under 253(a).[99] Such an approach is contrary to the material inhibition standard of *California Payphone* and the correct recognition by courts "that a prohibition does not have to be complete or 'insurmountable'" to constitute an effective prohibition.[100] Commission precedent beginning with *California Payphone* itself makes clear that an insurmountable barrier is not required to find an effective prohibition under Section 253(a).[101] The "effectively prohibit" language must have some meaning independent of the "prohibit"

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other things, "improve spectrum efficiency for 4G and future 5G services," "to fill local coverage gaps, to densify networks and to increase local capacity").

[97] Crown Castle June 7, 2018 *Ex Parte* Letter at 15; *see also id*. at 13 ("Densification of networks will be key for augmenting the capacity of existing networks and laying the groundwork for the deployment of 5G."); *id*. at 15-16 ("When trying to maximize spectrum re-use and boost capacity, moving facilities by just a few hundred feet can mean the difference between excellent service and poor service. The FCC's rules, therefore, must account for the effect siting decisions would have on every level of service, including increasing capacity and adding new spectrum bands. Practices and decisions that prevent carriers from doing either materially prohibit the provision of telecommunications service and thus should be considered impermissible under Section 332."). Contrary approaches appear to occur in part when courts' policy balancing places more importance on broadly preserving state and local authority than is justified. *See, e.g.*, *APT*, 196 F.3d at 479; *Albemarle County*, 211 F.3d at 86; *City Council of Virginia Beach*, 155 F.3d at 429; *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *see also, e.g.*, League of Arizona Cities *et al.* Joint Comments at 45; Smart Communities Reply at 33. As explained above, our interpretation that "telecommunications services" in Section 253(a) and "personal wireless services" in Section 332(c)(7)(B)(i)(II) are focused on the covered services that providers seek to provide —including the relevant service characteristics they seek to incorporate—not only is consistent with the text of those provisions but better reflects the broader policy goals of the Communications Act and the 1996 Act.

[98] *See* WIA Comments at 39; T-Mobile Comments at 43-44.

[99] *See, e.g.*, *County of San Diego*, 543 F.3d at 577, 579-80; *City of St. Louis*, 477 F.3d at 533-34; *see also, e.g.*, Virginia Joint Commenters Comments, Exh. A at 39-41. Although the Ninth Circuit in *County of San Diego* found that "the unambiguous text of §253(a)" precluded a prior Ninth Circuit approach that found an effective prohibition based on broad governmental discretion and the "mere possibility of prohibition," that holding is not implicated by our interpretations here. *County of San Diego*, 543 F.3d at 578; *cf. City of St. Louis*, 477 F.3d at 532. Consequently, those decisions do not preclude the Commission's interpretations here, *see, e.g.*, Verizon Reply at 7, and we reject claims to the contrary. *See, e.g.*, Smart Communities Comments at 60.

[100] *City of White Plains*, 305 F.3d at 76 (citing *RT Commc'ns*, 201 F.3d at 1268); *see also, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 18 (quoting *City of White Plains*, 305 F.3d at 76 and citing *City of Santa Fe*, 380 F.3d at 1269); Crown Castle June 7, 2018 *Ex Parte* Letter at 12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach at 5. Indeed, the Eighth Circuit's *City of St. Louis* decision acknowledges that under Section 253 "[t]he plaintiff need not show a complete or insurmountable prohibition," even while other aspects of that decision suggest that an insurmountable barrier effectively would be required. *City of St. Louis*, 477 F.3d at 533 (citing *City of White Plains*, 305 F.3d at 76).

[101] In *California Payphone*, the Commission concluded that the ordinance at issue "does not 'prohibit' the ability of any payphone service provider to provide payphone service in the Central Business District within the meaning of section 253(a)," but went on to evaluate the possibility of an effective prohibition by considering "whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone*, 12 FCC Rcd at 14205, 14206, paras. 28, 31. In the *Texas PUC Order*, the Commission found that state law build-out requirements would require "substantial financial investment" and a "comparatively high cost per loop sold" in particular areas, interfering with the

language, and we find that the interpretation of the First, Second, and Tenth Circuits reflects that principle, while being more consistent with the *California Payphone* standard than the approach of the Eighth and Ninth Circuits.[102] The reasonableness of our interpretation that 'effective prohibition' does not require a showing of an insurmountable barrier to entry is demonstrated not only by a number of circuit courts' acceptance of that view, but in the Supreme Court's own characterization of Section 253(a) as "prohibit[ing] state and local regulation that *impedes* the provision of 'telecommunications service.'"[103]

42. The Eighth and Ninth Circuits' suggestion that a provider must show an insurmountable barrier to entry in the jurisdiction imposing the relevant regulation is at odds with relevant statutory purposes and goals, as well. Section 253(a) is designed to protect "any entity" seeking to provide telecommunications services from state and local barriers to entry, and Sections 253(b) and (c) emphasize the importance of "competitively neutral" and "nondiscriminatory" treatment of providers.[104] Yet focusing on whether the carrier seeking relief faces an insurmountable barrier to entry would lead to disparities in statutory protections among providers based merely on considerations such as their access to capital and the breadth or narrowness of their entry strategies.[105] In addition, the Commission has observed in connection with Section 253: "Each local government may believe it is simply protecting the

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"statewide entry" plans that new entrants "may reasonable contemplate" in violation of Section 253(a) notwithstanding claims that the specific new entrants at issue had "'vast resources and access to capital' sufficient to meet those added costs. *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78. The Commission also has expressed "great concern" about an exclusive rights-of-way access agreement that "appear[ed] to have the potential to adversely affect the provision of telecommunications services by facilities-based providers, in violation of the provision of section 253(a)." *Minnesota Order*, 14 FCC Rcd at 21700, para. 3. As another example, in the *Western Wireless Order*, the Commission stated that a "universal service fund mechanism that provides funding only to ILECs" would likely violate Section 253(a) not because it was insurmountable but because it would "effectively lower the price of ILEC-provided service relative to competitor-provided service" and thus "give customers a strong incentive to choose service from ILECs rather than competitors." *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.

[102] We discuss specific applications of the *California Payphone* standard in the context of certain fees and non-fee regulations in the sections below; we leave others to be addressed case-by-case as they arise or otherwise are taken up by the Commission or courts in the future.

[103] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added); *see also, e.g.*, Level 3 Communications, Petition for a Writ of Certiorari, *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, at 13 (filed Nov. 7, 2008) ("[T]he term '[p]rohibit' commonly has a less absolute meaning than that adopted below, and properly refers to actions that 'hold back,' 'hinder,' or 'obstruct.'" (quoting Random House Webster's Unabridged Dictionary 1546 (2d ed. 1998)). We thus are not compelled to interpret 'effective prohibition' to set the high bar suggested by some commenters based on other dictionary definitions. Smart Communities Petition for Reconsideration, WC Docket No. 17-84, WT Docket No. 17-79 at 7 (filed Sept. 4, 2018). Because we are unpersuaded that the statutory terminology requires us to interpret an effective prohibition as satisfied only by an insurmountable barrier to entry, we likewise reject commenters' attempts to argue that "effective prohibition" must be understood to set a higher bar by comparison to the "impairment" language in Section 251 of the Act and associated regulatory interpretations of network unbundling requirements taken from that context. *Id* at 6. In addition, commenters do not demonstrate why the statutory framework and regulatory context of network unbundling under Section 251—and the specific concerns about access by non-facilities-based providers to competitive networks underlying the court precedent they cite—is sufficiently analogous to that of Section 253 and Section 332(c)(7)(B)(i)(II) that statements from that context should inform our interpretation here. *See, e.g.*, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 392. In responding to these discrete arguments raised in a petition for reconsideration of the *Moratoria Declaratory Ruling* that bear on actions we take in this order we do not thereby resolve any of the petition's arguments with respect to that order. The requests for relief raised in the petition remain pending in full.

[104] 47 U.S.C. § 253(a), (b), (c).

[105] *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78 (rejecting claims that there should be a higher bar to find an effective prohibition for providers with significant financial resources and recognizing that the effects of the relevant state requirements on a given provider could differ depending on the planned geographic scope of entry).

interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission."[106] As illustrated by our consideration of effective prohibitions flowing from state and local fees, there also can be cases where a narrow focus on whether an insurmountable barrier can be shown within the jurisdiction imposing a particular legal requirement would neglect the serious effects that flow through in other jurisdictions as a result, including harms to regional or national deployment efforts.[107]

B. State and Local Fees

43. Federal courts have long recognized that the fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed in the effective prohibition standard embodied in Sections 253 and 332.[108] In *Municipality of Guayanilla*, for example, the First Circuit addressed whether a city could lawfully charge a 5 percent gross revenue fee. The court found that the "5% gross revenue fee would constitute a substantial increase in costs" for the provider, and that the ordinance consequently "will negatively affect [the provider's] profitability."[109] The fee, together with other requirements, thus "place a significant burden" on the provider.[110] In light of this analysis, the First Circuit agreed that the fee "'materially inhibits or limits the ability'" of the provider "'to compete in a fair and balanced legal and regulatory environment.'"[111] The court thus held that the fee does not survive scrutiny under Section 253. In doing so, the First Circuit also noted that the inquiry is not limited to the impact that a fee would have on deployment in the jurisdiction that imposes the fee. Rather, the court noted the aggregate effect of fees when totaled across all relevant jurisdictions.[112] At the same time, the First Circuit did not decide whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or, at the very least, related to the actual use of the ROW.[113]

44. In *City of White Plains*, the Second Circuit likewise faced a 5 percent gross revenue fee, which it found to be "[t]he most significant provision" in a franchise agreement implementing an ordinance that the court concluded effectively prohibited service in violation of Section 253.[114] While the court noted that "compensation is . . . sometimes used as a synonym for cost,"[115] it ultimately did not resolve whether fair and reasonable compensation "is limited to cost recovery, or whether it also extends to a reasonable rent," relying instead on the fact that "White Plains has not attempted to charge Verizon

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[106] *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*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442, para. 106 (1997) (*TCI Cablevision Order*).

[107] *See infra* Part III.B.

[108] The Commission also has recognized the potential for fees to result in an effective prohibition. *See, e.g.*, *Pittencrieff*, 13 FCC Rcd at 1751-52, para. 37 (observing that "even a neutral [universal service] contribution requirement might under some circumstances effectively prohibit an entity from offering a service").

[109] *Municipality of Guayanilla*, 450 F.3d at 18-19.

[110] *Id*. at 19.

[111] *Id*. (quoting *City of White Plains*, 305 F.3d at 76).

[112] *Municipality of Guayanilla*, 450 F.3d at 17 (looking at the aggregate cost of fees charged across jurisdictions given the interconnected nature of the service).

[113] *Id*. at 22 ("We need not decide whether fees imposed on telecommunications providers by state and local governments must be limited to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, related to the actual use of rights of way and that 'the costs [of maintaining those rights of way] are an essential part of the equation.'").

[114] *City of White Plains*, 305 F.3d at 77.

[115] *Id.* In this context, the court stated that the term "compensation" is "flexible" and capable of different meanings depending on the context in which it is used. *Id.*

the fee that it seeks to charge TCG," thus failing Section 253's "competitively neutral and nondiscriminatory" standard.[116] But the court did observe that "Section 253(c) requires compensation to be reasonable essentially to prevent monopolist pricing by towns."[117]

45. In another example, the Tenth Circuit in *City of Santa Fe* addressed a $6,000 per foot fee set for Qwest's use of the ROW.[118] The court held "that the rental provisions are prohibitive because they create[d] a massive increase in cost" for Qwest.[119] The court recognized that Section 253 allows the recovery of cost-based fees, though it ultimately did not decide whether to "measure 'fair and reasonable' by the City's costs or by a 'totality of circumstances test'" applied in other courts because it determined that the fees at issue were not cost-based and "fail[ed] even the totality of the circumstances test."[120] Consequently, the fee was preempted under Section 253.

46. At the same time, the courts have adopted different approaches to analyzing whether fees run afoul of Section 253, at times failing even to articulate a particular test.[121] Among other things, courts have expressed different views on whether Section 253 limits states' and localities' fees to recovery of their costs or allows fees set in excess of that level.[122] We articulate below the Commission's interpretation of Section 253(a) and the standards we adopt for evaluating when a fee for Small Wireless Facility deployment is preempted, regardless how the fee is challenged. We also clarify that the Commission interprets Section 332(c)(7)(B)(i)(II) to have the same substantive meaning as Section 253(a).

47. *Record Evidence on Costs Associated with Small Wireless Facilities.* Keeping pace with the demands on current 4G networks and upgrading our country's wireless infrastructure to 5G require

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[116] *City of White Plains*, 305 F.3d at 79. In particular, the court concluded that "fees that exempt one competitor are inherently not 'competitively neutral,' regardless of how that competitor uses its resulting market advantage," *id.* at 80, and thus "[a]llowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the [1996 Act]," *id.* at 79.

[117] *Id*.

[118] *City of Santa Fe*, 380 F.3d at 1270-71.

[119] *Id*. at 1271.

[120] *Id*. at 1272 (observing that "[t]he City acknowledges . . . that the rent required by the Ordinance is not limited to recovery of costs").

[121] *Compare, e.g., Municipality of Guayanilla*, 450 F.3d at 18-19 (finding that fees were significant and had the effect of prohibiting service); *City of Santa Fe*, 380 F.3d at 1271 (similar); *with, e.g.*, *Qwest v. Elephant Butte Irrigation Dist.*, 616 F. Supp. 2d 1110, 1123-24 (D.N.M. 2008) (rejecting Qwest's reliance on preceding finding of effective prohibition from quadrupled costs where the fee at issue was a penny per foot); *Qwest v. City of Portland*, 2006 WL 2679543, *15 (D. Or. 2006) (asserting with no explanation that "a registration fee of $35 and a refundable deposit of $2,000 towards processing expenses . . . could not possibly have the effect of prohibiting Qwest from providing telecommunications services").

[122] For example and as noted above, in *Municipality of Guayanilla* the First Circuit reserved judgment on whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or if it was sufficient if the compensation was related to the actual use of rights of way. *Municipality of Guayanilla*, 450 F.3d at 22. Other courts have found reasonable compensation to require cost-based fees. *XO Missouri v. City of Maryland Heights*, 256 F. Supp. 2d 987, 993-95 (E.D. Mo. 2003) (*City of Maryland Heights*); *Bell Atlantic–Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 818 (D. Md. 1999) (*Prince George's County*) vacated on other grounds, 212 F.3d 863 (4th Cir. 2000). Still other courts have applied a test that weighs a number of considerations when evaluating whether compensation is fair and reasonable. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (*City of Dearborn*) (considering "the amount of use contemplated . . . the amount that other providers would be willing to pay . . . and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it now was challenging as unfair").

the deployment of many more Small Wireless Facilities.[123] For example, Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades.[124] Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years.[125] A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is "roughly double the number of macro cells built over the last 30 years."[126]

48. The many-fold increase in Small Wireless Facilities will magnify per-facility fees charged to providers. Per-facility fees that once may have been tolerable when providers built macro towers several miles apart now act as effective prohibitions when multiplied by each of the many Small Wireless Facilities to be deployed. Thus, a per-facility fee may affect a prohibition on 5G service or the densification needed to continue 4G service even if that same per-facility fee did not effectively prohibit previous generations of wireless service.

49. Cognizant of the changing technology and its interaction with regulations created for a previous generation of service, the *2017 Wireline Infrastructure NPRM/NOI* sought comment on whether government-imposed fees could act as a prohibition within the meaning of Section 253, and if so, what fees would qualify for 253(c)'s savings clause.[127] The *2017 Wireless Infrastructure NPRM/NOI* similarly sought comment on the scope of Sections 253 and 332(c)(7) and on any new or updated guidance the Commission should provide, potentially through a Declaratory Ruling.[128] In particular, the Commission sought comment on whether it should provide further guidance on how to interpret and apply the phrase "prohibit or have the effect of prohibiting."[129]

50. We conclude that ROW access fees, and fees for the use of government property in the ROW,[130] such as light poles, traffic lights, utility poles, and other similar property suitable for hosting

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[123] *See* CTIA June 27, 2018 *Ex Parte* Letter at 6 ("[s]mall cell technology is needed to support 4G densification and 5G connectivity."); *see also* Accelerating Wireless Deployment by Removing Barriers to Infrastructure Investment, Report and Order, 32 FCC Rcd 9760, 9765, para. 12 (2017) (*2017 Pole Replacement Order*) (recognizing that Small Wireless Facilities will be increasingly necessary to support the rollout of next-generation services).

[124] *See* Verizon Comments at 3; AT&T Comments at 1.

[125] *See* Letter from Keith C. Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Feb. 21, 2018).

[126] Accelerating Future Economic Value Report at 6; *see also* Deloitte 5G Paper.

[127] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3266, 3296-97, paras. 100 -101 and 3298-99, paras. 104-105 (2017).

[128] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3360, para. 87. In addition, in 2016, the Wireless Telecommunications Bureau released a public notice seeking comment on ways to expedite the deployment of next generation wireless infrastructure, including providing guidance on application processing fees and charges for use of rights of way. *See Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

[129] *Wireless Infrastructure NPRM/NOI,* 32 FCC Rcd at 3362*,* para. 90.

[130] We do not find these fees to be taxes within the meaning of Section 601(c)(2) of the 1996 Act. *See, e.g.*, Smart Communities Reply at 36 (quoting the savings clause for "State or local law pertaining to taxation" in Section 601(c)(2) of the 1996 Act). It is ambiguous whether a fee charged for access to ROWs should be viewed as a tax for purposes of Section 601(c)(2) of the 1996 Act. *See, e.g.*, *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) (distinguishing "the price paid to rent use of public right-of-ways" from a "tax" and citing similar precedent). Given that Congress clearly contemplated in Section 253(c) that states' and localities' fees for access to ROWs could be subject to preemption where they violate Section 253—or else the savings clause in that regard would be superfluous—we find the better view is that such fees do not represent a tax encompassed by Section 601(c)(2) of

Small Wireless Facilities, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities inside and outside the ROW, violate Sections 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs,[131] (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.[132]

51. We base our interpretation on several considerations, including the text and structure of the Act as informed by legislative history, the economics of capital expenditures in the context of Small Wireless Facilities (including the manner in which capital budgets are fixed *ex ante*), and the extensive record evidence that shows the actual effects that state and local fees have in deterring wireless providers from adding to, improving, or densifying their networks and consequently the service offered over them (including, but not limited to, introducing next-generation 5G wireless service). We address each of these considerations in turn.

52. *Text and Structure.* We start our analysis with a consideration of the text and structure of Section 253. That section contains several related provisions that operate in tandem to define the roles that Congress intended the federal government, states, and localities to play in regulating the provision of telecommunications services. Section 253(a) sets forth Congress's intent to preempt state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[133] Section 253(b), in turn, makes clear Congress's intent that state "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

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the 1996 Act. We do not address whether particular fees could be considered taxes under other statutes not administered by the FCC, but we reject the suggestion that tests courts use to determine what constitute "taxes" in the context of such other statutes should apply to the Commission's interpretation of Section 601(c)(2) here in light of the statutory context for Section 601(c)(2) in the 1996 Act and the Communications Act discussed above. *See, e.g.*, *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 & n.3 (9th Cir. 2006) (holding that particular fees at issue there were taxes for purposes of the Tax Injunction Act and stating in dicta that had the Tax Injunction Act not applied it would agree with the conclusion of the district court that it was covered by Section 601(c)(2) of the 1996 Act); *MCI Communications Services, Inc. v. City of Eugene*, 359 F. Appx. 692, 696 (9th Cir. 2009) (asserting without analysis that the same test would apply to determine if a fee constitutes a tax under both the Tax Injunction Act and Section 601(c)(2) of the 1996 Act).

[131] By costs, we mean those costs specifically related to and caused by the deployment. These include, for instance, the costs of processing applications or permits, maintaining the ROW, and maintaining a structure within the ROW. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005) (*Guayanilla District Ct. Opinion*), *aff'd*, 450 F.3d 9 (1st Cir. 2006) ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)).

[132] We explain above what we mean by "fees." *See supra* note 71. Contrary to some claims, we are not asserting a "general ratemaking authority." Virginia Joint Commenters Comments at 6. Our interpretations in this order bear on whether and when fees associated with Small Wireless Facility deployment have the effect of prohibiting wireless telecommunications service and thus are subject to preemption under Section 253(a), informed by the savings clause in Section 253(c). While that can implicate issues surrounding how those fees were established, it does so only to the extent needed to vindicate Congress's intent in Section 253. We do not interpret Section 253(a) or (c) to authorize the regulation or establishment of state and local fees as an exercise in itself. We likewise are not persuaded by undeveloped assertions that the Commission's interpretation of Section 253 in the context of fees would somehow violate constitutional separation of powers principles. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 52.

[133] 47 U.S.C. § 253(a).

of consumers" are not preempted.[134] Of particular importance in the fee context, Section 253(c) reflects a considered policy judgment that "[n]othing in this section" shall prevent states and localities from recovering certain carefully delineated fees. Specifically, Section 253(c) makes clear that fees are not preempted that are "fair and reasonable" and imposed on a "competitively neutral and nondiscriminatory basis," for "use of public rights-of-way on a "nondiscriminatory basis," so long as they are "publicly disclosed" by the government.[135] Section 253(d), in turn, provides one non-exclusive mechanism by which a party can obtain a determination from the Commission of whether a specific state or local requirement is preempted under Section 253(a)—namely, by filing a petition with the Commission.[136]

53. In reviewing this statutory scheme, the Commission previously has construed Section 253(a) as "broadly limit[ing] the ability of state[s] to regulate," while the remaining subsections set forth "defined areas in which states may regulate."[137] We reaffirm this conclusion, consistent with the view of most courts to have considered the issue—namely, that Sections 253(b) and (c) make clear that certain state or local laws, regulations, and legal requirements are not preempted under the expansive scope of Section 253(a).[138] Our interpretation of Section 253(a) is informed by this statutory context,[139] and the observation of courts that when a preemption provision precedes a narrowly-tailored savings clause, it is reasonable to infer that Congress intended a broad preemptive scope.[140] We need not decide today whether Section 253(a) preempts all fees not expressly saved by Section 253(c) with respect to all types of deployments. Rather, we conclude, based on the record before us, that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on deployment,[141] particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment.[142] Against this backdrop, and in light of significant evidence, set forth herein, that Congress intended Section 253 to preempt legal requirements that effectively prohibit service, including wireless infrastructure deployment, we view the substantive standards for fees that Congress sought to insulate from preemption in Section 253(c) as an appropriate ceiling for state and local fees that apply to the deployment of Small Wireless Facilities in public ROWs.[143]

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[134] 47 U.S.C. § 253(b).

[135] 47 U.S.C. § 253(c).

[136] 47 U.S.C. § 253(d).

[137] *Texas PUC Order*, 13 FCC Rcd at 3481, para. 44.

[138] *See, e.g., Connect America Fund; Sandwich Isles Communications, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 5878, 5881, 5885-87, paras. 8, 19-25 (2017) *(Sandwich Isles Section 253 Order)*; *Texas PUC Order*, 13 FCC Rcd at 3480-81, paras. 41-44; *Global Network Commc'ns, Inc. v. City of New York*, 562 F.3d 145, 150-51 (2d Cir. 2009); *Southwestern Bell Tel. Co. v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008); *City of St. Louis*, 477 F.3d at 531-32 (8th Cir. 2007); *Municipality of Guayanilla*, 450 F.3d at 15-16; *City of Santa Fe*, 380 F.3d at 1269; *BellSouth Telecomm's, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187-89 (11th Cir. 2001). Some courts appear to have viewed Section 253(c) as an independent basis for preemption. *See, e.g., City of Dearborn*, 206 F.3d at 624 (after concluding that a franchise fee did not violate Section 253(a), going on to evaluate whether it was "fair and reasonable" under Section 253(c)). We find more persuasive the Commission and other court precedent to the contrary, which we find better adheres to the statutory language.

[139] *See, e.g.*, *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014).

[140] *See, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44-45 (1987); *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 189-90 (2d Cir. 2010); *Frank v. Delta Airlines, Inc*., 314 F.3d 195, 199 (5th Cir. 2002); *cf. United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (justifying a broad reading of a statute given that Congress "narrowly defin[ed] exceptions and affirmative defenses against a backdrop of broad applicability").

[141] *See infra* paras. 62-63.

[142] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64.

[143] *See, e.g.*, Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9-10. We therefore reject the view of those courts that have concluded that Section 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based. *See, e.g.*, *Qwest v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006) ("we

54. In addition, notwithstanding that Section 253(c) only expressly governs ROW fees, we find it appropriate to look to its substantive standards as a ceiling for other state and local fees addressed by this *Declaratory Ruling*.[144] For one, our evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment—and we see no reason why the Act would tolerate a greater prohibitory effect in the case of application or review fees than for ROW fees.[145] In addition, elements of the substantive standards for ROW fees in Section 253(c) appear at least analogous to elements of the *California Payphone* standard for evaluating an effective prohibition under Section 253(a). In pertinent part, both incorporate principles focused on the legal requirements to which a provider may be fairly subject,[146] and seek to guard against competitive disparities.[147] Without resolving the precise interplay of those concepts in Section 253(c) and the *California Payphone* standard, their similarities support our use of the substantive standards of Section 253(c) to inform our evaluation of fees at issue here that are not directly governed by that provision.

55. From the foregoing analysis, we can derive the three principles that we articulate in this Declaratory Ruling about the types of fees that are preempted. As explained in more detail below, we also interpret Section 253(c)'s "fair and reasonable compensation" provision to refer to fees that represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being passed on are themselves objectively reasonable.[148] Although there is precedent that "fair and reasonable" compensation could mean not only cost-based charges but also market-based charges in certain instances,[149] the statutory context persuades us to adopt a cost-based interpretation here. In particular, while the general purpose of Section 253(c) is to preserve certain state and local conduct from preemption, it includes qualifications and limitations to cabin state and local action under that savings clause in ways that ensure appropriate protections for service providers. The reasonableness of interpreting the qualifications and limitations in the Section 253(c) savings clause as designed to protect the interests of service providers is emphasized by the statutory language. The "competitively neutral and

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decline to read" prior Ninth Circuit precedent "to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue"). At the same time, our interpretation does not take the broader view of the preemptive scope of Section 253 adopted by the Sixth Circuit, which interpreted Section 253(c) as an independent prohibition on conduct that is not itself prohibited by Section 253(a). *City of Dearborn*, 206 F.3d at 624.

[144] *See supra* note 71.

[145] *Cf. Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (observing that the *expressio unius* canon is a "feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved," and concluding there that "Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion").

[146] For ROW compensation to be saved under Section 253(c) it must be "fair and reasonable," while the *California Payphone* standard looks to whether a legal requirement "materially limits or inhibits" the ability to compete in a "fair" legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.

[147] For ROW compensation to be saved under Section 253(c) it also must be "competitively neutral and nondiscriminatory," while the *California Payphone* standard also looks to whether a legal requirement "materially limits or inhibits" the ability to compete in a "balanced" legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.

[148] *See infra* paras. 69-77; *see also, e.g.*, *City of Maryland Heights*, 256 F. Supp. 2d at 993-95; *Bell Atlantic–Maryland*, 49 F. Supp. 2d at 818.

[149] *See, e.g.*, *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) (statute did not unambiguously require the SEC to interpret "fair and reasonable" to mean cost-based, and the SEC's reliance on market-based rates as "fair and reasonable" where there was competition was a reasonable interpretation).

nondiscriminatory" and public disclosure qualifications in Section 253(c) appear most naturally understood as protecting the interest of service providers from fees that otherwise would have been saved from preemption under Section 253(c) absent those qualifiers. Under the *noscitur a sociis* canon of statutory interpretation, that context persuades us that the "fair and reasonable" qualifier in Section 253(c) similarly should be understood as focused on protecting the interest of providers.[150] As discussed in greater detail below, while it might well be fair for providers to bear basic, reasonable costs of entry,[151] the record does not reveal why it would be fair or reasonable from the standpoint of protecting providers to require them to bear costs beyond that level, particularly in the context of the deployment of Small Wireless Facilities. In addition, the text of Section 253(c) provides that ROW access fees must be imposed on a "competitively neutral and nondiscriminatory basis." This means, for example, that fees charged to one provider cannot be materially higher than those charged to a competitor for similar uses.[152]

56. Other considerations support our approach, as well. By its terms, Section 253(a) preempts state or local legal requirements that "prohibit" or have the "effect of prohibiting" the provision of services, and we agree with court precedent that "[m]erely allowing the [local government] to recoup its processing costs . . . cannot in and of itself prohibit the provision of services."[153] The Commission has long understood that Section 253(a) is focused on state or local barriers to entry for the provision of service,[154] and we conclude that states and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market.[155] We decline to interpret a government's recoupment of such fundamental costs of entry as having the effect of prohibiting the provision of services, nor has any commenter argued that recovery of cost by a government would prohibit service in a manner restricted by Section 253(a).[156] Reasonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for

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[150] *See, e.g.*, *Life Technologies Corp. v. Promega Corp.*, 137 S. Ct. 734 (2017) ("A word is given more precise content by the neighboring words with which it is associated." (internal alteration and quotation marks omitted)).

[151] *See infra* para. 56.

[152] *See, e.g.*, *City of White Plains*, 305 F.3d at 80.

[153] *City of Santa Fe*, 380 F.3d at 1269; *see also* Verizon Comments at 17.

[154] *See, e.g.*, *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5878, 5882-83, paras. 1, 13; *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8; *Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707, para. 18 (*Minnesota Order*); *Hyperion Order*, 14 FCC Rcd at 11070, para. 13; *Texas PUC Order*, 13 FCC Rcd at 3480, para. 41; *TCI Cablevision Order*, 12 FCC Rcd at 21399, para. 7; *California Payphone*, 12 FCC Rcd at 14209, para. 38; *see also, e.g.*, *AT&T Comm'ns of the Sw. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tx. 1998) (*AT&T v. City of Dallas*) ("[A]ny fee that is not based on AT&T's use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry."); Verizon Comments at 11-12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7. Because we view the *California Payphone* standard as reflecting a focus on barriers to entry, we decline requests to adopt a distinct, additional standard with that as an explicit focus. *See, e.g.*, T-Mobile Comments at 35.

[155] *See, e.g.*, *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5301-03, paras. 142-45 (2011) (rejecting an approach to defining a lower bound rate for pole attachments that "would result in pole rental rates *below* incremental cost" as contrary to cost causation principles); *Investigation of Interstate Access Tariff Non-Recurring Charges*, Memorandum Opinion and Order, 2 FCC Rcd 3498, 3502, para. 34 (1987) (observing in the rate regulation context that "the public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from the cost-causer"). Our interpretation limiting states and localities to the recovery of a reasonable approximation of objectively reasonable cost also takes into account state and local governments' exclusive control over access to the ROW.

[156] For example, Verizon states that "[a]lthough *any* fee could be said to raise the cost of providing service," Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9, "[t]he Commission should interpret . . . Section 253(a) to allow cost-based fees for access to public rights-of-way and structures within them, but to prohibit above-cost fees that generate revenue in excess of state and local governments' actual costs." *Id*., Attach. at 6.

communications services by protecting property rights and guarding against conflicting deployments that could harm or otherwise interfere with others' use of property.[157] By contrast, fees that recover more than the state or local costs associated with facilities deployment—or that are based on unreasonable costs, such as exorbitant consultant fees or the like—go beyond such governmental recovery of fundamental costs of entry. In addition, interpreting Section 253(a) to prohibit states and localities from recovering a reasonable approximation of reasonable costs could interfere with the ability of states to exercise the police powers reserved to them under the Tenth Amendment.[158] We therefore conclude that Section 253(a) is circumscribed to permit states and localities to recover a reasonable approximation of their costs related to the deployment of Small Wireless Facilities.

57. *Commission Precedent*. We draw further confidence in our conclusions from the Commission's *California Payphone* decision, which we reaffirm here, finding that a state or local legal requirement would violate Section 253(a) if it "materially limits or inhibits" an entity's ability to compete in a "balanced" legal environment for a covered service.[159] As explained above, fees charged by a state or locality that recover the reasonable approximation of reasonable costs do not "materially inhibit" a provider's ability to compete in a "balanced" legal environment. To the contrary, those costs enable localities to recover their necessary expenditures to provide a stable and predictable framework in which market participants can enter and compete. On the other hand, in the *Texas PUC Order* interpreting *California Payphone*, the Commission concluded that state or local legal requirements such as fees that impose a "financial burden" on providers can be effectively prohibitive.[160] As the record shows, excessive state and local governments' fees assessed on the deployment of Small Wireless Facilities in the ROW in fact materially inhibit the ability of many providers to compete in a balanced environment.[161]

58. *California Payphone* and *Texas PUC* separately support the conclusion that fees cannot be discriminatory or introduce competitive disparities, as such fees would be inconsistent with a "balanced" regulatory marketplace. Thus, fees that treat one competitor materially differently than other competitors in similar situations are themselves grounds for finding an effective prohibition—even in the case of fees that are a reasonable approximation of the actual and reasonable costs incurred by the state or locality. Indeed, the Commission has previously recognized the potential for subsidies provided to one

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[157] *See, e.g.*, *TCI Cablevision Order*, 12 FCC Rcd at 21441, para. 103; *see also, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). States' or localities' regulation premised on addressing effects of deployment besides these costs caused by facilities deployment are distinct issues, which we discuss below. *See infra* Part III.C.

[158] The Supreme Court has recognized that land use regulation can involve an exercise of police powers. *See, e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). As that Court observed, "[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." *Id*. at 292. At the same time, the Court also has held that "historic police powers of the States" are not to be preempted by federal law "unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (internal quotation marks omitted). As relevant here, we see no clear and manifest intent that Congress intended to preempt publicly disclosed, objectively reasonable cost-based fees imposed on a nondiscriminatory basis, particularly in light of Section 253(c).

[159] We disagree with suggestions that the Commission applied an additional and more stringent "commercial viability" test in *California Payphone*. *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 10. Instead, the Commission was simply evaluating the Section 253 petition on its own terms, *see, e.g.*, *California Payphone*, 12 FCC Rcd at 14204, 14210, paras. 27, 41, and, without purporting to define the bounds of Section 253(a), explaining that the petitioner "ha[d] not sufficiently supported its allegation" that the provision of service at issue "would be 'impractical and uneconomic.'" *Id*. at 14210, para. 41. Confirming that this language was simply the Commission's short-hand reference to arguments put forward by the petitioner itself, and not a Commission-announced standard for applying Section 253, the Commission has not applied a "commercial viability" standard in other decisions, as these same commenters recognize. *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 10.

[160] *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81.

[161] *See infra* paras. 60-65.

competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a).[162] We reaffirm that conclusion here.

59. *Legislative History*. While our interpretation follows directly from the text and structure of the Act, our conclusion finds further support in the legislative history, which reflects Congress's focus on the ability of states and localities to recover the reasonable costs they incur in maintaining the rights of way.[163] Significantly, Senator Dianne Feinstein, during the floor debate on Section 253(c), "offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including [to] 'require a company to pay fees to *recover an appropriate share of the increased street repair and paving costs* that result from repeated excavation.'"[164] Representative Bart Stupak, a sponsor of the legislation, similarly explained during the debate on Section 253 that "if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it *imposes a different burden* on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings," making clear that the compensation described in the statute is related to the burden, or cost, from a provider's use of the ROW.[165] These statements buttress our interpretation of the text and structure of Section 253 and confirm Congress's apparent intent to craft specific safe harbors for states and localities, and to permit recovery of reasonable costs related to the ROW as "fair and reasonable compensation," while preempting fees above a reasonable approximation of cost that improperly inhibit service.[166]

60. *Capital Expenditures*. Apart from the text, structure, and legislative history of the 1996 Act, an additional, independent justification for our interpretation follows from the simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether the reduction takes place on a local, regional or national level.[167] We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid)[168] amount of resources to use for the deployment of infrastructure. This does not mean that these resources are limitless, however. We conclude that fees imposed by localities, above and beyond the recovery of localities' reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere.[169] This and regulatory uncertainty created by such effectively prohibitive conduct[170] creates an

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[162] *See, e.g.*, *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.

[163] *See, e.g.*, WIA Comments, Attach. 2 at 70.

[164] WIA Comments, Attach. 2 at 70 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added)); *see also, e.g.*, Verizon Comments at 15 (similar); *City of Maryland Heights*, 256 F. Supp. 2d at 995-96.

[165] 141 Cong. Rec. H8460-01, H8460 (daily ed. Aug. 4, 1995).

[166] We reject other comments downplaying the relevance of legislative statements by some commenters as inconsistent with the text and structure of the Act. *See, e.g.*, League of Arizona Cities *et al.* Joint Comments at 27-28; NATOA Comments, Exh. A at 26-28; Smart Communities Reply at 57-58; Cities of San Antonio et al. Reply at 20-21; *see also, e.g.*, *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1071-72 (D. Or. 2005).

[167] At a minimum, this analysis complements and reinforces the justifications for our interpretation provided above. While the relevant language of Section 253(a) and Section 332(c)(7)(B)(i)(II) is not limited just to Small Wireless Facilities, we proceed incrementally in our Declaratory Ruling here and address the record before us, which indicates that our interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment.

[168] For example, the precise amount of these resources might shift as a service provider encounters unexpected costs, recovers costs passed on to subscribers, or earns a profit above those costs.

[169] As Verizon observes, "[a] number of states enacted infrastructure legislation because they determined that rate relief was necessary to ensure wireless deployment," and thus could be seen as having "acknowledged that excessive fees impose a substantial barrier to the provision of service." Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7-8. In view of the evidence in the record regarding the effect of state and local fees on capital expenditures, *see, e.g.,* Corning Sept. 5, 2018 *Ex Parte* Letter (noting that cost savings from reduced small cell attachment and application

appreciable impact on resources that materially limits plans to deploy service. This record evidence emphasizes the importance of evaluating the effect of fees on Small Wireless Facility deployment on an aggregate basis. Consistent with the First Circuit's analysis in *Municipality of Guayanilla*, the record persuades us that fees associated with Small Wireless Facility deployment lead to "a substantial increase in costs"—particularly when considered in the aggregate—thereby "plac[ing] a significant burden" on carriers and materially inhibiting their provision of service contrary to Section 253 of the Act.[171]

61. The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees.[172] As AT&T explains, "[a]ll providers have limited capital dollars to invest, funds that are quickly depleted when drained by excessive ROW fees."[173] AT&T added that "[c]ompetitive demands will force carriers to deploy small cells in the largest cities. But, when those largest cities charge excessive fees to access ROWs and municipal ROW structures, carriers' finite capital dollars are prematurely depleted, leaving less for investment in mid-level cities and smaller communities. Larger municipalities have little incentive to not overcharge, and mid-level cities and smaller

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fees could result in $2.4 billion in capital expenditure and that 97% of this capital expenditure would go toward investments in rural and suburban areas), we disagree with arguments that fees do not affect the deployment of wireless facilities in rural and underserved areas. *See, e.g.,* Letter from Sam Liccardo, Mayor, City of San Jose, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed Sept. 18, 2018) (City of San Jose Sept. 18, 2018 *Ex Parte* Letter) (stating that "whether or not a provider wishes to invest in a dense urban area, including underserved urban areas, or a rural area is fundamentally based on the size of the customer base and the market demand for service-not on the purported wiles of a 'must-serve' jurisdiction somehow forcing investment away from rural areas because a right of way or attachment fee is charged."); Letter from Joanne Hovis, Chief Executive Officer, Coalition for Local Internet Choice, James Baller, President, Coalition for Local Internet Choice, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 3 (filed Sept. 18, 2018) ("in lucrative areas, carriers will pay market fees for access to property just as they would any other cost of doing business. But they will not, as rational economic actors, necessarily apply new profits (created by FCC preemption) to deploying in otherwise unattractive areas.").

[170] *See, e.g.*, CTIA Comments at 32 (identifying "disparate interpretations" regarding the fees that are preempted and seeking FCC clarification to "dispel the resulting uncertainty"); Verizon Comments at 10 (similar); Letter from Cathleen A. Massey, Vice Pres.-Fed. Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 7 (filed Sept. 21, 2017) (seeking clarification of Section 253); BDAC Regulatory Barriers Report, p. 9 ("The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not 'fair and reasonable.' The Commission should specifically clarify that 'fair and reasonable' compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.").

[171] *Municipality of Guayanilla*, 450 F.3d at 19.

[172] *See, e.g.,* AT&T Comments at 2; Conterra Broadband et al. Comments at 6; Mobilitie Comments at 3; Sprint Comments at 17; Letter from Courtney Neville, Associate General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed July 16, 2018) (CCA July 16, 2018 *Ex Parte* Letter); Letter from Henry Hultquist, Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 8, 2018) (AT&T June 8, 2018 *Ex Parte* Letter); Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Letter from Katharine R. Saunders, Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 21, 2018) (Verizon June 21, 2018 *Ex Parte* Letter); Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Oct. 30, 2017); Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 2-4. When developing capital budgets, companies rationally would account for anticipated revenues associated with the services that can be provided by virtue of planned facilities deployment, and the record does not reveal—nor do we see any basis to assume—that such revenues would be so great as to eliminate constraints on providers' capital budgets so as to enable full deployment notwithstanding the level of state and local fees.

[173] AT&T Aug. 6, 2018 *Ex Parte* Letter at 2.

municipalities have no ability to avoid this harm."[174] As to areas that might not be sufficiently crucial to deployment to overcome high fees, AT&T identified jurisdictions in Maryland, California, and Massachusetts where high fees have directly resulted in paused or decreased deployments.[175] Limiting localities to reasonable cost recovery will "allow[] AT&T and other providers to stretch finite capital dollars to additional communities."[176] Verizon similarly explains that "[c]apital budgets are finite. When providers are forced to spend more to deploy infrastructure in one locality, there is less money to spend in others. The leverage that some cities have to extract high fees means that other localities will not enjoy next generation wireless broadband services as quickly, if at all."[177] Sprint, too, affirms that, because "all carriers face limited capital budgets, they are forced to limit the number and pace of their deployment investments to areas where the delays and impediments are the least onerous, to the detriment of their customers and, ultimately and ironically, to the very jurisdictions that imposed obstacles in the first place."[178] Sprint gives a specific example of its deployments in two adjacent jurisdictions—the City of Los Angeles and Los Angeles County—and describes how high fees in the county prevented Sprint from activating any small cells there, while more than 500 deployments occurred in the city, which had significantly lower fees.[179] Similarly, Conterra Broadband states that "[w]hen time and capital are diverted away from actual facility installation and instead devoted to clearing regulatory roadblocks, consumers and enterprises, including local small businesses, schools and healthcare centers, suffer."[180] Based on the record, we find that fees charged by states and localities are causing *actual* delays and restrictions on deployments of Small Wireless Facilities in a number of places across the country in violation of Section 253(a).[181]

62. Our conclusion finds further support when one considers the aggregate effects of fees imposed by individual localities, including, but not limited to, the potential limiting implications for a nationwide wireless network that reaches all Americans, which is among the key objectives of the statutory provisions in the 1996 Act that we interpret here.[182] When evaluating whether fees result in an effective prohibition of service due to financial burden, we must consider the marketplace regionally and nationally and thus must consider the cumulative effects of state or local fees on service in multiple geographic areas that providers serve or potentially would serve. Where providers seek to operate on a regional or national basis, they have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider's capital budget for a given

[174] *Id.*

[175] *Id.* (pausing or delaying deployments in Citrus Heights, CA, Oakland, CA and three Maryland counties; decreasing deployments in Lowell, MA and decreasing deployments from 98 to 25 sites in Escondido, CA).

[176] *Id*.

[177] Verizon Aug. 10, 2018 *Ex Parte* Letter at 5, Attach. at 2-4.

[178] Sprint Comments at 17.

[179] Sprint Aug. 13, 2018 *Ex Parte* Letter at 1-2.

[180] Conterra Broadband *et al*. Comments at 6; *see also* Letter from John Scott, Counsel for Mobilitie, LLC to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 ("high fees imposed by some cities hurt other cities that have reasonable fees, because they reduce capital resources that might have gone to those cities, and because they pressure other financially strapped cities not to turn away what appears to be a revenue opportunity").

[181] Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed August 10, 2018) (Crown Castle Aug. 10, 2018 *Ex Parte* Letter).

[182] *New England Public Comms. Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19717, para. 9 (1996) (1996 Act intent of "accelerat[ing] deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition."); *see also* Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 7.

period of time is often set in advance.[183] In such cases, the resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.[184] The text of Section 253(a) is not limited by its terms only to effective prohibitions within the geographic area targeted by the state or local fee. Where a fee in a geographic area affects service outside that geographic area, the statute is most naturally read to encompass consideration of all affected areas.

63. A contrary, geographically-restrictive interpretation of Section 253(a) would exacerbate the digital divide by giving dense or wealthy states and localities that might be most critical for a provider to serve the ability to leverage their unique position to extract fees for their own benefit at the expense of regional or national deployment by decreasing the deployment resources available for less wealthy or dense jurisdictions.[185] As a result, the areas likely to be hardest hit by excessive government fees are not necessarily jurisdictions that charge those fees, but rather areas where the case for new, expanded, or improved service was more marginal to start—and whose service may no longer be economically justifiable in the near-term given the resources demanded by the "must-serve" areas. To cite some examples of harmful aggregate effects, AT&T notes that high annual recurring fees are particularly harmful because of their "continuing and compounding nature."[186] It also states that, "if, as S&P Global Market Intelligence estimates, small-cell deployments reach nearly 800,000 by 2026, a ROW fee of $1000 per year …would result in nearly $800 million annually in forgone investment." [187] Yet another commenter notes that, "[f]or a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible," and "far exceed[ing] any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure."[188] Endorsing such a result would thwart the purposes underlying Section 253(a). As Crown Castle observes, "[e]ven where the fees do not result in a direct lack of service in a high-demand area like a city or urban core, the high cost of building and operating facilities in these jurisdictions consume [sic] capital and revenue that could otherwise be used to expand wireless infrastructure in higher cost areas. This impact of egregious fees is prohibitory and should be taken into account in any prohibition analysis."[189]

64. Some municipal commenters endorse a cost-based approach to "ensure that localities are fully compensated for their costs [and that] fees should be reasonable and non-discriminatory, and should ensure that localities are made whole"[190] in recognition that "getting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources."[191] Commenters from smaller municipalities recognize that "thousands and thousands of small cells are needed for 5G… [and]

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[183] *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2.

[184] *See, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 17 ("Given the interconnected nature of utility services across communities and the strain that the enactment of gross revenue fees in multiple municipalities would have on PRTC's provision of services, the Commonwealth-wide estimates are relevant to determining how the ordinance affects PRTC's 'ability . . . to provide any interstate or intrastate telecommunications service'" under Section 253(a)).

[185] *See, e.g.,* Letter from Sam Liccardo, Mayor or San Jose, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, Attachment at 1-2 (filed Aug. 2, 2018) (describing payment by providers of $24 million to a Digital Inclusion Fund in order to deploy small cells in San Jose on city owned light poles).

[186] AT&T Comments at 19.

[187] AT&T Comments at 19-20.

[188] Mobilitie Comments at 3.

[189] Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 2.

[190] Sal Pace July 30, 2018 *Ex Parte* Letter at 1.

[191] LaWana Mayfield July 31, 2018 *Ex Parte Letter* at 1

old regulations could hinder the timely arrival of 5G throughout the country"[192] and urge the Commission to "establish some common-sense standards insofar as it relates to fees associated with the deployment of small cells [due to] a cottage industry of consultants [] who have wrongly counseled communities to adopt excessive and arbitrary fees."[193] Representatives from non-urban areas in particular caution that, "if the investment that goes into deploying 5G on the front end is consumed by big, urban areas, it will take longer for it to flow outwards in the direction of places like Florence, [SC]."[194] "[R]educing the high regulatory costs in urban areas would leave more dollars to development in rural areas [because] most of investment capital is spent in the larger urban areas [since] the cost recovery can be made in those areas. This leaves the rural areas out."[195] We agree with these commenters, and we further agree with courts that have considered "the *cumulative effect* of future similar municipal [fees ordinances]" across a broad geographic area when evaluating the effect of a particular fee in the context of Section 253(a).[196] To the extent that other municipal commenters argue that our interpretation gives wireless providers preferential treatment compared to other users of the ROW, the record does not contain data about other users that would support such a conclusion.[197] In any event, Section 253 of the Communications Act expressly bars legal requirements that effectively prohibit telecommunications service without regard to whether it might result in preferential treatment for providers of that service.[198]

65. Applying this approach here, the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated Small Wireless Facility deployment.[199] The record reveals that these effects can take several forms. In some cases, the fees in a particular jurisdiction will lead to reduced or entirely forgone deployment of Small Wireless Facilities in the near term for that

[192] Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter at 2.

[193] Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018).

[194] Representative Terry Alexander Aug. 7, 2018 *Ex Parte* Letter at 1.

[195] Senator Duane Ankney July 31, 2018 *Ex Parte* Letter at 1; *see also* Letter from Elder Alexis D. Pipkins, Sr. to the Hon. Brendan Carr, Commissioner, FCC at 1 (filed July 26, 2018) ("the race to 5G is global…instead of each city or state for itself, we should be working towards aligned, streamlined frameworks that benefit us all."); Letter from Jeffrey Bohm, Chairman of the Board of Commissioners, County of St. Clair to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed August 22, 2018) ("Smaller communities, such as those located in St. Clair County would benefit from having the Commissions reduce the costly and unnecessary fee's that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage"); Letter from Scott Niesler, Mayor, City of Kings Mountain, to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed June 4, 2018) ("the North Carolina General Assembly has enacted legislation to encourage the deployment of small cell technology to limit exorbitant fees which can siphon off capital from further expansion projects. I was encouraged to see the FCC taking similar steps to enact policies that help clear the way for the essential investment").

[196] *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 111-12; *but see, e.g.,* Letter from Nina Beety to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Sept. 17, 2018) (Nina Beety Sept. 17, 2018 *Ex Parte* Letter) (asserting that providers artificially under-capitalize their deployment budgets to build the case for poverty).

[197] Letter from Larry Hanson, Executive Director, Georgia Municipal Association to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 17, 2018) (Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter).

[198] 47 U.S.C. § 253(a).

[199] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64. In addition, although one could argue that, in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service in a particular instance, the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus.

jurisdiction.[200] In other cases, where it is essential for a provider to deploy in a given area, the fees charged in that geographic area can deprive providers of capital needed to deploy elsewhere, and lead to reduced or forgone near-term deployment of Small Wireless Facilities in other geographic areas.[201] In both of those scenarios the bottom-line outcome on the national development of 5G networks is the same—diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks.[202]

66. Some have argued that our decision today regarding Sections 253 and 332 should not be applied to preempt agreements (or provisions within agreements) entered into prior to this Declaratory Ruling.[203] We note that courts have upheld the Commission's preemption of the enforcement of provisions in private agreements that conflict with our decisions[204] We therefore do not exempt existing agreements (or particular provisions contained therein) from the statutory requirements that we interpret here. That said, however, this Declaratory Ruling's effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case.[205] Without examining the particular features of an agreement, including any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today's decision does or does not impact any particular agreement entered into before this decision.

67. *Relationship to Section 332*. While the above analysis focuses on the text and structure of the Act, legislative history, Commission orders, and case law interpreting Section 253(a), we reiterate that in the fee context, as elsewhere, the statutory phrase "prohibit or have the effect of prohibiting" in Section 332(c)(7)(B)(i)(II) has the same meaning as the phrase "prohibits or has the effect of prohibiting" in Section 253(a). As noted in the prior section, there is no evidence to suggest that Congress intended for virtually identical language to have different meanings in the two provisions.[206] Instead, we find it

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[200] *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2.

[201] AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2; CCA July 16, 2018 *Ex Parte* Letter at 2-3.

[202] *See, e.g.,* Letter from Thomas J. Navin, Counsel to Corning, Inc. to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan 25, 2018), Attach. at 6-7 (comparing different effects on deployment between a base case and a high fee case, and estimating that pole attachment fees nationwide assuming high fees would result in 28.2M fewer premises passed, or 31 percent of the 5G Base case results, and an associated $37.9B in forgone network deployment).

[203] City of San Jose Sept. 18, 2018 *Ex Parte* Letter at 1-2.

[204] *See, e.g., Building Owners and Managers Ass'n Int'l v. FCC,* 254 F.3d 89 (D.C. Cir. 2001) (OTARD rules barring exclusivity provisions in lease agreements). As the D.C. Circuit has recognized, "[w]here the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law." *Id.* at 96; s*ee also Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC,* 713 F.3d 187 (4th Cir. 2013).

[205] For example, the City of Los Angeles asserts that fee provisions in its agreements with providers are not prohibitory and must be examined in light of a broader exchange of value contemplated by the agreements in their entirety. Letter from Eric Garcetti, Mayor, City of Los Angeles to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 (filed Sept 18, 2018). We agree that agreements entered into before this decision will need to be examined in light of their potentially unique circumstances before a decision can be reached about whether those agreements or any particular provisions in those agreements are or are not impacted by today's FCC decision.

[206] We reject the claims of some commenters that Section 332(c)(7)(B)(i)(II) is limited exclusively to decisions on individual requests and therefore must be interpreted differently than Section 253(a). *See, e.g.*, San Francisco Comments at 24-26. Section 332(c)(7)(B)(i) explicitly applies to "regulation of the placement, construction, and modification," and it would be irrational to interpret "regulation" in that paragraph to mean something different from the term "regulation" as used in 253(a) or to find that it does not encompass generally applicable "regulations" as well as decisions on individual applications. Moreover, even assuming *arguendo* that San Francisco's position reflects the appropriate interpretation of the scope of Section 332(c)(7)(B)(i)(II), the record does not reveal why a

more reasonable to conclude that the language in both sections generally should be interpreted to have the same meaning and to reflect the same standard, including with respect to preemption of fees that could "prohibit" or have "the effect of prohibiting" the provision of covered service. Both sections were enacted to address concerns about state and local government practices that undermined providers' ability to provide covered services, and both bar state or local conduct that prohibits or has the effect of prohibiting service.

68. To be sure, Sections 253 and 332(c)(7) may relate to different categories of state and local fees. Ultimately, we need not resolve here the precise interplay between Sections 253 and 332(c)(7). It is enough for us to conclude that, collectively, Congress intended for the two provisions to cover the universe of fees charged by state and local governments in connection with the deployment of telecommunications infrastructure. Given the analogous purposes of both sections and the consistent language used by Congress, we find the phrase "prohibit or have the effect of prohibiting" in Section 332(c)(7)(B)(i)(II) should be construed as having the same meaning and governed by the same preemption standard as the identical language in Section 253(a).[207]

69. *Application of the Interpretations and Principles Established Here*. Consistent with the interpretations above, the requirement that compensation be limited to a reasonable approximation of objectively reasonable costs and be non-discriminatory applies to all state and local government fees paid in connection with a provider's use of the ROW to deploy Small Wireless Facilities including, but not limited to, fees for access to the ROW itself, and fees for the attachment to or use of property within the ROW owned or controlled by the government (*e.g.*, street lights, traffic lights, utility poles, and other infrastructure within the ROW suitable for the placement of Small Wireless Facilities). This interpretation applies with equal force to any fees reasonably related to the placement, construction, maintenance, repair, movement, modification, upgrade, replacement, or removal of Small Wireless Facilities within the ROW, including, but not limited to, application or permit fees such as siting applications, zoning variance applications, building permits, electrical permits, parking permits, or excavation permits.

70. Applying the principles established in this Declaratory Ruling, a variety of fees not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7) in the context of Small Wireless Facility deployments.[208] For example, we agree with courts that have recognized that gross

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distinction between broadly-applicable requirements and decisions on individual requests would call for a materially different analytical approach, even if it arguably could be relevant when evaluating the application of that analytical approach to a particular preemption claim. In addition, although some commenters assert that such an interpretation "would make it virtually impossible for local governments to enforce their zoning laws with regard to wireless facility siting," they provide no meaningful explanation why that would be the case. *See, e.g.*, San Francisco Reply at 16. While some local commenters note that the savings clauses in Section 253(b) and (c) do not have express counterparts in the text of Section 332(c)(7)(B)(i), *see, e.g.*, San Francisco Comments at 26, we are not persuaded that this compels a different interpretation of the virtually identical language restricting actual or effective prohibitions of service in Section 253(a) and Section 332(c)(7)(B)(i)(II), particularly given our reliance on considerations in addition to the savings clauses themselves when interpreting the "effective prohibition" language. *See supra* paras. 57-65. We offer these interpretations both to respond to comments and in the event that some court decision could be viewed as supporting a different result.

[207] Section 253(a) expressly addresses state or local activities that prohibit or have the effect of prohibiting "any entity" from providing a telecommunications service. 47 U.S.C. § 253(a). In the *2009 Declaratory Ruling*, the Commission likewise interpreted Section 332(c)(7)(B)(i)(II) as implicated where the state or local conduct prohibits or has the effect of prohibiting the provision of personal wireless service by one entity even if another entity already is providing such service. *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65.

[208] We acknowledge that a fee not calculated by reference to costs might nonetheless happen to land at a level that is a reasonable approximation of objectively reasonable costs, and otherwise constitute fair and reasonable compensation as we describe herein. If all these criteria are met, the fee would not be preempted.

revenue fees generally are not based on the costs associated with an entity's use of the ROW,[209] and where that is the case, are preempted under Section 253(a). In addition, although we reject calls to preclude a state or locality's use of third party contractors or consultants, or to find all associated compensation preempted,[210] we make clear that the principles discussed herein regarding the reasonableness of cost remain applicable. Thus, fees must not only be limited to a reasonable approximation of costs, but in order to be reflected in fees, the *costs themselves* must also be reasonable. Accordingly, any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual "cost" to the government. If a locality opts to incur unreasonable costs, Sections 253 and 332(c)(7) do not permit it to pass those costs on to providers. Fees that depart from these principles are not saved by Section 253(c), as we discuss below.

71. *Interpretation of Section 253(c) in the Context of Fees.* In this section, we turn to the interpretation of several provisions in Section 253(c), which provides that state or local action that otherwise would be subject to preemption under Section 253(a) may be permissible if it meets specified criteria. Section 253(c) expressly provides that state or local governments may require telecommunications providers to pay "fair and reasonable compensation" for use of public ROWs but requires that the amounts of any such compensation be "competitively neutral and nondiscriminatory" and "publicly disclosed."[211]

72. We interpret the ambiguous phrase "fair and reasonable compensation," within the statutory framework we outlined for Section 253, to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs. We conclude that an appropriate yardstick for "fair and reasonable compensation," and therefore an indicator of whether a fee violates Section 253(c), is whether it recovers a reasonable approximation of a state or local government's objectively reasonable costs of, respectively, maintaining the ROW, maintaining a structure within the ROW, or processing an application or permit.[212]

73. We disagree with arguments that "fair and reasonable compensation" in Section 253(c) should somehow be interpreted to allow state and local governments to charge "any compensation," and we give weight to BDAC comments that, "[a]s a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment."[213] Several commenters argue, in

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[209] *See, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 21; *City of Maryland Heights*, 256 F. Supp. 2d at 993-96; *Prince George's County*, 49 F. Supp. 2d at 818; *AT&T v. City of Dallas*, 8 F. Supp. 2d at 593; *see also, e.g.*, CTIA Comments at 30, 45; *id*. Attach. at 17; ExteNet Comments, Exh. 1 at 41; T-Mobile Comments at 7; WIA Comments at 52-53.

[210] *See, e.g.*, CCA Comments at 17-21 (asking the Commission to declare franchise fees or percentage of revenue fees outside the scope of fair and reasonable compensation and to prohibit state and localities from requiring service providers to obtain business licenses for individual cell sites). For example, although fees imposed by a state or local government calculated as a percentage of a provider's revenue are unlikely to be a reasonable approximation of cost, if such a percentage-of-revenue fee were, in fact, ultimately shown to amount to a reasonable approximation of costs, the fee would not be preempted.

[211] 47 U.S.C. § 253(c).

[212] *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 114 ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd* 299 F. 3d 235 (3d Cir. 2002) (*New Jersey Payphone*) ("Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry.")

[213] BDAC Regulatory Barriers Report, Appendix C, p. 3 (a "[ROW] burden-oriented [fee] standard is flexible enough to suit varied localities and network architectures, would ensure that fees are not providing additional

particular, that Section 253(c)'s language must be read as permitting localities latitude to charge any fee at all[214] or a "market-based rent."[215] Many of these arguments seem to suggest that Section 253 or 332 have not previously been read to impose limits on fees, but as noted above courts have long read these provisions as imposing such limits. Still others argue that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies' use of public resources.[216] We find little support in the record, legislative history, or case law for that position.[217] Indeed, our

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revenues for other localities purposes unrelated to providing and maintaining the ROW, and would provide some basis to challenge fees that, on their face, are so high as to suggest their sole intent is to maximize revenue.")

[214] *See, e.g.*, Baltimore Comments at 15-16 (noting that local governments traditionally impose fees based on rent, and other ROW users pay market-based fees and arguing that citizens should not have to "subsidize" wireless deployments); Bellevue *et al*. Reply at 12-13 (stating that "the FCC should compensate municipalities at fair market value because any physical invasion is a taking under the Fifth Amendment, and just compensation is "typically" calculated using fair market value."); NLC Comments at 5 ("local governments, like private landlords, are entitled to collect rent for the use of their property and have a duty to their residents to assess appropriate compensation. This does not necessarily translate to restricting this compensation to just the cost of managing the asset—just as private property varies in value, so does municipal property."); Smart Communities Reply at 7-10 (stating that "fair and reasonable compensation (i.e., fair market value) is not, as some commenters contend, measured by the regulatory cost for use of a ROW or other property; rather it is measured by what it would cost the user of the ROW to purchase rights form a local property owner.").

[215] Draft BDAC Rates and Fees Report, p. 10 (listing "Local Government Perspectives").

[216] *See, e.g.*, NLC Comments, Statement of the Hon. Gary Resnick, Mayor, Wilton Manors, FL Comments at 6-7 ("preemption of local fees or rent for use of government-owned light and traffic poles, or fees for use of the right-of-way amounts to a taxpayer subsidy of wireless providers and wireless infrastructure companies. There is no corresponding benefit for such taxpayers such as requiring the broadband industry to reduce consumer rates or offer advanced services to all communities within a certain time frame."); Letter from Rondella M. Hawkins, Officer, City of Austin—Telecommunications & Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 7, 2018) at 1. These commenters do not explain why allowing recovery of a reasonable approximation of the state or locality's objectively reasonable costs would involve a taxpayer subsidy of service providers, and we are not persuaded that our interpretation would create a subsidy.

[217] As discussed more fully above, Congress intended through Section 253 to preempt state and local governments from imposing barriers in the form of excessive fees, while also preserving state and local authority to protect specified interests through competitively neutral regulation consistent with the Act. Our interpretation of Section 253(c) is consistent with Congress's objectives. Our interpretation of "fair and reasonable compensation" in Section 253(c) is also consistent with prior Commission action limiting fees, and easing access, to other critical communications infrastructure. For example, in implementing the requirement in the Pole Attachment Act that utilities charge "just and reasonable" rates, the Commission adopted rules limiting the rates utilities can impose on cable companies for pole attachments. Based on the costs associated with building and operation of poles, the rates the Commission adopted were upheld by the Supreme Court, which found that the rates imposed were permissible and not "confiscatory" because they "provid[ed] for the recovery of fully allocated cost, including the actual cost of capital." *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Here, based on the specific language in the separate provision of Section 253, we interpret the "effective prohibition" language, as applied to small cells, to permit state and local governments to recover only "fair and reasonable compensation" for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities. Relatedly, Smart Communities errs in arguing that the Commission's Order "provides localities 60 days to provide access and sets the rate for access," making it a "classic taking." Smart Communities Sept. 19, 2018 *Ex Parte* Letter at 25. To the contrary, the Commission has not given providers any right to compel access to any particular state or local property. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis. In this regard, we note that the record in this proceeding reflects that the vast majority of local jurisdictions voluntarily accept placement of wireless, utility, and other facilities in their rights-of-way. And in any event, cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities. *See Alabama Power Co. v. FCC*, 311 F.3d 1357, 1368, 1370-71 (11th Cir. 2002). *See also United States v. 564.54 Acres*

approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure.

74. The existence of Section 253(c) makes clear that Congress anticipated that "effective prohibitions" could result from state or local government fees, and intended through that clause to provide protections in that respect, as discussed in greater detail herein.[218] Against that backdrop, we find it unlikely that Congress would have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments.[219] Our interpretation of Section 253(c), in fact, is consistent with the views of many municipal commenters, at least with respect to one-time permit or application fees, and the members of the BDAC Ad Hoc Committee on Rates and Fees, who unanimously concurred that one-time fees for municipal applications and permits, such as an electrical inspection or a building permit, should be based on the cost to the government of processing that application.[220] The Ad Hoc Committee noted that "[the] cost-based fee structure [for one-time fees] unanimously approved by the committee accommodates the different siting related costs that different localities may incur to review and process permit applications, while precluding excessive fees that impede deployment.[221] We find that the same reasoning should apply to other state and local government fees such as ROW access fees or fees for the use of government property within the ROW.[222]

75. We recognize that state and local governments incur a variety of direct and actual costs in connection with Small Wireless Facilities, such as the cost for staff to review the provider's siting application, costs associated with a provider's use of the ROW, and costs associated with maintaining the ROW itself or structures within the ROW to which Small Wireless Facilities are attached.[223] We also recognize that direct and actual costs may vary by location, scope, and extent of providers' planned deployments, such that different localities will have different fees under the interpretation set forth in this Declaratory Ruling.

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of Land, 441 U.S. 506, 513 (1979) (recognizing that alternative measure of compensation might be appropriate "with respect to public facilities such as roads or sewers").

[218] *See supra* Parts III.A, B.

[219] *See, e.g., City of White Plains*, 305 F.3d at 78-79; *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 114. We disagree with arguments that competition between municipalities, or competition from adjacent private landowners, would be sufficient to ensure reasonable pricing in the ROW. *See e.g.*, Smart Communities Comments, Exh. 2, The Economics of Government Right of Way Fees, Declaration of Kevin Cahill, Ph.D at para. 15. We find this argument unpersuasive in view of the record evidence in this proceeding showing significant fees imposed on providers in localities across the country. *See, e.g.*, AT&T Comments at 18; Verizon Comments at 6-7; *see also* BDAC Regulatory Barriers Report, Appendix. C, p. 2.

[220] *See, e.g.,* Smart Communities Comments Cahill 2A at 2-3 (noting that "…a common model is to charge a fee that covers the costs that a municipality incurs in conducting the inspections and proceedings required to allow entry, fees that cover ongoing costs associated with inspection or expansion of facilities ..."); Colorado Comm. and Utility All. *et al.* Comments at 19 (noting that "application fees are based upon recovery of costs incurred by localities."); Draft BDAC Rates and Fees Report, p. 15-16.

[221] *See also* Draft BDAC Rates and Fees Report, p. 15-16. Although the BDAC Ad Hoc Rates and Fees Committee and municipal commenters only support a cost-based approach for one-time fees, we find no reason not to extend the same reasoning to ROW access fees or fees for the use of government property within the ROW, when all three types of fees are a legal requirement imposed by a government and pose an effective prohibition. The BDAC Rates and Fees Report did not provide a recommendation on fees for ROW access or fees for the use of government property within the ROW, and we disagree with suggestions that our ruling, which was consistent with the committee's recommendation for one-time fees, circumvents the efforts of the Ad Hoc Rates and Fees Committee. *See* Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 3.

[222] *See supra* para. 50.

[223] *See*, *e.g.*, Colorado Comm. and Utility All. *et al*. Comments at 18-19 (discussing range of costs that application fees cover).

76. Because we interpret fair and reasonable compensation as a *reasonable approximation* of costs, we do not suggest that localities must use any specific accounting method to document the costs they may incur when determining the fees they charge for Small Wireless Facilities within the ROW. Moreover, in order to simplify compliance, when a locality charges both types of recurring fees identified above (i.e., for access to the ROW and for use of or attachment to property in the ROW), we see no reason for concern with how it has allocated costs between those two types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved.[224] Fees that cannot ultimately be shown by a state or locality to be a reasonable approximation of its costs, such as high fees designed to subsidize local government costs in another geographic area or accomplish some public policy objective beyond the providers' use of the ROW, are not "fair and reasonable compensation…for *use* of the public rights-of-way" under Section 253(c).[225] Likewise, we agree with both industry and municipal commenters that excessive and arbitrary consulting fees or other costs should not be recoverable as "fair and reasonable compensation,"[226] because they are not a function of the provider's "use" of the public ROW.

77. In addition to requiring that compensation be "fair and reasonable," Section 253(c) requires that it be "competitively neutral and nondiscriminatory." The Commission has previously interpreted this language to prohibit states and localities from charging fees on new entrants and not on incumbents.[227] Courts have similarly found that states and localities may not impose a range of fees on one provider but not on another[228] and even some municipal commenters acknowledge that governments should not discriminate as to the fees charged to different providers.[229] The record reflects continuing concerns from providers, however, that they face discriminatory charges.[230] We reiterate the Commission's previous determination that state and local governments may not impose fees on some providers that they do not impose on others. We would also be concerned about fees, whether one-time or recurring, related to Small Wireless Facilities, that exceed the fees for other wireless telecommunications infrastructure in similar situations, and to the extent that different fees are charged

[224] *See supra* note 71 (identifying three categories of fees charged by states and localities).

[225] 47 U.S.C. § 253(c) (emphasis added). Our interpretation is consistent with court decisions interpreting the "fair and reasonable" compensation language as requiring fees charged by municipalities relate to the degree of actual use of a public ROW. *See, e.g, Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543-44 (D.P.R. 2003); *see also Municipality of Guayanilla*, 450 F.3d at 21-24; *City of Maryland Heights*, 256 F. Supp. 2d at 984.

[226] *See* Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018); *see also*, Illinois Municipal League Comments at 2 (noting that proposed small cell legislation in Illinois allows municipalities to recover "reasonable costs incurred by the municipality in reviewing the application.").

[227] *TCI Cablevision of Oakland County*, 12 FCC Rcd. at 21443, para. 108 (1997).

[228] *City of White Plains*, 305 F.3d 80.

[229] City of Baltimore Reply at 15 ("The City does agree that rates to access the right of way by similar entities must be nondiscriminatory."). Other commenters argue that nothing in Section 253 can apply to property in the ROW. City of San Francisco Reply at 2-3, 19 (denying that San Francisco is discriminatory to different providers but also asserting that "[l]ocal government fees for use of their poles are simply beyond the purview of section 253(c)").

[230] *See, e.g.*, CFP Comments at 31-33 (noting that the City of Baltimore charges incumbent Verizon "less than $.07 per linear foot for the space that it leases in the public right-of-way" while it charges other providers "$3.33 per linear foot to lease space in the City's conduit). Some municipal commenters argue that wireless infrastructure occupies more space in the ROW. *See* Smart Communities Reply Comments at 82 ("wireless providers are placing many of those permanent facilities in the public rights-of-way, in ways that require much larger deployments. It is not discrimination to treat such different facilities differently, and to focus on their impacts"). We recognize that different uses of the ROW may warrant charging different fees, and we only find fees to be discriminatory and not competitively neutral when different amounts are charged for similar uses of the ROW.

for similar use of the public ROW.[231]

78. *Fee Levels Likely to Comply with Section 253.* Our interpretation of Section 253(a) and "fair and reasonable compensation" under Section 253(c) provides guidance for local and state fees charged with respect to one-time fees generally, and recurring fees for deployments in the ROW. Following suggestions for the Commission to "establish a presumptively reasonable 'safe harbor' for certain ROW and use fees,"[232] and to facilitate the deployment of specific types of infrastructure critical to the rollout of 5G in coming years, we identify in this section three particular types of fee scenarios and supply specific guidance on amounts that presumptively are not prohibited by Section 253. Informed by our review of information from a range of sources, we conclude that fees at or below these amounts presumptively do not constitute an effective prohibition under Section 253(a) or Section 332(c)(7), and are presumed to be "fair and reasonable compensation" under Section 253(c).

79. Based on our review of the Commission's pole attachment rate formula, which would require fees below the levels described in this paragraph, as well as small cell legislation in twenty states, local legislation from certain municipalities in states that have not passed small cell legislation, and comments in the record, we presume that the following fees would not be prohibited by Section 253 or Section 332(c)(7): (a) $500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, or $1,000 for non-recurring fees for a new pole (*i.e.*, not a collocation) intended to support one or more Small Wireless Facilities; and (b) $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.[233]

80. By presuming that fees at or below the levels above comply with Section 253, we assume

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[231] Our interpretation is consistent with principles described by the BDAC's Ad Hoc Committee on Rates and Fees. Draft BDAC Rates and Fees Report at 5 (Jul. 24, 2018) (listing "neutral treatment and access of all technologies and communication providers based upon extent/nature of ROW use" as principle to guide evaluation of rates and fees).

[232] BDAC Regulatory Barriers Report, Appendix C, p. 3.

[233] These presumptive fee limits are based on a number of different sources of data. Many different state small cell bills, in particular, adopt similar fee limits despite their diversity of population densities and costs of living, and we expect that these presumptive fee limits will allow for recovery in excess of costs in many cases. 47 CFR § 1.1409; National Conference of State Legislatures, Mobile 5G and Small Cell Legislation, (May 7, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx (providing description of state small cell legislation); Little Rock, Ark. Ordinance No. 21,423 (June 6, 2017); NCTA August 20, 2018 *Ex Parte* Letter, Attachment; *see also* H.R. 2365, 2018 Leg. 2d Reg. Sess. (Ariz. 2018) ($100 per facility for first 5 small cells in application; $50 annual utility attachment rate, $50 ROW access fee); H.R. 189 149th Gen. Assemb. Reg. Sess. (Del. 2017) ($100 per small wireless facility on application; fees not to exceed actual, direct and reasonable cost); S. 21320th Gen. Assemb. Reg. Sess. (Ind. 2017) ($100 per small wireless facility); H.R. 1991, 99th Gen. Assemb. 2nd Reg. Sess. (Missouri, 2018) ($100 for each facility collocated on authority pole; $150 annual fee per pole); H.R. 38 2018 Leg. Assemb. 2d Reg. Sess. (N.M. 2018) ($100 for each of first 5 small facilities in an application; $20 per pole annually; $250 per facility annually for access to ROW); S. 189, 2018 Leg. Gen. Sess. (Utah 2018) ($100 per facility to collocate on existing or replacement utility pole; $250 annual ROW fee per facility for certain attachments). *See also* Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, and D. Zachary Champ, Director, Government Affairs, WIA to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018) Attach. (listing fees in twenty state small cell legislations) (CTIA/WIA Aug. 10, 2018 *Ex Parte* Letter); Letter from Scott K. Bergmann, Sen. Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 4, 2018) at 3, Attach. (analyzing average and median recurring fee levels permitted under state legislation). These examples suggest that the fee levels we discuss above may be higher than what many states already allow and further support our finding that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. We recognize that certain fees in a minority of state small cell bills are above the levels we presume to be allowed under Section 253. Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.

that there would be almost no litigation by providers over fees set at or below these levels. Likewise, our review of the record, including the many state small cell bills passed to date, indicate that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. In those limited circumstances, a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the limits imposed by Section 253—that is, that they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory.[234] Allowing localities to charge fees above these levels upon this showing recognizes local variances in costs.[235]

C. Other State and Local Requirements that Govern Small Facilities Deployment

81. There are also other types of state and local land-use or zoning requirements that may restrict Small Wireless Facility deployments to the degree that they have the effect of prohibiting service in violation of Sections 253 and 332. In this section, we discuss how those statutory provisions apply to requirements outside the fee context, both generally and with a particular focus on aesthetic and undergrounding requirements.

82. As discussed above, a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[236] Our interpretation of that standard, as set forth above, applies equally to fees and to non-fee legal requirements. And as with fees, Section 253 contains certain safe harbors that permit some legal requirements that might otherwise be preempted by Section 253(a). Section 253(b) saves state "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.[237] And Section 253(c) preserves state and local authority to manage the public rights-of-way.[238]

83. Given the wide variety of possible legal requirements, we do not attempt here to determine which of every possible non-fee legal requirements are preempted for having the effect of prohibiting service, although our discussion of fees above should prove instructive in evaluating specific requirements. Instead, we focus on some specific types of requirements raised in the record and provide guidance on when those particular types of requirements are preempted by the statute.

84. *Aesthetics.* The *Wireless Infrastructure NPRM/NOI* sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how Sections 253 and 332(c)(7) should be applied to them.[239] Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize

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[234] Several state and local commenters express concern about the presumptively reasonable fee levels we establish, including concerns about the effect of the fee levels on existing fee-related provisions included in state and local legislation. *See e.g.*, Letter from Kent Scarlett, Exec. Director, Ohio Municipal League to Marlene H. Dortch, Secretary, FCC at 1 (filed Sept. 18, 2018); Letter from Liz Kniss, Mayor, City of Palo Alto to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84 at 1 (filed Sept. 17, 2018). As stated above, while the fee levels we establish reflect our presumption regarding the level of fees that would be permissible under Section 253 and 332(c)(7), state or local fees that exceed these levels may be permissible if the fees are based on a reasonable approximation of costs and the costs themselves are objectively reasonable.

[235] We emphasize that localities may charge fees to recover their objectively reasonable costs and thus reject arguments that our approach requires localities to bear the costs of small cell deployment or applies a one-size-fits-all standard. *See, e,g.*, Letter from Mike Posey, Mayor, City of Huntington Beach, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept.11, 2018) (Mike Posey Sept. 11, 2018 *Ex Parte* Letter).

[236] *California Payphone*, 12 FCC Rcd at 14206, para. 31; *see supra* paras. 34-42.

[237] 47 U.S.C. § 253(b).

[238] 47 U.S.C. § 253(c).

[239] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3362-66, paras. 90-92, 95, 97-99.

burdensome requirements to deploy facilities using "stealth" designs or other means of camouflage,[240] as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details.[241] Providers also assert that the procedures some localities use to evaluate the appearance of proposed facilities and to decide whether they comply with applicable land-use requirements are overly restrictive.[242] Many providers are particularly critical of the use of unduly vague or subjective criteria that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning and adding to the time necessary to deploy facilities.[243] At the same time, we have heard concerns in the record about carriers deploying unsightly facilities that are significantly out of step with similar, surrounding deployments.

85. State and local governments add that many of their aesthetic restrictions are justified by factors that the providers fail to mention. They assert that their zoning requirements and their review and enforcement procedures are properly designed to, among other things, (1) ensure that the design, appearance, and other features of buildings and structures are compatible with nearby land uses; (2) manage ROW so as to ensure traffic safety and coordinate various uses; and (3) protect the integrity of

[240] *See, e.g.,* CCIA Comments at 14-15 (discussing regulations enacted by Village of Skokie, Illinois); WIA Reply Comments (WT Docket No. 16-421) at 9-10 (discussing restrictions imposed by Town of Hempstead, New York); *see also* AT&T Comments at 14-17; PTA-FLA Comments at 19; Verizon Comments at 19-20; AT&T Aug. 6, 2018 *ex parte* at 3.

[241] *See, e.g.,* CCIA Comments at 13-14 (describing regulations established by Skokie, Illinois that prescribe in detail the permissible colors of paint and their potential for reflecting light); AT&T Aug. 6, 2018 *ex parte* at 3 ("Some municipalities require carriers to paint small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the ROW by electric incumbents, competitive telephone companies, or cable companies," and asserts that it often "is highly burdensome to maintain non-factory paint schemes over years or decades, including changes to the municipal paint scheme," due to "technical constraints as well such as manufacture warranty or operating parameters, such as heat dissipation, corrosion resistance, that are inconsistent with changes in color, or finish."); AT&T Comments at 16-17 (contending that some localities "allow for a single size and configuration for small cell equipment while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance," and thus effectively compel "providers [to] incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the delays associated with the approval of an alternative equipment design and the risk of rejection of that design."); *id.* at 17 (some local governments "prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district").

[242] *See, e.g.,* Crown Castle Comments at 14-15 (criticizing San Francisco's aesthetic review procedures that discriminate against providers and criteria and referring to extended litigation); CTIA Reply Comments at 17 ("San Francisco imposes discretionary aesthetic review for wireless ROW facilities."); T-Mobile Comments at 40; *but see* San Francisco Comments at 3-7 (describing aesthetic review procedures). *See also* AT&T Comments at 13-17; Extenet Comments at 37; CTIA Comments at 21-22; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8.

[243] *See, e.g.,* AT&T Comments at 13-17; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8. WIA cites allegations that an unnamed city in California recently declined to support approval of a proposed small wireless installation, claiming that the installations do not meet "Planning and Zoning Protected Location Compatibility Standards," even though the same equipment has been deployed elsewhere in the city dozens of times, and even though the "Protected Location" standards should not apply because the proposals are not on "protected view" streets). WIA Reply Comments, WT Docket No. 16-421 at 9-10; *id.* at 8 (noting that one city changed its aesthetic standards after a proposal was filed); AT&T Comments at 17 (noting that a design approval took over a year); Virginia Joint Commenters, WT Docket No. 16-421 (state law providing discretion for zoning authority to deny application because of "aesthetics" concerns without additional guidance); Extenet Reply Comments at 13 (noting that some "local governments impose aesthetic requirements based entirely on subjective considerations that effectively give local governments latitude to block a deployment for virtually any aesthetically-based reason")

their historic, cultural, and scenic resources and their citizens' quality of life.[244]

86. Given these differing perspectives and the significant impact of aesthetic requirements on the ability to deploy infrastructure and provide service, we provide guidance on whether and in what circumstances aesthetic requirements violate the Act. This will help localities develop and implement lawful rules, enable providers to comply with these requirements, and facilitate the resolution of disputes. We conclude that aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.

87. Like fees, compliance with aesthetic requirements imposes costs on providers, and the impact on their ability to provide service is just the same as the impact of fees. We therefore draw on our analysis of fees to address aesthetic requirements. We have explained above that fees that merely require providers to bear the direct and reasonable costs that their deployments impose on states and localities should not be viewed as having the effect of prohibiting service and are permissible.[245] Analogously, aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment. For example, a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service.

88. Finally, in order to establish that they are reasonable and reasonably directed to avoiding aesthetic harms, aesthetic requirements must be objective—*i.e.*, they must incorporate clearly-defined and ascertainable standards, applied in a principled manner—and must be published in advance.[246] "Secret" rules that require applicants to guess at what types of deployments will pass aesthetic muster substantially increase providers' costs without providing any public benefit or addressing any public harm. Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site.[247]

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[244] *See, e.g.,* NLC Comments, WT Docket No. 16-421 at 8-10; Smart Communities Comments, WT Docket No. 16-421 at 35-36; New York City Comments at 10-15; New Orleans Comments at 1-2, 5-8; San Francisco Comments at 3-12; CCUA Reply Comments at 5; Irvine (CA) Comments at 2; Oakland County (MI) Comments at 3-5; Florida Coalition of Local Gov'ts Reply Comments at 6-12 (justifications for undergrounding requirements); *id.* at 16-421 (justifications for municipal historic-preservation requirements); *id.* at 22-16 (justifications for aesthetics and design requirements).

[245] *See supra* paras. 55-56.

[246] Our decision to adopt this objective requirement is supported by the fact that many states have recently adopted limits on their localities' aesthetic requirements that employ the term "objective." *See, e.g.,* Letter from Scott Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 19, 2018) (noting requirements enacted in the states of Arizona, Delaware, Missouri, North Carolina, Ohio, and Oklahoma, that local siting requirements for small wireless facilities be "objective"); *see also* Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 4, 2018)

[247] Some local governments argue that, because different aesthetic concerns may apply to different neighborhoods, particularly those considered historic districts, it is not feasible for them to publish local aesthetic requirements in advance. *See, e.g.,* Letter from Mark J. Schwartz, County Manager, Arlington County, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018) (Arlington County Sept. 18 *Ex Parte* Letter); Letter from Allison Silberberg, Mayor, City of Alexandria, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018). We believe this concern is unfounded. As noted above, the fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision. Moreover, the aesthetic requirements to be published in advance need not

89. We appreciate that at least some localities will require some time to establish and publish aesthetics standards that are consistent with this Declaratory Ruling. Based on our review and evaluation of commenters' concerns, we anticipate that such publication should take no longer than 180 days after publication of this decision in the Federal Register.

90. *Undergrounding Requirements.* We understand that some local jurisdictions have adopted undergrounding provisions that require infrastructure to be deployed below ground based, at least in some circumstances, on the locality's aesthetic concerns. A number of providers have complained that these types of requirements amount to an effective prohibition.[248] In addressing this issue, we first reiterate that, while undergrounding requirements may well be permissible under state law as a general matter, any local authority to impose undergrounding requirements under state law does not remove such requirements from the provisions of Section 253. In this regard, we believe that a requirement that *all* wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals. In this sense, we agree with the U.S. Court of Appeals for the Ninth Circuit when it observed that, "[i]f an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services."[249] Further, a requirement that materially inhibits wireless service, even if it does not go so far as requiring that all wireless facilities be deployed underground, also would be considered an effective prohibition of service. Thus, the same criteria discussed above in the context of aesthetics generally would apply to state or local undergrounding requirements.

91. *Minimum Spacing Requirements.* Some parties complain of municipal requirements regarding the spacing of wireless installations—*i.e.*, mandating that facilities be sited at least 100, 500, or 1,000 feet, or some other minimum distance, away from other facilities, ostensibly to avoid excessive overhead "clutter" that would be visible from public areas.[250] We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements.[251] For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use. Such a rule change with retroactive effect would

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prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards.

[248] *See, e.g.,* AT&T Comments at 14-15; Crown Castle Comments at 54-56; T-Mobile Comments at 38; Verizon Comments at 6-8; WIA Comments at 56; CTIA Reply at 16. *But see* Chicago Comments at 15; City of Claremont (CA) Comments at 1; City of Kenmore (WA) Comments at 1; City of Mukilteo (WA) Comments at 2; Florida Coalition of Local Gov'ts Comments at 6-12; Smart Communities Comments at 74.

[249] *County of San Diego*, 543 F.3d at 580, *accord*, BDAC Model Municipal Code at 13, § 2.3.e (providing for municipal zoning authority to allow providers to deploy small wireless facilities on existing vertical structures where available in neighborhoods with undergrounding requirements, or if no technically feasible structures exist, to place vertical structures commensurate with other structures in the area).

[250] *See, e.g.,* Verizon Comments at 8 (describing requirements imposed by Buffalo Grove, Illinois); CCIA Comments at 14-15 ("These restrictions stifle technological innovation and unnecessarily burden the ability of a provider to use the best available technological to serve a particular area. For example, 5G technology will require higher band spectrum for greater network capacity, yet some millimeter wave spectrum simply cannot propagate long distances over a few thousand feet—let alone a few hundred. Therefore, a local requirement of, for example, a thousand-foot minimum separation distance between small cells would unnecessarily forestall any network provider seeking to use higher band spectrum with greater capacity when that provider needs to boost coverage in a specific area of a few hundred feet."). *See also* AT&T Comments at 15; CTIA Reply at 17.

[251] 47 U.S.C. § 253(a).

almost certainly have the effect of prohibiting service under the standards we articulate here. Therefore, such requirements should be evaluated under the same standards for aesthetic requirements as those discussed above.[252]

D. States and Localities Act in Their Regulatory Capacities When Authorizing and Setting Terms for Wireless Infrastructure Deployment in Public Rights of Way

92. We confirm that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.[253] As explained below, for two alternative and independent reasons, we disagree with state and local government commenters who assert that, in providing or denying access to government-owned structures, these governmental entities function solely as "market participants" whose rights cannot be subject to federal preemption under Section 253(a) or Section 332(c)(7).[254]

93. First, this effort to differentiate between such governmental entities' "regulatory" and "proprietary" capacities in order to insulate the latter from preemption ignores a fundamental feature of the market participant doctrine.[255] As the Ninth Circuit has observed, at its core, this doctrine is "a

[252] Another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an "in-kind" service or benefit to the municipality, such as installing a communications network dedicated to the municipality's exclusive use. *See*, *e.g.*, Comcast Comments at 9-10 Verizon Comments at 7, Crown Castle Comments at 55-56. Such requirements impose costs, but rarely, if ever, yield benefits directly related to the deployment. Additionally, where such restrictions are not cost-based, they inherently have "the effect of prohibiting" service, and thus are preempted by Section 253(a). *See also* BDAC Regulatory Barriers Report, Appendix E at 1 (describing "conditions imposed that are unrelated to the project for which they were seeking ROW access" as "inordinately burdensome"); BDAC Model Municipal Code at 19, § 2.5a.(v)(F) (providing that municipal zoning authority "may not require an Applicant to perform services . . . or in-kind contributions [unrelated] to the Communications Facility or Support Structure for which approval is sought").

[253] *See supra* paras. 50-91. Some have argued that Section 224 of the Communications Act's exception of state-owned and cooperative-owned utilities from the definition of "utility," "[a]s used in this section," suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. City of Mukilteo, et. al. Ex Parte Comments on the Draft Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from James Bradford Ramsay, General Counsel, NARUC to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79 at 7 (filed Sept. 19, 2018). We see no basis for such a reading. Nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. *Compare* 47 U.S.C. § 224 *with* 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.

[254] *See, e.g.,* AASHTO Comments, Att. 1 (Del. DOT Comments) at 3-5; New York City Comments at 2-8; San Antonio *et al.* Comments at 14-15; Smart Communities Comments at 62-66; San Francisco Comments at 28-30; League of Arizona Cities *et al.* Comments, WT Docket No. 16-421 at 3-9; San Antonio *et al.* Comments, WT Docket No. 16-421 at 14-15. *See also Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3364-65, para. 96 (seeking comment on this issue).

[255] The market participant doctrine establishes that, unless otherwise specified by Congress, federal statutory provisions may be interpreted as preempting or superseding state and local governments' activities involving regulatory or public policy functions, but not their activities as "market participants" to serve their "purely proprietary interests," analogous to similar transactions of private parties. *Building & Construction Trades Council*

presumption about congressional intent," which "may have a different scope under different federal statutes."[256] The Supreme Court has likewise made clear that the doctrine is applicable only "[i]n the absence of any express or implied indication by Congress."[257] In contrast, where state action conflicts with express or implied federal preemption, the market participant doctrine does not apply, whether or not the state or local government attempts to impose its authority over use of public rights-of-way by permit or by lease or contract.[258] Here, both Sections 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct.[259]

94. Specifically, Section 253(a) expressly preempts certain state and local "legal requirements" and makes no distinction between a state or locality's regulatory and proprietary conduct. Indeed, as the Commission has long recognized, Section 253(a)'s sweeping reference to "State [and] local statute[s] [and] regulation[s]" and "other State [and] local legal requirement[s]" demonstrates Congress's intent "to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services."[260] Section 253(b) mentions "requirement[s]," a phrase that is even broader than that used in Section 253(a) but covers "universal service," "public safety and welfare," "continued quality of telecommunications," and "safeguard[s for the] rights of consumers." The subsection does not recognize a distinction between regulatory and proprietary. Section 253(c), which expressly insulates from preemption certain state and local government activities, refers in relevant part to "manag[ing] the public rights-of-way" and "requir[ing] fair and reasonable compensation," while eliding any distinction between regulatory and proprietary action in either context. The Commission has previously observed that Section 253(c) "makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public

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v. Associated Builders & Contractors, 507 U.S. 218, 229, 231 (1993) (*Boston Harbor*); *see also Wisconsin Dept. of Industry, Labor, and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (*Gould*).

[256] *See*, *e.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Distr.,* 498 F.3d 1031, 1042 (9th Cir. 2007); *Johnson v. Rancho Santiago Comm. College*, 623 F.3d 1011, 1022 (9th Cir. 2010).

[257] *See Boston Harbor*, 507 U.S. at 231.

[258] *See American Trucking Ass'n v. City of Los Angeles,* 569 U.S. 641, 650 (2013) (*American Trucking*).

[259] At a minimum, we conclude that Congress's language has not unambiguously pointed to such a distinction. *See* Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Aug. 23, 2018) (Verizon Aug. 23, 2018 *Ex Parte* Letter). Furthermore, we contrast these statutes with those that do not expressly or impliedly preempt proprietary conduct. *Compare*, *e.g.*, *American Trucking*, 569 U.S. 641 (finding that FAA Authorization Act of 1994's provision that "State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" expressly preempted the terms of a standard-form concession agreement drafted to govern the relationship between the Port of Los Angeles and any trucking company seeking to operate on the premises), *and Gould*, 475 U.S. at 289 (finding that NLRA preempted a state law barring state contracts with companies with disfavored labor practices because the state scheme was inconsistent with the federal scheme), *with Boston Harbor*, 507 U.S. at 224-32. In *Boston Harbor*, the Supreme Court observed that the NLRA contained no express preemption provision or implied preemption scheme and consequently held:

> In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.

Id. (internal citations omitted).

[260] *See Minnesota Order*, 14 FCC Rcd at 21707, para. 18. We find these principles to be equally applicable to our interpretation of the meaning of "regulation[s]" referred to under Section 332(c)(7)(B) insofar as such actions impermissibly "prohibit or have the effect of prohibiting the provision of personal wireless services." *Supra* paras. 34-42.

rights-of-way."[261] We conclude here that, as a general matter, "manage[ment]" of the ROW includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary.[262] This reading, coupled with Section 253(c)'s narrow scope, suggests that Congress's omission of a blanket proprietary exception to preemption was intentional, and thus, that such conduct can be preempted under Section 253(a). We therefore construe Section 253(c)'s requirements, including the requirement that compensation be "fair and reasonable," as applying equally to charges imposed via contracts and other arrangements between a state or local government and a party engaged in wireless facility deployment.[263] This interpretation is consistent with Section 253(a)'s reference to "State or local legal requirement[s]," which the Commission has consistently construed to include such agreements.[264] In light of the foregoing, whatever the force of the market participant doctrine in other contexts,[265] we believe the language, legislative history, and purpose of Sections 253(a) and (c) are incompatible with the application of this doctrine in this context. We observe once more that "[o]ur conclusion that Congress intended this language to be interpreted broadly is reinforced by the scope of section 253(d)," which "directs the Commission to preempt any statute, regulation, or legal requirement *permitted* or imposed by a state or local government if it contravenes sections 253(a) or (b). A more restrictive interpretation of the term 'other legal requirements' easily could permit state and local restrictions on competition to escape preemption based solely on the way in which [state] action was structured. We do not believe that Congress intended this result."[266]

95. Similarly, and as discussed elsewhere,[267] we interpret Section 332(c)(7)(B)(ii)'s references to "any request[s] for authorization to place, construct, or modify personal wireless service facilities" broadly, consistent with Congressional intent. As described below, we find that "any" is unqualifiedly broad, and that "request" encompasses anything required to secure all authorizations necessary for the deployment of personal wireless services infrastructure. In particular, we find that Section 332(c)(7) includes authorizations relating to access to a ROW, including but not limited to the

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[261] *See Minnesota Order*, 14 FCC Rcd at 21728-29, para. 60, quoting H. R. Rep. No. 104-204, U.S. Congressional & Administrative News, March 1996, vol.1, Legislative History section at 41 (1996).

[262] Indeed, to permit otherwise could limit the utility of ROW access for telecommunications service providers and thus conflict with the overarching preemption scheme set up by Section 253(a), for which 253(b) and 253(c) are exceptions. By construing "manage[ment]" of a ROW to include some proprietary behaviors, we mean to suggest that conduct taken in a proprietary capacity is likewise subject to 253(c)'s general limitations, including the requirement that any compensation charged in such capacity be "fair and reasonable."

[263] *Cf. Minnesota Order*, 14 FCC Rcd at 21729-30, para. 61-62 (internal citations omitted) ("Moreover, Minnesota has not shown that the compensation required for access to the right-of-way is 'fair and reasonable.' The compensation appears to reflect the value of the exclusivity inherent in the Agreement [which provides the developer with exclusive physical access, for at least ten years, to longitudinal rights-of-way along Minnesota's interstate freeway system] rather than fair and reasonable charges for access to the right-of-way. Nor has Minnesota shown that the Agreement provides for 'use of public rights-of-way on a nondiscriminatory basis.'")

[264] *Cf.* Crown Castle June 7, 2018 *Ex Parte* Letter at 17 n.83 ("Section 253(c), which carves out ROW management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute's sweep.").

[265] We acknowledge that the Commission previously concluded that "Section 6409(a) applies only to State and local governments acting in their role as land use regulators" and found that "this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt 'non regulatory decisions[.]'" *See 2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240. To the extent necessary, we clarify here that the actions and analysis there were limited in scope given the different statutory scheme and record in that proceeding, which did not, at the time, suggest a need to "further elaborate as to how this principle should apply to any particular circumstance" (there, in connection with application of Section 6409(a)). Here, in contrast, as described herein, we find that further elucidation by the Commission is needed.

[266] *Minnesota Order*, 14 FCC Rcd at 21707, para. 18 (internal citations omitted) (emphasis omitted).

[267] *See infra* Part IV.C.1 (Authorizations Subject to the "Reasonable Period of Time" Provision of Section 332(c)(7)(B)(ii)).

"place[ment], construct[ion], or modif[ication]" of facilities on government-owned property, for the purpose of providing "personal wireless service." We observe that this result, too, is consistent with Commission precedent such as the *Minnesota Order*, which involved a contract that provided exclusive access to a ROW. As but one example, to have limited that holding to exclude government-owned property within the ROW even if the carrier needed access to that property would have the effect of diluting or completely defeating the purpose of Section 332(c)(7).[268]

96. Second, and in the alternative, even if Section 253(a) and Section 332(c)(7) were to permit leeway for states and localities acting in their proprietary role, the examples in the record would be excepted because they involve states and localities fulfilling regulatory objectives.[269] In the proprietary context, "a State acts as a 'market participant with no interest in setting policy.'"[270] We contrast state and local governments' purely proprietary actions with states and localities acting with respect to managing or controlling access to property within public ROW, or to decisions about where facilities that will provide personal wireless service to the public may be sited. As several commenters point out, courts have recognized that states and localities "hold the public streets and sidewalks in trust for the public" and "manage public ROW in their regulatory capacities."[271] These decisions could be based on a number of regulatory objectives, such as aesthetics or public safety and welfare, some of which, as we note elsewhere, would fall within the preemption scheme envisioned by Congress. In these situations, the state or locality's role seems to us to be indistinguishable from its function and objectives as a regulator.[272] To

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[268] *See also infra* para. 134-36 and cases cited therein. Precedent that may appear to reach a different result can be distinguished in that it resolves disputes arising under Section 332 and/or 253(a) without analyzing the scope of Section 253(c). Furthermore, those situations did not involve government-owned property or structures within a public ROW. *See*, *e.g.*, *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (declining to find preemption under Section 332 applicable to terms of a school rooftop lease); *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195-96, 200-01 (9th Cir. 2013) (declining to find preemption under Section 332 applicable to restrictions on lease of parkland).

[269] In this regard, also relevant to our interpretations here is courts' admonition that government activities that are characterized as transactions but in reality are "tantamount to regulation" are subject to preemption, *Gould*, 475 U.S. at 289, and that government action disguised as private action may not be relied on as a pretext to advance regulatory objectives. *See*, *e.g.*, *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to section 253(a) where the advertising was a material factor in the provider's ability to provide the payphone service itself).

[270] *See*, *e.g.*, *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008).

[271] *See* Verizon Comments at 26-28 & n.85; T-Mobile Comments at 50 & n.210 and cases cited therein.

[272] Indeed, the Commission has long recognized that, in enacting Sections 253(c) and 332(c)(7), Congress affirmatively protected the ability of state and local governments to carry out their responsibilities for maintaining, managing, and regulating the use of ROW and structures therein for the benefit of the public. *TCI Cablevision Order,* 12 FCC Rcd at 21441, para. 103 (1997) ("We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way."); *Moratoria Declaratory Ruling*, FCC 18-111, para. 142 (same); *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling, and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103, para. 39 (1996) (same). We find these situations to be distinguishable from those where a state or locality might be engaged in a discrete, *bona fide* transaction involving sales or purchases of services that do not otherwise violate the law or interfere with a preemption scheme. *Compare*, *e.g.*, *Cardinal Towing & Auto Repair, Inc., v. City of Bedford*, 180 F.3d 686, 691, 693-94 (5th Cir. 1999) (declining to find that the FAA Authorization Act of 1994, as amended by the ICC Termination Act of 1995, preempted an ordinance and contract specifications that were designed only to procure services that a municipality itself needed, not to regulate the conduct of others), *with NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308 (N.D.N.Y., Dec. 10, 2004) (crediting allegations that a city's actions, such as issuing a request for proposal and implementing a general franchising scheme, were not of a purely proprietary nature, but rather, were taken in pursuit of a regulatory objective or policy). This action could include, for example, procurement of services for the state or locality, or a

the extent that there is some distinction, the temptation to blend the two roles for purposes of insulating conduct from federal preemption cannot be underestimated in light of the overarching statutory objective that telecommunications service and personal wireless services be deployed without material impediments.

97. Our interpretation of both provisions finds ample support in the record of this proceeding. Specifically, commenters explain that public ROW and government-owned structures within such ROW are frequently relied upon to supply services for the benefit of the public, and are often the best-situated locations for the deployment of wireless facilities.[273] However, the record is also replete with examples of states and localities refusing to allow access to such ROW or structures, or imposing onerous terms and conditions for such access.[274] These examples extend far beyond governments' treatment of single structures;[275] indeed, in some cases it has been suggested that states or localities are using their proprietary roles to effectuate a general municipal policy disfavoring wireless deployment in public ROW.[276] We believe that Section 253(c) is properly construed to suggest that Congress did not intend to permit states and localities to rely on their ownership of property within the ROW as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted.[277] Our interpretations here are intended to facilitate the implementation of the scheme Congress intended and to provide greater regulatory certainty to states, municipalities, and regulated parties about what conduct is preempted under Section 253(a). Should factual questions arise about whether a state or locality is engaged in such behavior, Section 253(d) affords state and local governments and private parties an avenue for specific preemption challenges.

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contract for employment services between a state or locality and one of its employees. We do not intend to reach these scenarios with our interpretations today.

[273] *See, e.g.,* Verizon Aug. 23, 2018 *Ex Parte* Letter at 4-5.

[274] *See supra* para. 25.

[275] *Cf. Sprint Spectrum L.P. v. Mills*, 283 F.3d 404.

[276] *See NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308; *Coastal Communications Service v. City of New York*, 658 F. Supp. 2d at 441-42.

[277] We contrast this instance to others in which we either declined to act or responded to requests for action with respect to specific disputes. *See*, *e.g.*, *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240; *Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201, 13220, para. 43 (2006) (observing, in the context of a different statutory and regulatory scheme, that "[g]iven that the Commission intended to preempt restrictions [regarding restrictions on Continental's use of its Wi-Fi antenna] in private lease agreements, however, Massport would be preempted even if it is acting in a private capacity with regard to its lease agreement with Continental."); *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5883, para. 14 (rejecting argument that argument that Section 253(a) is inapplicable where it would affect the state's ability to "deal[] with its real estate interests . . . as it sees fit," such as by granting access to "rights-of-way over land that it owns); *Minnesota Order*, 14 FCC Rcd at 21706-08, paras. 17-19; *cf*. *Amigo.Net Petition for Declaratory Ruling*, Memorandum Opinion and Order, 17 FCC Rcd 10964, 10967 (WCB 2002) (Section 253 did not apply to carrier's provision of network capacity to government entities exclusively for such entities' internal use); *T-Mobile West Corp. v. Crow*, 2009 WL 5128562 (D. Ariz., Dec. 17, 2009) (Section 332(c)(7) did not apply to contract for deployment of wireless facilities and services for use on state university campus). We clarify here that such prior instances are not to be construed as a concession that Congress did not make preemption available, or that the Commission lacked the authority to support parties' attempts to avail themselves of relief offered under preemption schemes, when confronted with instances in which a state or locality is relying on its proprietary role to skirt federal regulatory reach. Indeed, these instances demonstrate the opposite—that preemption is available to effectuate Congressional intent—and merely illustrate application of this principle. Also, we do not find it necessary to await specific disputes in the form of Section 253(d) petitions to offer these interpretations. In the alternative and as an independent means to support the interpretations here, we clarify that we intend for our views to guide how preemption should apply in fact-specific scenarios.

E. Responses to Challenges to Our Interpretive Authority and Other Arguments

98. We reject claims that we lack authority to issue authoritative interpretations of Sections 253 and 332(c)(7) in this Declaratory Ruling. As explained above, we act here pursuant to our broad authority to interpret key provisions of the Communications Act, consistent with our exercise of that interpretive authority in the past.[278] In this instance, we find that issuing a Declaratory Ruling is necessary to remove what the record reveals is substantial uncertainty and to reduce the number and complexity of legal controversies regarding certain fee and non-fee state and local legal requirements in connection with Small Wireless Facility infrastructure. We thus exercise our authority in this Declaratory Ruling to interpret Section 253 and Section 332(c)(7) and explain how those provisions apply in the specific scenarios at issue here.[279]

99. Nothing in Sections 253 or 332(c)(7) purports to limit the exercise of our general interpretive authority.[280] Congress's inclusion of preemption provisions in Section 253(d) and Section 332(c)(7)(B)(v) does not limit the Commission's ability pursuant to other sections of the Act to construe and provide its authoritative interpretation as to the meaning of those provisions.[281] Any preemption under Section 253 and/or Section 332(c)(7)(B) that subsequently occurs will proceed in accordance with the enforcement mechanisms available in each context. But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in Section 253 or Section 332(c)(7) prevents the Commission from declaring that a category of state or local laws is inconsistent with Section 253(a) or Section 332(c)(7)(B)(i)(II) because it prohibits or has the effect of prohibiting the relevant covered service.[282]

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[278] *See, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, paras. 161-68; *2009 Declaratory Ruling*, 24 FCC Rcd at 14001, para. 23.

[279] Targeted interpretations of the statute like those we adopt here fall far short of a "federal regulatory program dictating the scope and policies involved in local land use" that some commenters fear. League of Minnesota Cities Comments at 9.

[280] We also reject claims that Section 601(c)(1) of the 1996 Act constrains our interpretation of these provisions. *See, e.g.*, NARUC Reply at 3; Smart Communities Reply at 33, 35-36. That provision guards against implied preemption, while Section 253 and Section 332(c)(7)(B) both expressly restrict state and local activities. *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3485-86, para. 51. Courts also have read that provision narrowly. *See, e.g.*, *In re FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014); *Qwest Corp. v. Minnesota Pub. Utilities Comm'n*, 684 F.3d 721, 730-31 (8th Cir. 2012); *Farina v. Nokia Inc.*, 625 F.3d 97, 131 (3d Cir. 2010). Although the Ninth Circuit in *County of San Diego* asserted that there is a presumption that express preemption provisions should be read narrowly, and that the presumption would apply to the interpretation of Section 253(a), *County of San Diego*, 543 F.3d at 548, the cited precedent applies that presumption where "the State regulates in an area where there is no history of significant federal presence." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005). Whatever the applicability of such a presumption more generally, there is a substantial history of federal involvement here, particularly insofar as interstate telecommunications services and wireless services are implicated. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003); *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490–92 (2d Cir. 1968); 47 U.S.C., Title III.

[281] *See, e.g.*, California PUC Comments at 11; Verizon Comments at 31-33; CTIA Reply at 22-23; WIA Reply at 16-18. We thus reject claims to the contrary. *See, e.g.*, City of New York Comments at 8; Virginia Joint Commenters Comments, Exh. A at 41-44; City of New York Reply at 1-2; NATOA Reply at 9-10; Smart Communities Reply at 34. Indeed, the Fifth Circuit upheld just such an exercise of authority with respect to the interpretation of Section 332(c)(7) in the past. *See generally City of Arlington*, 668 F.3d at 249-54. While some commenters assert that the questions addressed by the Commission in the order underlying the Fifth Circuit's *City of Arlington* decision are somehow more straightforward than our interpretations here, they do not meaningfully explain why that is the case, instead seemingly contemplating that the Commission would address a wider, more general range of circumstances than we actually do here. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 44-45.

[282] Consequently, we reject claims that relying on our general interpretative authority to interpret Section 253 and Section 332(c)(7) would render any provisions of the Act mere surplusage, *see, e.g.*, Smart Communities Reply at 34-35, or would somehow "usurp the role of the judiciary." Washington State Cities Reply at 14. We likewise

100. Although some commenters contend in general terms that differences in judicial approaches to Section 253 are limited and thus there is little need for Commission guidance,[283] the interpretations we offer in this Declaratory Ruling are intended to help address certain specific scenarios that have caused significant uncertainty and legal controversy, irrespective of the degree to which this uncertainty has been reflected in court decisions. We also reject claims that a Supreme Court brief joined by the Commission demonstrates that there is no need for the interpretations in this Declaratory Ruling.[284] To the contrary, that brief observed that some potential interpretations of certain court decisions "would create a serious conflict with the Commission's understanding of Section 253(a), and [] would undermine the federal competition policies that the provision seeks to advance."[285] The brief also noted that, if warranted, "the Commission can restore uniformity by issuing authoritative rulings on the application of Section 253(a) to particular types of state and local requirements."[286] Rather than cutting against the need for, or desirability of, the interpretations we offer in this Declaratory Ruling, the brief instead presaged them.[287]

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reject other arguments insofar as they purport to treat Section 253(d)'s provision for preemption as more specific than, or otherwise controlling over, other Communications Act provisions enabling the Commission to authoritatively interpret the Act. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43. To the contrary, "[t]he specific controls but only within its self-described scope." *Nat'l Cable & Telecomm. Ass'n v. Gulf Power*, 534 U.S. 327, 336 (2002). In addition, concerns that the Commission might interpret Section 253(c) in a manner that would render it a nullity or in a manner divorced from relevant context—things we do not do here—bear on the reasonableness of a given interpretation and not on the existence of interpretive authority in the first instance, as some contend. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43-44.

[283] *See, e.g.*, City of San Antonio *et al*. Comments, Exh. B at 26-27; Fairfax County Comments at 20; Smart Communities Comments at 61. Some commenters assert that there are reasonable, material reliance interests arising from past court interpretations that would counsel against our interpretations in this order because "localities and providers have adjusted to the tests within their circuits" and "reflected those standards in local law." Smart Communities Comments, WT Docket No. 16-141 at 67 (filed Mar. 8, 2017) cited in City of Austin Comments at 2 n.3. Arguments such as these, however, merely underscore the regulatory patchwork that inhibits the development of a robust nationwide telecommunications and private wireless service as envisioned by Congress. By offering interpretations of the relevant statutes here, we intend, thereby, to eliminate potential regional regulatory disparities flowing from differing interpretations of those provisions. *See, e.g.*, WIA Reply at 19-20.

[284] *See* City of San Antonio *et al*. Comments, Exh. B at 27 (citing Brief for the United States as Amicus Curiae, *Level 3 Commc'ns v. City of St. Louis*, Nos. 08-626, 08-759 at 9, 11 (filed May 28, 2009) (Amicus Brief)).

[285] Amicus Brief at 12-13. The brief also identified other specific areas of concern with those cases. *See, e.g.*, *id*. at 13 ("The court appears to have accorded inordinate significance to Level 3's inability to 'state with specificity what additional services it might have provided' if it were not required to pay St. Louis's license fee. That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3's case—is not central to a proper Section 253(a) inquiry." (citation omitted)); *id*. at 14 ("Portions of the Ninth Circuit's decision, moreover, could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. As discussed above, limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote." (citation omitted)).

[286] *Id*. at 18.

[287] Contrary to some claims, the need for these clarifications also is not undercut by prior determinations that advanced telecommunications capability is being deployed in a reasonable and timely fashion to all Americans. *See, e.g.*, Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) (NATOA June 21, 2018 *Ex Parte* Letter) (citing *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 33 FCC Rcd 1660, 1707-08, para. 94 (2018) (*2018 Broadband Deployment Report*)). These commenters do not explain why the distinct standard for evaluating deployment of advanced telecommunications capability, *see 2018 Broadband Deployment Report*, 33 FCC Rcd at 1663-76, paras. 9-39, should bear on the application of Section 253 or Section 332(c)(7). Further, as the Commission itself observed, "[a] finding that deployment of advanced

101. Our interpretations of Sections 253 and Section 332(c)(7) are likewise not at odds with the Tenth Amendment and constitutional precedent, as some commenters contend.[288] In particular, our interpretations do not directly "compel the states to administer federal regulatory programs or pass legislation."[289] The outcome of violations of Section 253(a) or Section 332(c)(7)(B) of the Act are no more than a consequence of "the limits Congress already imposed on State and local governments" through its enactment of Section 332(c)(7).[290]

102. We also reject the suggestion that the limits Section 253 places on state and local ROW fees and management will unconstitutionally interfere with the relationship between a state and its political subdivisions.[291] As relevant to our interpretations here, it is not clear, at first blush, that such concerns would be implicated.[292] Because state and local legal requirements can be written and structured in myriad ways, and challenges to such state or local activities could be framed in broad or narrow terms, we decline to resolve such questions here, divorced from any specific context.

IV. THIRD REPORT AND ORDER

103. In this Third Report and Order, we address the application of shot clocks to state and local review of wireless infrastructure deployments. We do so by taking action in three main areas. First, we adopt a new set of shot clocks tailored to support the deployment Small Wireless Facilities. Second, we adopt a specific remedy that applies to violations of these new Small Wireless Facility shot clocks, which we expect will operate to significantly reduce the need for litigation over missed shot clocks. Third, we clarify a number of issues that are relevant to all of the FCC's shot clocks, including the types of authorizations subject to these time periods.

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telecommunications capability is reasonable and timely in no way suggests that we should let up in our efforts to foster greater deployment." *Id*. at 1664, para. 13.

[288] *See, e.g.*, City of San Antonio *et al*. Comments, Exh. A at 28; Smart Communities Comments at 77-78; Smart Communities Reply at 48-50; NATOA June 21, 2018 *Ex Parte* Letter at 3.

[289] *Montgomery County*, 811 F.3d at 128; *see Printz v. United States*, 521 U.S. 898 (1997) (*Printz*); *New York v. United States*, 505 U.S. 144 (1992) (*New York*). These provisions preempting state law thus do not "compel the States to enact or administer a federal regulatory program," *Printz*, 521 U.S. at 900, or "dictate what a state . . . may or may not do." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) (*Murphy*).

[290] *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. The Communications Act establishes its own framework for oversight of wireless facility deployment—one that is largely deregulatory, *see, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 63; *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480-81, para. 182 (1994)—and it is reasonable to expect state and local governments electing to act in that area to do so only in a manner consistent with the Act's framework. *See, e.g.*, *Murphy*, 138 S. Ct. at 1470-71, 1480. Thus, the application of Section 253 and Section 332(c)(7)(B) is clearly distinguishable from the statute the Supreme Court struck down in *Murphy*, which did not involve a preemption scheme but nonetheless prohibited state authorization of sports gambling. *Id*. at 1481. The application here is also clearly distinguishable from the statute in *Printz*, which mandated states to run background checks on handgun purchases, *Printz*, 521 U.S. at 904–05, and the statute in *New York*, which required states to enact state laws that provide for the disposal of radioactive waste or else take title to such waste. *New York*, 505 U.S. at 151–52.

[291] *See, e.g.*, City of New York Comments at 9-10; Smart Communities Comments at 78.; *see also, e.g.*, *Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004) (identifying Tenth Amendment issues with the application of Section 253 where that application would implicate "state or local governmental self-regulation (or regulation of political inferiors)").

[292] For example, where a state or local law or other legal requirement simply sets forth particular fees to be paid, or where the legal requirement at issue is simply an exercise of discretion that governing law grants the state or local government, it is not clear that preemption would unconstitutionally interfere with the relationship between a state and its political subdivisions.

A. New Shot Clocks for Small Wireless Facility Deployments

104. In 2009, the Commission concluded that we should use shot clocks to define a presumptive "reasonable period of time" beyond which state or local inaction on wireless infrastructure siting applications would constitute a "failure to act" within the meaning of Section 332.[293] We adopted a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations. The record here suggests that our two existing Section 332 shot clocks have increased the efficiency of deploying wireless infrastructure. Many localities already process wireless siting applications in less time than required by those shot clocks, and a number of states have enacted laws requiring that collocation applications be processed in 60 days or less.[294] Some siting agencies acknowledge that they have worked to gain efficiencies in processing siting applications and welcome the addition of new shot clocks tailored to the deployment of small scale facilities.[295] Given siting agencies' increased experience with existing shot clocks, the greater need for rapid siting of Small Wireless Facilities nationwide, and the lower burden siting of these facilities places on siting agencies in many cases, we take this opportunity to update our approach to speed the deployment of Small Wireless Facilities.[296]

1. Two New Section 332 Shot Clocks for Deployment of Small Wireless Facilities

105. In this section, using authority confirmed in *City of Arlington*, we adopt two new Section 332 shot clocks for Small Wireless Facilities—60 days for review of an application for collocation of Small Wireless Facilities using a preexisting structure and 90 days for review of an application for attachment of Small Wireless Facilities using a new structure. These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority "within a reasonable period of time… taking into account the nature and scope of the request."[297] Further, our decision is consistent with the BDAC's Model Code for Municipalities' recommended timeframes, which utilize this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures[298] and are similar to shot clocks enacted in state level small cell bills and the real world

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[293] *2009 Declaratory Ruling*, 24 FCC Rcd at 13994.

[294] *See infra* para. 106.

[295] Chicago Comments at 7 ("[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists."); New Orleans Comments at 3 ("City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.").

[296] *See* LaWana Mayfield July 31, 2018 *Ex Parte* Letter at 2 ("However, getting this infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure."); Letter from John Richard C. King, House of Representatives, South Carolina, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed Aug. 27, 2018) ("A patchwork system of town-to-town, state-to-state rules slows the approval of small cell installations and delays the deployment of 5G. We need a national framework with guardrails to streamline the path forward to our wireless future"); Letter from Andy Thompson, State Representative, Ohio House District 95, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 24, 2018) ("In order for 5G to arrive as quickly and as effectively as possible, relevant infrastructure regulations must be streamlined. It makes very little sense for rules designed for 100-foot cell towers to govern the path to deployment for modern equipment called small cells that can fit into a pizza box."); Letter from Todd Nash, Wallowa County Board of Commissioners, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed Sept. 10, 2018) (FCC should streamline regulatory processes by, for example, tightening the deadlines for states and localities to approve new network facilities).

[297] 47 U.S.C. § 332(c)(7)(ii).

[298] The BDAC Model Municipal Code recommended, for certain types of facilities, shot clocks of 60 days for collocations and 90 days for new constructions on applications for siting Small Wireless Facilities. BDAC Model

experience of many municipalities which further supports the reasonableness of our approach.[299] Our actions will modernize the framework for wireless facility siting by taking into consideration that states and localities should be able to address the siting of Small Wireless Facilities in a more expedited review period than needed for larger facilities.[300]

106. We find compelling reasons to establish a new presumptively reasonable Section 332 shot clock of 60 days for collocations of Small Wireless Facilities on existing structures. The record demonstrates the need for, and reasonableness of, expediting the siting review of these collocations.[301] Notwithstanding the implementation of the current shot clocks, more streamlined procedures are both reasonable and necessary to provide greater predictability for siting applications nationwide for the deployment of Small Wireless Facilities. The two current Section 332 shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted nine years ago. Since 2009, localities have gained significant experience processing wireless siting applications.[302] Indeed, many localities already process wireless siting applications in less than the required time[303] and several

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Municipal Code at §§ 2.2, 2.3, 3.2a(i)(B). Our approach utilizes the same timeframes set forth in the Model Municipal Code, and we disagree with comments that it is inconsistent with or ignores the work of the BDAC. GMA September 17 *Ex Parte* Letter at 4-5.

[299] For instance, while the City of Chicago opposes the shot clocks adopted here, we note that the City has also stated that, "[d]espite th[e] complex review process, involving many utilities and other entities, CDOT on average processed small cell applications last year in 55 days." Letter from Edward N. Siskel, Corp. Counsel, Dept. of Law, City of Chicago, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 19, 2018).

[300] Just like the shot clocks originally established in 2009—later affirmed by the Fifth Circuit and the Supreme Court—the shot clocks framework in this Third Report and Order are no more than an interpretation of "the limits Congress already imposed on State and local governments" through its enactment of Section 332(c)(7). *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. *See also City of Arlington*, 668 F.3d at 259. As explained in the *2009 Declaratory Ruling*, the shot clocks derived from Section 332(c)(7) "will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification," and they "will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A)." *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25.

[301] CTIA Comments, WT Docket No. 16-421, at 33 (filed Mar. 8, 2017); Letter from Juan Huizar, City Manager of the City of Pleasanton, TX, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed June 4, 2018) (describing the firsthand benefit of small cells and noting that communications infrastructure is a critical component of local growth); Letter from Sara Blackhurst, President, Action 22, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed May 18, 2018) (Action 22 *Ex Parte*)("While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now."); Letter from Maurita Coley Flippin, President and CEO, MMTC, to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 at 2 (filed Sept. 5, 2018) (encourages the Commission to remove unnecessary barriers such as unreasonable delays so deployment can proceed expeditiously); Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter at 1 (It is critical that the Commission continue to remove barriers to building new wireless infrastructure such as by setting reasonable timelines to review applications).

[302] T-Mobile Comments at 20; Crown Castle Reply at 5 (noting that the adoption of similar time frames by several states for small cell siting review confirms their reasonableness, and the Commission should apply these deadlines on a nationwide basis).

[303] Alaska Dep't of Natural Resources Comments at 2 ("[W]e are currently meeting or exceeding the proposed timeframe of the 'Shot Clock.'"); *see also* CTIA Aug. 30, 2018 *Ex Parte* Letter at 5 ("Eleven states—Delaware, Florida, Indiana, Kansas, Missouri, North Carolina, Rhode Island, Tennessee, Texas, Utah, and Virginia—recently adopted small cell legislation that includes 45-day or 60-day shot clocks for small cell collocations."); Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter.

jurisdictions require by law that collocation applications be processed in 60 days or less.[304] With the passage of time, siting agencies have become more efficient in processing siting applications.[305] These facts demonstrate that a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable.[306]

107. As we found in 2009, collocation applications are generally easier to process than new construction because the community impact is likely to be smaller.[307] In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community.[308] The size of Small Wireless Facilities poses little or no risk of adverse effects on the environment or historic preservation.[309] Indeed, many jurisdictions do not require public hearings for approval of such attachments, underscoring their belief that such attachments do not implicate complex issues requiring a more searching review.[310]

108. Further, we find no reason to believe that applying a 60-day time frame for Small Wireless Facility collocations under Section 332 creates confusion with collocations that fall within the scope of "eligible facilities requests" under Section 6409 of the Spectrum Act, which are also subject to a 60-day review.[311] The type of facilities at issue here are distinctly different and the definition of a Small Wireless Facility is clear. Further, siting authorities are required to process Section 6409 applications involving the swap out of certain equipment in 60 days, and we see no meaningful difference in processing these applications than processing Section 332 collocation applications in 60 days. There is

[304] North Carolina requires its local governments to decide collocation applications within 45 days of submission of a complete application. N.C. Gen. Stat. Ann. § 153A-349.53(a2). The same 45-day shot clock applies to certain collocations in Florida. Fla. Stat. Ann. § 365.172(13)(a)(1), (d)(1). In New Hampshire, applications for collocation or modification of wireless facilities generally have to be decided within 45 days (subject to some exceptions under certain circumstances) or the application is deemed approved. N.H. Rev. Stat. Ann. § 12-K:10. Wisconsin requires local governments to decide within 45 days of receiving complete applications for collocation on existing support structure that does not involve substantial modification, or the application will be deemed approved, unless the local government and applicant agree to an extension. Wis. Stat. Ann. § 66.0404(3)(c). Local governments in Indiana have 45 days to decide complete collocation applications, unless an extension is allowed under the statute. Ind. Code Ann. § 8-1-32.3-22. Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. Minn. Stat. § 15.99, subd. 2(a). By not requiring hearings, collocation applications in these states can be processed in a timely manner.

[305] Chicago Comments at 7 ("[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists."); New Orleans Comments at 3 ("City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class."); Action 22 *Ex Parte* at 2 ("While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.").

[306] CCA Comments at 11-14; T-Mobile Comments at 20; Incompas Reply at 9; Sprint Comments at 45-47 (noting that Florida, Indiana, Kansas, Texas and Virginia all have passed small cell legislation that requires small cell application attachments to be acted upon in 60 days); T-Mobile Comments at 18 (arguing that the Commission should accelerate the Section 332 shot clocks for all sites to 60 days for collocations, including small cells).

[307] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 40.

[308] TIA Comments at 4.

[309] *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 42 (citing Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, Appx. B, § VI (Collocation NPA)); *see also* 47 CFR § 1.1306(c)(1) (excluding certain wireless facilities from NEPA review).

[310] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46.

[311] DESHPO Comments at 2 ("opposes the application of separate time limits for review of facility deployments not covered by the Spectrum Act, as it would lead to confusion within the process for all parties involved (Applicants/Carrier, Consultants, SHPO)").

no reason to apply different time periods (60 vs. 90 days) to what is essentially the same review: modification of an existing structure to accommodate new equipment.[312] Finally, adopting a 60-day shot clock will encourage service providers to collocate rather than opting to build new siting structures which has numerous advantages.[313]

109. Some municipalities argue that smaller facilities are neither objectively "small" nor less obtrusive than larger facilities.[314] Others contend that shorter shot clocks for a broad category of "smaller" facilities are too restrictive,[315] and would fail to take into account the varied and unique climate, historic architecture, infrastructure, and volume of siting applications that municipalities face.[316] We take those considerations into account by clearly defining the category of "Small Wireless Facility" in our rules and allowing siting agencies to rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face. For similar reasons, we disagree that establishing shorter shot clocks for smaller facilities would impair states' and localities' authority to regulate local rights of way.[317]

110. While some commenters argue that additional shot clock classifications would make the siting process needlessly more complex without any proven benefits,[318] any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.[319] We

[312] CTIA Aug. 30, 2018 *Ex Parte* Letter at 6.

[313] Letter from Richard Rossi, Senior Vice President, General Counsel, American Tower, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (filed Aug. 10, 2018) ("The reason to encourage collocation is straightforward, it is faster, cheaper, more environmentally sound, and less disruptive than building new structures.").

[314] League of Az Cities and Towns Comments at 13, 29 (arguing that many small cells or micro cells can be taller and more visually intrusive than macro cells).

[315] *See, e.g.,* Letter from Geoffrey C. Beckwith, Executive Director & CEO, Mass. Municipal. Assoc., Boston, MA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, (filed Sept. 11, 2018) (Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter); Mike Posey Sept. 11, 2018 *Ex Parte* Letter; Letter from John A. Barbish, Mayor, City of Wickliffe, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 13, 2018); Letter from Pauline Russo Cutter, Mayor, City of San Leandro, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 12, 2018); Letter from Ed Waage, Mayor, City of Pismo Beach, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Scott A. Hancock, Executive Director, MML, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 18, 2018); Letter from Leon Towarnicki, City Manager, Martinsville, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Thomas Aujero Small, Mayor, City of Culver City, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018).

[316] Philadelphia Comments at 4-5 (arguing that shorter shot clocks should not be implemented because "cities are already resource constrained and any further attempt to further limit the current time periods for review of applications will seriously and adversely affect public safety as well as diminish the proper role, under our federalist system, of state and local governments in regulating local rights of way"); Smart Communities Comments, Docket 16-421, at 13 (filed Mar. 8, 2017) (included by reference by Austin's Comments); Alaska Dept. of Trans. Comments at 2. *See, e.g.,* TX Hist. Comm. Comments at 2 (current shot clocks are appropriate and that further shortening these shot clocks is not warranted); Arlington, TX Comments at 2; Letter from William Tomko, Mayor of Chagrin Falls, OH, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 1-2 (filed Sept. 17, 2018); Nina Beety Sept. 17, 2018 *Ex Parte* Letter; Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 4.

[317] League of Az Cities and Towns *et al.* Comments at 26-27, 29-35; Cities of San Antonio *et. al* Comments at 8; Philadelphia Comments at 4.

[318] T-Mobile Comments at 22; Florida Coalition Comments at 9 (creating new shot clocks would result in "too many 'shot clocks' and both the industry and local governments would be confused as to which shot clock applied to what application").

[319] While several parties proposed additional shot clock categories, we believe that the any benefit from a closer tailoring of categories to circumstances is not outweighed by the administrative burden on siting authorities and

also reject the assertion that revising the period of time to review siting decisions would amount to a nationwide land use code for wireless siting.[320] Our approach is consistent with the Model Code for Municipalities that recognizes that the shot clocks that we are adopting for the review of Small Wireless Facility deployment applications correctly balance the needs of local siting agencies and wireless service providers.[321] Our balance of the relevant considerations is informed by our experience with the previously adopted shot clocks, the record in this proceeding, and our predictive judgment about the effectiveness of actions taken here to promote the provision of personal wireless services.

111. For similar reasons as set forth above, we also find it reasonable to establish a new 90 day Section 332 shot clock for new construction of Small Wireless Facilities. Ninety days is a presumptively reasonable period of time for localities to review such siting applications. Small Wireless Facilities have far less visual and other impact than the facilities we considered in 2009, and should accordingly require less time to review.[322] Indeed, some state and local governments have already adopted 60-day maximum reasonable periods of time for review of *all* small cell siting applications, and, even in the absence of such maximum requirements, several are already reviewing and approving small-cell siting applications within 60 days or less after filing.[323] Numerous industry commenters advocated a 90-day shot clock for all non-collocation deployments.[324] Based on this record, we find it reasonable to conclude that review of an application to deploy a Small Wireless Facility using a new structure warrants more review time than a mere collocation, but less than the construction of a macro tower.[325] For the reasons explained below, we

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providers to manage these categories. *See* TX Hist. Comm. Comments at 2 (stating that it "could support a shorter review period for new structures less than fifty (50) feet tall, or where structures are located within or adjacent to existing utility rights-of-way (but not transportation rights-of-way) with existing utility structures taller than the proposed telecommunications structure"); Georgia Dept. of Trans. Comments at 2 (stating that time frames based on the zoning area are reasonable).

[320] Cities of San Antonio *et. al* Comments, Exh. A at 17-18. In the same vein, the Florida Department of Transportation contends that "[p]ermit review times should comply with state statutes," especially if the industry insists on being treated similarly as other utilities. AASHTO Comments, Attach. at 13 (Florida Dept. of Trans. Comments); *see also* Alaska Dept. of Trans. Comments at 2; TX Dept. of Trans. Comments at 2 (explaining that variations in topography, weather, government interests, and state and local political structure counsel against standardized nationwide shot clocks). The Maryland Department of Transportation is concerned about the shortened shot clocks proposed because they would conflict with a Maryland law that requires a 90-day comment period in considering wireless siting applications and because certain applications can be complex and necessitate longer review periods. AASHTO Comments, Attach. at 40 (MD Dept. of Trans. Comments).

[321] BDAC Model Municipal Code at § 3.2a(i)(B).

[322] CTIA Comments, Attach. 1 at 38.

[323] T-Mobile Comments at 19-20 (stating that some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks); Incompas Reply at 9 (stating that there is no basis for differing time-periods for similarly-situated small cell installation requests, and the lack of harmonization could discourage the use of a more efficient infrastructure); CCA Comments at 14 n.52 (citing CCA Streamlining Reply at 7-8 that in Houston, Texas, the review process for small cell deployments "usually takes 2 weeks, but no more than 30 days to process and complete the site review. In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days").

[324] CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities); CTIA Comments at 11-12 (asserting that the existing 150-day review period for new wireless sites should be shortened to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); ExteNet Comments at 8 (asserting that the Commission should accelerate the shot clock for all other non-collocation applications, including those for new DNS poles, from 150 days to 90 days); WIA Reply at 2.

[325] CCUA argues that the new shot clocks would force siting authorities to deny applications when they find that applications are incomplete. Letter from Kenneth S. Fellman, Counsel, CCUA, to Marlene H. Dortch, Secretary,

also specify today a provision that will initially reset these two new shot clocks in the event that a locality receives a materially incomplete application.

112. Finally, we note that our 60- and 90-day approach is similar to that in pending legislation that has bipartisan congressional support, and is consistent with the Model Code for Municipalities. Specifically, the draft STREAMLINE Small Cell Deployment Act, would apply a 60-day shot clock to collocation of small personal wireless service facilities and a 90-day shot clock to any other action relating to small personal wireless service facilities.[326] Further, the Model Code for Municipalities recommended by the FCC's Broadband Deployment Advisory Committee also utilizes this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures.[327]

2. Batched Applications for Small Wireless Facilities

113. Given the way in which Small Wireless Facilities are likely to be deployed, in large numbers as part of a system meant to cover a particular area, we anticipate that some applicants will submit "batched" applications: multiple separate applications filed at the same time, each for one or more sites *or* a single application covering multiple sites.[328] In the *Wireless Infrastructure NPRM/NOI*, the Commission asked whether batched applications should be subject to either longer or shorter shot clocks than would apply if each component of the batch were submitted separately.[329] Industry commenters contend that the shot clock applicable to a batch or a class of applications should be no longer than that applicable to an individual application of the same class.[330] On the other hand, several commenters, contend that batched applications have often been proposed in historic districts and historic buildings (areas that require a more complex review process), and given the complexities associated with reviews of that type, they urge the Commission not to apply shorter shot clocks to batched applications.[331] Some localities also argue that a single, national shot clock for batched applications would fail to account for unique local circumstances.[332]

114. We see no reason why the shot clocks for batched applications to deploy Small Wireless Facilities should be longer than those that apply to individual applications because, in many cases, the batching of such applications has advantages in terms of administrative efficiency that could actually

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FCC, WT Docket No. 17-79 et al., at 3 (filed Sept. 18, 2018) (Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter). We disagree that this would be the outcome in such an instance because, as explained below, siting authorities can toll the shot clocks upon a finding of incompleteness.

[326] STREAMLINE Small Cell Deployment Act, S. 3157, 115th Cong. (2018).

[327] BDAC Model Municipal Code at § 3.2a(i)(B),

[328] We define either scenario as "batching" for the purpose of our discussion here.

[329] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 18; *see also Mobilitie PN*, 31 FCC Rcd at 13371.

[330] *See, e.g.,* Extenet Comments at 10-11 ("The Commission should not adopt a longer shot clock for batches of multiple DNS applications."); Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); CCA Comments at 16 ("The FCC also should ensure that batch applications are not saddled with a longer shot clock than those afforded to individual siting applications . . . ."); Verizon Comments at 42 ("The same 60-day shot clock should apply to applications proposing multiple facilities—so called 'batch applications.'"); Crown Castle Comments at 30 ("Crown Castle also does not support altering the deadline for 'batches' of requests."); T-Mobile Comments at 22-23 ("[A]n application that batches together similar numbers of small cells of like character and in proximity to one another should also be able to be reviewed within the same time frame . . . ."); CTIA Comments at 17 ("There is, however, no need for the Commission to establish different shot clocks for batch processing of similar facilities . . . .").

[331] San Antonio Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket No. 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

[332] Cities of San Antonio *et al*. Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

make review easier.[333] Our decision flows from our current Section 332 shot clock policy. Under our two existing Section 332 shot clocks, if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting agency.[334] These multiple siting applications are equivalent to a batched application and therefore the shot clocks for batching should follow the same rules as if the applications were filed separately. Accordingly, when applications to deploy Small Wireless Facilities are filed in batches, the shot clock that applies to the batch is the same one that would apply had the applicant submitted individual applications. Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

115. We recognize the concerns raised by parties arguing for a longer time period for at least some batched applications, but conclude that a separate rule is not necessary to address these concerns. Under our approach, in extraordinary cases, a siting authority, as discussed below, can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources.[335] Thus, contrary to some localities' arguments,[336] our approach provides for a certain degree of flexibility to account for exceptional circumstances. In addition, consistent with, and for the same reasons as our conclusion below that Section 332 does not permit states and localities to prohibit applicants from requesting multiple types of approvals simultaneously,[337] we find that Section 332(c)(7)(B)(ii) similarly does not allow states and localities to refuse to accept batches of applications to deploy Small Wireless Facilities.

B. New Remedy for Violations of the Small Wireless Facilities Shot Clocks

116. In adopting these new shot clocks for Small Wireless Facility applications, we also provide an additional remedy that we expect will substantially reduce the likelihood that applicants will need to pursue additional and costly relief in court at the expiration of those time periods.

117. At the outset, and for the reasons the Commission articulated when it adopted the 2009 shot clocks, we determine that the failure of a state or local government to issue a decision on a Small Wireless Facility siting application within the presumptively reasonable time periods above will constitute a "failure to act" within the meaning of Section 332(c)(7)(B)(v). Therefore, a provider is, at a minimum, entitled to the same process and remedies available for a failure to act within the new Small Wireless Facility shot clocks as they have been under the FCC's 2009 shot clocks. But we also add an additional remedy for our new Small Wireless Facility shot clocks.

118. State or local inaction by the end of the Small Wireless Facility shot clock will function not only as a Section 332(c)(7)(B)(v) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II). Accordingly, we would expect the state or local government to issue all necessary permits without further delay. In cases where such action is not taken, we assume, for the reasons discussed below, that the applicant

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[333] *See, e.g.,* Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); Verizon Comments at 42; CTIA Comments at 17.

[334] WIA Comments at 27 ("Merely bundling similar sites into a single batched application should not provide a locality with more time to review a single batched application than to process the same applications if submitted individually.").

[335] *See infra* paras. 117, 119. *See* Letter from Nina Beety, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 17, 2018); Letter from Dave Ruller, City Manager, City of Kent, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 18, 2018).

[336] Cities of San Antonio *et al*. Comments, Exh. A at 17, 19-20; *see also* Smart Communities Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

[337] *See infra* para. 144.

would have a straightforward case for obtaining expedited relief in court.[338]

119. As discussed in the Declaratory Ruling, a regulation under Section 332(c)(7)(B)(i)(II) constitutes an effective prohibition if it materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.[339] Missing shot clock deadlines would thus presumptively have the effect of unlawfully prohibiting service in that such failure to act can be expected to materially limit or inhibit the introduction of new services or the improvement of existing services.[340] Thus, when a siting authority misses the applicable shot clock deadline, the applicant may commence suit in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II), in addition to a violation of Section 332(c)(7)(B)(ii), as discussed above. The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services.

120. Given the seriousness of failure to act within a reasonable period of time, we expect, as noted above, siting authorities to issue without any further delay all necessary authorizations when notified by the applicant that they have missed the shot clock deadline, absent extraordinary circumstances. Where the siting authority nevertheless fails to issue all necessary authorizations and litigation is commenced based on violations of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii), we expect that applicants and other aggrieved parties will likely pursue equitable judicial remedies.[341] Given the relatively low burden on state and local authorities of simply acting—one way or the other—within the Small Wireless Facility shot clocks, we think that applicants would have a relatively low hurdle to clear in establishing a right to expedited judicial relief. Indeed, for violations of Section 332(c)(7)(B), courts commonly have based the decision whether to award preliminary and permanent injunctive relief on several factors. As courts have concluded, preliminary and permanent injunctions fulfill Congressional intent that action on applications be timely and that courts consider violations of Section 332(c)(7)(B) on an expedited basis.[342] In addition, courts have observed that "[a]lthough Congress in the Telecommunications Act left intact some of local zoning boards' authority under state law," they should not be owed deference on issues relating to Section 332(c)(7)(B)(ii), meaning that "in the majority of cases the proper remedy for a zoning board decision that violates the Act will be an order. . . instructing the board to authorize construction."[343] Such relief also is supported where few or no issues remain to be decided, and those that remain can be addressed by a court.[344]

121. Consistent with those sensible considerations reflected in prior precedent, we expect that

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[338] Where we discuss litigation here, we refer, for convenience, to "the applicant" or the like, since that is normally the party that pursues such litigation. But we reiterate that under the Act, "[a]ny person adversely affected by" the siting authority's failure to act could pursue such litigation. 47 U.S.C. § 332(c)(7)(B)(v).

[339] *See supra* paras. 34-42.

[340] *Id.*

[341] *See, e.g.*, *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

[342] *See, e.g.*, *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 41 (1st Cir. 2014) (addressing claimed violation of Section 332(c)(7)(B)(i)(II) of the Act); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2002) (*Nat'l Tower*) (same); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999) (addressing violation of Section 332(c)(7)(B)(v) of the Act); *AT&T Mobility Servs., LLC v. Vill. of Corrales*, 127 F. Supp. 3d 1169, 1175-76 (D.N.M. 2015) (addressing violation of Section 332(c)(7)(B)(i)(II)); *Bell Atl. Mobile of Rochester v. Town of Irondequoit*, 848 F. Supp. 2d 391, 403 (W.D.N.Y. 2012) (addressing violation of Section 332(c)(7)(B)(ii)); *New Cingular Wireless PCS, LLC v. City of Manchester*, 2014 WL 79932, *8 (D.N.H. Feb. 28, 2014) (addressing violation of Section 332(c)(7)(B)(i)(II)).

[343] *See, e.g.*, *Nat'l Tower*, 297 F.3d at 21-22; *AT&T Mobility*, 127 F. Supp. 3d at 1176.

[344] *See, e.g.*, *Green Mountain Realty*, 750 F.3d at 41-42; *Nat'l Tower*, 297 F.3d at 24-25; *Cellular Tel. Co.*, 166 F.3d at 497; *Bell Atl. Mobile*, 848 F. Supp. 2d at 403; *New Cingular Wireless PCS*, 2014 WL 79932, *8.

courts will typically find expedited and preliminary and permanent injunctive relief warranted for violations of Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii) of the Act when addressing the circumstances discussed in this Order. Prior findings that preliminary and permanent injunctive relief best advances Congress's intent in assuring speedy resolution of issues encompassed by Section 332(c)(7)(B) appear equally true in the case of deployments of Small Wireless Facilities covered by our interpretation of Section 332(c)(7)(B)(ii) in this Third Report and Order.[345] Although some courts, in deciding whether an injunction is the appropriate form of relief, have considered whether a siting authority's delay resulted from bad faith or involved other abusive conduct,[346] we do not read the trend in court precedent overall to treat such considerations as more than relevant (as opposed to indispensable) to an injunction. We believe that this approach is sensible because guarding against barriers to the deployment of personal wireless facilities not only advances the goal of Section 332(c)(7)(B) but also policies set out elsewhere in the Communications Act and 1996 Act, as the Commission recently has recognized in the case of Small Wireless Facilities.[347] This is so whether or not these barriers stem from bad faith. Nor do we anticipate that there would be unresolved issues implicating the siting authority's expertise and therefore requiring remand in most instances.

122. In light of the more detailed interpretations that we adopt here regarding reasonable time frames for siting authority action on specific categories of requests—including guidance regarding circumstances in which longer time frames nonetheless can be reasonable—we expect that litigation generally will involve issues that can be resolved entirely by the relevant court. Thus, as the Commission has stated in the past, "in the case of a failure to act within the reasonable time frames set forth in our rules, and absent some compelling need for additional time to review the application, we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief."[348] We therefore caution those involved in potential future disputes in this area against placing too much weight on the Commission's recognition that a siting authority's failure to act within the associated timeline might not always result in a preliminary or permanent injunction under the Section 332(c)(7)(B) framework while placing too little weight on the Commission's recognition that policies established by federal communications laws are advanced by streamlining the process for deploying wireless facilities.

123. We anticipate that the traditional requirements for awarding preliminary or permanent injunctive relief would likely be satisfied in most cases and in most jurisdictions where a violation of 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is found. Typically, courts require movants to establish the following elements of preliminary or permanent injunctive relief: (1) actual success on the merits for permanent injunctive relief and likelihood of success on the merits for preliminary injunctive relief, (2) continuing irreparable injury, (3) the absence of an adequate remedy at law, (4) the injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (5) award of injunctive relief would not be adverse to the public interest.[349] Actual success on the merits would be

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[345] *See Green Mountain Realty Corp.*, 750 F.3d at 41 (reasoning that remand to the siting authority "would not be in accordance with the text or spirit of the Telecommunications Act); *Cellular Tel. Co*, 166 F.3d at 497 (noting "that injunctive relief best serves the TCA's stated goal of expediting resolution" of cases brought under 47 U.S.C. § 332(c)(7)(B)(v)).

[346] *See, e.g.*, *Nat'l Tower*, 297 F.3d at 23; *Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29, 32 (2d Cir. 2017) (Summary Order).

[347] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 62; *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332, para. 5.

[348] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para, 284.

[349] *Pub. Serv. Tel. Co. v. Georgia Pub. Serv. Comm'n*, 755 F. Supp. 2d 1263, 1273 (N.D. Ga.), *aff'd*, 404 F. App'x 439 (11th Cir. 2010); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004); *Nat. Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914–15 (1st Cir. 1989).

demonstrated when an applicant prevails in its failure-to-act or effective prohibition case; likelihood of success would be demonstrated because, as discussed, missing the shot clocks, depending on the type of deployment, presumptively prohibits the provision of personal wireless services and/or violates Section 332(c)(7)(B)(ii)'s requirement to act within a reasonable period of time.[350] Continuing irreparable injury likely would be found because remand to the siting authority "would serve no useful purpose" and would further delay the applicant's ability to provide personal wireless service to the public in the area where deployment is proposed, as some courts have previously determined.[351] There also would be no adequate remedy at law because applicants "have a federal statutory right to participate in a local [personal wireless services] market free from municipally-imposed barriers to entry," and money damages cannot directly substitute for this right.[352] The public interest and the balance of harms also would likely favor the award of a preliminary or permanent injunction because the purpose of Section 332(c)(7) is to encourage the rapid deployment of personal wireless facilities while preserving, within bounds, the authority of states and localities to regulate the deployment of such facilities, and the public would benefit if further delays in the deployment of such facilities—which a remand would certainly cause—are prevented.[353] We also expect that the harm to the siting authority would be minimal because the only right of which it would be deprived by a preliminary or permanent injunction is the right to act on the siting application beyond a reasonable time period,[354] a right that "is not legally cognizable, because under [Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii)], the [siting authority] has no right to exercise this power."[355] Thus, in the context of Small Wireless Facilities, we expect that the most appropriate remedy in typical cases involving a violation of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is the award of injunctive relief in the form of an order to issue all necessary authorizations.[356]

124. Our approach advances Section 332(c)(7)(B)(v)'s provision that certain siting disputes, including those involving a siting authority's failure to act, shall be heard and decided by a court of competent jurisdiction on an expedited basis. The framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain.[357] This accords with the Fifth Circuit's recognition in *City of Arlington*

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Note that the standards for permanent injunctive relief differ in some respects among the circuits and the states. For example, "most courts do not consider the public interest element in deciding whether to issue a permanent injunction, though the Third Circuit has held otherwise." *Klay*, 376 F.3d at 1097. Courts in the Second Circuit consider only irreparable harm and success on the merits. *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004). The Third and Fifth Circuits have precedents holding that irreparable harm is not an essential element of a permanent injunction. *See Roe v. Operation Rescue*, 919 F.2d 857, 873 n. 8 (3d Cir. 1990); *Lewis v. S. S. Baune*, 534 F.2d 1115, 1123–24 (5th Cir. 1976). For the sake of completeness, our analysis discusses all of the elements that have been used in decided cases.

[350] *See New Jersey Payphone*, 130 F. Supp. 2d at 640.

[351] *See Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d at 225–26 (quoting *Nextel Partners, Inc. v. Town of Amherst, N.Y.,* 251 F. Supp. 2d 1187, 1201 (W.D.N.Y. 2003)); *see Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 318 (N.D.N.Y. 2017).

[352] *New Jersey Payphone*, 130 F. Supp. 2d at 641.

[353] *City of Arlington*, 668 F.3d at 234.

[354] *Contra* 47 U.S.C. 332(c)(7)(B)(ii).

[355] *New Jersey Payphone*, 130 F. Supp. 2d at 641.

[356] *See Cellular Tel. Co*, 166 F.3d at 496. While our discussion here focused on cases that apply the permanent injunction standard, we have the same view regarding relief under the preliminary injunction standard when a locality fails to act within the applicable shot clock periods. *See, e.g.*, *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008) (discussing the standard for preliminary injunctive relief).

[357] Several commenters support this position, urging the Commission to reaffirm that adversely affected applicants must seek redress from the courts. *See, e.g.,* League of Ar Cities and Towns *et al*. Comments at 14-21; Philadelphia

that the Act could be read "as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision."[358]

125. The guidance provided here should reduce the need for, and complexity of, case-by-case litigation and reduce the likelihood of vastly different timing across various jurisdictions for the same type of deployment.[359] This clarification, along with the other actions we take in this Third Report and Order, should streamline the courts' decision-making process and reduce the possibility of inconsistent rulings. Consequently, we believe that our approach helps facilitate courts' ability to "hear and decide such [lawsuits] on an expedited basis," as the statute requires.[360]

126. Reducing the likelihood of litigation and expediting litigation where it cannot be avoided should significantly reduce the costs associated with wireless infrastructure deployment. For instance, WIA states that if one of its members were to challenge every shot clock violation it has encountered, it would be mired in lawsuits with forty-six localities.[361] And this issue is likely to be compounded given the expected densification of wireless networks. Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026.[362] If, for example, 30 percent (based on T-Mobile's experience[363]) of these expected deployments are not acted upon within the applicable shot clock

(Continued from previous page)
Comments at 2; Philadelphia Reply at 4-6; City of San Antonio *et al*. Comments, Exh. B at 14-15; San Francisco Comments at 16-17; Colorado Munis Comments at 7; CWA Reply at 5; Fairfax County Comments at 12-15; AASHTO Comments at 20-21, 23 (ID Dept. of Trans. Comments); NATOA Comments, Attach. 3 at 53-55; NLC Comments at 3-4; Smart Communities Comments at 39-43. Our interpretation thus preserves a meaningful role for courts under Section 332(c)(7)(B)(v), contrary to the concern some commenters expressed with particular focus on alternative proposals we do not adopt, such as a deemed granted remedy. *See, e.g.*, Colorado Comm. and Utility All. *et al*. Comments at 6-7; League of Az Cities and Towns *et al*. Comments at 14-23; Philadelphia Comments at 2; Baltimore Reply at 11; City of San Antonio *et al*. Reply at 2; San Francisco Reply at 6; League of Az Cities and Towns *et al*. Reply at 2-3. In addition, our interpretation of Section 332(c)(7)(B)(ii) does not result in a regime in which the Commission could be seen as implicitly issuing local land use permits, a concern that states and localities raised regarding an absolute deemed granted remedy, because applicants are still required to petition a court for relief, which may include an injunction directing siting authorities to grant the application. *See* Alexandria Comments at 2; Baltimore Reply at 10; Philadelphia Reply at 8; Smart Cities Coal Comments at ii, 4, 39.

[358] *City of Arlington*, 668 F.3d at 250.

[359] The likelihood of non-uniform or inconsistent rulings on what time frames are reasonable or what circumstances could rebut the presumptive reasonableness of the shot clock periods stems from the intrinsic ambiguity of the phrase "reasonable period of time," which makes it susceptible of varying constructions. *See City of Arlington*, 668 F.3d at 255 (noting "that the phrase 'a reasonable period of time,' as it is used in § 332(c)(7)(B)(ii), is inherently ambiguous"); *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them."). *See also* Lightower Comments at 3 ("The lack of consistent guidance regarding statutory interpretation is creating uncertainty at the state and local level, with many local jurisdictions seeming to simply make it up as they go. Differences in the federal courts are only exacerbating the patchwork of interpretations at the state and local level.").

[360] 47 U.S.C. § 332(c)(7)(B)(v).

[361] WIA Comments at 16.

[362] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13363-64 (2016) (citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).

[363] T-Mobile Comments at 8.

period, that would translate to 45,000 violations in 2018 and 240,000 violations in 2026.[364] These sheer numbers would render it practically impossible to commence Section 332(c)(7)(B)(v) cases for all violations, and litigation costs for such cases likely would be prohibitive and could virtually bar providers from deploying wireless facilities.[365]

127. Our updated interpretation of Section 332(c)(7) for Small Wireless Facilities effectively balances the interest of wireless service providers to have siting applications granted in a timely and streamlined manner[366] and the interest of localities to protect public safety and welfare and preserve their authority over the permitting process.[367] Our specialized deployment categories, in conjunction with the acknowledgement that in rare instances, it may legitimately take longer to act, recognize that the siting process is complex and handled in many different ways under various states' and localities' long-established codes. Further, our approach tempers localities' concerns about the inflexibility of the *Wireless Infrastructure NPRM/NOI*'s deemed granted proposal because the new remedy we adopt here accounts for the breadth of potentially unforeseen circumstances that individual localities may face and the possibility that additional review time may be needed in truly exceptional circumstances.[368] We further find that our interpretive framework will not be unduly burdensome on localities because a number of states have already adopted even more stringent deemed granted remedies.[369]

128. At the same time, there may be merit in the argument made by some commenters that the FCC has the authority to adopt a deemed granted remedy.[370] Nonetheless, we do not find it necessary to decide that issue today, as we are confident that the rules and interpretations adopted here will provide substantial relief, effectively avert unnecessary litigation, allow for expeditious resolution of siting applications, and strike the appropriate balance between relevant policy considerations and statutory

[364] These numbers would escalate under WIA's estimate that 70 percent of small cell deployment applications exceed the applicable shot clock. WIA Comments at 7.

[365] *See* CTIA Comments at 9 (explaining that, "[p]articularly for small cells, the expense of litigation can rarely be justified); WIA Comments at 16 (quoting and discussing Lightower's Comments in 2016 Streamlining Public Notice); T-Mobile Comment, Attach. A at 8.

[366] *See, e.g.,* AT&T Comments at 26; CCA Comments at 7, 9, 11-12; CCA Reply at 5-6, 8; Cityscape Consultants Comments at 1; CompTIA Comments at 3; CIC Comments at 17-18; Crown Castle Comments at 23-28; Crown Castle Reply at 3; CTIA Comments at 7-9, Attach. 1 at 5, 39-43, Attach. 2 at 3, 23-24; GCI Comments at 5-9; Lightower Comments at 7, 18-19; Samsung Comments at 6; T-Mobile Comments at 13, 16, Attach. A at 25; WIA Comments at 15-17.

[367] *See, e.g.,* Arizona Munis Comments at 23; Arizona Munis Reply at 8-9; Baltimore Reply at 10; Lansing Comments at 2; Philadelphia Reply at 9-12; Torrance Comments at 1-2; CPUC Comments at 14; CWA Reply at 5; Minnesota Munis Comments at 9; *but see* CTIA Reply at 9.

[368] *See, e.g.,* Chicago Comments at 2 (contending that wireless facilities siting entails fact-specific scenarios); AASHTO Comments, Attach. at 40 (MD Dept. of Trans. SHA Comments) (describing the complexity of reviewing proposed deployments on rights-of-way); AASHTO Comments, Attach. at 51 (Wyoming DOT Comments); Baltimore Reply at 11; Philadelphia Comments at 4; Alexandria Comments at 6; Mukilteo Comments at 1; Alaska Dept. of Trans. Comments at 2; Alaska SHPO Reply at 1.

[369] *See* Fla. Stat. Ann. § 365.172(13)(d)(3.b); Ariz. Rev. Stat. Ann. § 9-594(C) (3); 53 Pa. Stat. Ann. § 11702.4; Cal. Gov't Code § 65964.1; Va. Code Ann. § 15.2-2232; Va. Code Ann. § 15.2-2316.4; Va. Code Ann. § 56-484.29; Va. Code Ann. § 56-484.28; Ky. Rev. Stat. Ann. § 100.987; N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. Ann. § 66.0404; Kan. Stat. Ann. § 66-2019(h)(3); Del. Code Ann. tit. 17, § 1609; Iowa Code Ann. § 8C.7A(3)(c)(2); Iowa Code Ann. § 8C.4(4)(5); Iowa Code Ann. § 8C.5; Mich. Comp. Laws Ann. § 125.3514. *See also* CCA Reply at 9.

[370] *See, e.g.*, CTIA Comments at 10-11; T-Mobile Comments at 15-18, Verizon Comments at 37, 39-41, WIA Comments at 17-20.

objectives[371] guiding our analysis.[372]

129. We expect that our decision here will result in localities addressing applications within the applicable shot clocks in a far greater number of cases. Moreover, we expect that the limited instances in which a locality does not issue a decision within that time period will result in an increase in cases where the locality then issues all needed permits. In what we expect would then be only a few cases where litigation commences, our decision makes clear the burden that localities would need to clear in those circumstances.[373] Our updated interpretation of Section 332 for Small Wireless Facilities will help courts to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions.[374] Placing this burden on the siting authority should address the concerns raised by supporters of a deemed granted remedy—that filing suit in court to resolve a siting dispute is burdensome and expensive on applicants, the judicial system, and citizens—because our interpretations should expedite the courts'

[371] *City of Arlington*, 668 F.3d at 234 (noting that the purpose of Section 332(c)(7) is to balance the competing interests to preserve the traditional role of state and local governments in land use and zoning regulation and the rapid development of new telecommunications technologies).

[372] *See supra* paras. 119-20 (explaining how the remedy strikes the proper balance between competing interests). Because our approach to shot clocks involves our interpretation of Section 332(c)(7)(B)(ii) and the consequences that flow from that—and does not rely on Section 253 of the Act—we need not, and thus do not, resolve disputes about the potential use of Section 253 in this specific context, such as whether it could serve as authority for a deemed granted or similar remedy. *See, e.g.*, San Francisco Comments at 9-10; CPUC Comments at 10; Smart Communities Comments at 4-11, 21; Smart Communities Reply at 78-79; League of Az Cities and Towns *et al*. Reply at 4; Alexandria Comments at 5; Irvine Comments at 5; Minnesota Cities Comments at 11-13; Philadelphia Reply at 2, 7; Fairfax County Comments at 17; Greenlining Reply at 4; NRUC Reply at 3-5; NATOA June 21, 2018 *Ex Parte* Letter. To the extent that commenters raise arguments regarding the proper interpretation of "prohibit or have the effect of prohibiting" under Section 253 or the scope of Section 253, these issues are discussed in the Declaratory Ruling, *see supra* paras. 34-42.

[373] *See* App Association Comments at 9; CCI Comments at 6-8; Conterra Comments at 14-17; ExteNet Comments at 13; T-Mobile Comments at 17; Quintillion Reply at 6; Verizon Comments at 8-18; WIA Comments at 9-10. WIA contends that adoption of a deemed granted remedy is needed because various courts faced with shot clock claims have failed to provide meaningful remedies, citing as an example a case in which the court held that the town failed to act within the shot clock period but then declined to issue an injunction directing the siting agency to grant the application. WIA Comments at 16-17. However, a number of cases involving violations of the "reasonable period of time" requirement of Section 332(c)(7)(B)(ii)—decided either before or after the promulgation of the Commission's Section 332(c)(7)(B)(ii) shot clocks—have concluded with an award of injunctive relief. *See, e.g.*, *Upstate Cellular Network*, 257 F. Supp. 3d at 318 (concluding that the siting authority's failure to act within the 150-day shot clock was unreasonable and awarding a permanent injunction in favor of the applicant); *Am. Towers, Inc. v. Wilson County*, No. 3:10-CV-1196, 2014 WL 28953, at *13–14 (M.D. Tenn. Jan. 2, 2014) (finding that the county failed to act within a reasonable period of time, as required under Section 332(c)(7)(B)(ii), and granting an injunction directing the county to approve the applications and issue all necessary authorizations for the applicant to build and operate the proposed tower); *Cincinnati Bell Wireless, LLC v. Brown County*, Ohio, No. 1:04-CV-733, 2005 WL 1629824, at *4–5 (S.D. Ohio July 6, 2005) (finding that the county failed to act within a reasonable period of time under Section 332(c)(7)(B)(ii) and awarding injunctive relief). *But see Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29 (2d Cir. 2017) (declining to reverse district court's refusal to issue injunction compelling immediate grant of application). Courts have also held "that injunctive relief best serves the TCA's stated goal of expediting resolution of" cases brought under Section 332(c)(7)(B)(v). *Cellular Tel. Co.*, 166 F.3d at 497; *Brehmer v. Planning Bd. of Town of Wellfleet*, 238 F.3d 117, 121 (1st Cir. 2001). Under these circumstances, we do not agree with WIA that courts have failed to provide meaningful remedies to such an extent as would require the adoption of a deemed granted remedy.

[374] *Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d at 383, 387 (more than four-and-a-half years for Sprint to prevail in court), *aff'd*, 606 F. App'x 669 (3d Cir. 2015); *Vill. of Corrales*, 127 F. Supp. 3d 1169 (nineteen months from complaint to grant of summary judgment); *Orange County–Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), *aff'd sub nom.*, *Orange County–County Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 632 F. App'x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).

decision-making process.

130. We find that the more specific deployment categories and shot clocks, which presumptively represent the reasonable period within which to act, will prevent the outcome proponents of a deemed granted remedy seek to avoid: that siting agencies would be forced to reject applications because they would be unable to review the applications within the prescribed shot clock period.[375] Because the more specific deployment categories and shot clocks inherently account for the nature and scope of a variety of deployment applications, our new approach should ensure that siting agencies have adequate time to process and decide applications and will minimize the risk that localities will fail to act within the established shot clock periods. Further, in cases where a siting authority misses the deadline, the opportunity to demonstrate exceptional circumstances provides an effective and flexible way for siting agencies to justify their inaction if genuinely warranted. Our overall framework, therefore, should prevent situations in which a siting authority would feel compelled to summarily deny an application instead of evaluating its merits within the applicable shot clock period.[376] We also note that if the approach we take in this Order proves insufficient in addressing the issues it is intended to resolve, we may again consider adopting a deemed granted remedy in the future.

131. Some commenters also recommend that the Commission issue a list of "Best Practices" or "Recommended Practices."[377] The joint comments filed by NATOA and other government associations suggest the "development of an informal dispute resolution process to remove parties from an adversarial relationship to a partnership process designed to bring about the best result for all involved" and the development of "a mediation program which could help facilitate negotiations for deployments for parties who seem to have reached a point of intractability."[378] Although we do not at this time adopt these proposals, we note that the steps taken in this order are intended to facilitate cooperation between parties to reach mutually agreed upon solutions. For example, as explained below, mutual agreement between the parties will toll the running of the shot clock period, thereby allowing parties to resolve disagreements in a collaborative, instead of an adversarial, setting.[379]

C. Clarification of Issues Related to All Section 332 Shot Clocks

1. Authorizations Subject to the "Reasonable Period of Time" Provision of Section 332(c)(7)(B)(ii)

132. As indicated above, Section 332(c)(7)(B)(ii) requires state and local governments to act "within a reasonable period of time" on "any request for authorization to place, construct, or modify personal wireless service facilities."[380] Neither the *2009 Declaratory Ruling* nor the *2014 Wireless Infrastructure Order* addressed the specific types of authorizations subject to this requirement. Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment.[381] Local siting authorities, on the other hand, argue that a broad application of Section 332 will harm public safety and welfare by not

[375] Baltimore Reply at 12; Mukilteo Comments at 1; Cities of San Antonio *et al*. Reply at 10; Washington Munis Comments, Attach. 1 at 8-9; *but see* CTIA Reply at 9.

[376] We also note that a summary denial of a deployment application is not permitted under Section 332(c)(7)(B)(iii), which requires the siting authority to base denials on "substantial evidence contained in a written record."

[377] KS Rep. Sloan Comments at 2; Nokia Comments at 10.

[378] NATOA *et al*. Comments at 16-17.

[379] *See infra* paras. 145-46.

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

[381] *See, e.g.,* CTIA Comments at 15; CTIA Reply at 10; Mobilitie Comments at 6-7; WIA Comments at 24; WIA Reply at 13; T-Mobile Comments at 21-22; CCA Reply at 9; Sprint June 18 *Ex Parte* at 3.

giving them enough time to evaluate whether a proposed deployment endangers the public.[382] They assert that building and encroachment permits should not be subsumed within the shot clocks because these permits incorporate essential health and safety reviews.[383] After carefully considering these arguments, we find that "any request for authorization to place, construct, or modify personal wireless service facilities" under Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. This interpretation finds support in the record and is consistent with the courts' interpretation of this provision and the text and purpose of the Act.

133. The starting point for statutory interpretation is the text of the statute,[384] and here, the statute is written broadly, applying to "any" request for authorization to place, construct, or modify personal wireless service facilities. The expansive modifier "any" typically has been interpreted to mean "one or some indiscriminately of whatever kind," unless Congress "add[ed] any language limiting the breadth of that word."[385] The title of Section 332(c)(7) ("Preservation of local zoning authority") does not restrict the applicability of this section to zoning permits in light of the clear text of Section 332(c)(7)(B)(ii).[386] The text encompasses not only requests for authorization to *place* personal wireless service facilities, e.g., zoning requests, but also requests for authorization to *construct* or *modify* personal wireless service facilities. These activities typically require more than just zoning permits. For example, in many instances, localities require building permits, road closure permits, and the like to make construction or modification possible.[387] Accordingly, the fact that the title standing alone could be read

[382] League of Az Cities and Towns *et al*. Reply at 21-22. *See also* Arlington County, Sept. 18 *Ex Parte* Letter at 1-2 (asserting that it is infeasible to have the shot clock encompass all steps related the small cell siting process because there is no single application to get ROW access, public notice, lease negotiations, road closures, etc.; because these are separate processes involving different departments; and because the timeline in some instances will depend on the applicant, or the required information may interrelate in a manner that makes doing them all at once infeasible); Letter from Robert McBain, Mayor, Piedmont, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 3 (filed Sept. 18, 2018).

[383] League of Az Cities and Towns *et al*. Reply at 21-22.

[384] *Implementation of Section 402(b)(1)(a) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 11233 (1996); *2002 Biennial Regulatory Review*, Report, 18 FCC Rcd 4726, 4731–32 (2003); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Communications Assistance for Law Enf't Act & Broadband Access & Servs.*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, 14992–93, para. 9 (2005) (interpreting an ambiguous statute by considering the "structure and history of the relevant provisions, including Congress's stated purposes" in order to "faithfully implement[] Congress's intent"); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007) (using legislative history "to identify Congress's clear intent"); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (same).

[385] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *HUD v. Rucker*, 535 U.S. 125, 131 (2002).

[386] *See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528–29 (1947) ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text."). Our conclusion is also consistent with our interpretation that Sections 253 and 332(c)(7) apply to fees for all applications related to a Small Wireless Facility. *See supra* para. 50.

[387] *See, e.g.,* Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Cities Coal. Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

to limit Section 332(c)(7) to zoning decisions does not overcome the specific language of Section 332(c)(7)(B)(ii), which explicitly applies to a variety of authorizations.[388]

134. The purpose of the statute also supports a broad interpretation. As noted above, the Supreme Court has stated that the 1996 Act was enacted "to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies" by, *inter alia*, reducing "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers."[389] A narrow reading of the scope of Section 332 would frustrate that purpose by allowing local governments to erect impediments to the deployment of personal wireless services facilities by using or creating other forms of authorizations outside of the scope of Section 332(c)(7)(B)(ii).[390] This is especially true in jurisdictions requiring multi-departmental siting review or multiple authorizations.[391]

135. In addition, our interpretation remains faithful to the purpose of Section 332(c)(7) to balance Congress's competing desires to preserve the traditional role of state and local governments in regulating land use and zoning, while encouraging the rapid development of new telecommunications technologies.[392] Under our interpretation, states and localities retain their authority over personal wireless facilities deployment. At the same time, deployment will be kept on track by ensuring that the entire approval process necessary for deployment is completed within a reasonable period of time, as defined by the shot clocks addressed in this Third Report and Order.

136. A number of courts have either explicitly or implicitly adopted the same view, that all necessary permits are subject to Section 332. For example, in *Cox Communications PCS, L.P. v. San Marcos*, the court considered an excavation permit application as falling within the parameters of Section 332.[393] In *USCOC of Greater Missouri, LLC v. County of Franklin*, the Eighth Circuit reasoned that "[t]he issuance of the requisite building permits" for the construction of a personal wireless services facility arises under Section 332(c)(7).[394] In *Ogden Fire Co. No. 1 v. Upper Chichester Township*, the Third Circuit affirmed the district court's order compelling the township to issue a building permit for the

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[388] *See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947). If the title of Section 332(c)(7) were to control the interpretation of the text, it would render superfluous the provision of Section 332(c)(7)(B)(ii) that applies to "authorization to . . . construct, or modify personal wireless service facilities" and give effect only to the provision that applies to "authorization to place . . . personal wireless service facilities." This result would "flout[] the rule that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

[389] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. at 115 (internal quotation marks and citations omitted).

[390] For example, if we were to interpret Section 332(c)(7)(B)(ii) to cover only zoning permits, states and localities could delay their consideration of other permits (e.g., building, electrical, road closure or other permits) to thwart the proposed deployment.

[391] *See, e.g.*, Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; Smart Communities Comments at 33-34; CTIA Comments at 15 (stating that some jurisdictions "impose multiple, sequential stages of review"); WIA Comments at 24 (noting that "[m]any jurisdictions grant the application within the shot clock period only to stall on issuing the building permit"); Verizon Comments at 6 (stating that "[a] large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way"); Sprint June 18 *Ex Parte* at 3 (noting that "after a land-use permit or attachment permit is received, many localities still require electric permits, road closure permits, aesthetic approval, and other types of reviews that can extend the time required for final permission well beyond just the initial approval.").

[392] *City of Arlington*, 668 F.3d at 234.

[393] *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

[394] *USCOC of Greater Mo., LLC v. County of Franklin*, 636 F.3d 927, 931-32 (8th Cir. 2011).

construction of a wireless facility after finding that the township had violated Section 332(c)(7).[395] In *Upstate Cellular Network v. Auburn*, the court directed the city to approve the application, including site plan approval by the planning board, granting a variance by the zoning authority, and "any other municipal approval or permission required by the City of Auburn and its boards or officers, including but not limited to, a building permit."[396] And in *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, the court ordered that the locality grant "any and all permits necessary for the construction of the proposed wireless facility."[397] Our interpretation is also consistent with judicial precedents involving challenges under Section 332(c)(7)(B) to denials by a wide variety of governmental entities, many of which involved variances,[398] special use/conditional use permits,[399] land disturbing activity and excavation permits,[400] building permits,[401] and a state department of education permit to install an antenna at a high school.[402] Notably, a lot of cases have involved local agencies that are separate and distinct from the local zoning authority,[403] confirming that Section 332(c)(7)(B) is not limited in application to decisions of zoning authorities. Our interpretation also reflects the examples in the record where providers are required to obtain other types of authorizations besides zoning permits before they can "place, construct, or modify personal wireless service facilities."[404]

137. We reject the argument that this interpretation of Section 332 will harm the public because it would "mean that building and safety officials would have potentially only a few days to

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[395] *Ogden Fire Co. No. 1 v. Upper Chichester TP.*, 504 F.3d 370, 395-96 (3d Cir. 2007).

[396] *Upstate Cellular Network*, 257 F. Supp. 3d at 319.

[397] *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, 234 F. Supp. 3d 856, 872 (E.D. Ky. 2017). *Accord T-Mobile Ne. LLC v. Lowell*, Civil Action No. 11–11551–NMG, 2012 WL 6681890, *6-7, *11 (D. Mass. Nov. 27, 2012) (directing the zoning board "to issue all permits and approvals necessary for the construction of the plaintiffs' proposed telecommunications facility"); *New Par v. Franklin County Bd. of Zoning Appeals*, No. 2:09–cv–1048, 2010 WL 3603645, *4 (S.D. Ohio Sept. 10, 2010) (enjoining the zoning board to "grant the application and issue all permits required for the construction of the" proposed wireless facility).

[398] *See, e.g., New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 760 (E.D. Mich. 2001), *aff'd*, 301 F.3d 390 (6th Cir. 2002)

[399] *See, e.g., Virginia Metronet, Inc. v. Bd. of Sup'rs of James City County*, 984 F. Supp. 966, 968 (E.D. Va. 1998); *Cellular Tel. Co.*, 166 F.3d at 491; *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1303 (10th Cir. 2008); *City of Anacortes*, 572 F.3d at 989; *Helcher*, 595 F.3d at 713-14; *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1152 (S.D. Cal. 2003); *PrimeCo Pers. Commc'ns L.P. v. City of Mequon*, 242 F. Supp. 2d 567, 570 (E.D. Wis.), *aff'd*, 352 F.3d 1147 (7th Cir. 2003); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1212 (11th Cir. 2002).

[400] *See, e.g., Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005); *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

[401] *See, e.g., Upstate Cellular Network,* 257 F. Supp. 3d at 319; *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395-96 (3rd Cir. 2007).

[402] *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d 148, 150 (S.D.N.Y. 1999), *aff'd*, 283 F.3d 404 (2d Cir. 2002).

[403] *See, e.g., Tennessee ex rel. Wireless Income Props., LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005) (city public works department); *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 720 (9th Cir. 2009) (city public works director, city planning commission, and city council); *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d at 150 (New York State Department of Education).

[404] *See, e.g.,* Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Communities Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

evaluate whether a proposed deployment endangers the public."[405] Building and safety officials will be subject to the same applicable shot clock as all other siting authorities involved in processing the siting application, with the amount of time allowed varying in the rare case where officials are unable to meet the shot clock because of exceptional circumstances.

2. Codification of Section 332 Shot Clocks

138. In addition to establishing two new Section 332 shot clocks for Small Wireless Facilities, we take this opportunity to codify our two existing Section 332 shot clocks for siting applications that do not involve Small Wireless Facilities. In the *2009 Declaratory Ruling*, the Commission found that 90 days is a reasonable time frame for processing collocation applications and 150 days is a reasonable time frame to process applications other than collocations.[406] Since these Section 332 shot clocks were adopted as part of a declaratory ruling, they were not codified in our rules. In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether to modify these shot clocks.[407] We find no need to modify them here and will continue to use these shot clocks for processing Section 332 siting applications that do not involve Small Wireless Facilities.[408] We do, though, codify these two existing shot clocks in our rules alongside the two newly-adopted shot clocks so that all interested parties can readily find the shot clock requirements in one place.[409]

139. While some commenters argue for a 60-day shot clock for all collocation categories,[410] we conclude that we should retain the existing 90-day shot clock for collocations not involving Small Wireless Facilities. Collocations that do not involve Small Wireless Facilities include deployments of

[405] League of Az Cities and Towns *et al*. Reply at 21-22.

[406] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012-013, paras. 45, 48.

[407] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-33, 3334, 3337-38, paras. 6, 9, 17-19.

[408] Chicago Comments at 2 (supporting maintaining existing shot clocks); Bellevue *et al*. Comments at 13-14 (supporting maintaining existing shot clocks).

[409] We also adopt a non-substantive modification to our existing rules. We redesignate the rule adopted in 2014 to codify the Commission's implementation of the 2012 Spectrum Act, formerly designated as section 1.40001, as section 1.6100, and we move the text of that rule from Part 1, Subpart CC, to the same Subpart as the new rules promulgated in this Third Report and Order (Part 1, Subpart U). This recognizes that both sets of requirements pertain to "State and local government regulation of the placement, construction, and modification of personal wireless service facilities" (the caption of new Subpart U). The reference in paragraph (a) of that preexisting rule to 47 U.S.C. § 1455 has been consolidated with new rule section 1.6001 to reflect that all rules in Subpart U, collectively, implement both § 332(c)(7) and § 1455. With those non-substantive exceptions, the text of the 2014 rule has not been changed in any way. Contrary to the suggestion submitted by the Washington Joint Counties, *see* Letter from W. Scott Snyder et al., Counsel for the Washington Cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 6-7 (filed June 19, 2018), this change is not substantive and does not require advance notice. We find that "we have good cause to reorganize and renumber our rules in this fashion without expressly seeking comment on this change, and we conclude that public comment is unnecessary because no substantive changes are being made. Moreover, the delay engendered by a round of comment would be contrary to the public interest." *See 2017 Pole Replacement Order*, 32 FCC Rcd at 9770, para. 26; *see also* 5 U.S.C. §553(b)(B) (notice not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[410] CCIA Comments at 10; CCA Comments at 13-14; CCA Reply at 6 (arguing for 30-day shot clock for collocations and a 60-to-75-day shot clock for all other siting applications); WIA Reply at 21. *See also* Letter from Jill Canfield, NTCA Vice President Legal & Industry and Assistant General Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 19, 2018) (stating that NTCA supports a revised interpretation of the phrase "reasonable period of time" as found in Section 332(c) (7)(B)(ii) of the Communications Act as applicable to small cell facilities and that sixty days for collocations and 90 days for all other small cell siting applications should provide local officials sufficient time for review of requests to install small cell facilities in public rights-of-way).

larger antennas and other equipment that may require additional time for localities to review and process.[411] For similar reasons, we maintain the existing 150-day shot clock for new construction applications that are not for Small Wireless Facilities. While some industry commenters such as WIA, Samsung, and Crown Castle argue for a 90-day shot clock for macro cells and small cells alike, we agree with commenters such as the City of New Orleans that there is a significant difference between the review of applications for a single 175-foot tower versus the review of a Small Wireless Facility with much smaller dimensions.[412]

3. Collocations on Structures Not Previously Zoned for Wireless Use

140. Wireless industry commenters assert that they should be able to take advantage of the Section 332 collocation shot clock even when collocating on structures that have not previously been approved for wireless use.[413] Siting agencies respond that the wireless industry is effectively seeking to have both the collocation definition and a reduced shot clock apply to sites that have never been approved by the local government as suitable for wireless facility deployment.[414] We take this opportunity to clarify that for purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities. As the Commission stated in the *2009 Declaratory Ruling*, "an application is a request for collocation if it does not involve a 'substantial increase in the size of a tower' as defined in the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas."[415] The definition of "[c]ollocation" in the NPA provides for the "mounting or installation of an antenna on an existing tower, *building or structure* for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, *whether or not there is an existing antenna on the structure.*"[416] The NPA's definition of collocation explicitly encompasses collocations on structures and buildings that have not yet been zoned for wireless use. To interpret the NPA any other way would be unduly narrow and there is no persuasive reason to accept a narrower interpretation. This is particularly true given that the NPA definition of collocation stands in direct contrast with the definition of collocation in the

[411] *Wireless Infrastructure Second R&O*, FCC 18-30 at paras. 74-76.

[412] New Orleans Comments at 2-3; Samsung Comments at 4-5 (arguing that the Commission should reduce the shot clock applicable to new construction from 150 days to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); TX Hist. Comm. Comments at 2 (arguing that the reasonable periods of time that the FCC proposed in 2009, 90 days for collocation applications and 150 days for other applications appear to be appropriate); WIA Comments at 20-23; WIA Reply at 11 (arguing for a 90-day shot clock for applications involving substantial modifications, including tower extensions; and a 120-day shot clock for applications for all other facilities, including new macro sites); CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities).

[413] AT&T Comments at 10; AT&T Reply at 9; Verizon Reply at 32; WIA Comments at 22; ExteNet Comments at 9.

[414] Bellevue *et al.* Reply at 6-7 (arguing that the Commission has rejected this argument twice and instead determined that a collocation occurs when a wireless facility is attached to an existing infrastructure that houses wireless communications facilities; San Francisco Reply at 7-8 (arguing that under Commission definitions, a utility pole is neither an existing base station nor a tower; thus, the Commission simply cannot find that adding wireless facilities to utility pole that has not previously been used for wireless facilities is an eligible facilities request). *See, e.g.*, Letter from Bonnie Michael, City Council President, Worthington, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018); Letter from Jill Boudreau, Mayor, Mount Vernon, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018).

[415] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para 46.

[416] 47 CFR Part 1, App. B, NPA, Subsection C, Definitions.

Spectrum Act, pursuant to which facilities only fall within the scope of an "eligible facilities request" if they are attached to towers or base stations that have already been zoned for wireless use.[417]

4. When Shot Clocks Start and Incomplete Applications

141. In the *2014 Wireless Infrastructure Order*, the Commission clarified, among other things, that a shot clock begins to run when an application is first submitted, not when the application is deemed complete.[418] The clock can be paused, however, if the locality notifies the applicant within 30 days that the application is incomplete.[419] The locality may pause the clock again if it provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.[420] In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on these determinations.[421] Localities contend that the shot clock period should not begin until the application is deemed complete.[422] Industry commenters argue that the review period for incompleteness should be decreased from 30 days to 15 days.[423]

142. With the limited exception described in the next paragraph, we find no cause or basis in the record to alter the Commission's prior determinations, and we now codify them in our rules. Codified rules, easily accessible to applicants and localities alike, should provide helpful clarity. The complaints by states and localities about the sufficiency of some of the applications they receive are adequately addressed by our current policy, particularly as amended below, which preserves the states' and localities' ability to pause review when they find an application to be incomplete.[424] We do not find it necessary at this point to shorten our 30-day initial review period for completeness because, as was the case when this review period was adopted in the *2009 Declaratory Ruling*, it remains consistent with review periods for completeness under existing state wireless infrastructure deployment statutes[425] and still "gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants

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[417] *See* 47 CFR § 1.40001(b)(3), (4), (5) (definitions of eligible facilities request, eligible support structure, and existing). Each of these definitions refers to facilities that have already been approved under local zoning or siting processes.

[418] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, at para. 258.

[419] *2009 Declaratory Ruling*, 24 FCC Rcd at 14014, paras. 52-53 (providing that the "timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information").

[420] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 259.

[421] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

[422] *See, e.g.*, Maine DOT Comments at 2-3; Philadelphia Comments at 6; League of Az Cities and Towns *et al.* at 4, 8-9; Letter from Barbara Coler, Chair, Marin Telecommunications Agency, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 4, 2018) (Barbara Coler Sept. 4, 2018 *Ex Parte* Letter); Letter from Sam Liccardo, Mayor, San Jose, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 5 (filed Sept. 18, 2018).

[423] Verizon Comments at 43. *See* Sprint June 18 *Ex Parte* at 2 (asserting that the shot clocks should begin to run when the application is complete and that a siting authority should review the application for completeness within the first 15 days of receipt or it would waive the right to object on that basis).

[424] *See, e.g.*, Barbara Coler Sept. 4, 2018 *Ex Parte* Letter at 2 (the pace of installation may be affected by incomplete applications); Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter at 3 (not uncommon to find documents not properly prepared and not in compliance with relevant regulations).

[425] Most states have a 30-day review period for incompleteness. *See, e.g.*, Colo. Rev. Stat. Ann. § 29-27-403; Ga. Code Ann. § 36-66B-5; Iowa Code Ann. § 8C.4; Kan. Stat. Ann. § 66-2019; Minn. Stat. Ann. § 237.163(3c)(b); 53 Pa. Stat. Ann. § 11702.4(b)(1); Cal. Gov't Code § 65943. A minority of states have adopted either a longer or shorter review period for incompleteness, ranging from 5 days to 45 days. *See* N.C. Gen. Stat. Ann. § 153A-349.53 (45 days); Wash. Rev. Code Ann. § 36.70B.070 (28 days); N.H. Rev. Stat. Ann. § 12-K:10 (15 days); Del. Code Ann. tit. 17, § 1609 (14 days); Va. Code Ann. §§ 15.2-2316.4; 56-484.28; 56-484.29 (10 days); Wis. Stat. Ann. § 66.0404(3) (5 days).

from a last minute decision that an application should be denied as incomplete."[426]

143. However, for applications to deploy Small Wireless Facilities, we implement a modified tolling system designed to help ensure that providers are submitting complete applications on day one. This step accounts for the fact that the shot clocks applicable to such applications are shorter than those established in the *2009 Declaratory Ruling* and, because of which, there may instances where the prevailing tolling rules would further shorten the shot clocks to such an extent that it might be impossible for siting authorities to act on the application.[427] For Small Wireless Facilities applications, the siting authority has 10 days from the submission of the application to determine whether the application is incomplete. The shot clock then resets once the applicant submits the supplemental information requested by the siting authority. Thus, for example, for an application to collocate Small Wireless Facilities, once the applicant submits the supplemental information in response to a siting authority's timely request, the shot clock resets, effectively giving the siting authority an additional 60 days to act on the Small Wireless Facilities collocation application. For subsequent determinations of incompleteness, the tolling rules that apply to non-Small Wireless Facilities would apply—that is, the shot clock would toll if the siting authority provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.

144. As noted above, multiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities.[428] All of these permits are subject to Section 332's requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here.

145. We also find that mandatory pre-application procedures and requirements do not toll the shot clocks.[429] Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock.[430] Localities counter that in many instances, applicants submit applications that are incomplete in material respects, that pre-application interactions smooth the application process, and that many of their pre-application requirements go to important health and safety matters.[431] We conclude that the ability to toll a shot clock when an application is found incomplete or by

[426] *2009 Declaratory Ruling*, 24 FCC Rcd at 14014-15, para. 53.

[427] *See, e.g.*, Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter at 1; Letter from Brad Cole, Executive Director, Illinois Municipal League, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al. at 1 (filed Sept. 14, 2018); Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 2.

[428] *See* Sprint June 18 *Ex Parte* at 3; *cf.* Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; CTIA Comments at 15 ("The Commission should declare that the shot clocks apply to the entire local review process.").

[429] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

[430] *See, e.g.*, CCA Reply at 7 (noting also that some localities unreasonably request additional information after submission that is either already provided or of unreasonable scope); GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

[431] *See, e.g.*, Philadelphia Reply at 9 (arguing that shot clocks should not run until a complete application with a full set of engineering drawings showing the placement, size and weight of the equipment, and a fully detailed structural analysis is submitted, to assess the safety of proposed installations); Philadelphia Comments at 6; League of Az Cities and Towns *et al*. Comments at 4 (arguing that the shot clock should not begin until after an application has been "duly filed," because "some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate their submittal may be"); Colorado Comm. and Utility All. *et al*. Comments at 14 (explaining that the pre-application meetings are intended "to give prospective applicants an opportunity to discuss code and regulatory provisions with local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision"); Smart

mutual agreement by the applicant and the siting authority should be adequate to address these concerns. Much like a requirement to file applications one after another, requiring pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their start date. An application is not ruled on within "a reasonable period of time after the request is duly filed" if the state or locality takes the full ordinary review period after having delayed the filing in the first instance due to required pre-application review. Indeed, requiring a pre-application review before an application may be filed is similar to imposing a moratorium, which the Commission has made clear does not stop the shot clocks from running.[432] Therefore, we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed,[433] the shot clock begins to run when the application is proffered. In other words, the request is "duly filed" at that time,[434] notwithstanding the locality's refusal to accept it.

146. That said, we encourage *voluntary* pre-application discussions, which may well be useful to both parties. The record indicates that such meetings can clarify key aspects of the application review process, especially with respect to large submissions or applicants new to a particular locality's processes, and may speed the pace of review.[435] To the extent that an applicant voluntarily engages in a pre-application review to smooth the way for its filing, the shot clock will begin when an application is filed, presumably after the pre-application review has concluded.

147. We also reiterate, consistent with the *2009 Declaratory Ruling*, that the remedies granted under Section 332(c)(7)(B)(v) are independent of, and in addition to, any remedies that may be available under state or local law.[436] Thus, where a state or locality has established its own shot clocks, an applicant may pursue any remedies granted under state or local law in cases where the siting authority fails to act within those shot clocks.[437] However, the applicant must wait until the Commission shot clock period has expired to bring suit for a "failure to act" under Section 332(c)(7)(B)(v).[438]

V. PROCEDURAL MATTERS

148. *Final Regulatory Flexibility Analysis*. With respect to this Third Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of

(Continued from previous page)
Communities Comments at 15, 35 (pre-application procedures "may translate into faster consideration of individual applications over the longer term, as providers and communities alike, gain a better understanding of what is required of them, and providers submit applications that are tailored to community requirements"); UT Dept. of Trans. Comments at 5 ("The purpose of the pre-application access meeting is to help the entity or person with the application and provide information concerning the requirements contained in the rule."); CCUA *at al*. Reply at 6 ("[Pre-application meetings] provide an opportunity for informal discussion between prospective applicants and the local jurisdiction. Pre-application meetings serve to educate, answer questions, clarify process issues, and ultimately result in a more efficient process from application filing to final action."); AASHTO Comments, Attach. at 3 (GA Dept. of Trans. contending that pre-application procedures "should be encouraged and separated from an 'official' "application submittal"); League of Az Cities and Towns *et al*. Comments at 5-7 (providing examples of incomplete applications).

[432] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971, at para. 265.

[433] *See, e.g.*, CCA Reply at 7; GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

[434] 47 U.S.C. § 332(c)(7)(B)(ii).

[435] *See* CCUA *et al*. Comments at 14; Smart Communities Comments at 15, 35; UT Dept. of Trans. Comments at 5; CCUA *et al*. Reply at 6; Mukilteo Reply, Docket No. WC 17-84, at 1 (filed July 10, 2017).

[436] *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

[437] *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

[438] 47 U.S.C. § 332(c)(7)(B)(v).

the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Third Report and Order. The Commission will send a copy of the Third Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

149. *Paperwork Reduction Act*. This Third Report and Order does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

150. *Congressional Review Act*. The Commission will send a copy of this Declaratory Ruling and Third Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), *see* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

151. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), 7, 201, 253, 301, 303, 309, 319, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 157, 201, 253, 301, 303, 309, 319, 332, that this Declaratory Ruling and Third Report and Order in WT Docket No. 17-79 IS hereby ADOPTED.

152. IT IS FURTHER ORDERED that Part 1 of the Commission's Rules is AMENDED as set forth in Appendix A, and that these changes SHALL BE EFFECTIVE 90 days after publication in the Federal Register.

153. IT IS FURTHER ORDERED that this Third Report and Order SHALL BE effective 90 days after its publication in the Federal Register. The Declaratory Ruling and the obligations set forth therein ARE EFFECTIVE on the same day that this Third Report and Order becomes effective. It is our intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

154. IT IS FURTHER ORDERED that, pursuant to 47 CFR § 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review of this Declaratory Ruling and Third Report and Order will commence on the date that a summary of this Declaratory Ruling and Third Report and Order is published in the Federal Register.

155. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Declaratory Ruling and Third Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

156. IT IS FURTHER ORDERED that this Declaratory Ruling and Third Report and Order SHALL BE sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Streamlining State and Local Review of Wireless Facility Siting Applications

Part 1—Practice and Procedure

1. Add subpart U to Part 1 of Title 47 to read as follows:

Subpart U—State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Service Facilities

§ 1.6001 Purpose.

This subpart implements 47 U.S.C. 332(c)(7) and 1455.

§ 1.6002 Definitions.

Terms used in this subpart have the following meanings:

(a) *Action* or *to act* on a siting application means a siting authority's grant of a siting application or issuance of a written decision denying a siting application.

(b) *Antenna*, consistent with section 1.1320(d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this title.

(c) *Antenna equipment*, consistent with section 1.1320(d), means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

(d) *Antenna facility* means an antenna and associated antenna equipment.

(e) *Applicant* means a person or entity that submits a siting application and the agents, employees, and contractors of such person or entity.

(f) *Authorization* means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.

(g) *Collocation*, consistent with section 1.1320(d) and the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas, Appendix B of this part, section I.B, means—

(1) Mounting or installing an antenna facility on a pre-existing structure, and/or

(2) Modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

(3) The definition of "collocation" in paragraph (b)(2) of section 1.6100 applies to the term as used in that section.

(h) *Deployment* means placement, construction, or modification of a personal wireless service facility.

(i) *Facility* or *personal wireless service facility* means an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services.

(j) *Siting application* or *application* means a written submission to a siting authority requesting authorization for the deployment of a personal wireless service facility at a specified location.

(k) *Siting authority* means a State government, local government, or instrumentality of a State government or local government, including any official or organizational unit thereof, whose authorization is necessary prior to the deployment of personal wireless service facilities.

(l) *Small wireless facilities*, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

(m) *Structure* means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of services).

Terms not specifically defined in this section or elsewhere in this subpart have the meanings defined in Part 1 of Title 47 and the Communications Act of 1934, 47 U.S.C. 151 *et seq*.

§ 1.6003 Reasonable periods of time to act on siting applications

(a) *Timely action required.* A siting authority that fails to act on a siting application on or before the shot clock date for the application, as defined in paragraph (e) of this section, is presumed not to have acted within a reasonable period of time.

(b) *Shot clock period*. The shot clock period for a siting application is the sum of—

(1) the number of days of the presumptively reasonable period of time for the pertinent type of application, pursuant to paragraph (c) of this section, plus

(2) the number of days of the tolling period, if any, pursuant to paragraph (d) of this section.

(c) *Presumptively reasonable periods of time*.

(1) The following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments in the categories set forth below:

(i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.

(ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.

(iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days.

(iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.

(2) *Batching*.

(i) If a single application seeks authorization for multiple deployments, all of which fall within a category set forth in either paragraph (c)(1)(i) or paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is equal to that for a single deployment within that category.

(ii) If a single application seeks authorization for multiple deployments, the components of which are a mix of deployments that fall within paragraph (c)(1)(i) and deployments that fall within paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is 90 days.

(iii) Siting authorities may not refuse to accept applications under paragraphs (c)(2)(i) and (c)(2)(ii).

(d) *Tolling period*. Unless a written agreement between the applicant and the siting authority provides otherwise, the tolling period for an application (if any) is as set forth below.

(1) *For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information,* the shot clock date calculation shall restart at zero on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete.

(2) *For all other initial applications,* the tolling period shall be the number of days from –

(i) The day after the date when the siting authority notifies the applicant in writing that the application is materially incomplete and clearly and specifically identifies the missing documents or information that the applicant must submit to render the application complete and the specific rule or regulation creating this obligation, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(2)(i) is effectuated on or before the 30th day after the date when the application was submitted; or

(3) *For resubmitted applications following a notice of deficiency*, the tolling period shall be the number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority's original request under paragraph (d)(1) or paragraph (d)(2) of this section, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(3)(i) is effectuated on or before the 10th day after the date when the applicant makes a supplemental submission in response to the siting authority's request under paragraph (d)(1) or paragraph (d)(2) of this section.

(e) *Shot clock date*. The shot clock date for a siting application is determined by counting forward, beginning on the day after the date when the application was submitted, by the number of calendar days of the shot clock period identified pursuant to paragraph (b) of this section and including any pre-application period asserted by the siting authority; *provided*, that if the date calculated in this manner is a "holiday" as defined in section 1.4(e)(1) or a legal holiday within the relevant State or local jurisdiction, the shot clock date is the next business day after such date. The term "business day" means any day as defined in section 1.4(e)(2) and any day that is not a legal holiday as defined by the State or local jurisdiction.

3. Redesignate § 1.40001 as § 1.6100, remove and reserve paragraph (a) of newly redesignated § 1.6100, and revise paragraph (b)(7)(vi) of newly redesignated § 1.6100 by changing "1.40001(b)(7)(i)(iv)" to "1.6100(b)(7)(i)-(iv)."

4. Remove subpart CC.

APPENDIX B

Comments and Reply Comments

Comments

5G Americas
Aaron Rosenzweig
ACT | The App Association
Advisory Council on Historic Preservation
Advisors to the International EMF Scientist Appeal
African American Mayors Association
Agua Caliente Band of Cahuilla Indians Tribal Historic Preservation Office
Alaska Department of Transportation & Public Facilities
Alaska Native Health Board
Alaska Office of History and Archaeology
Alexandra Ansell
American Association of State Highway and Transportation Officials
American Bird Conservancy
American Cable Association
American Petroleum Institute
American Public Power Association
Angela Fox
Arctic Slope Regional Corporation
Arizona State Parks & Trails, State Historic Preservation Office
Arkansas SHPO
Arnold A. McMahon
Association of American Railroads
AT&T
B. Golomb
Bad River Band of Lake Superior Tribe of Chippewa Indians
Benjamin L. Yousef
BioInitiative Working Group
Blue Lake Rancheria
Board of County Road Commissioners of the County of Oakland
Bristol Bay Area Health Corporation
Cahuilla Band of Indians
California Office of Historic Preservation, Department of Parks and Recreation
California Public Utilities Commission
Cape Cod Bird Club, Inc.
Catawba Indian Nation Tribal Historic Preservation Office
Charter Communications, Inc.
Cheyenne River Sioux Tribe Cultural Preservation Office
Chickasaw Nation
Chippewa Cree Tribe
Choctaw Nation of Oklahoma
Chuck Matzker
Cindy Li
Cindy Russell
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
Citizen Potawatomi Nation
Citizens Against Government Waste

City and County of San Francisco
City of Alexandria, Virginia; Arlington County, Virginia; and Henrico County, Virginia
City of Arlington, Texas
City of Austin, Texas
City of Bellevue, City of Bothell, City of Burien, City of Ellensburg, City of Gig Harbor, City of Kirkland, City of Mountlake Terrace, City of Mukilteo, City of Normandy Park, City of Puyallup, City of Redmond, and City of Walla Walla
City of Chicago
City of Claremont (Tony Ramos, City Manager)
City of Eden Prairie, MN
City of Houston
City of Irvine, California
City of Kenmore, Washington, and David Baker, Vice-Chair, National League of Cities Information Technology and Communications Committee
City of Lansing, Michigan
City of Mukilteo
City of New Orleans, Louisiana
City of New York
City of Philadelphia
City of Springfield, Oregon
Cityscape Consultants, Inc.
Coalition for American Heritage, Society for American Archaeology, American Cultural Resources Association, Society for Historical Archaeology, and American Anthropological Association
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Colorado River Indian Tribes
Colorado State Historic Preservation Office
Comcast Corporation
Commissioner Sal Pace, Pueblo Board of County Commissioners
Community Associations Institute
Competitive Carriers Association
CompTIA (The Computing Technology Industry Association)
Computer & Communications Industry Association (CCIA)
Confederated Tribes of the Colville Reservation
Confederated Tribes of the Umatilla Indian Reservation Cultural Resources Protection Program
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group, Inc.
Critical Infrastructure Coalition
Crow Creek Sioux Tribe
Crown Castle
CTIA
CTIA and Wireless Infrastructure Association
David Roetman, Minnehaha County GOP Chairman
Defenders of Wildlife
Department of Arkansas Heritage (Arkansas Historic Preservation Program)
DuPage Mayors and Managers Conference
East Bay Municipal Utility District
Eastern Shawnee Tribe of Oklahoma
Edward Czelada
Elijah Mondy
Elizabeth Doonan

Ellen Marks
EMF Safety Network, Ecological Options Network
Environmental Health Trust
ExteNet Systems, Inc.
Fairfax County, Virginia
FibAire Communications, LLC d/b/a AireBeam
Florida Coalition of Local Governments
Fond du Lac Band of Lake Superior Chippewa
Forest County Potawatomi Community of Wisconsin
Fort Belknap Indian Community
Free State Foundation
General Communication, Inc.
Georgia Department of Transportation
Georgia Historic Preservation Division
Georgia Municipal Association, Inc.
Gila River Indian Community
Greywale Advisors
History Colorado (Colorado State Historic Preservation Office)
Hongwei Dong
Hualapai Department of Cultural Resources
Illinois Department of Transportation
Illinois Municipal League
INCOMPAS
Information Technology and Innovation Foundation
International Telecommunications Users Group
Jack Li
Jackie Cale
Jerry Day
Joel M. Moskowitz, Ph.D.
Jonathan Mirin
Joyce Barrett
Karen Li
Karen Spencer
Karon Gubbrud
Kate Kheel
Kaw Nation
Kevin Mottus
Keweenaw Bay Indian Community
Kialegee Tribal Town
League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities
League of Minnesota Cities
Leo Cashman
Lower Brule Sioux Tribe
Li Sun
Lightower Fiber Networks
Lisbeth Britt
Lower Brule Sioux Tribe
Maine Department of Transportation
Marty Feffer
Mary Whisenand, Iowa Governor's Commission on Community Action Agencies
Mashantucket (Western) Pequot Tribe
Mashpee Wampanoag Tribe

Matthew Goulet
Mayor Patrick Furey, City of Torrance, California
McLean Citizens Association
Miami Tribe of Oklahoma
Missouri State Historic Preservation Office
Mobile Future
Mobilitie, LLC
Mohegan Tribe of Indians of Connecticut
Montana State Historic Preservation Office
Monte R. Lee and Company
Muckleshoot Indian Tribe
Muscogee (Creek) Nation
National Association of Tower Erectors (NATE)
National Association of Tribal Historic Preservation Officers
National Black Caucus of State Legislators
National Conference of State Historic Preservation Officers
National Congress of American Indians
National Congress of American Indians, National Association of Tribal Historic Preservation Officers, and United South and Eastern Tribes Sovereignty Protection Fund
National Congress of American Indians and United South and Eastern Tribes Sovereignty Protection Fund
National League of Cities
National League of Cities, United States Conference of Mayors, International Municipal Lawyers Association, Government Finance Officers Association, National Association of Counties, National Association of Regional Councils, National Association of Towns and Townships, and National Association of Telecommunications Officers and Advisors
National Tribal Telecommunications Association
National Trust for Historic Preservation
Native Public Media
NATOA
Natural Resources Defense Council
Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
Naveen Albert
NCTA—The Internet & Television Association
nepsa solutions LLC
New Mexico Department of Cultural Affairs, Historic Preservation Division
Nez Perce Tribe
Nina Beety
Nokia
North Carolina State Historic Preservation Office
Northern Cheyenne Tribal Historic Preservation Office
NTCA—The Rural Broadband Association
Office of Historic Preservation for the Mashantucket Pequot Tribal Nation of Connecticut
Ohio State Historic Preservation Office
Oklahoma History Center State Historic Preservation Office
Olemara Peters
Omaha Tribe of Nebraska
ONE Media, LLC
Oregon State Historic Preservation Office
Osage Nation
Otoe-Missouria Tribe
Pala Band of Mission Indians

Patrick Wronkiewicz
Pechanga Band of Luiseno Indians
Pennsylvania State Historic Preservation Office
Prairie Island Indian Community
PTA-FLA, Inc .
Pueblo of Laguna
Pueblo of Pojoaque
Pueblo of Tesuque
Puerto Rico State Historic Preservation Office
Quad Cities Cable Communications Commission
Quapaw Tribe of Oklahoma
R Street Institute
Rebecca Carol Smith
Red Cliff Band of Lake Superior Chippewa
Representative Tom Sloan, State of Kansas House of Representatives
Representatives Anna G. Eshoo, Frank Pallone, Jr., and Raul Ruiz, U.S. House of Representatives
Rhode Island Historical Preservation and Heritage Commission
Rosebud Sioux Tribe Tribal Historic Preservation Cultural Resource Management Office
Ronald M. Powell, Ph.D.
S. Quick
Sacred Wind Communications, Inc.
Samsung Electronics America, Inc.
Santa Clara Pueblo
Sault Ste. Marie Tribe of Chippewa Indians
SCAN NATOA, Inc.
Seminole Nation of Oklahoma
Seminole Tribe of Florida
Senator Duane Ankney, Montana State Senate
Shawnee Tribe
Sisseton Wahpeton Oyate
Skokomish Indian Tribe Tribal Historic Preservation Office
Skull Valley Band of Goshute
Smart Communities and Special Districts Coalition
Soula Culver
Sprint
Standing Rock Sioux Tribe
Starry, Inc.
State of Washington Department of Archaeology & Historic Preservation
Sue Present
Swinomish Indian Tribal Community
Table Mountain Rancheria Tribal Government Office
Tanana Chiefs Conference
Telecommunications Industry Association
Texas Department of Transportation
Texas Historical Commission
Thlopthlocco Tribal Town
T-Mobile USA, Inc.
Tonkawa Tribe of Oklahoma
Triangle Communication System, Inc.
Twenty-Nine Palms Band of Mission Indians
United Keetoowah Band of Cherokee Indians In Oklahoma
Utah Department of Transportation

Ute Mountain Ute Tribe
Utilities Technology Council
Verizon
Wampanoag Tribe of Gay Head (Aquinnah)
WEC Energy Group, Inc.
Wei Shen
Wei-Ching Lee, MD, California Medical Association Delegate of Los Angeles County
Winnebago Tribe of Nebraska
Wireless Infrastructure Association
Wireless Internet Service Providers Association
Xcel Energy Services Inc.

Reply Comments
Alaska State Historic Preservation Office
American Cable Association
American Public Power Association
Association of American Railroads
California Public Utilities Commission
Catherine Kleiber
Chippewa Cree Tribe
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
City of Baltimore, Maryland
City of New York
City of Philadelphia
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Comcast Corporation
Communications Workers of America
Competitive Carriers Association
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group Inc.
Critical Infrastructure Coalition
CTIA
Dan Kleiber
Enterprise Wireless Alliance
Environmental Health Trust
ExteNet Systems, Inc.
Florida Coalition of Local Governments
Confederated Tribes of Grand Ronde Community of Oregon Historic Preservation Department
INCOMPAS
Irregulators
League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities
National Association of Regulatory Utility Commissioners
National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Towns and Townships, National Association of Regional Councils, United States Conference of Mayors, and Government Finance Officers Association
National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers
National Organization of Black Elected Legislative (NOBEL) Women
National Rural Electric Cooperative Association

Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
NCTA—The Internet & Television Association
Pueblo of Acoma
Puerto Rico Telephone Company, Inc., d/b/a Claro
Quintillion Networks, LLC, and Quintillion Subsea Operations, LLC
Rebecca Carol Smith
SDN Communications
Skyway Towers, LLC
SmallCellSite.Com
Smart Communities and Special Districts Coalition
Sue Present
The Greenlining Institute
T-Mobile USA, Inc.
Triangle Communication System, Inc.
United States Conference of Mayors
Verizon
Washington, D.C. Office of the Chief Technology Officer
Wireless Internet Service Providers Association
Xcel Energy Services Inc.

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (*NPRM*), released in April 2017.[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are addressed below in Section B. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for and Objectives of the Rules

2. In the *Third Report and Order*, the Commission continues its efforts to promote the timely buildout of wireless infrastructure across the country by eliminating regulatory impediments that unnecessarily delay bringing personal wireless services to consumers. The record shows that lengthy delays in approving siting applications by siting agencies has been a persistent problem.[4] With this in mind, the *Third Report and Order* establishes and codifies specific rules concerning the amount of time siting agencies may take to review and approve certain categories of wireless infrastructure siting applications. More specifically, the Commission addresses its Section 332 shot clock rules for infrastructure applications which will be presumed reasonable under the Communications Act. As an initial matter, the Commission establishes two new shot clocks for Small Wireless Facilities applications. For collocation of Small Wireless Facilities on preexisting structures, the Commission adopts a 60-day shot clock which applies to both individual and batched applications. For applications associated with Small Wireless Facilities new construction we adopt a 90-day shot clock for both individual and batched applications.[5] The Commission also codifies two existing Section 332 shot clocks for all other Non-Small Wireless Facilities that were established in the *2009 Declaratory Ruling* without codification.[6]These existing shot clocks require 90-days for processing of all other Non-Small Wireless Facilities collocation applications, and 150-days for processing of all other Non-Small Wireless Facilities applications other than collocations.

3. The *Third Report and Order* addresses other issues related to both the existing and new shot clocks. In particular we address the specific types of authorizations subject to the "Reasonable Period of Time" provisions of Section 332(c)(7)(B)(ii), finding that "any request for authorization to place, construct, or modify personal wireless service facilities" under Section 332(c)(7)(B)(ii) means all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment of personal wireless services infrastructure.[7] The Commission also addresses collocation on structures not previously zoned for wireless use,[8] when the four Section 332 shot clocks begin to run,[9]

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601—612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017).

[3] *See* 5 U.S.C. § 604.

[4] *See supra* paras. 23-9.

[5] *See supra* paras. 111-12.

[6] *See supra* paras. 138-39; *2009 Declaratory Ruling*.

[7] *See supra* paras. 132-37.

[8] *See supra* para. 140.

the impact of incomplete applications on our Section 332 shot clocks,[10] and how state imposed shot clocks remedies effect the Commission's Section 332 shot clocks remedies.[11]

4. The Commission discusses the appropriate judicial remedy that applicants may pursue in cases where a siting authority fails to act within the applicable shot clock period.[12] In those situations, applicants may commence an action in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II) and seek injunctive relief granting the application. Notwithstanding the availability of a judicial remedy if a shot clock deadline is missed, the Commission recognizes that the Section 332 time frames might not be met in exceptional circumstances and has refined its interpretation of the circumstances when a period of time longer than the relevant shot clock would nonetheless be a reasonable period of time for action by a siting agency.[13] In addition, a siting authority that is subject to a court action for missing an applicable shot clock deadline has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services thereby rebutting the effective prohibition presumption.

5. The rules adopted in the *Third Report and Order* will accelerate the deployment of wireless infrastructure needed for the mobile wireless services of the future, while preserving the fundamental role of localities in this process. Under the Commission's new rules, localities will maintain control over the placement, construction and modification of personal wireless facilities, while at the same time the Commission's new process will streamline the review of wireless siting applications.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. Only one party—the Smart Communities and Special Districts Coalition—filed comments specifically addressing the rules and policies proposed in the IRFA. They argue that any shortening or alteration of the Commission's existing shot clocks or the adoption of a deemed granted remedy will adversely affect small local governments, special districts, property owners, small developers, and others by placing their siting applications behind wireless provider siting applications.[14] Subsequently, NATOA filed comments concerning the draft FRFA.[15] NATOA argues that the new shot clocks impose burdens on local governments and particularly those with limited resources. NATOA asserts that the new shot clocks will spur more deployment applications than localities currently process.

7. These arguments, however, fail to acknowledge that Section 332 shot clocks have been in place for years and reflect Congressional intent as seen in the statutory language of Section 332. The record in this proceeding demonstrates the need for, and reasonableness of, expediting the siting review of certain facility deployments.[16] More streamlined procedures are both reasonable and necessary to provide greater predictability. The current shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the original shot clocks were adopted nine years ago. Localities have gained significant experience processing wireless siting applications and several jurisdictions already have in place laws that require

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[9] *See supra* paras. 141-46.

[10] *Id*.

[11] *See supra* para. 147.

[12] *See supra* paras. **Error! Reference source not found.**-131.

[13] *See supra* para. 127.

[14] Smart Communities Comments at 81; *see also* Letter from Gerard Lavery Lederer, Counsel, Smart Communities, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, *Ex Parte* Submission at 33 (filed Sept. 19, 2018).

[15] Letter from Nancy Werner, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 4-5 (filed Sept. 19, 2018).

[16] *See supra* para. 106.

applications to be processed in less time than the Commission's new shot clocks. With the passage of time, sitting agencies have become more efficient in processing siting applications and this, in turn, should reduce any economic burden the Commission's new shot clock provisions have on them.

8. The Commission has carefully considered the impact of its new shot clocks on siting authorities and has established shot clocks that take into consideration the nature and scope of siting requests by establishing shot clocks of different lengths of time that depend on the nature of the siting request at issue.[17] The length of these shot clocks is based in part on the need to ensure that local governments have ample time to take any steps needed to protect public safety and welfare and to process other pending utility applications.[18] Since local siting authorities have gained experience in processing siting requests in an expedited fashion, they should be able to comply with the Commission's new shot clocks.

9. The Commission has taken into consideration the concerns of the Smart Communities and Special Districts Coalition and NATOA. It has established shot clocks that will not favor wireless providers over other applicants with pending siting applications. Further, instead of adopting a deemed granted remedy that would grant a siting application when a shot clock lapses without a decision on the merits, the Commission provides guidance as to the appropriate judicial remedy that applicants may pursue and examples of exceptional circumstance where a siting authority may be justified in needing additional time to review a siting application then the applicable shot clock allows.[19] Under this approach, the applicant may seek injunctive relief as long as several minimum requirements are met. The siting authority, however, can rebut the presumptive reasonableness of the applicable shot clock under certain circumstances. The circumstances under which a sitting authority might have to do this will be rare. Under this carefully crafted approach, the interests of siting applicants, siting authorities, and citizens are protected.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

10. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.[20]

11. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

12. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[21] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[22] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[23] A "small business

[17] *See supra* paras. 105-112.

[18] *Id*.

[19] *See supra* paras. 116-131.

[20] 5 U.S.C. § 604(a)(3).

[21] *See* 5 U.S.C. § 604(a)(3).

[22] 5 U.S.C. § 601(6).

[23] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an

concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[24]

13. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.[25] First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[26] These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.[27]

14. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[28] Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[29]

15. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[30] U.S. Census Bureau data from the 2012 Census of Governments[31] indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[32] Of this number there were

(Continued from previous page)
agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[24] 15 U.S.C. § 632.

[25] *See* 5 U.S.C. § 601(3)-(6).

[26] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1—What is a small business?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

[27] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 2- How many small businesses are there in the U.S.?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

[28] 5 U.S.C. § 601(4).

[29] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this number 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of $100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. *See* http://nccs.urban.org/sites/all/nccs-archive/html//tablewiz/tw.php where the report showing this data can be generated by selecting the following data fields: Report: "The Number and Finances of All Registered 501(c) Nonprofits"; Show: "Registered Nonprofits"; By: "Total Revenue Level (years 1995, Aug to 2016, Aug)"; and For: "2016, Aug" then selecting "Show Results".

[30] 5 U.S.C. § 601(5).

[31] *See* 13 U.S.C. § 161. The Census of Government is conducted every five (5) years compiling data for years ending with "2" and "7". *See also* Program Description Census of Government *https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#.*

[32] *See* U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

37, 132 General purpose governments (county[33], municipal and town or township[34]) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts[35] and special districts[36]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.[37] Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."[38].

16. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless Internet access, and wireless video services.[39] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[40] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[41] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[42] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications

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[33] *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01. There were 2,114 county governments with populations less than 50,000.

[34] *See* U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States—States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

[35] *See* U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. There were 12,184 independent school districts with enrollment populations less than 50,000.

[36] *See* U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01. The U.S. Census Bureau data did not provide a population breakout for special district governments.

[37] *See* U.S. Census Bureau, 2012 Census of Governments, **C**ounty Governments by Population-Size Group and State: 2012 - United States-States - https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States–States - https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

[38] *Id.*

[39] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Carriers (Except Satellite)," *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&typib&id=ib.en./ECN.NAICS2012.517210.

[40] 13 CFR § 121.201, NAICS Code 517210.

[41] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5*, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[42] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

carriers (except satellite) are small entities.

17. The Commission's own data—available in its Universal Licensing System—indicate that, as of May 17, 2018, there are 264 Cellular licensees that will be affected by our actions.[43] The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.[44] Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[45] Thus, using available data, we estimate that the majority of wireless firms can be considered small.

18. *Personal Radio Services*. Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our rules.[46] These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.[47] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.[48] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[49] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[50] Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. We note however that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

19. *Public Safety Radio Licensees*. Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency

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[43] *See* http://wireless.fcc.gov/uls. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

[44] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

[45] *See id*.

[46] 47 CFR Part 90.

[47] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 CFR Part 95.

[48] 13 CFR § 121.201, NAICS Code 517312.

[49] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[50] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

medical services.[51] Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. [52] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[53] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[54] Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.[55] There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.[56] We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

20. *Private Land Mobile Radio Licensees*. Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engag*ed in radiotelephone communications.*[57] The appropriate size standard for this category under SBA rules is that such a business

[51] *See* subparts A and B of Part 90 of the Commission's Rules, 47 CFR §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

[52] *See* 13 CFR § 121.201, NAICS Code 517210.

[53] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[54] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[55] This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

[56] Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA—Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

[57] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Carriers (Except Satellite)," *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210 (last visited Mar. 6, 2018).

is small if it has 1,500 or fewer employees.[58] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[59] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[60] Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

21. According to the Commission's records, a total of approximately 400,622 licenses comprise PLMR users.[61] Of this number there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by the *Third Report and Order*.[62] The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

22. *Multiple Address Systems***.** Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define "small entity" for MAS licensees as an entity that has average annual gross revenues of less than $15 million over the three previous calendar years.[63] A "Very small business" is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than $3 million over the preceding three calendar years.[64] The SBA has approved these definitions.[65] The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications.

23. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS

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[58] *See* 13 CFR § 121.201, NAICS Code 517210.

[59] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[60] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[61] This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.

[62] This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.

[63] *See Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008 para. 123 (2000).

[64] *Id*.

[65] *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

licenses in 176 EAs was conducted.[66] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

24. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The closest applicable definition of a small entity is the "Wireless Telecommunications Carriers (except Satellite)" definition under the SBA rules.[67] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[68] For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[69] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[70] Thus under this category and the associated small business size standard, the Commission estimates that the majority of firms that may be affected by our action can be considered small.

25. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high-speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[71]

26. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[72] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent

[66] *See Multiple Address Systems Spectrum Auction Closes*, Public Notice, 16 FCC Rcd 21011 (2001).

[67] 13 CFR § 121.201, NAICS Code 517210.

[68] *Id*.

[69] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[70] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[71] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[72] 47 CFR § 21.961(b)(1).

BRS licensees do not meet the small business size standard).[73] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

27. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[74] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[75] Auction 86 concluded in 2009 with the sale of 61 licenses.[76] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

28. *EBS* - The Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.[77] The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees.[78] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[79] Of this total, 3,083 operated with fewer than 1,000 employees.[80] Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census Bureau data, the Commission's Universal Licensing System indicates that as of October 2014, there are 2,206 active EBS licenses. The Commission estimates that of these 2,206 licenses, the majority are held by non-profit educational

[73] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[74] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[75] *Id.* at 8296 para. 73.

[76] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[77] U.S. Census Bureau, 2017 NAICS Definitions, "517311 Wired Telecommunications Carriers,", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2017.

[78] *See* 13 CFR § 121.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICs code as 517311 for Wired Telecommunications Carriers. *See*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[79] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[80] *Id.*

institutions and school districts, which are by statute defined as small businesses.[81]

29. *Location and Monitoring Service (LMS)*. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $15 million.[82] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $3 million.[83] These definitions have been approved by the SBA.[84] An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

30. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."[85] These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.[86] These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.[87] The 2012 Economic Census reports that 751 firms in this category operated in that year.[88] Of that number, 656 had annual receipts of $25,000,000 or less, 25 had annual receipts between $25,000,000 and $49,999,999 and 70 had annual receipts of $50,000,000 or more.[89] Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

31. The Commission has estimated the number of licensed commercial television stations to be 1,377.[90] Of this total, 1,258 stations (or about 91 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384.[91] Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how

[81] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[82] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 CFR § 90.1103.

[83] *Id*.

[84] *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

[85] U.S. Census Bureau, 2017 NAICS Definitions, "515120 Television Broadcasting," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017.

[86] *Id*.

[87] 13 CFR § 121.201; 2012 NAICS Code 515120.

[88] U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515120.

[89] *Id*.

[90] *Broadcast Station Totals as of* June 30, 2018, Press Release (MB, rel. Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals Press Release), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[91] *Id*.

many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations.[92] Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

32. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations must be included.[93] Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of "small business" requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

33. *Radio Stations.* This Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources."[94] The SBA has established a small business size standard for this category as firms having $38.5 million or less in annual receipts.[95] Economic Census data for 2012 show that 2,849 radio station firms operated during that year.[96] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[97] Therefore, based on the SBA's size standard the majority of such entities are small entities.

34. According to Commission staff review of the BIA/Kelsey, LLC's Publications, Inc. Media Access Pro Radio Database (BIA) as of January 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of $38.5 million or less and thus qualify as small entities under the SBA definition.[98] The Commission has estimated the number of licensed commercial AM radio stations to be 4,633 stations and the number of commercial FM radio stations to be 6,738, for a total number of 11,371.[99] We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128.[100] Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

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[92] *Id.*

[93] *See* 13 CFR § 21.103(a)(1) "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both."

[94] U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[95] 13 CFR § 121.201, NAICS Code 515112.

[96] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[97] *Id.*

[98] BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).

[99] Broadcast Station Totals as of June 30, 2018, Press Release (MB Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[100] *Id.*

35. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.[101] The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation.[102] We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

36. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.[103] This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.[104] Programming may originate in their own studio, from an affiliated network, or from external sources.[105] The SBA has established a small business size standard which consists of all radio stations whose annual receipts are $38.5 million dollars or less.[106] U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.[107] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[108] Therefore, based on the SBA's size standard, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

37. *Multichannel Video Distribution and Data Service (MVDDS).* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[109] These definitions were approved by the SBA.[110] On January 27, 2004, the Commission

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[101] 13 CFR § 121.103(a)(1). "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both."

[102] 13 CFR § 121.102(b).

[103] *See*, U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[104] *Id.*

[105] *Id*.

[106] 13 CFR § 121.201, NAICS code 515112.

[107] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[108] *Id.*

[109] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers,*

completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[111] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[112]

38. *Satellite Telecommunications.* This category comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[113] Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.[114] For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.[115] Of this total, 299 firms had annual receipts of less than $25 million.[116] Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

39. *All Other Telecommunications.* The "All Other Telecommunications" category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[117] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.[118] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[119] The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of $32.5 million or less.[120] For this category, U.S. Census data for 2012 show that there

(Continued from previous page)
Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[110] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

[111] *See* "*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*," Public Notice, 19 FCC Rcd 1834 (2004).

[112] *See* "*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63*," Public Notice, 20 FCC Rcd 19807 (2005).

[113] U.S. Census Bureau, 2017 NAICS Definitions, "517410 Satellite Telecommunications," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017.

[114] 13 CFR § 121.201, NAICS Code 517410.

[115] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517410, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517410.

[116] *Id.*

[117] *See* U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code "517919 All Other Telecommunications", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

[118] *Id.*

[119] *Id*.

[120] 13 CFR § 121.201, NAICS Code 517919.

were 1,442 firms that operated for the entire year.[121] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 42 firms had annual receipts of $25 million to $49, 999,999.[122] Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

40. *Fixed Microwave Services*. Microwave services include common carrier,[123] private-operational fixed,[124] and broadcast auxiliary radio services.[125] They also include the Local Multipoint Distribution Service (LMDS),[126] the Digital Electronic Message Service (DEMS),[127] the 39 GHz Service (39 GHz),[128] the 24 GHz Service,[129] and the Millimeter Wave Service[130] where licensees can choose between common carrier and non-common carrier status.[131] At present, there are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.[132] The Commission has not yet defined a small business size standard for microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.[133] U.S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year.[134] Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

41. The Commission notes that the number of firms does not necessarily track the number of

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[121] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[122] *Id*.

[123] *See* 47 CFR Part 101, Subpart I.

[124] Persons eligible under parts 80 and 90 of the Commission's rules can use Private-Operational Fixed Microwave services. *See* 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[125] *See* 47 CFR Parts 74, 78 (governing Auxiliary Microwave Service) Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

[126] *See* 47 CFR §§ 101, 1001-101, 1017.

[127] *See* 47 CFR §§ 101, 101.501-101.538.

[128] *See* 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).

[129] *See id.*

[130] *See* 47 CFR §§ 101, 101.1501-101.1527.

[131] *See* 47 CFR §§ 101.533, 101.1017.

[132] These statistics are based on a review of the Universal Licensing System on September 22, 2015.

[133] 13 CFR § 121.201.

[134] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series, "Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

licensees. The Commission also notes that it does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. The Commission estimates however, that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

42. *Non-Licensee Owners of Towers and Other Infrastructure*. Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration ("ASR") system and comply with applicable rules regarding review for impact on the environment and historic properties.

43. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.[135] Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

44. The closest applicable SBA category is All Other Telecommunications, and the appropriate size standard consists of all such firms with gross annual receipts of $32.5 million or less.[136] For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.[137] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[138] Thus, under this SBA size standard a majority of the firms potentially affected by our action can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

45. The *Third Report and Order* does not establish any reporting, recordkeeping, or other

[135] We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

[136] 13 CFR § 121.201, NAICS Code 517919.

[137] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012,* NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[138] *Id*.

compliance requirements for companies involved in wireless infrastructure deployment.[139] In addition to not adopting any reporting, recordkeeping or other compliance requirements, the Commission takes significant steps to reduce regulatory impediments to infrastructure deployment and, therefore, to spur the growth of personal wireless services. Under the Commission's approach, small entities as well as large companies will be assured that their deployment requests will be acted upon within a reasonable period of time and, if their applications are not addressed within the established time frames, applicants may seek injunctive relief granting their siting applications. The Commission, therefore, has taken concrete steps to relieve companies of all sizes of uncertainly and has eliminated unnecessary delays.

46. The *Third Report and Order* also does not impose any reporting or recordkeeping requirements on state and local governments. While some commenters argue that additional shot clock classifications would make the siting process needlessly complex without any proven benefits, the Commission concludes that any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.[140] The Commission's actions are consistent with the statutory language of Section 332 and therefore reflect Congressional intent. Further, siting agencies have become more efficient in processing siting applications and will be able to take advantage of these efficiencies in meeting the new shot clocks. As a result, the additional shot clocks that the Commission adopts will foster the deployment of the latest wireless technology and serve consumer interests.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

47. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[141]

48. The steps taken by the Commission in the *Third Report and Order* eliminate regulatory burdens for small entities as well as large companies that are involved with the deployment of person wireless services infrastructure. By establishing shot clocks and guidance on injunctive relief for personal wireless services infrastructure deployments, the Commission has standardized and streamlined the permitting process. These changes will significantly minimize the economic burden of the siting process on all entities, including small entities, involved in deploying personal wireless services infrastructure. The record shows that permitting delays imposes significant economic and financial burdens on companies with pending wireless infrastructure permits. Eliminating permitting delays will remove the associated cost burdens and enabling significant public interest benefits by speeding up the deployment of personal wireless services and infrastructure. In addition, siting agencies will be able to utilize the efficiencies that they have gained over the years processing siting applications to minimize financial impacts.

49. The Commission considered but did not adopt proposals by commenters to issue "Best Practices" or "Recommended Practices,"[142] and to develop an informal dispute resolution process and

[139] *See supra* para. 144.

[140] *See supra* para. 110.

[141] 5 U.S.C. § 603(c)(1)-(4).

[142] KS Rep. Sloan Comments at 2; Nokia Comments at 10.

mediation program, [143] noting that the steps taken in the *Third Report and Order* address the concerns underlying these proposals to facilitate cooperation between parties to reach mutually agreed upon solutions.[144] The Commission anticipates that the changes it has made to the permitting process will provide significant efficiencies in the deployment of personal wireless services facilities and this in turn will benefit all companies, but particularly small entities, that may not have the resources and economies of scale of larger entities to navigate the permitting process. By adopting these changes, the Commission will continue to fulfill its statutory responsibilities, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of personal wireless services facilities and infrastructure across the country.

Report to Congress

50. The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.[145] In addition, the Commission will send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order* and FRFA (or summaries thereof) also will be published in the *Federal Register*. [146]

[143] NATOA *et al*. Comments at 16-17.

[144] *See supra* para. 131.

[145] 5 U.S.C. § 801(a)(1)(A).

[146] 5 U.S.C. § 604(b).

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79*; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84

Perhaps the defining characteristic of the communications sector over the past decade is that the world is going wireless. The smartphone's introduction in 2007 may have seemed an interesting novelty to some at the time, but it was a precursor of a transformative change in how consumers access and use the Internet. 4G LTE was a key driver in that change.

Today, a new transition is at hand as we enter the era of 5G. At the FCC, we're working hard to ensure that the United States leads the world in developing this next generation of wireless connectivity so that American consumers and our nation's economy enjoy the immense benefits that 5G will bring.

Spectrum policy of course features prominently in our 5G strategy. We're pushing a lot more spectrum into the commercial marketplace. On November 14, for example, our 28 GHz band spectrum auction will begin, and after it ends, our 24 GHz band spectrum auction will start. And in 2019, we plan to auction off three additional spectrum bands.

But all the spectrum in the world won't matter if we don't have the infrastructure needed to carry 5G traffic. New physical infrastructure is vital for success here. That's because 5G networks will depend less on a few large towers and more on numerous small cell deployments—deployments that for the most part don't exist today.

But installing small cells isn't easy, too often because of regulations. There are layers of (sometimes unnecessary and unreasonable) rules that can prevent widespread deployment. At the federal level, we acted earlier this year to modernize our regulations and make our own review process for wireless infrastructure 5G fast. And many states and localities have similarly taken positive steps to reform their own laws and increase the likelihood that their citizens will be able to benefit from 5G networks.

But as this *Order* makes clear, there are outliers that are unreasonably standing in the way of wireless infrastructure deployment. So today, we address regulatory barriers at the local level that are inconsistent with federal law. For instance, big-city taxes on 5G slow down deployment there and also jeopardize the construction of 5G networks in suburbs and rural America. So today, we find that all fees must be non-discriminatory and cost-based. And when a municipality fails to act promptly on applications, it can slow down deployment in many other localities. So we mandate shot clocks for local government review of small wireless infrastructure deployments.

I commend Commissioner Carr for his leadership in developing this *Order*. He worked closely with many state and local officials to understand their needs and to study the policies that have worked at the state and local level. It should therefore come as no surprise that this *Order* has won significant support from mayors, local officials, and state legislators.

To be sure, there are some local governments that don't like this *Order*. They would like to continue extracting as much money as possible in fees from the private sector and forcing companies to navigate a maze of regulatory hurdles in order to deploy wireless infrastructure. But these actions are not only unlawful, they're also short-sighted. They slow the construction of 5G networks and will delay if not prevent the benefits of 5G from reaching American consumers. And let's also be clear about one thing: When you raise the cost of deploying wireless infrastructure, it is those who live in areas where the

investment case is the most marginal—rural areas or lower-income urban areas—who are most at risk of losing out. And I don't want 5G to widen the digital divide; I want 5G to help close that divide.

In conclusion, I'd like to again thank Commissioner Carr for leading this effort and his staff for their diligent work. And I'm grateful to the hardworking staff across the agency who have put many hours into this *Order*. In particular, thanks to Jonathan Campbell, Stacy Ferraro, Garnet Hanly, Leon Jackler, Eli Johnson, Jonathan Lechter, Kate Matraves, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Dana Shaffer, Jiaming Shang, David Sieradzki, Michael Smith, Don Stockdale, Cecilia Sulhoff, Patrick Sun, Suzanne Tetreault, and Joseph Wyer from the Wireless Telecommunications Bureau; Matt Collins, Adam Copeland, Dan Kahn, Deborah Salons, and John Visclosky from the Wireline Competition Bureau; Chana Wilkerson from the Office of Communications Business Opportunities; and Ashley Boizelle, David Horowitz, Tom Johnson, Marcus Maher, Bill Richardson, and Anjali Singh from the Office of General Counsel.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79*; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84

I enthusiastically support the intent of today's item and the vast majority of its content, as it will lower the barriers that some localities place to infrastructure siting. By tackling exorbitant fees, ridiculous practices, and prolonged delays, we are taking the necessary steps to expedite deployment and make it more cost efficient. Collectively, these provisions will help facilitate the deployment of 5G and enable providers to expand services throughout our nation, with ultimate beneficiaries being the American people.

While this is a tremendous step in the right direction, there are some things that could have been done to improve the situation further. For instance, the agreement reached by all parties in the 1996 Telecommunications Act was that states and localities would have no role over radio frequency emission issues, could not regulate based on the aesthetics of towers and antennas, and were prohibited from imposing any moratoriums on processing wireless siting applications. State and localities did not honor this agreement and the courts have sadly enabled their efforts via harmful and wrongly decided cases. Accordingly, I would have preferred that the aesthetics related provisions in the item be deleted, but I will have to swallow it recognizing that I can't get the rest without it. At the very least, I do appreciate that, at my request, it was clarified that the aesthetic requirements, which must be published in advance, must be objective.

I am also concerned that by setting application and recurring fees that are presumed to be reasonable, the Commission is inviting localities to adopt these rates, even if they are not cost based. Providers should be explicitly provided the right to challenge these rates if they believe they are not cost based. Even if not stated, I hope that providers will challenge unreasonable rates. I thank my colleagues for agreeing to my edits that the application fee presumption applies to all non-recurring costs, not just the application fee.

Further, I think there should be a process and standards in place if a locality decides that it needs more time to review batched applications. Objective criteria are needed regarding what are considered "exceptional circumstances" or "exceptional cases" warranting a longer review period for batch processing, when localities need to inform the applicant that they need more time, how this notification will occur, and how much time they will get. For instance, the item appears to excuse a locality that does not act within the shot clocks for any application if there are "extraordinary circumstances," but there are no parameters on what circumstances we are envisioning. Is a lack of adequate staff or having processing rules or policies in place a sufficient excuse? Such things should be determined upfront, as opposed to allowing courts to decide such matters. Without further clarity, I fear that we may be creating unnecessary loopholes, resulting in further delay.

Finally, I would have liked today's item to be broader and cover the remaining infrastructure issues in the record. First, the Commission's new interpretation of sections 253 and 332 applies beyond small cells. While our focus has been on these newer technologies, there needs to be a recognition that macro towers will continue to play a crucial role in wireless networks. One tower provider states that "[m]acro cell sites will continue to be a central component of wireless infrastructure . . . ," because 80 [percent] of the population lives in suburban or rural areas where "macro sites are the most efficient way

to transmit wireless signals."[1] Further, many of the interpretations in today's item apply not only to these macro towers, but also to other telecommunications services, including those provided by traditional wireline carriers and potentially cable companies.

Second, the Commission needs to close loopholes in section 6409 that some localities have been exploiting. While these rules pertaining to the modification of existing structures are clear, some localities are trying to undermine Congress's intent and our actions. For instance, localities are refusing ancillary permissions, such as building or highway permits, to slow down or prevent siting; using the localities' concealment and aesthetic additions to increase the size of the facility or requiring that poles be replaced with stealth infrastructure for the purpose of excluding facilities from section 6409; placing improper conditions on permits; and forcing providers to sign agreements that waive their rights under section 6409. And, I have been told that some are claiming that section 6409 does not apply to their siting processes. This must stop. I appreciate the Chairman's firm commitment to my request for an additional item to address such matters, and I expect that it will be coming in the very near future.

Third, there is a need to harmonize our rules regarding compound expansion. Currently, an entity seeking to replace a structure is allowed to expand the facility's footprint by 30 feet, but if the same entity seeks to expand the tower area to hold new equipment associated with a collocation, a new review is needed. It doesn't make sense that these situations are treated differently. And while we are at it, the Commission should also harmonize its shot clocks and remedies. These issues should also be added to any future item.

Lastly, the Commission also must finish its review of the comments filed in response to the twilight towers notice, make the revisions to the program comment, and submit it to Advisory Council on Historic Preservation for their review and vote. These towers are eligible, yet not permitted, to hold an estimated 6,500 collocations that will be needed for next-generation services and FirstNet. It is time to bring this embarrassment, which started in 2001, to an end.

Not only do I thank the Chairman for agreeing to additional infrastructure items, but I also thank the Chairman and Commissioner Carr for implementing several of my edits to the item today. Besides those already mentioned, they include applying the aesthetic criteria, including that any requirements must be reasonable, objective, and published in advance, to undergrounding; stating that undergrounding requirements that apply to some, but not all facilities, will be considered an effective prohibition if they materially inhibit wireless service; and adding similar language to the minimum spacing section of the item. Further, the minimum spacing requirements will not apply to replacement facilities or prevent collocations on existing structures. Additionally, localities claiming that an application is incomplete will need to specifically state what rule requires the submission of the missing information.

With this, I approve.

[1] American Tower Ex Parte Letter, WT Docket No. 17-79, n.6 (Aug. 10, 2018).

STATEMENT OF
COMMISSIONER BRENDAN CARR

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79*; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84

The United States is on the cusp of a major upgrade in wireless technology to 5G. The WALL STREET JOURNAL has called it transformative from a technological and economic perspective. And they're right. Winning the global race to 5G—seeing this new platform deployed in the U.S. first—is about economic leadership for the next decade. Those are the stakes, and here's how we know it.

Think back ten years ago when we were on the cusp of upgrading from 3G to 4G. Think about the largest stocks and some of the biggest drivers of our economy. It was big banks and big oil. Fast forward to today: U.S.-based technology companies, from FAANG (Facebook, Apple, Amazon, Netflix, and Google) down to the latest startup, have transformed our economy and our lives.

Think about your own life. A decade ago, catching a ride across town involved calling a phone number, waiting 20 minutes for a cab to arrive, and paying rates that were inaccessible to many people. Today, we have Lyft, Uber, Via, and other options.

A decade ago, sending money meant going to a brick-and-mortar bank, standing in that rope line, getting frustrated when that pen leashed to the table was out of ink (again!), and ultimately conducting your transaction with a teller. Now, with Square, Venmo, and other apps you can send money or deposit checks from anywhere, 24 hours a day.

A decade ago, taking a road trip across the country meant walking into your local AAA office, telling them the stops along your way, and waiting for them to print out a TripTik booklet filled with maps that you would unfold as you drove down the highway. Now, with Google Maps and other apps you get real-time updates and directions right on your smartphone.

American companies led the way in developing these 4G innovations. But it's not by chance or luck that the United States is the world's tech and innovation hub. We have the strongest wireless economy in the world because we won the race to 4G. No country had faster 4G deployment and more intense investment than we did. Winning the race to 4G added $100 billion to our GDP. It led to $125 billion in revenue for U.S. companies that could have gone abroad. It grew wireless jobs in the U.S. by 84 percent. And our world-leading 4G networks now support today's $950 billion app economy. That history should remind policymakers at all levels of government exactly what is at stake. 5G is about our leadership for the next decade.

And being first matters. It determines whether capital will flow here, whether innovators will start their new businesses here, and whether the economy that benefits is the one here. Or as Deloitte put it: "First-adopter countries . . . could sustain more than a decade of competitive advantage."

We're not the only country that wants to be first to 5G. One of our biggest competitors is China. They view 5G as a chance to flip the script. They want to lead the tech sector for the next decade. And they are moving aggressively to deploy the infrastructure needed for 5G.

Since 2015, China has deployed 350,000 cell sites. We've built fewer than 30,000. Right now, China is deploying 460 cell sites a day. That is twelve times our pace. We have to be honest about this infrastructure challenge. The time for empty statements about carrots and sticks is over. We need a concrete plan to close the gap with China and win the race to 5G.

We take this challenge seriously at the FCC. And we are getting the government out of the way, so that the private sector can invest and compete.

In March, we held that small cells should be treated differently than large, 200-foot towers. And we're already seeing results. That decision cut $1.5 billion in red tape, and one provider reports that it is now clearing small cells for construction at six times the pace as before.

So we're making progress in closing the infrastructure gap with China. But hurdles remain. We've heard from dozens of mayors, local officials, and state lawmakers who get what 5G means—they understand the economic opportunity that comes with it. But they worry that the billions in investment needed to deploy these networks will be consumed by the high fees and long delays imposed by big, "must-serve" cities. They worry that, without federal action, they may not see 5G. I'd like to read from a few of the many comments I've received over the last few months.

Duane Ankney is a retired coal miner from Montana with a handlebar mustache that would be the envy of nearly any hipster today. But more relevantly, he's a Member of the Montana State Legislature and chairs its Energy and Telecommunications Committee. He writes: "Where I see the problem is, that most of investment capital is spent in the larger urban areas. This is primarily due to the high regulatory cost and the cost recovery [that] can be made in those areas. This leaves the rural areas out."

Mary Whisenand, an Iowa commissioner, writes: "With 99 counties in Iowa, we understand the need to streamline the network buildout process so it's not just the big cities that get 5G but also our small towns. If companies are tied up with delays and high fees, it's going to take that much longer for each and every Iowan to see the next generation of connectivity."

Ashton Hayward, the Mayor of Pensacola, Florida, writes: "[E]xcessive and arbitrary fees . . . result[] in nothing more than telecom providers being required to spend limited investment dollars on fees as opposed to spending those limited resources on the type of high-speed infrastructure that is so important in our community."

And the entire board of commissioners from a more rural area in Michigan writes: "Smaller communities such as those located in St. Clair County would benefit by having the [FCC] reduce the costly and unnecessary fees that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage. By making small cell deployment less expensive, the FCC will send a clear message that all communities, regardless of size, should share in the benefits of this crucial new technology."

They're right. When I think about success—when I think about winning the race to 5G—the finish line is not the moment we see next-gen deployments in New York or San Francisco. Success can only be achieved when all Americans, no matter where they live, have a fair shot at fast, affordable broadband.

So today, we build on the smart infrastructure policies championed by state and local leaders. We ensure that no city is subsidizing 5G. We prevent excessive fees that would threaten 5G deployment. And we update our shot clocks to account for new small cell deployments. I want to thank Commissioner Rosenworcel for improving the new shot clocks with edits that protect municipalities from providers that submit incomplete applications and provide localities with more time to adjust their operations. Her ideas improved this portion of the order.

More broadly, our decision today has benefited from the diverse views expressed by a range of stakeholders. On the local government side, I met with mayors, city planners, and other officials in their home communities and learned from their perspectives. They pushed back on the proposed "deemed

granted" remedy, on regulating rents on their property outside of rights-of-way, and on limits to reasonable aesthetic reviews. They reminded me that they're the ones that get pulled aside at the grocery store when an unsightly small cell goes up. Their views carried the day on all of those points. And our approach respects the compromises reached in state legislatures around the country by not preempting nearly any of the provisions in the 20 state level small cells bills.

This is a balanced approach that will help speed the deployment of 5G. Right now, there is a cottage industry of consultants spurring lawsuits and disputes in courtrooms and city halls around the country over the scope of Sections 253 and 332. With this decision, we provide clear and updated guidance, which will eliminate the uncertainty inspiring much of that litigation.

Some have also argued that we unduly limit local aesthetic reviews. But allowing reasonable aesthetic reviews—and thus only preventing unreasonable ones—does not strike me as a claim worth lodging.

And some have asked whether this reform will make a real difference in speeding 5G deployment and closing the digital divide. The answer is yes. It will cut $2 billion in red tape. That's about $8,000 in savings per small cell. Cutting these costs changes the prospects for communities that might otherwise get left behind. It will stimulate $2.4 billion in new small cell deployments. That will cover 1.8 million more homes and businesses—97% of which are in rural and suburban communities. That is more broadband for more Americans.

* * *

In closing, I want to thank my colleagues for working to put these ideas in place. I want to thank Chairman Pai for his leadership in removing these regulatory barriers. And I want to recognize the exceptionally hard-working team at the FCC that helped lead this effort, including, in the Wireless Telecommunications Bureau, Donald Stockdale, Suzanne Tetrault, Garnet Hanly, Jonathan Campbell, Stacy Ferraro, Leon Jackler, Eli Johnson, Jonathan Lechter, Marcus Maher, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Jiaming Shang, and David Sieradzki. I also want to thank the team in the Office of General Counsel, including Tom Johnson, Ashley Boizelle, Bill Richardson, and Anjali Singh.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79*; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84

A few years ago, in a speech at a University of Colorado event, I called on the Federal Communications Commission to start a proceeding on wireless infrastructure reform. I suggested that if we want broad economic growth and widespread mobile opportunity, we need to avoid unnecessary delays in the state and local approval process. That's because they can slow deployment.

I believed that then. I still believe it now.

So when the FCC kicked off a rulemaking on wireless infrastructure last year, I had hopes. I hoped we could provide a way to encourage streamlined service deployment nationwide. I hoped we could acknowledge that we have a long tradition of local control in this country but also recognize more uniform policies across the country will help us in the global race to build the next generation of wireless service, known as 5G. Above all, I hoped we could speed infrastructure deployment by recognizing the best way to do so is to treat cities and states as our partners.

In one respect, today's order is consistent with that vision. We shorten the time frames permitted under the law for state and local review of the deployment of small cells—an essential part of 5G networks. I think this is the right thing to do because the shot clocks we have now were designed in an earlier era for much bigger wireless facilities. At the same time, we retain the right of state and local authorities to pursue court remedies under Section 332 of the Communications Act. This strikes an appropriate balance. I appreciate that my colleagues were willing to work with me to ensure that localities have time to update their processes to accommodate these new deadlines and that they are not unfairly prejudiced by incomplete applications. I support this aspect of today's order.

But in the remainder of this decision, my hopes did not pan out. Instead of working with our state and local partners to speed the way to 5G deployment, we cut them out. We tell them that going forward Washington will make choices for them—about which fees are permissible and which are not, about what aesthetic choices are viable and which are not, with complete disregard for the fact that these infrastructure decisions do not work the same in New York, New York and New York, Iowa. So it comes down to this: three unelected officials on this dais are telling state and local leaders all across the country what they can and cannot do in their own backyards. This is extraordinary federal overreach.

I do not believe the law permits Washington to run roughshod over state and local authority like this and I worry the litigation that follows will only slow our 5G future. For starters, the Tenth Amendment reserves powers to the states that are not expressly granted to the federal government. In other words, the constitution sets up a system of dual sovereignty that informs all of our laws. To this end, Section 253 balances the interests of state and local authorities with this agency's responsibility to expand the reach of communications service. While Section 253(a) is concerned with state and local requirements that may prohibit or effectively prohibit service, Section 253(d) permits preemption only on a case-by-case basis after notice and comment. We do not do that here. Moreover, the assertion that fees above cost or local aesthetic requirements in a single city are tantamount to a service prohibition elsewhere stretches the statute beyond what Congress intended and legal precedent affords.

In addition, this decision irresponsibly interferes with existing agreements and ongoing deployment across the country. There are thousands of cities and towns with agreements for infrastructure deployment—including 5G wireless facilities—that were negotiated in good faith. So

many of them could be torn apart by our actions here. If we want to encourage investment, upending commitments made in binding contracts is a curious way to go.

Take San Jose, California. Earlier this year it entered into agreements with three providers for the largest small cell-driven broadband deployment of any city in the United States. These partnerships would lead to 4,000 small cells on city-owned light poles and more than $500 million of private sector investment. Or take Little Rock, Arkansas, where local reforms to the permitting process have put it on course to become one of the first cities to benefit from 5G service. Or take Troy, Ohio. This town of under 26,000 spent time and energy to develop streamlined procedures to govern the placement, installation, and maintenance of small cell facilities in the community. Or take Austin, Texas. It has been experimenting with smart city initiatives to improve transportation and housing availability. As part of this broader effort, it started a pilot project to deploy small cells and has secured agreements with multiple providers.

This declaratory ruling has the power to undermine these agreements—and countless more just like them. In fact, too many municipalities to count—from Omaha to Overland Park, Cincinnati to Chicago and Los Angeles to Louisville—have called on the FCC to halt this federal invasion of local authority. The National Governors Association and National Conference of State Legislatures have asked us to stop before doing this damage. This sentiment is shared by the United States Conference of Mayors, National League of Cities, National Association of Counties, and Government Finance Officers Association. In other words, every major state and municipal organization has expressed concern about how Washington is seeking to assert national control over local infrastructure choices and stripping local elected officials and the citizens they represent of a voice in the process.

Yet cities and states are told to not worry because with these national policies wireless providers will save as much as $2 billion in costs which will spur deployment in rural areas. But comb through the text of this decision. You will not find a single commitment made to providing more service in remote communities. Look for any statements made to Wall Street. Not one wireless carrier has said that this action will result in a change in its capital expenditures in rural areas. As Ronald Reagan famously said, "trust but verify." You can try to find it here, but there is no verification. That's because the hard economics of rural deployment do not change with this decision. Moreover, the asserted $2 billion in cost savings represents no more than 1 percent of investment needed for next-generation networks.

It didn't have to be this way. So let me offer three ideas to consider going forward.

First, we need to acknowledge we have a history of local control in this country but also recognize that more uniform policies can help us be first to the future. Here's an idea: Let's flip the script and build a new framework. We can start with developing model codes for small cell and 5G deployment—but we need to make sure they are supported by a wide range of industry and state and local officials. Then we need to review every policy and program—from universal service to grants and low-cost loans at the Department of Commerce, Department of Agriculture, and Department of Transportation and build in incentives to use these models. In the process, we can create a more common set of practices nationwide. But to do so, we would use carrots instead of sticks.

Second, this agency needs to own up to the impact of our trade policies on 5G deployment. In this decision we go on at length about the cost of local review but are eerily silent when it comes to the consequences of new national tariffs on network deployment. As a result of our escalating trade war with China, by the end of this year we will have a 25 percent duty on antennas, switches, and routers—the essential network facilities needed for 5G deployment. That's a real cost and there is no doubt it will diminish our ability to lead the world in the deployment of 5G.

Finally, in this decision the FCC treats the challenge of small cell deployment with a bias toward more regulation from Washington rather than more creative marketplace solutions. But what if instead we focused our efforts on correcting the market failure at issue? What if instead of micromanaging costs we fostered competition? One innovative way to do this involves dusting off our 20-year old over-the-air-reception-device rules, or OTARD rules.

Let me explain. The FCC's OTARD rules were designed to protect homeowners and renters from laws that restricted their ability to set up television and broadcast antennas on private property. In most cases they accomplished this by providing a right to install equipment on property you control—and this equipment for video reception was roughly the size of a pizza box.

Today OTARD rules do not contemplate 5G deployment and small cells. But we could change that by clarifying our rules. If we did, a lot of benefits would follow. By creating more siting options for small cells, we would put competitive pressure on public rights-of-way, which could bring down fees through competition instead of the government ratemaking my colleagues offer here. Moreover, this approach would create more opportunities for rural deployment by giving providers more siting and backhaul options and creating new use cases for signal boosters. Add this up and you get more competitive, more ubiquitous, and less costly 5G deployment.

We don't explore these market-based alternatives in today's decision. We don't say a thing about the real costs that tariffs impose on our efforts at 5G leadership. And we don't consider creative incentive-based systems to foster deployment, especially in rural areas.

But above all we neglect the opportunity to recognize what is fundamental: if we want to speed the way for 5G service we need to work with cities and states across the country because they are our partners. For this reason, in critical part, I dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84

ORDER DENYING MOTION FOR STAY

Adopted: December 10, 2018 **Released: December 10, 2018**

By the Chief, Wireless Telecommunications Bureau:

1. On September 27, 2018, the Commission released its Declaratory Ruling and Third Report & Order (*Order*) in the proceedings listed above.[1] On October 31, 2018, the National League of Cities and a group of local governments and associations (collectively, NLC) filed a Motion for Stay of the Order pending judicial review (Motion).[2] For the reasons discussed below, we deny the Motion.

I. BACKGROUND

2. In the *Order*, the Commission determined that certain state and local legal requirements and related governmental actions may be unlawful because they effectively prohibit the deployment and provision of wireless services. It interpreted the term "effect of prohibiting," as used by Congress in both Sections 253 and 332(c)(7) of the Communications Act.[3] Based on this interpretation, the *Order* articulated specific standards for resolving concrete disputes over whether states' or localities' fees in connection with certain types of wireless facility deployments or their requirements or restrictions relating to wireless facilities' aesthetic impact or related concerns are consistent with Sections 253 and 332(c)(7).[4] It further clarified that states' and localities' rates and terms for deployment of wireless facilities in public rights-of-way (ROW) or on government structures within the ROW are subject to the limits Congress imposed in Sections 253 and 332(c)(7).[5] The Commission also considered and rejected various statutory and constitutional challenges to its interpretive authority.[6]

3. In addition, the *Order* addressed the statutory requirement that state and local governments "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time."[7] Among other things, it codified the existing "shot clocks"

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[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, *et al.*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (released Sept. 27, 2018) (*Order*).

[2] National League of Cities, *et al.* Motion for Stay, WT Docket No. 17-79 and WC Docket No. 17-84 (filed Oct. 31, 2018), https://www.fcc.gov/ecfs/filing/103154366759 (Motion). *See id.* at 1 n.1 (listing parties joining the motion).

[3] *Order* at paras. 34-42 (Part III.A); *see* 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

[4] *Order* at paras. 43-80 (Part III.B) (fees), paras. 81-92 (Part III.C) (aesthetic requirements and similar restrictions).

[5] *Id.* at paras. 92-97 (Part III.D).

[6] *Id.* at paras. 98-102 (Part III.E); *see also id.* at paras. 73-77.

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

(*i.e.*, presumptively reasonable periods of time for state and local governments to act on deployment requests) that the Commission adopted in 2009[8] and specified new shot clocks for "small wireless facilities."[9]

4. The full text of the *Order* was released on September 27, 2018; a summary was published in the Federal Register on October 15; and the *Order* is scheduled to take effect on January 14, 2019 (90 days after publication).[10] The *Order* acknowledged that "some localities will require some time to establish and publish aesthetics standards," and therefore the *Order's* aesthetics standards will not take effect until 180 days after Federal Register publication. As a consequence, to the extent localities choose to impose aesthetic requirements on the deployment of covered wireless facilities 180 days after Federal Register publication, the requirements must be "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance."[11]

5. Various parties have petitioned for judicial review of the *Order*.[12] Pursuant to 28 U.S.C. § 2112(a), the Judicial Panel on Multidistrict Litigation consolidated the petitions and assigned them to the U.S. Court of Appeals for the Tenth Circuit.[13]

II. DISCUSSION

6. When evaluating a stay request, the Commission considers "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[14] "The third and fourth factors merge when the [federal] Government is the opposing party."[15] We conclude that NLC's Motion fails to satisfy these factors.

A. NLC Fails to Show a Likelihood of Success on the Merits

7. NLC contends that aspects of the *Order* conflict with various provisions of the Communications Act,[16] are arbitrary and capricious under the Administrative Procedure Act,[17] and violate local governments' Fifth Amendment and Tenth Amendment rights.[18] None of these arguments is likely to succeed on the merits.[19]

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[8] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *pet. for review denied*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

[9] *Order* at paras. 104-30. *See id.* at para. 11 n.9, & App. A, 47 CFR § 1.6002(*l*) (defining "small wireless facilities").

[10] 83 FR 51867 (Oct. 15, 2018); *Order* at paras. 152-53.

[11] *Order* at para. 89.

[12] In addition, one petition for reconsideration of the *Order* has been filed. The present order should be not construed as expressing any view on the merits of that petition.

[13] *In re Federal Communications Commission, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Consolidation Order, MCP No. 155 (U.S. Judicial Panel on Multidistrict Litig., Nov. 2, 2018), https://docs.fcc.gov/public/attachments/DOC-354923A1.pdf.

[14] *Nken v. Holder*, 556 U.S. 416, 425-26 (2009); *see also Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008).

[15] *Nken*, 556 U.S. at 435.

[16] Motion at 2-3, 12-16.

[17] *Id.* at 16-22.

[18] *Id.* at 5-9 (Tenth Amendment), 9-11 (takings), 11 (due process).

8. *Communications Act*. We find unpersuasive NLC's assertions that the Commission's interpretation of Sections 253 and 332(c)(7) and its application of those provisions to local governments' fees and restrictive requirements unambiguously conflict with the statute.[20] NLC argues that the Commission's *Order* is in tension with and must follow the Eighth and Ninth Circuits' precedents establishing that "evidence of an existing or complete inability to offer a telecommunications service is required" to show that a locality violated Section 253(a).[21] Assuming, *arguendo*, that NLC's characterization of the Eighth Circuit and Ninth Circuit's precedents is correct, NLC nonetheless does not establish likelihood of success on the merits. As the *Order* explains, the Commission's decision is consistent with conclusions endorsed by the First, Second, and Tenth Circuits, as well as longstanding Commission precedent, that the statute's "effect of prohibiting" standard does not "require that a bar to entry be insurmountable before the FCC must preempt it."[22] It is axiomatic that reviewing courts must defer to the Commission's interpretation of "gaps" not clearly resolved by ambiguous terms in the Communications Act.[23] Here, the statutory term at issue—"effect of prohibiting" in Sections 253 and 332(c)(7)—is undeniably ambiguous; indeed, inasmuch as there is a contrast between the Eighth and Ninth Circuits' precedents, upon which NLC relies, and those of the First, Second, and Tenth Circuits, the contrast reinforces this conclusion. The Commission acted well within its authority to "address and reconcile this split" among the courts' potentially "conflicting views."[24]

9. The Commission's interpretation of these provisions also "makes considerable sense in terms of the statute's basic objectives" and is confirmed by its "consisten[cy] with the agency's own longstanding interpretation."[25] The *Order* explains that the narrow "coverage gap"-based interpretation of the term "effect of prohibiting," developed by some courts in the late 1990s,[26] is incompatible with the public's demand for mobile data and technological changes. Wireless providers must not only fill coverage gaps as they did in the 1990s, but now they must exponentially increase their networks' data capacity to maintain service and lay the groundwork for the deployment of 5G.[27] The Commission's rejection of the "coverage gap" interpretation is also driven by its expert policy judgment regarding the urgent need to ensure that "the deployment of wireless infrastructure, particularly Small Wireless

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[19] Notably, while NLC recites the "likely to succeed" element of the stay standard, it does not contend that any of its claims are actually likely to succeed, but only that they are "significant" or "serious and have a fair prospect of success" (*id.* at 5), or that they raise "substantial concerns" or "substantial questions" of statutory or constitutional violations (*id.* at 9, 11, 16).

[20] *Compare* Motion at 2, 13-15 *with Order* at paras. 34-42.

[21] *Order* at para. 41; *cf.* Motion at 13-14 (citing *Level 3 Communications LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), and *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008)).

[22] *RT Communications v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000). *See Order* at para. 35 & n. 79 and para. 41 & n.100 (citing *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); and *RT Communications*, *supra*). *See also Order* at para. 41 & n.101 (citing prior Commission rulings reaching consistent conclusion).

[23] *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984); *City of Arlington*, 569 U.S. at 290; *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 377-78 (1999).

[24] *Order* at para. 9.

[25] *Barnhart v. Walton*, 535 U.S. 212, 219 (2002); *see Order* at paras. 35-39 (explaining consistency with *California Payphone Ass'n*, 12 FCC Rcd 14191 (1997), and other longstanding Commission precedents).

[26] Under this standard, a locality's denial of a facility siting application was deemed to have the "effect of prohibiting" service only if that decision effectively prevented a carrier from filling a gap in its coverage and precludes the carrier from providing *any* service in a geographic area. *See Order* at para. 34 & notes nn.74-75, para. 40 & n.95, and cases cited therein.

[27] *Order* at para 40 & n.97.

Facilities, not be stymied by unreasonable state and local requirements."[28] That NLC or others might prefer different outcomes or would select alternative interpretations of the statute does not mean that the Commission's choices are impermissible or that NLC's arguments are likely to prevail on the merits.

10. We need not refute in detail each of NLC's other challenges[29] to various other determinations in the *Order* given the Commission's extensive legal analyses in support of its conclusions, which we believe will be sustained on judicial review. And principles of *Chevron* deference fortify our view that NLC's challenges to the Commission's interpretation and application of the Communications Act are likely to fail.[30]

11. *Arbitrary and Capricious.* NLC fails to show that the Commission's decisions are "arbitrary and capricious" in violation of the Administrative Procedure Act.[31] NLC contends that the Commission should have discounted some of the record evidence that it relied on and should have paid greater heed to materials that it claims the Commission ignored;[32] but courts accord the greatest deference to agencies' assessments of the reliability of disparate evidence, factual conclusions, and predictive judgments.[33] NLC fails to show that the Commission's assessments lack any support in the record or that

[28] *Id.* at para. 23; *see generally id.* at paras. 23-28 (discussing policy factors that necessitate Commission action). *See also id.* at para. 11 n.9 (defining "Small Wireless Facilities"); *id.* at App. A, new rule § 1.6002(*l*) (same).

[29] *See, e.g.*, Motion at 13 (challenging the *Order*'s analysis of the relationship between Sections 253 and 332(c)(7)); *but see Order* at paras 35-36 & n.83 (refuting that argument). *See also* Motion at 17 (characterizing as "beyond the bounds of reasonable interpretation" the *Order*'s analysis of the interplay between Section 253(a) and (c), without providing any contrary analysis to refute the Commission's conclusion); *but see Order* at paras. 71-74 (explaining analysis supporting Commission's conclusion). *See also* Motion at 2, 15 (objecting to *Order*'s standards for assessing whether localities' aesthetic requirements and similar restrictions are lawful as unauthorized by statute); *but see Order* at paras. 87-91 (explaining basis for these standards—to prevent state or local requirements that are unreasonably discriminatory or have the "effect of prohibiting" deployment, in violation of Sections 253(a) and 332(c)(7)(B)(i)(I) and (II)). *See also* Motion at 7, 16 (suggesting, in passing, that the *Order* violates Section 224 by requiring municipal utilities to allow access to utility poles at regulated rates); *but see Order* at para. 92 n.253 (explaining that Section 224's exclusion of publicly-owned utilities from the definition of utility, "[a]s used in this section," does not necessarily preclude the application of Section 253 to poles or other facilities owned by such entities). *See also* Motion at 21 (disputing *R&O*'s treatment of "exceptional circumstances" as basis for rebutting shot clocks' presumption of reasonableness); *but see Order* at paras. 115, 119, 121-22 (explaining bases for localities to rebut shot clocks' presumption of reasonableness). *See also* Motion at 21 (characterizing as "too flimsy to pass muster" the *R&O*'s reliance on recently-enacted state laws to justify applying shot clocks to batched applications); *but see Order* at paras. 105-15 (discussing factors, including but not limited to state laws, justifying shot clock rules).

[30] *See, e.g.*, *City of Arlington*, 569 U.S. at 296, 307 (reaffirming that "because Congress has unambiguously vested the FCC with general authority to administer the Communications Act," courts must defer under *Chevron* to the Commission's authoritative interpretations of the Act).

[31] *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (standard of review of claims that agency actions are "arbitrary and capricious").

[32] *See, e.g.,* Motion at 17 (*Order* ignores evidence about size of Small Wireless Facilities); *id.* at 18 (characterizing certain economic assertions as "unsubstantiated" and claiming that evidence supporting contrary conclusion was "completely ignored"); *id.* at 19 (heading) ("The Order Ignored Economic Evidence in the Record Prior to Setting Presumptively Reasonable Rates."); *id.* at 20 (one of the arguments discussed in the *Order* "was rebutted by ample economic evidence the Commission ignored"); *id.* at 20 (challenging conclusion that excessive rates may discourage deployment); *id.* at 21-22 (evidence of state legislation in support new shot clocks as "too flimsy to pass muster").

[33] *See, e.g.*, *FERC v. Electric Supply Ass'n*, 136 S. Ct. 760, 781 (2016) ("The scope of review under the arbitrary and capricious standard is narrow," and a court "must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action") (internal quotation marks and alterations omitted); *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1011 (8th Cir. 2018) ("[T]he FCC may

the Commission failed to articulate a reasoned explanation between the facts found and the choice made, and its disagreements with the Commission's conclusions on these matters cannot justify reversal of the *Order*.

12. *Tenth Amendment.* NLC's contention that the *Order* contravenes the Tenth Amendment's "prohibition against compelling the states [or their local subdivisions] to implement . . . federal regulatory programs"[34] is, at bottom, a challenge to the Communications Act itself.[35] Through Section 253 and 332(c)(7) of the Act, Congress barred localities from "prohibit[ing] or hav[ing] the effect of prohibiting" service. The *Order* interprets those provisions to bar certain local requirements that effectively prohibit service. While the Commission strongly encourages states and localities to implement "forward-looking policies" that "facilitate the deployment of . . . infrastructure" needed to "bring greater connectivity to their communities,"[36] neither Sections 253 and 332(c)(7) nor the Commission's interpretations of those provisions require states or localities to carry out any specific policies or to approve any particular siting request.[37] These are state and local decisions that are merely conditioned pursuant to the terms Congress specified in Sections 253 and 332(c)(7).[38]

13. *Uncompensated Takings.* We are not persuaded by NLC's mischaracterization of the *Order* as "depriv[ing] . . . local governments of their proprietary powers as owners of property."[39] The *Order* does not implicate local governments' actions in their role as property-owners; rather, it focuses on preventing them from violating federal law when they engage in "managing or controlling access to property within public ROW" for wireless facility deployment and when they make "decisions about where [such] facilities may be sited."[40] These regulatory functions are entirely distinguishable from transactions involving purchases or sales of property or services for a municipal government's own use.[41]

14. Nor are we persuaded by NLC's portrayal of the *Order*'s protections against excessive fees as "takings" of local governments' "private property" without just compensation.[42] First, the *Order* does not give "providers any right to compel access to any particular state or local property."[43] Rather, the *Order* requires that when access is provided, fees charged be a reasonable approximation of the

(Continued from previous page)
rationally choose which evidence to believe among conflicting evidence in its proceedings, especially when predicting what will happen in the markets under its jurisdiction.").

[34] Motion at 5; *see generally id.* at 5-7.

[35] *See Order* at para. 101 & n.290.

[36] *Order* at para. 25.

[37] NLC is incorrect that the *Order* "requires localities to publish aesthetic standards" or "specifies their form or contents." Motion at 6. Nothing in the *Order* requires localities to adopt aesthetic or any other standards, much less dictates their contents. The *Order* simply concludes that if a state or local government chooses to enforce aesthetic requirements, those requirements must be reasonable, non-discriminatory, objective, and published in advance, otherwise they would have the effect of prohibiting the provision of service, in violation of Sections 253 and 332(c)(7). *Order* at paras. 84-89.

[38] *See Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015) (rejecting Tenth Amendment challenge to a related provision of the Communications Act); *see also Order* at para. 101 nn.289, 290 (showing Tenth Amendment cases cited by NLC are inapposite).

[39] Motion at 8. NLC characterizes the Commission's determinations on this issue, *see Order* at para. 92-97, as a "departure from prior precedent [that] is never explained," Motion at 8, but does not cite any prior precedents, much less explain why it thinks the *Order* departs from them.

[40] *Order* at para. 96.

[41] *Id.* at para. 96 & nn.268, 269, 272 and cases cited therein.

[42] Motion at 9-11.

[43] *Order* at n.217.

localities' costs and that they be "no higher than those fees charged to similarly-situated competitors in similar situations."[44] For example, it may be the case that localities that do not offer access to their poles still may comply with Sections 253 and 332(c)(7).[45] Second, localities' obligation not to charge fees that exceed a reasonable approximation of their costs is not analogous to a regulation that deprives a private proprietor of its "investment-backed expectations."[46] Allowing wireless deployments on public ROW and associated structures does not prevent localities from using their ostensible "property" in a manner consistent with their "investment-backed expectations." Moreover, even if requiring localities to allow such access were construed as depriving them of the use of their property, they would not necessarily be entitled to compensation for such purported deprivation in amounts that exceed their reasonable costs.[47]

15. *Due Process*. The *Order* does not deprive local governments of their due process rights. NLC merely argues that "there is no way to implement this Order" within 90 days and that it established "effective dates that *preclude* compliance," but provides no basis for that assertion.[48] Moreover, even assuming *arguendo* that the argument had any merit, it would not justify an indefinite stay on Constitutional due process grounds. We are not persuaded that the drastic remedy of an indefinite stay is warranted for theoretical harm that many or most jurisdictions may never sustain.[49]

B. Local Governments Will Not Suffer Irreparable Harm

16. NLC also fails to justify a stay pending judicial review because it has not shown that local governments are *likely* to suffer irreparable harm absent a stay of the *Order*, and "simply showing some '*possibility* of irreparable injury' fails to satisfy the second factor" of the test for granting a stay pending judicial review.[50] "[T]he 'possibility standard is too lenient."[51] Here, NLC's alleged injuries fall far short of establishing a likelihood of irreparable harm, because none of its purported harms is plausible, legally cognizable, and irreparable.

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[44] *Order* at para. 50.

[45] *Id.* at para. 73 n.217 ("There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis."); *see also id.* at para. 97.

[46] *Id.* at 10 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

[47] NLC asserts that "fair market value" must be used to measure just compensation for takings purposes, but there is no "market value" of assets that are not freely bought and sold in a free "market"; and in such cases, use of actual costs or other readily-discernable amounts are not unreasonable proxies for estimating a market value that would be "fair" if a market existed. *See United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (recognizing that alternative measure of compensation might be appropriate "with respect to public facilities such as roads or sewers"); *see also Order* at para. 73 n.217 ("cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities") (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002)). NLC is likewise wrong to assume that the "fair market value" for placing small wireless facilities on government structures in the ROW necessarily exceeds a reasonable approximation of costs associated with that infrastructure. Only monopolists can presume—as NLC apparently does—that the "full . . . market value" will exceed "actual and direct costs," *id.* at 9; and neither private property-owners nor local governments are entitled to recover monopoly profits. *See Order* at para. 73 (finding that "local fees designed to maximize profit are barriers to deployment"). The "actual and reasonable cost" standard in the *Order* does not prescribe any specific accounting method or cost-allocation methodology and does not preclude recovery of any category of costs that the locality reasonably incurred and that are reasonably attributable to the provider's use of the public ROW or other facility. *See Order* at para. 76.

[48] Motion at 3, 11 (emphasis in original). *See also id.* at 23 ("Exposing localities to liability without even a reasonable opportunity to comply violates Due Process.").

[49] As noted below, many localities' requirements may already comply with the *Order*, and they will not need to make any changes to their requirements. *See infra* para. 20.

[50] *Nken*, 556 U.S. at 434-35 (emphasis added).

[51] *Id.* at 435.

17. *Reduced Fee Revenues.* First, NLC contends that irreparable harm will result from the "reduction in the fees that local governments [may] charge . . . to process applications" and asserts that they will not be able to recoup these losses later if the *Order* is overturned on appeal.[52] But as NLC concedes, monetary losses generally do not qualify as "irreparable."[53]

18. Most significantly, the ostensible revenue losses caused by the *Order*'s fee standards are hypothetical and speculative at this point.[54] The *Order*'s determinations about how Sections 253 and 332(c)(7) apply to state or local fees do not resolve the permissibility of any specific local government's fees or other requirements, and any disputes must be adjudicated through future litigation or regulatory proceedings. Moreover, the presumptively reasonable fee levels identified in the *Order* are only safe harbors and do not preclude a given locality from demonstrating that a higher fee is reasonable under the circumstances.[55] Absent a concrete dispute regarding a specific fee, NLC has no basis for speculating that "[t]he presumptively reasonable amount is far less than the record suggested would be required" or "deprives localities of resources that could have been devoted to other projects."[56]

19. Localities' alleged "*risk* of being hauled into court"[57] likewise offers no basis for a stay. Contrary to NLC's claims,[58] the cost of defending against unknown future lawsuits does not justify a stay; it is well established that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."[59] And the mere possibility that a locality may need to explain and justify its fees to a court is not the same as an order to lower its fees; no local government will be compelled to reduce any fee unless and until an aggrieved provider challenges the fee and successfully demonstrates to a court or the Commission that the fee violates the *Order's* standards. There is no telling when and whether such a lawsuit or petition will be filed—and no reason to assume local governments will lose such cases. In future cases, "when harm is more imminent and more certain," localities "will have an ample opportunity" to argue that their fees comply with Sections 253 and 337(c)(7).[60]

20. *Administrative Burdens of Overhauling Siting Review Procedures.* NLC's allegations that local governments will be required to overhaul their siting authorization requirements within a short time are overstated and premised on assumed administrative burdens that bear little resemblance to the *Order's* actual requirements. For instance, as to aesthetics, the *Order* simply requires that if a locality chooses to impose aesthetic requirements on covered Small Wireless Facilities applications, such requirements be published in advance and provide sufficient information to enable applicants to understand how their siting applications will be evaluated, without requiring extensive details.[61] Indeed,

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[52] Motion at 27.

[53] *Id.*

[54] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (purely "conjectural or hypothetical" injuries are not sufficiently "concrete and particularized" to rise to the level of "injury-in-fact" necessary to satisfy the "irreducible constitutional minimum of standing" under Article III of the Constitution).

[55] *Order* at paras. 79-80 & nn.233-34.

[56] Motion at 27.

[57] *Id.* at 25 (emphasis added).

[58] *See* Motion at 24 ("The Order exposes Movants to a Hobson's choice: they will face a significant risk of litigation or be forced to comply with an Order they are challenging as unlawful in court.").

[59] *Standard Oil Co. of Calif. v. FTC*, 449 U.S. 232, 244 (1980).

[60] *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998).

[61] *Order* at para. 88 n.247 ("[T]he aesthetic requirements to be published in advance need not prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of

as noted above, many localities' existing rules may already comply with the *Order*.[62] Moreover, the Commission already has taken into account concerns about the difficulty some localities might face in establishing and publishing aesthetic standards within a short time frame and, in part to address those concerns, has taken significant steps to alleviate any such difficulties.[63]

21. NLC's protestations about the administrative burdens of complying with the *Order's* new shot clocks for Small Wireless Facility applications[64] are also unfounded. The Commission's 2009 and 2014 orders already require localities to complete their review and act on some types of facility applications within 60 days and others within 90 days.[65] The new 60-day and 90-day shot clocks established for certain types of Small Wireless Facilities should require no major changes to localities' implementation procedures but may simply entail use of existing procedures already in place for review of applications that are already subject to those deadlines. Of course, if local governments have not already established whatever procedures are needed to comply with the existing 60-day and 90-day deadlines, any burdens they now face are caused by their non-compliance with existing rules rather than any new burdens imposed by the present *Order*.

22. *Aesthetics, Property Values, and Traffic Hazards.* Finally, NLC's claim that local governments will suffer immediate harm due to the construction of Small Wireless Facilities that the *Order* will compel them to permit[66] is likewise unfounded. As NLC concedes, the *Order* does not compel any locality to authorize any particular facility.[67] Nothing in the *Order* prevents localities from exercising their authority to deny applications to install facilities that are aesthetically inappropriate,[68] much less facilities that pose *bona fide* traffic hazards or other risks to public safety, so long as they do not wield

(Continued from previous page)
detail as to enable providers to design and propose their deployments in a manner that complies with those standards.").

[62] As the *Order* points out, "[t]he fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision." *Id.* This fact also indicates that the Commission's rulings may not cause localities in those states *any* burdens because, pursuant to state law, they may have already implemented any changes needed to comply with the Commission's decisions.

[63] The *Order* provides that it will become effective 90 days after Federal Register publication and localities will have an additional 90 days (i.e., 180 days after Federal Register publication in total) to comply with the *Order's* aesthetics standards. *See Order* at paras. 89, 153. *Cf.* Letter from Clarence E. Anthony, CEO and Executive Director, National League of Cities, *et al.*, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 6-7 (filed Sept. 19, 2018) ("[W]e ask the Commission to delay the effective date for at least six months after publication in the Federal Register to give local governments a sufficient transition period to amend their codes consistent with the Order and new rules. This is especially important given the requirement that, to be applicable, aesthetic requirements must be in place prior to application submission. . . . A delayed effective date is needed to provide sufficient time for local governments to implement thoughtful requirements that balance local processes and concerns with providers' deployment needs, which is best achieved where there is time for input from the public and wireless providers.").

[64] Motion at 21, 25-26.

[65] *See Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12957, para. 216 (2014), *aff'd*, *Montgomery County v. FCC*, *supra* (60-day deadline for review of "eligible facility requests" subject to Section 6409 of the Spectrum Act, 47 U.S.C. § 1455(a)); *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46 (90-day deadline for collocation applications pursuant to Section 332(c)(7)).

[66] Motion at 26. According to the Motion, such compelled construction will cause "immediate aesthetic harm," immediate "effect on property values," and "immediate hazard to traffic and during storms" that could be mitigated or avoided only if the *Order* is stayed or vacated. *Id.*

[67] *Id.* at 7.

[68] The *Order* makes clear that localities retain their authority to enforce objective aesthetic requirements that are "reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments." *Order* at para. 87.

such authority in a manner that is arbitrary or that improperly "prohibits or has the effect of prohibiting" the provision of wireless service. Likewise, the new shot clocks for Small Wireless Facilities require local governments to act on siting requests within specified periods of time but do not compel them to approve such requests.[69]

C. A Stay Would Harm Wireless Consumers and Providers, and the Public Interest Requires that the Order Take Effect Promptly

23. The Commission has repeatedly recognized "the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G."[70] It is important for the Commission to remove unnecessary regulatory barriers to such deployment to prevent harm to consumers who increasingly depend on access to wireless communications, and whose rapidly growing demand for wireless services and technologies can be met only if providers can rapidly "deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies."[71] For these reasons, the potentially extended delay that would result from NLC's requested stay would harm both consumers and providers of wireless services and would be contrary to public policy.[72]

24. Moreover, we reject NLC's assertion that a stay would benefit wireless industry applicants by reducing uncertainty.[73] To the contrary, allowing the *Order* to take effect as scheduled will give wireless providers, as well as the consumers they seek to serve, greater certainty due to the clear and objective standards that will govern local governments' review of proposed new deployments going forward, as well as the reduction of investment barriers caused by excessive fees or unduly restrictive land-use requirements. Given the weight of the record support for the Commission's determination that the *Order*'s requirements must be implemented promptly to accelerate deployment of the next generation of wireless facilities, we find that a stay of the *Order* would disserve the public interest.[74] We therefore deny NLC's Motion.

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[69] Motion at 7 & n.23 (citing *Order* at para. 73 n.217).

[70] *Order* at para. 28.

[71] *Id.* at paras. 23-24.

[72] *Cf. FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301-02 (Stevens, J., in chambers) (because "the harm to the public caused by a nationwide postponement of the auction would outweigh [any] possible harm to" movants, the public interest weighs heavily against granting a stay), *mot. to vacate denied*, 516 U.S. 938 (1995).

[73] Motion at 32.

[74] We do not credit NLC's assertion that statements by Verizon and Crown Castle executives "confirm that a stay of the Order would not harm deployment." Motion at 30 & n.100; *see also id* at 4 & n.8. Both companies submit that NLC mischaracterizes those statements. *See* Letter from William H. Johnson, Senior Vice President, Legal and Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Nov. 16, 2018) (quoting Verizon's Chief Financial Officer's public statements that the *Order* is "hugely important" because requiring municipalities to "get 5G site approvals done within a certain time frame and at a certain cost that's lower than where a lot of them have been" will help with "getting 5G built out as quickly as possible" and "help ensure that more Americans gain access more quickly to 5G services," and explaining that NLC mischaracterized another executive's statement made in a different context); Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle Int'l Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Nov. 15, 2018) (explaining that the "18 to 24 month deployment cycle for Crown Castle's facilities is a nationwide average and is driven by a wide variety of factors[;]"emphasizing that some localities' "onerous regulatory requirements and prohibitory fee demands can substantially delay or even prevent wireless buildout, stretching the deployment in [such] jurisdictions well past the nationwide average or, in some cases, keeping facilities from being built at all[;]" and pointing out Crown Castle's Chief Executive Officer's public statement that the *Order* will have an "immediate positive impact on our small cell deployments across the US"). In any event, extensive record evidence outweighs whatever probative value the statements quoted by NLC might have.

III. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201, and 303(r) and the authority delegated pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131 and 0.331, this Order Denying Motion for Stay in WT Docket No. 17-79 and WC Docket No. 17-84 IS ADOPTED.

26. It is FURTHER ORDERED that the Motion for Stay pending judicial review of the Declaratory Ruling and Third Report & Order in this proceeding, filed by the National League of Cities, *et al.*, IS DENIED.

27. It is FURTHER ORDERED that this Order Denying Motion for Stay SHALL BE EFFECTIVE upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

NOTE: Excerpt excludes attachments

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TIME WARNER TELECOM OF OREGON, LLC, an Oregon Limited Liability Company, and **QWEST COMMUNICATIONS CORPORATION,** a Delaware Corporation,

PLAINTIFFS,

v.

THE CITY OF PORTLAND, an Oregon Municipal Corporation,

DEFENDANT.

CV 04-1393-MO

EXPERT REPORT OF ALAN PEARCE, Ph.D.
Information Age Economics, Inc.
202-466-2654

A. INTRODUCTION

1. I am President of Information Age Economics, Inc. (IAE), a Washington D.C.-based research and consulting firm. I founded IAE in March, 1978, after serving for approximately eight years in senior-level positions with the U.S. Government, first as Chief Economist and Special Assistant to two Chairmen of the Federal Communications Commission (FCC), Dean Burch and Richard E. Wiley, then as Chief Economist of the House of Representatives Telecommunications Subcommittee, under the Chairmanship of Cong. Torbert H. Macdonald and Cong. Lionel Van Deerlin, and finally as Senior Telecommunications Economist and Policy Adviser in the Office of Telecommunications Policy, Executive Office of the President. I attended The London School of Economics

and Political Science, University of London, as both an undergraduate and graduate student, and have a Ph.D. in Business and Telecommunications from Indiana University. My resume, litigation experience, and publications are attached.

2. In connection with the preparation of this report, I reviewed the documents listed in the attached Appendix 2: Reference Materials, along with the amended complaint in this case, Judge Jelderks' decision in Qwest v. City of Portland (March 22, 2002), the Ninth Circuit's decision on appeal thereof (October 12, 2004), the Ninth Circuit's decision in City of Auburn v. Qwest, as amended (July 10, 2001), and the FCC's decision in the Pittencrieff case (October 2, 1997). I worked with Michael F. Carlo, M.B.A. in gathering the information used in this report. Mr. Carlo worked under my direction and supervision.

3. Based on my training and my experience in the telecommunications industry, I was asked to express an opinion on the following issues:

a. From an economic standpoint, is there reason to conclude that the statutes, regulations or legal requirements challenged by plaintiffs "may prohibit" entry? I conclude that there is no evidence to suggest that the regulations "may prohibit" entry, based on a comparison with other communities of similar size, and on general economic principles.

b. From an economic standpoint, is there reason to conclude that the City's approach to telecommunications franchising promotes competition? Is there reason to conclude that the existence of the City's IRNE network promotes competition? I answer both questions in the affirmative, based on a comparison of Portland to other Cities, and on data that suggests that

IRNE's entry into the market enhances opportunities for competition. Indeed, an examination of the relative numbers of competitive telecommunications services providers in the comparable cities, listed below in this report, clearly demonstrates that the city of Portland has a relatively large number of competitive providers, representing a significant indication that the city's regulatory policies have not inhibited competitive entry. On the contrary, competitive entry has been enabled by the city's pro-competitive policies. In sum, the City of Portland has fully lived up to the goals and spirit of The Telecommunications Act of 1996.

c. Is there reason to find that the "in-kind" requirements contained in the Portland franchises are part of a "fair and reasonable" compensation package for use of the rights of way in light of industry practices, and are nondiscriminatory and competitively neutral? I conclude that the "in-kind" requirements are fair and reasonable, and fairly common within the telecommunications industry in transactions where one entity provides a resource (whether rights of way or conduit) to another. In-kind "payments" are not new in the telecommunications-information industry having existed as a common business practice since before World War Two. In-kind merely refers to another form of "payment," for example the performance of "free" services and/or the provision or sharing of facilities. Major telecommunications companies, for example BellSouth, Southwestern Bell, and Verizon, among others, publicize websites that specialize in the sharing of conduits and rights of way, where a variety of

deals and methods of payment can be struck, see Appendix 2 for a list of carrier websites and pole attachment literature. I also conclude that the requirements imposed upon telecommunications providers here are relatively similar, and are both non-discriminatory and competitively neutral. Moreover, the management of the rights of way program does effectively allow for competition while balancing the interests of the taxpayers in the city of Portland.

B. ASSUMPTIONS UNDERLYING REPORT; TERMS.

4. I have been asked by the attorneys for the City to assume that all the challenges raised by plaintiffs relate to "statutes, regulations or legal requirements," within the meaning of 47 U.S.C. § 253, even though I understand that City contends that several of plaintiffs' challenges raise issues that are not the proper subject of a Section 253 challenge. I have prepared this report consistent with this assumption so that I could address contentions raised by plaintiffs. I have no opinion one way or the other as to the validity of the assumption.

5. I refer to Plaintiff Qwest Communications Corp below as QCC. The term "Qwest" refers to the incumbent local exchange carrier, an affiliate of QCC. I refer to plaintiff Time Warner Telecom of Oregon LLC as "TWTC" or "Time Warner." IRNE is Portland's "Integrated Regional Network."

6. In this report, I summarize my opinions and the current bases for those opinions, based on the information reviewed thus far. As I review additional information I may revise the opinions expressed in this report, add additional opinions, or both.

Exhibi

nalysis of Public Rights-of-Way Pr
Wireline Network Design and Con

July 13, 2011

d by Columbia Telecommunications Corporation

1 Introduction: Public rights-of-way processes represent a minor matter relative to the full effort required for broadband deployment

This report describes, from an engineering standpoint, the permitting process in the context of wireline broadband outside plant design and construction process. The observations in this report are based on Columbia Telecommunications Corporation (CTC) staff-members' decades of expert work building out and overseeing build-out of communications infrastructure across the United States.[1]

The report concludes that accommodating permitting and other local government requirements in public rights-of-way is a relatively small part of the cost and time required for design and construction of outside plant for a communications network. The National Broadband Plan asserts that "[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands. Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20 percent of the cost of fiber optic deployment…" This statement – assuming it is accurate - conflates permitting and very different activities associated with obtaining access to utility poles and conduit. Fees charged by local governments in connection with the *deployment* of broadband are a very small portion of the cost of fiber deployment, and certainly nothing close to 20 percent of deployment costs.

As discussed in this paper, the outside plant design and construction process, broadly speaking, involves the work from the time a network engineer receives instructions to construct a particular type of line in a particular community through the time the line is actually built. This is, of course, only a part of the work involved in the overall design of a network. Generally speaking, outside plant design and construction occurs at a point when overall network design and marketing principles are already in place. The decision as to *what* and *whether* to build involves additional time and cost. And of course, with broadband systems, the physical plant "design and construction" are only part of effort required to provide services. The design, installation, and integration of electronics and software add significantly to cost, and affect whether, when and where a company will build a system, and how it will stage construction. In our experience, it is other factors, rather than details within the outside plant and construction process, that drive deployment, and the time required for deployment.

[1] CTC provides technology engineering and business planning consulting services for public sector and non-profit clients nationwide and abroad. Since 1983, CTC has assisted hundreds of public and non-profit entities to analyze technology needs and strategies, plan and design broadband systems, and work with the private sector to meet local broadband and technology needs. This report was prepared by CTC's Director of Engineering, Andrew Afflerbach, Ph.D., P.E., who has 15 years of experience designing and evaluating fiber network design, with the support of CTC's outside plant engineers, who, among them, hold more than 100 years of experience designing and building outside plant for both telephone and cable companies.

In our experience with the communications industry and engineering broadband networks, public rights-of-way acquisition costs represent – in those communities that assess them – a remarkably minor factor in the larger analysis of outside plant design and construction processes and expenses—a cost of a few percent of construction (and thus an even smaller percentage of the total cost associated with planning and implementing a communications network).

Labor and material capital costs for outside plant and construction range from $25,000 to $250,000 per mile, depending on the service area and the type of construction used. In our experience, build-out costs are primarily a function of local labor rates, materials pricing as of the date of construction/integration, the complexity of the terrain, real estate acquisition, whether the construction will be aerial or underground, and the make ready process. By comparison, local permitting fees are a small amount of these costs. Operational costs (depending on the nature of the services provided by the broadband facility) are dominated by programming, Internet backhaul, outside plant maintenance, customer service, and billing.

Nor does the permitting process significantly delay deployment. While every project is different, for aerial construction, it is almost always the case that the majority of time in outside plant design and construction is in fact the make-ready process--coordinating with the pole owner and existing utilities to prepare utility poles for attachment, as described in Section 2.

Where local government rights-of-way permitting time is a significant part of the overall outside plant design and construction process in a typical mixed aerial/underground construction project, it will typically be where special reports, inspections, or approvals are required before a permit may issue—and most of these additional reports, inspections, or approvals are based on state and federal requirements. Special permits or other authorizations are required for crossing railroads, waterways or environmentally sensitive areas, or where federal funding mandates environmental assessments, for example. The time required to obtain the necessary approvals from federal environmental officials that are conditions to the issuance of a permit can double or triple total construction time for a particular project. However, it is very difficult to eliminate the requirement for additional time without harming property, creating significant risks to public safety, to the environment, or to other utilities and critical transportation systems.

To some degree, the impact on construction projects can be mitigated by proper planning, routing, and staging by the owner of the communications network. For example, in our experience, if the network deployers (or their contractors) make an effort to stage the filing of permit applications rather than filing hundreds at one time, the processing burden on the locality is spread over a reasonable period of time. In our experience, localities are very willing

to work with deployers to establish timetables and processes for reasonable submission – and reasonable review – of permit applications.

In many localities, local permitting processes and fees do not exist. Either as a matter of local or state policy, many localities—particularly those in rural areas—impose little or no process or fee on use of the public rights-of-way. In addition, in some areas, localities are not engaged in rights-of-way permitting. [2]

In our experience, it is in the most unserved and underserved rural areas where local fees are most minimal or non-existent; for example, traffic control in these areas requires less coordination. Thus, the absence of a process or fees does not, in our experience, encourage the deployment of services—providing further support for our conclusion that the consideration is simply not a relevant factor.

However, we have found that a well-managed process of local oversight of network construction often adds value and plays an essential, enabling role in key processes related to construction of broadband networks, including:

1. Reducing hits and cuts to other utilities located in the rights-of-way—for example, in Anne Arundel County and Howard County Maryland, the local governments intervened to improve quality control and remove contractors when Verizon Communications' construction of FiOS caused massive rights-of-way disruption and damage to existing cable and telecommunications utilities and made the project owners accountable for improving their practices and paying for their damages.

2. Enforcing codes which in turn make the finished construction safer and reduce its aesthetic impact—for example, many local governments monitor electrical and safety code in the rights-of-way and require entities in the rights-of-way to fix safety violations such as improper clearances, relocate enclosures in dangerous locations, and repairing damaged infrastructure.

3. Reducing disruption to roadways and economic activity through coordination of joint builds and enforcement of restoration requirements—for example, notifying service providers and coordinating the "open trench" installation of communications conduit in rights-of-way when road or utility construction is taking place.

4. Providing Geographic Information System (GIS) mapping. One of the significant contributions of many local jurisdictions is the availability of GIS base maps. If these are

[2] For example, in many parts of Virginia, rights-of-way including neighborhood streets are managed by the Virginia Department of Transportation; permitting is all done by the state. However, this is simply a consolidation of major and minor rights-of-way under one roof; a full permitting process still exists.

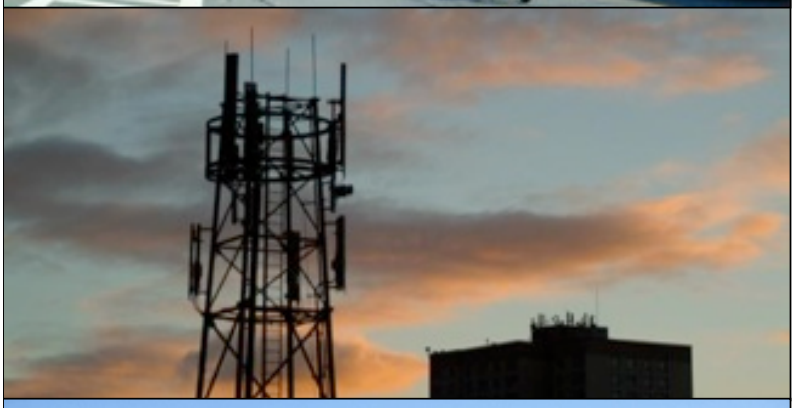
Way Processes

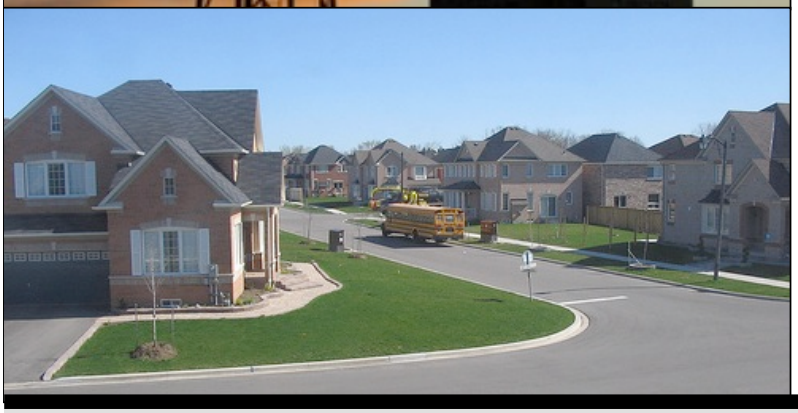
tions they must be p

er itself.

Exhibit G

Effect on Broadband Deployment of Local Government Right of Way Fees and Practices





By,

Bryce Ward

July 18, 2011

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II. SUMMARY OF CONCLUSIONS

Our analysis of the available data on ROW fees and BB deployment found that ROW fees have no measurable effect on deployment. Areas where local governments' authority to levy fees is strictly limited have the same levels of BB deployment and adoption as areas where local governments have relatively wider latitude to recover fair rents for use of the ROW.

Other factors likely explain the differences in deployment and adoption observed across the country. For instance, the relatively small percentage of communities un-served by BB account for a small percentage of the U.S. population. These communities lack BB services because of their isolated location, far from centers of population and commerce. These communities typically have few residences and businesses dispersed across large geographic areas. The costs of installing BB infrastructure and providing service greatly exceed the revenues that providers can earn on these services. The FCC calculates this gap at over $23 billion. Our analysis shows that limiting or abolishing ROW fees and subsidizing BB in currently un-served areas would likely have no measurable effect on BB penetration into most of these areas. The ROW-savings would be, at most, a small fraction of the required investment.

The literature on BB adoption identifies cost of service as one of the many factors that can influence adoption. The relationship between cost and adoption, however, is complex because of the many factors included in the cost of using or accessing BB service. Even if lower ROW fees were passed onto consumers as lower prices, this would not address many of the relevant costs factors that inhibit BB adoption—such as requiring deposits or long-term contracts, costs of computers and software, price increases after introductory offers expire, and the cost of purchasing BB bundled with other, unwanted services. A large gap exists between what current non-users say they would be willing to pay for BB services, and the maximum cost savings they could expect if providers passed on ROW-fee savings. Limiting or abolishing ROW fees would likely have little effect on BB adoption.

It is even more unlikely that limiting or abolishing ROW fees would have an impact on adoption given that BB providers advertise their, often national, prices excluding taxes, fees, installation costs and other costs. Unless lowering ROW fees in the places they are currently allowed led to changes in the nationally advertised prices, potential new customers would be unlikely to know the extent to which ROW-fee savings would impact the price they pay for BB services.

One argument by private BB providers for limiting or abolishing the ROW fees that they pay local jurisdictions is that the providers would use some of the savings to subsidize BB services in currently un-served or under-served higher cost areas. Even if one assumed that ROW fees drove BB deployment, such voluntary cross subsidization makes no economic sense for profit making firms. Firms allocate capital to investment that will generate the highest returns. It makes no business sense for private communications companies to take savings from not paying ROW fees and using that savings to fund less-profitable operations. More likely the firms would pocket the

savings and increase their profits. But, because fees are unlikely to drive deployment, even if we assume that BB providers did distribute ROW-fee savings from one market to another, it would likely have no measurable effect on BB penetration or adoption.

Allowing state and local governments to charge market value for use of public ROW is consistent with the economic principle of using prices to allocate scarce resources. From an economic perspective, a locality's ROW is a scarce resource just as lands—public or private—outside a ROW are scarce. Charging a fee for ROW access helps ensure that the ROW will be used efficiently, that is, that the ROW will not be misused or wasted. Furthermore, the closer the fee approximates the relevant market price, the more likely the ROW will be used in an economically efficient manner, a fundamental criterion by which economists evaluate the performance of a market and overall social welfare.

Reasonable charges for ROW can be established through any number of well-recognized mechanisms, including but not limited to contract negotiations. Local jurisdictions have little incentive to act as monopolists when negotiating or setting ROW fees. Local governments have different goals, responsibilities, and functions than do corporate entities. Localities hold resources—including ROW resources—in trust for their citizens and businesses. The local interest in promoting economic growth and development for residents and businesses disciplines ROW pricing. Also, local governments compete vigorously with one another to attract and encourage deployment of advanced and reliable utilities. Thus, local jurisdictions have a strong incentive not to overprice ROW access: a community that discouraged ROW deployment runs the risk of losing businesses and residents to neighboring communities.

While we find no evidence that a public policy that actually limited existing ROW fees would produce meaningful benefits in increased BB deployment or adoption, such a policy would reduce local revenues. Jurisdictions may be required to recover the lost revenues by raising taxes or fees charged to others. Another response could be to cut services. A locality may be forced to reduce the planning and management actions that help maintain efficient ROW uses. This would allow ROW users to externalize their own costs onto other ROW users. Also, the lack of efficient allocation of ROW resources could drive additional ROW costs onto taxpayers, and adversely affect residents, businesses, and ROW users. In addition, there would be a cost to regulation and compliance that could itself be substantial, and that would add to the negative impact of reducing ROW fees.

Given the absence of obvious, measurable benefits to BB deployment or adoption from regulating ROW fees, together with the prospect of harm to BB consumers, residents, businesses, telecom providers and other ROW users, and additional direct and indirect regulatory costs, it is difficult to find an economic justification for regulating local rights of way charges or practices.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

STREAMLINING DEPLOYMENT OF SMALL CELL INFRASTRUCTURE BY IMPROVING WIRELESS FACILITIES SITING POLICIES; MOBILITIE, LLC PETITION FOR DECLARATORY RULING	WT Docket No. 16-421

THE ECONOMICS OF LOCAL GOVERNMENT RIGHT OF WAY FEES

DECLARATION OF

KEVIN E. CAHILL, PHD

March 8, 2017

I. INTRODUCTION

A. Author

1. My name is Kevin E. Cahill, PhD. I am a project director and senior economist at ECONorthwest, a public policy and economics consulting firm based in Portland, Oregon. I have published on a variety of topics related to applied microeconomics and have presented my research at academic conferences nationwide. I am also experienced in commercial litigation and antitrust matters, labor economics, and public policy and have testified numerous times in deposition and at trial. I earned my BA in mathematics and economics (with honors) from Rutgers College and MA and PhD in economics from Boston College. My professional and academic qualifications are described in my curriculum vitae, which is attached as Appendix A.

B. Purpose

2. My declaration in this matter addresses two topics: 1) the economic criteria that municipalities should apply when considering rights-of-way (ROW) charges, such as those at issue in the Mobilitie, Inc. ("Mobilitie") Petition;[1] and 2) the appropriate measures of economic cost for determining a fair, reasonable, and nondiscriminatory rate.

C. Summary of Opinions

3. Economic principles provide a clear justification for why municipalities should charge market-rate fees to access government-owned property such as rights-of-way.[2] First, market-rate fees ensure the efficient use of ROW—the allocation of this scarce resource that

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[1] Mobilitie, LLC. 2016. Petition for Declaratory Ruling. Before the Federal Communications Commission, In the Matter of Promoting Broadband for All American by Prohibiting Excessive Charges for Access to Public Rights of Way, WT Docket No. 16-421 (November 15).

[2] Mobiltie's petition, as I understand it, addresses two very different charges: regulatory fees, which are designed to capture the cost associated with regulating a particular voluntary activity in which a user engages, and market rents, which capture the costs associated with providing a benefit to a particular entity in return for a use of public properties. From an economics perspective the term "cost" as it pertains to access to ROW, and the "market rate" based on this cost, incorporates both those associated with regulatory fees (e.g., administrative costs and operations and management costs) and those associated with market rents (e.g., opportunity costs and negative externalities). As I note throughout this report, these costs should be fully considered in the price that municipalities charge for access to ROW in order for an efficient allocation of resources to take place. Further, while most of this report is focused on costs related to market rents, it bears emphasizing that, unless fees are set at a level that recovers all costs associated with a regulatory activity, that activity effectively is being subsidized by others and a marketplace benefit is being provided to the entity that is allowed to avoid these costs.

maximizes social welfare. Restricting fees below the market rate creates excess demand for ROW and leads to its overutilization. Second, the market rate should compensate the municipality not only for the administrative costs and operations and maintenance (O&M) costs associated with ROW access, but also for the fixed costs that the municipality incurred to create the ROW, the opportunity costs associated with occupying the ROW (e.g., increased costs in planning for future projects), and any negative externalities associated with placement of a facility in the rights of way (e.g., negative impacts on community aesthetics and property values). These components reflect the true cost to the municipality of granting access to its ROW.

4. Municipalities do not "profit" when users pay the full cost of accessing the ROW, nor is the socially-optimal level and rate of deployment of a new technology achieved when fees are restricted to just cover administrative costs and operations and maintenance costs. Quite the contrary. Such restrictions harm municipalities because resources are misallocated. The fact that some organizations might benefit from these restrictions—namely, by lowering their costs of production and supplying more of their product—does not imply that municipalities and its citizens and businesses also realize a net benefit (they do not).
5. Simply put, the efficient allocation of ROW is achieved when users pay the market price for accessing the ROW.

II. THE ECONOMIC PRINCIPLES OF ACCESSING ROW

6. Economics is the study of the efficient allocation of scarce resources. In an economic sense, a resource is scarce when demand or wants exceed the available supply. Very few resources would *not* be considered scarce—sand in the desert or seawater at the beach are two examples. Each household, city, state, and country has a limited supply of scarce resources (e.g., labor, land, knowledge, energy), and each entity decides how to allocate their resources. Municipalities, too, have scarce resources—land, infrastructure, vehicles, buildings—which they hold in trust for residents, businesses owners, and taxpayers.[3]

[3] Mankiw, G. 2015. *Principles of Microeconomics*. Stamford, CT: Cengage Learning; Samuelson, P. and W. Nordhaus. 2005. *Economics*. New York, NY: McGraw-Hill International Edition; Hall, R. and M. Lieberman. 1998. *Microeconomics: Principles and Applications*. Cincinnati, OH: South-Western College Publishing.

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VIA ELECTRONIC FILING

September 5, 2018

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

Dear Ms. Dortch:

On August 29, 2018, Corning Incorporated ("Corning") submitted a report, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 2, 5G Attachment and Application Fee Scenarios* ("Report"),[1] estimating the potential impact on 5G fixed wireless deployment of instituting a cap on small cell pole attachment and application fees.

On September 5, 2018, the Commission released a draft Declaratory Ruling in which annual attachment fee caps were set at $270 per small cell and the application fee cap was set at $100.[2] In response, Corning respectfully submits the attached supplemental sensitivity analysis, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 3*.[3] The sensitivity analysis concludes that reducing small cell and application fees could reduce deployment costs by $2.0 billion over five years, or $7,500 per small cell built. These cost savings could lead to an additional $2.4 billion in capital expenditure due to additional neighborhoods moving from being economically unviable to becoming economically viable, with 97% of this capital expenditure going towards investment in rural and suburban areas.

[1] *See* Letter from Thomas J. Navin, Counsel to Corning, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Aug. 29, 2018), at Attachment A. The Report supplements previous reports submitted by Corning in this proceeding and the Commission's *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* proceeding. *See* Letter from Thomas J. Navin, Counsel to Corning, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Jan. 25, 2018), at Attachments A and B.

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC-CIRC1809-02, at ¶ 76 (Sept. 5, 2018), *available at* https://docs.fcc.gov/public/attachments/DOC-353962A1.pdf.

[3] *See* Attachment A.

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, a copy of this letter is being filed via ECFS. Should you have any questions, please do not hesitate to contact me.

Respectfully Submitted,

/s/ Thomas J. Navin

Thomas J. Navin
Counsel for Corning Incorporated

Tim Regan
Senior Vice President, Global Government Affairs, Corning Inc.

Attachment A

Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 3

September 2018

Ed Naef, CMA Strategy Consulting

Micah Sachs, CMA Strategy Consulting

Ed Naef is a Partner at CMA Strategy Consulting and Micah Sachs is a Principal at CMA Strategy Consulting. The authors would like to thank Corning for the funding to support this study.

Recently, CMA published a study ("*Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 2, 5G Attachment and Application Fee Scenarios*," henceforth: Annex 2) estimating the potential impact on 5G fixed wireless deployment of instituting a cap on small cell pole attachment and application fees[1]. CMA assessed the impact of reducing small cell fees in two ways: 1) calculating the cost savings from capping fees at a level in line with the median of recent state regulations[2] and 2) estimating the new capital investment that could occur due to these cost savings making more neighborhoods economically viable for 5G fixed wireless deployment. In this new brief annex (Annex 3), we share our findings from a sensitivity analysis modeling the impact if pole attachment fees were capped at a slightly higher level than the assumption used in Annex 2. For purposes of this analysis, the term "attachment" fee includes recurring annual charges both for right-of-way (ROW) access and for attaching to poles.

In Annex 2, we assumed a $150 small cell annual attachment fee cap and a $100 (one-time) small cell application fee cap. For Annex 3, we were requested by the sponsor of this study, Corning, to model a sensitivity if annual attachment fee caps were set at $270 per small cell and the application fee cap were set at $100. We calculated cost savings and other incremental benefits relative to our Revised Base Case as described in Annex 2, which modeled potential 5G fixed wireless deployment assuming no change in regulations and average small cell attachment and application fees in line with what deployers of wireless infrastructure have recently observed[3]. The key findings of this new sensitivity analysis are:

- Reducing small cell attachment and application fees could reduce deployment costs by $2.0 billion over five years, or $7,500 per small cell built. $1.8 billion would be operating expenditure reductions due to lower annual attachment fees, and $200 million in cost reductions would be attributable to lower application fees, which are required prior to building out a small cell network.
- These cost savings could lead to an additional $2.4 billion in capital expenditure due to additional neighborhoods moving from being economically unviable to becoming economically viable. 97% of this capital expenditure would go towards investment in rural and suburban

[1] *See* Letter from Thomas J. Navin, Counsel to Corning Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Aug. 29, 2018), at Attachment A (Ed Naef and Micah Sachs, CMA Strategy Consulting, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 2, 5G Attachment and Application Fee Scenarios* (Aug. 2018)); the study includes a detailed explanation of CMA's sources, methodology and conclusions.

[2] *See* Ex Parte Letter from Kara Graves, CTIA, and Zachary Champ, WIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 and WT Docket No. 16-421 (Aug. 10, 2018).

[3] For the Revised Base Case, CMA developed state-level assumptions for annual small cell attachment fees and application fees. For states with caps documented by the CTIA/WIA survey, CMA used the documented caps, under the assumption that most municipalities will charge the maximum fee allowed. For other states (or states included in the CTIA/WIA survey that did not have caps on one of the two categories of fees), CMA used national benchmarks drawn from recent filings from developers of wireless infrastructure as part of the proceedings *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79*; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84*; and *Streamlining Deployment of Small Cell Infrastructure, WT Docket No. 16-421*. See Annex 2 for full list of sources.

areas. These newly economically viable neighborhoods contain 1.8 million homes and businesses.

Note: this excerpt excludes approximately 60 pages of qualifications and prior testimony.

Report of Ed Whitelaw

September 1, 2005

Prepared for

The City of Portland

by

ECONorthwest
99 W. Tenth, Suite 400
Eugene, OR 97401
(541) 687-0051

I. INTRODUCTION

My name is Ed Whitelaw. I am a professor of economics at the University of Oregon, where I have taught since 1967. I am also president of ECONorthwest (ECONW), which provides analysis in economics, finance, planning and policy evaluation for businesses and government.

In the matter of Time Warner Telecom of Oregon, LLC (TWT) and Qwest Communications Corporation (QCC) v. the City of Portland (City), the City retained ECONW to evaluate and express an opinion on the prices that the City charges TWT and QCC for using the City's rights-of-way (ROW), and to consider and express an opinion on the Plaintiffs' claims regarding the City's Integrated Regional Network Enterprise (IRNE). The prices are set in the franchise agreements between the City and TWT and QCC. This matter has been brought under the Telecommunications Act of 1996.

I received a Ph.D. in economics from the Massachusetts Institute of Technology. I have testified on economic matters in administrative, legislative and Congressional hearings, and in courts in the Pacific Northwest and elsewhere. A copy of my vita and a table of my prior testimony is attached hereto as Exhibit A. ECONW bills my time at a rate of $375 per hour. No part of this compensation depends upon the outcome of this matter.

Throughout this report, I use "we," "our," and "us" to refer to my ECONW colleagues and me. In their work on this matter, my colleagues have worked under my direction. In this report, I summarize my opinions and the current bases for those opinions, based on the information we have reviewed so far. As we review additional information I may revise the opinions expressed in this report, add additional opinions, or both.

In preparing this report, I have relied on my general training, experience and knowledge regarding economic value and market prices of goods and services, including municipal ROW. We have examined documents produced in this case, reviewed other publicly available information relevant to the case, and interviewed City staff. Appendix B lists the material considered as part of our analysis.

II. SUMMARY OF OPINIONS AT THIS TIME

- Charging a fee to access the City's ROW ensures that the ROW will be used efficiently. The closer the fee approximates the relevant market price, the more likely the ROW will be used in an economically efficient manner, which is a fundamental criterion by which economists evaluate the performance of a market and overall social welfare.

- Valuing ROW using comparable transactions is common practice that helps establish a fair market value for ROW.

- TWT and QCC pay fair and reasonable fees to access the City's ROW, and these fees reflect the relevant market value of the ROW.

- Charging in-kind compensation as part of a fair and reasonable compensation package is common practice. TWT and QCC pay fair and reasonable in-kind compensation.

- For access to its ROW, the City does not require compensation from TWT and QCC that is competitively non-neutral or discriminatory.

- IRNE's use of the City's ROW does not constitute unfair competition or antitrust behavior on the part of the City.

- The City holds IRNE to the same standards as it holds other telecommunications firms that use the City's ROW.

- IRNE does not rely on any of the conduit paid in-kind by the Plaintiffs. Conduit paid-in kind by other telecommunications firms amounts to a miniscule proportion of the total value of IRNE and confers no measurable competitive advantage or disadvantage to the City.

- The intergovernmental agreements (IGA) between the City and other jurisdictions to share fiber and other resources do not constitute anticompetitive behavior. Private entities, including telecommunications firms, share resources for a variety of reasons. Telecommunications firms in the Portland market engage in strategic alliances to share ROW access and construction costs. Plaintiff TWT shares ROW access and construction costs in ways similar to the City's alleged anticompetitive behavior.

- IRNE's operation benefits consumers and competition. We know of no evidence to support the Plaintiffs' claim that IRNE's operation represents an abuse of "monopoly control" of the City's ROW.[1]

III. ECONOMIC BACKGROUND

As I understand the Telecommunications Act of 1996, state and local governments have the authority "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way . . ." (Sec. 253 (c)). In this section I describe economic concepts relating to compensation for use of ROW and competition.

A. Compensation for Use of Public Resources

The Telecommunications Act's provision allowing compensation for use of public ROW is consistent with the economic principle of using prices to allocate scarce resources. From an economics perspective, the City's ROW is a scarce resource. In contrast to "free resources," scarce resources do not "exist in such large quantities that they need not be rationed out

[1] *See* Complaint for Declaratory Judgment (First). September 28, 2004. In the matter of Time Warner Telecom of Oregon, LLC and Qwest Communications Corporation v. the City of Portland. Page 10, paragraph 18.

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coalition for local internet choice

September 18, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: WT Docket No. 17-79; WC Docket No. 17-84

Dear Ms. Dortch:

Please accept for filing in the dockets listed above the appended letter and attachments from Blair Levin to Jim Baller and Joanne Hovis of the Coalition for Local Internet Choice and to Mike Lynch and Nancy Werner of the National Association of Telecommunications Officers and Advisors.

We urge the Commission to consider Mr. Levin's extensive comments on the flaws of the economic and financial assumptions underlying the Commission's proposed restrictions on the ability of state and local governments to manage and obtain fair compensation for the siting of small cell wireless facilities in public rights of way and on public facilities.

Respectfully submitted,

Joanne Hovis
Chief Executive Officer
Coalition for Local Internet Choice

James Baller
President
Coalition for Local Internet Choice

cc: Mike Lynch
Nancy Werner

Joanne Hovis, President
Jim Baller, CEO
Coalition for Local Internet Choice

Michael Lynch, President
Nancy Werner, General Counsel
National Association of Telecommunications Officers and Advisors

September 17, 2018

Dear Jim, Joanne, Mike, and Nancy:

This is in response to your request for my view of the FCC's pending order, proposing to cap the fees that state and local governments may charge for small cell attachments. According to the FCC's draft order, these price-caps will save the industry $2B in costs to operate in metropolitan areas—which will translate into $2.5B in new wireless investment, primarily in rural areas. This letter summarizes my thoughts on aspects of the draft order. I have also attached three speeches I recently gave on this topic.

My judgment in this matter is based on several decades of advising institutional investors in telecommunications, my work as a municipal finance lawyer which involved structuring a number of public-private partnerships, and my experience in Washington DC as FCC Chief of Staff, and as Executive Director of the National Broadband Plan and Gig.U—roles that required me to be involved in evaluating detailed analysis of the economics of broadband deployment and the tools with which federal, state, and local government authorities can incent and stimulate investment.

Through these different roles, I've interacted with numerous investors, carriers, and localities, and that experience leads to my concerns with the FCC's argument:

First, focusing on state and local government fees and processes is a distraction from the real obstacles to accelerated and ubiquitous deployment of next generation mobile services, which are that broadband deployment economics are very challenging and have to be addressed at all levels of government and through creative collaboration with the private sector. Fees for access to public property represent only one of many, many costs of doing business a carrier will encounter. A focus on reducing or eliminating one (relatively marginal) cost of doing business does not solve the challenging economics of broadband deployment and serves only to obscure the true challenges. Indeed, even if one accepts the FCC claim about the $2.5 billion—which is highly questionable—that amount is about 1% of what the FCC and industry claim is the necessary new investment needed for next generation network deployments, and therefore is not likely to have a significant impact. As discussed in the attached speeches, while the FCC focused on the relatively small amounts at issue with municipal fees, it did not even evaluate

what other countries and cities have done to reduce deployment costs by amounts orders of magnitude greater than what the FCC proposes to do. In addition, the FCC action ignores other federal government action that will have a greater—and negative—impact on 5G deployment. As Intel recently told the United States Trade Representative, the recently announced tariffs on China "will slow down the pace of technology adoption across the U.S. economy, causing American firms and institutions to fall behind foreign competitors outside of China that aren't subject to the same tariffs." Thus, despite the FCC rhetoric, the item is unlikely to have any material impact on whether the United States leads the world in 5G deployment.

Second, local governments have a strong recent track record of endeavoring to enable and facilitate broadband deployment, as the Google Fiber experience conclusively demonstrated. Vilifying them based on fees for use of public property is not only a distraction, but also unfair. Indeed, rather than acknowledging that carriers have a proven ability to negotiate advantageous fees with localities, the FCC's draft order infantilizes carriers by preempting state and local government, presumably on the theory that carriers cannot protect themselves in negotiations with states and localities.

This is absurd. As the carriers themselves have acknowledged, they have sufficient leverage to walk away from any locality that creates too many obstacles to deployment and that leverage has led them to strike the same kinds of deals that numerous fixed broadband providers were able to strike in the wake of the Google Fiber efforts. In the attached speeches, I note the *piece de resistance* demonstrating the ability of carriers to work things out with localities without federal interference involves the carriers and the city of San Jose. They were antagonists in the FCC's recent BDAC process, but those parties were able to negotiate terms that all thought fair and that allows the companies to begin small cell deployments. Notably, the deals include having the companies contribute to a digital inclusion initiative and help the city pay for accelerated permitting, thus securing all parties' goals. Further, San Jose is not unique. Other cities and carriers have struck deals that provide benefits to both sides and will result in deployment without the need of a top-down, one-size-fits-all framework that the FCC is preparing to impose on thousands of diverse municipalities.

The FCC characterizes its draft order as "balanced," which is equally absurd, as all the new costs and obligations are borne by localities and all the benefits are enjoyed by the carriers. The more accurate description would be a "power grab" in which the FCC majority substitutes their judgment of what is best for local communities for the judgment of duly elected local officials. The FCC is deciding that the sole method localities can use for charging for access to public rights-of-ways is a cost-based methodology. I might note that in directing the writing of the National Broadband Plan (at Recommendation 6.6) and in my work at Gig.U, I have advocated to cities that they move in the direction of cost-based charges. There is a huge difference, however, in believing that generally city officials should lower costs to access to public property when they

believe their community will receive a benefit—and a federal agency, with no expertise in municipal finance and at no cost to itself, mandating that all localities have to lower the costs to all carriers, whether or not the carrier will be deploying new network facilities or whether or not the local community obtains any benefit.

Indeed, given the challenges of broadband deployment economics, partnerships of all sorts between companies and local governments are essential. Tying the hands of localities and states is self-defeating – it stops them from using creative partnering strategies (as they have successfully done in cities like San Jose, CA and Lincoln, NE) to find ways to improve broadband outcomes. Perversely, the draft order actually prevents local communities and states from working with their private partners by taking away a tool they have at their disposal (the attractiveness of their assets as mounting locations for small cells) to negotiate on behalf of the public.

In fact, I have been in discussions with a number of local governments and states that wish to provide an attractive investment climate for small cell and 5G networks but also seek to assure that under-adopting communities receive the benefit of the new services. They are exploring a range of techniques, such as pricing permits in less attractive areas significantly less than the more attractive areas or prioritizing permitting requests that are in areas of under-adoption. The FCC's draft order would make such efforts to address the digital divide ineffective if not illegal. I cannot predict with confidence how many localities and states would undertake such efforts. I can predict with confidence that any such locally-led efforts are more likely to narrow the digital divide than the FCC's order, which provides carriers with economic incentive to cherry pick locations. Thus, despite the FCC's rhetoric, the proposal will likely exacerbate, rather than alleviate, the digital divide.

Third, the FCC's draft order is based on a fallacy that no credible investor would adopt and no credible economist endorse: that reducing or eliminating costs for small cell mounting on public property in lucrative areas of the country (thus reducing carriers' operating costs), will lead to increased capital expenditures in less lucrative areas– thus supposedly making investment more attractive in rural areas.

That simply is not how investment decisions are made. Rather, as Commissioner Carr admitted in his recent speech, in lucrative areas, carriers will pay market fees for access to property just as they would any other cost of doing business. But they will not, as rational economic actors, necessarily apply new profits (created by FCC preemption) to deploy in otherwise-unattractive areas. My experience on Wall Street is that neither analysts nor investors regard this FCC action as likely to lead to increased deployment in non-economically attractive areas, which most on Wall Street would consider an irrational act. The smoking gun revealing that neither the companies nor Wall Street believe the economic logic that the FCC uses is that, to my knowledge,

no carrier has publicly specified and committed to Wall Street that the FCC action will cause it to materially increase its capital expenditures or has specifically committed to how its deployment map will be broadened in light of the FCC action.

In short, while the FCC may ignore reality, the carriers and Wall Street understand that increasing profitability in Market A will not make Market B more attractive for investment. Market B will still an area that is unprofitable or otherwise unattractive for investment, and the new requirement that Market A subsidize carriers by reducing fees will not benefit Market B under these circumstances. Indeed, as I detail in my attached speeches, only in Washington do otherwise intelligent people believe that lower costs automatically lead to commensurate capital investment.

Carriers have the same incentives as other corporate entities. The reality that my Wall Street clients have taught me over the last two decades, and that has been proven in through all kinds of evidence that the FCC simply ignored, is that under most circumstances stock-buy backs, debt reduction, or dividend support are higher priorities than new capital investments in networks. Nothing the FCC is doing changes those incentives.

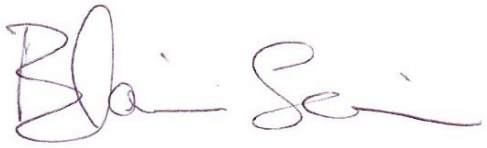
Finally, let me note something I discuss at length in the attached speeches: the draft order presents a framework in which industry gets all the benefits (reduced fees to access state and local property) with no obligations to reinvest the resulting profits in rural broadband—even though the purported rationale for the reduced fees is that they will lead to new investment. At the same time, states and localities will be forced by federal mandate to bear all the costs and receive no guaranteed benefits. These costs include not just the loss of revenue but having to bear the increased costs of addressing the permitting needs of a single industry (which, notably in the case of deals negotiated between carriers and cities, carriers agreed that they should assist in funding some of those costs.) The principal impact of the FCC's action is to facilitate a large transfer of wealth from the public to private enterprises—and leave American communities and states no better positioned to bridge digital gaps between urban and rural or between rich and poor. Further, those communities will lose revenues that they are using for such critical services as police, fire, and schools. The FCC is disingenuous in ignoring the cost of its action. In addition, the FCC action will likely lead to litigation over, among other things, jurisdiction and the meaning of such terms as "cost-based," that will delay, rather than accelerate, next generation broadband deployment.

In short, my response to your request is that I am deeply troubled by the FCC's draft order, the options it ignored, and the fallacious logic on which it rests. And I'm particularly concerned about the prospect of unelected federal officials in Washington DC mandating how, and at what price, state and local elected officials can manage their own property—all for the benefit of a select

group of companies that are under no obligations to reinvest these mandated public subsidies in new deployment.

I should note that I am providing this letter to you solely in my personal capacity and the views expressed herein are solely my own and should not be attributed to any organization with which I am currently affiliated.

Sincerely,



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September 19, 2018

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: City of Eugene, Oregon – *Ex Parte* Submission, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79; *Implementation of Section 621(a)(1)of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311

Dear Secretary Dortch:

On behalf of the City of Eugene, Oregon ("City" or "Eugene"), I submit this letter to respond to (1) NCTA's *ex parte* filings of June 11, 2018, in Docket No. 17-84,[1] and May 3, 2018, in Docket No. 05-311;[2] and (2) the September 5, 2018, *Draft Declaratory Ruling*'s hypothesis that preempting recurring above-cost right-of-way (ROW) and public infrastructure fees in economically attractive urban and suburban markets would result in more capital investment in economically unattractive rural and other low-density markets.[3]

NCTA's position is contrary to the plain language and clear legislative history of both the Cable Act and the 1996 Telecommunications Act and would result in the very sort of

[1] Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed June 11, 2018) ("NCTA June Letter").
[2] Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (filed May 3, 2018) ("NCTA May Letter").
[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC-CIRC1809-02, at ¶¶ 58-63 (Sept. 5, 2018), https://docs.fcc.gov/public/attachments/DOC-353962A1.pdf ("*Draft Declaratory Ruling*").

47 U.S.C. § 542(c). So under NCTA's approach, cable operators' broadband/telecommunications services would receive a free ride on the ROW, while broadband/telecommunications providers that are not cable operators would have to pay ROW fees on their broadband/telecommunications services.

Fifth, NCTA's suggestion that the 5% cable franchise fee is "more than 'fair and reasonable compensation' for [cable operators'] use of the public ROW" (NCTA May Letter at 8) is irreconcilably at odds with the Cable Act itself, which permits a 5% cable franchise fee.

Sixth, NCTA's assertion that imposing generally applicable gross revenue-based ROW fees on cable operators' non-cable services is a "local entry barrier[ ]" under Section 253[9] is unsupported by facts or common sense. Cable operators are by far the largest broadband service providers in the nation,[10] and they have more broadband subscribers than cable subscribers.[11] Moreover, the record stands unrefuted that Eugene's non-cable ROW fee has not prohibited telecommunications or broadband service in any way.[12] To suggest that requiring cable operators to pay the same gross revenue-based fee that their non-cable wireline broadband competitors pay is an "entry barrier" is therefore belied by the record.

2. The *Draft Declaratory Ruling*'s "Voluntary Cross-Subsidization" Rationale for Preempting Non-Cost-Based ROW Fees in Markets Where No Prohibition Can Be Shown Makes No Economic Sense.

Confronted with the awkward, but undeniable fact that deployment is occurring primarily in more urban, higher-density communities where ROW fees tend to be higher, and not occurring in more rural communities where ROW fees are low or non-existent,[13] the *Draft Declaratory Ruling* seeks to sidestep this problem by asserting the supposedly "simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether the reduction takes place on a local, regional or national level."[14] Aside from self-serving, but wholly non-binding, assertions by providers that they could use money saved in attractive markets to invest in otherwise economically unattractive markets, the only purportedly empirical support for the *Draft Declaratory Ruling*'s "voluntary cross-subsidization" hypothesis are two reports prepared by CMA Strategy Consulting and submitted by Corning, one before the

[9] NCTA May Letter at 7 (citing 47 U.S.C. § 253(a)).
[10] Press Releases, Leichtman Research Group, Inc., *455,000 Added Broadband in 2Q 2018* (Aug. 14, 2018), https://www.leichtmanresearch.com/455000-added-broadband-in-2q-2018/.
[11] *See* NCTA, Cable's Customer Base (66.4 million broadband customers, 51.9 million "television" customers), *available at* https://www.ncta.com/chart/cables-customer-base.
[12] *See* Letter from Tillman L. Lay, City of Eugene counsel, to Marlene H. Dortch, Secretary, and Elizabeth Bowles, Chair, Broadband Deployment Advisory Comm., FCC, WC Docket No. 17-84, GN Docket No. 17-83, WT Docket No. 17-79, at 3-4 & Attach. 5 (filed Dec. 19, 2017).
[13] *See*, *e.g.*, San Antonio Infrastructure Reply Comments at 22-23; Comments of the Cities of San Antonio, *et al.*, *Wireless/Wireline Infrastructure Docket*, Ex. C, at 6-8, Ex. D, at 7-9 (filed June 15, 2017). Commissioner Carr has conceded as much. Remarks of FCC Commissioner Brendan Carr at the Above Ground Level Summit, Philadelphia, PA, at 3 (June 14, 2018), https://docs.fcc.gov/public/attachments/DOC-351626A1.pdf (New York and San Francisco "will get 5G almost regardless of what we do at the FCC.").
[14] *Draft Declaratory Ruling*, ¶ 58. *See generally id.* ¶¶ 58-65.

Draft Declaratory Ruling was released,[15] and another just after its release.[16] These reports conclude that preemption of non-cost-based ROW application and use fees "*could* reduce deployment costs by $2.0 billion over five years," and these "cost savings *could* lead to an additional $2.4 billion in capital expenditure . . . . 97% of this capital expenditure would go towards investment in rural and suburban areas."[17]

In other words, the *Draft Declaratory Ruling*'s hypothesis, and the Corning studies' assumption, is that (1) preemption of above-cost local ROW fees in markets, like Eugene, New York City, San Jose, San Francisco and elsewhere, where no prohibition can be shown, will put an extra $2 billion in the pockets of providers over five years, and (2) providers – without any regulatory compulsion to do so and with many alternatives available for use of those funds – will nevertheless spend the extra $2 billion to invest in deploying facilities in lower-density, currently economically unviable, markets.

This "voluntary cross-subsidization" hypothesis is irredeemably flawed on theoretical, factual and legal grounds. Here are just a few of those flaws:

First, the Corning-backed reports on which the *Draft Declaratory Ruling* relies calculate the "cost savings" from preempting above-cost local fees by extrapolating from anecdotal, unverified local cost and fee information in industry's past filings in the *Wireless/Wireline Infrastructure Dockets*.[18] Even assuming for the sake of argument that industry's anecdotal allegations about a relative handful of local fees are accurate, anecdotal data cannot serve as a reliable basis for estimating what total nationwide ROW fees would be absent FCC preemption, and therefore are an inherently unreliable basis for calculating what the "cost savings" to industry would be from FCC preemption of those fees.

Second, the Corning-backed studies conclude that 95% of the $2 billion in supposed five-year cost savings from preempting local ROW fees comes from reduced operating expenses (recurring ROW fees), *not* reduced capital costs (up-front application fees).[19] That contradicts, rather than supports, the *Draft Declaratory Ruling*'s entire thesis (at ¶¶ 58-59) about the effect of such fees on providers' supposedly "limited capital budgets" (*id.* ¶ 59).

Third, if the Commission were to preemptively reduce providers' recurring ROW fee operating costs, in a competitive market those reduced costs would be passed through to the providers' customers in the form of lower prices. (And we note that the Commission has recently found the wireless market to be competitive.[20]) And if those ROW fee cost savings were in fact passed on to providers' customers, they would not be available to the provider to

[15] Letter from Thomas J. Nevin, Corning, Inc. counsel, to Marlene H. Dortch, Secretary, FCC, WTC Docket No. 17-79, Attach. A (filed Aug. 29, 2018) ("Corning Aug. filing").
[16] Letter from Thomas J. Nevin, Corning, Inc. counsel, to Marlene H. Dortch, Secretary, FCC, WTC Docket No. 17-79, Attach. A (filed Sept. 5, 2018) ("Corning Sept. filing").
[17] *Id.* at 1 & Attach. A, at 2-3 (emphasis added).
[18] *See* Corning Aug. filing, Attach. A, at 8 tbl.2 & n.26.
[19] *Id.* Attach. A, at 4; Corning Sept. filing at 2.
[20] *In re Implementation of Section 6002(b) of The Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 17-69, Twentieth Report, 32 FCC Rcd. 8968, 9037 (2017).

invest in deployment in other markets, again undercutting the *Draft Declaratory Ruling*'s entire thesis.

Fourth, assuming that providers were able to pocket the "cost savings" from preemptively reduced ROW fee operating costs (an assumption that would also mean that providers do in fact have market power[21]), at best that means that the *only* thing that we can be sure the *Draft Declaratory Ruling*'s proposed ROW fee preemption would accomplish is to increase providers' profit margin, and profits, in those markets where the fees were preempted. What the preemption would *not* do is to furnish providers with any additional economic incentive to use the extra profits in these lucrative markets to invest in any market whose low density or other characteristics make it an economically unattractive market in which to invest the providers' capital. Put a little differently, that a provider might earn more profits in Eugene or New York City as a result of Commission preemption of their current ROW fees, would not make investing those additional profits in rural North Dakota or Mississippi an any more attractive option than it was if Eugene's or New York City's ROW fees had not been preempted. It would just mean that the providers earn more profits in Eugene and New York City. But providers would have several other options for use of the additional profits made possible by the FCC's preemption. Here are just a few, each of which small cell/wireless industry members have recently done:

- Corporate acquisitions.[22]
- Increasing shareholder dividends.[23]
- Repurchase of stocks or bonds.[24]

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[21] In fact, as noted below, the kind of cross-subsidization that the *Draft Declaratory Ruling* supposes cannot occur unless a provider has market power in the subsidizing market (here, the lucrative high-density markets with higher ROW fees that the Commission proposes to preempt).

[22] *See, e.g.*, Michael J. de la Merced, *AT&T Agrees to Buy Time Warner for $85.4 Billion*, N.Y. Times (Oct. 22, 2016), https://www.nytimes.com/2016/10/23/business/dealbook/att-agrees-to-buy-time-warner-for-more-than-80-billion.html; Thomas Gryta, *AT&T Closes $49 Billion DirecTV Buy*, Wall St. J. (July 24, 2015), https://www.wsj.com/articles/at-t-closes-49-billion-directv-acquisition-1437766932; Ryan Knutson & Deepa Seetharaman, *Verizon Agrees to Buy Yahoo's Web Assets for $4.83 Billion*, Wall St. J. (July 25, 2016), https://www.wsj.com/articles/verizon-agrees-to-buy-yahoo-for-4-83-billion-1469444984; Mike Shields & Thomas Gryta, *Verizon Agrees to Buy AOL for $4.4 Billion*, Wall. St. J. (May 12, 2015), https://www.wsj.com/articles/verizon-to-buy-aol-for-4-4-billion-1431428458.

[23] *See*, *e.g.*, *See, e.g.*, Press Release, AT&T Inc., *AT&T Declares Quarterly Dividend* (June 29, 2018), http://about.att.com/story/att_declares_quarterly_dividend_2018.html; Press Release, Verizon Commc'ns Inc., *Verizon Increases Dividend for 12th Consecutive Year* (Sept. 6, 2018), https://www.verizon.com/about/news/verizon-increases-dividend-12th-consecutive-year; Press Release, T-Mobile US, Inc., *T-Mobile Announces Quarterly Preferred Stock Dividend* (Nov. 17, 2017), http://investor.t-mobile.com/file/Index?KeyFile=391155125; News Release, Crown Castle Int'l Corp., *Crown Castle Declares Quarterly Common Stock Dividend* (Aug. 2, 2018), http://investor.crowncastle.com/news-releases/news-release-details/crown-castle-declares-quarterly-common-stock-dividend-20; Press Release, Corning, Inc., *Corning Declares Quarterly Dividend* (July 19, 2018), https://investor.corning.com/investor-relations/news-and-events/details/2018/Corning-Declares-Quarterly-Dividend-4473370f5/default.aspx.

Fifth, the *Draft Declaratory Ruling*'s "voluntary cross-subsidization" hypothesis rests entirely on the assumption that industry members will devote the $2 billion in ROW fee "cost savings" in lucrative, but above-cost ROW fee, markets to deploying facilities in rural and suburban markets that, absent the extra funds from lucrative markets, would not be economically viable. But this hypothesis runs directly contrary to established economic literature about cross-subsidization that the FCC should well know: A rational firm will not engage in such voluntary cross-subsidization; regulatory compulsion is required. A recent study sponsored by USTelecom and NTCA, cites the economic literature and explains the principle well:

> *The economics literature deals with cross-subsidies in detail*. A cross-subsidy by the same firm involves pricing one service below cost while other services are priced above cost to a degree sufficient to cover the below-cost pricing. More precisely, the service receiving the subsidy is priced such that the present value of the revenues from that service are below the present value of the costs caused by that service – the shortfall being recovered from other services offered by that same firm. As noted above, *any rational firm should avoid such a cross-subsidy since avoiding offering the subsidized service (or raising the price of the service to eliminate the subsidy) would yield a higher stream of present-value adjusted profits. In addition, the services priced above cost to provide the cross-subsidy will invite competition which then puts pressure on the source of funding for the cross-subsidy. Such cross-subsidies can exist however when prices are regulated or otherwise mandated by a government agency*. This has occurred in price-regulated (rate-of-return) industries, as is described in the sections below (in telecommunications, for example, below-cost basic exchange service prices to residential customers were established for rate-of-return local telecommunications providers).[25]

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[24] *See, e.g.*, *See, e.g.*, Press Release, American Tower Corp., *American Tower Corporation Declares Quarterly Distribution and Announces New Stock Repurchase Program* (Dec. 7, 2017), http://www.americantower.com/corporateus/investor-relations/press-releases/news-item.htm?id=2321626; Press Release, T-Mobile US, Inc., *T-Mobile Announces $1.5 Billion Stock Repurchase Program* (Dec. 6, 2017), http://investor.t-mobile.com/file/Index?KeyFile=391358109; Press Release, Verizon Commc'ns Inc., *Verizon Announces Tender Offers for 8 Series of Notes*, Sept. 6, 2018: https://www.verizon.com/about/news/verizon-announces-tender-offers-8-series-notes; Press Release, AT&T Inc., *AT&T Inc. Announces Cash Offers for Four Series of Notes Open to All Investors* (Mar. 29, 2018), https://about.att.com/story/cash_offers_for_four_series_of_notes_open_to_all_investors.html.

[25] Steve Parsons & James Stegeman, *Rural Broadband Economics: A Review of Rural Subsidies*, at 14 (rev. July 13, 2018) (emphasis added), https://www.ustelecom.org/sites/default/files/Rural%20Broadband%20Economics-A%20Review%20of%20Rural%20Subsidies%20final%20paper.pdf (citing Steve G. Parsons, *Cross-Subsidization in Telecommunications*, 13 J. Reg. Econ. 157 (1998). *See also* Gerald R. Faulhaber, *Cross-Subsidization: Pricing in Public Enterprises*, 65 Am. Econ. Rev. 966-77 (1975).

Thus, if long-accepted economic theory holds (and neither the *Draft Declaratory Ruling* nor any of industry's filings it cites give a reasoned explanation as to why it wouldn't), the Commission's "voluntary cross-subsidization" proposal would, by industry's own calculation, result in nothing more than a wealth transfer of $2 billion from local governments and their taxpaying residents to industry and its shareholders over a five-year period.

Sixth, even if, contrary to economic theory, as well as providers' own past behavior, they nevertheless chose to engage in the voluntary cross-subsidization that the *Draft Declaratory Ruling* hypothesizes, Section 253 cannot plausibly be construed to empower the Commission, by preemptive fiat, to compel states and localities (and thus their taxpayers) to fund that cross-subsidization. Neither Section 253's plain language, nor its legislative history, remotely suggests that, hiding beneath its "prohibiti[on]" language was a grant to the FCC of the power to force some state or local governments and their taxpayers to subsidize the provision of service to other states or localities. Construing Section 253 to authorize such a Commission-imposed implicit cross-subsidization scheme would be directly contrary to the 1996 Telecommunications Act's purpose of eliminating implicit cross-subsidies in favor of explicit subsidies through a revamped universal service funding mechanism.[26] It also would raise serious constitutional questions under the Commerce Clause, the Spending Clause, the Necessary and Proper Clause, and the Tenth and Eleventh Amendments.[27]

Seventh, the *Draft Declaratory Ruling*'s reliance on *Puerto Rico Telephone Co. v. Municipality of Guayanilla*[28] as support for its "voluntary cross-subsidization" hypothesis is misplaced. As an initial matter, *Guayanilla's* reading of Section 253(a)'s language has been criticized and rejected by other circuits, [29] and rightfully so. But in any event, the *Guayanilla* court's ruling was not based solely, or even primarily, on "the notion that all other municipalities will follow the Municipality of Guayanilla's lead by enacting gross revenue fees." 450 F. 3d at 17. Rather, it was based on the court's finding that Guayanilla offered no evidence at all to rebut the plaintiff telephone company's factual showing about the adverse fiscal impact of the fee on the company (including an "86% decline" in overall profits, *id.*) and the court's finding about the impact of the fee "on the profitability of PRTC's operations *within the Municipality itself*" (*id.*) (emphasis added). The court reasoned that "it generally costs more to provide services in rural or less heavily populated areas [like Guayanilla] than it does in large urban centers," so "PRTC's profit margin on services that it sells within [Guayanilla] is likely to be *lower* than the company's overall, island-wide margins." *Id.* (internal quotations omitted). *Guayanilla* therefore presented the inverse of the *Draft Declaratory Ruling*'s "voluntary cross-subsidization" hypothesis: the imposition of an above-cost ROW fee in an area that was rural and, prior to imposition of the fee, already marginally profitable at best. Nothing in *Guayanilla* suggests that, absent any showing

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[26] *See* 47 U.S.C. § 254(k); H.R. Rep. No. 104-458, at 134, *reprinted in* 1996 U.S.S.C.A.N. at 146; H.R. Rep. No. 104-204, at 67-68 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 33.

[27] Could, for instance, the federal government order that the price of one state's property must be reduced to cost in order to subsidize service to another state? Precedent suggests not. *See Nat'l Fed. Of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575-88 (2012); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-78 (2018).

[28] 450 F.3d 9, 19, 17 (1st Cir. 2006) (cited in *Draft Declaratory Ruling* at ¶ 58 & n.156, ¶ 60 & n.169).

[29] *Level 3 Commc'n, LLC v. City of St. Louis*, 477 F. 3d 528, 532-33 (8th Cir. 2007). *See also Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577-78 (9th Cir. 2008) (en banc).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment	**WT Docket No. 17-79**

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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also appeal a CUA denial. Once those 30 days have passed, the applicant may submit an application for a building permit so that construction can begin.

The Planning Department's fees to review applications to install wireless facilities on private property are consistent with the department's fees for other CUAs. They include a base fee of $5,332.00.[13] The Planning Department could also charge the applicant for extra time and materials. Building permit fees are based on construction costs.[14]

San Francisco has permitted over 700 wireless facilities on private property. Of those, nearly 300 required a CUA and over 400 required only a building permit.

C. San Francisco Has Made More than 26,000 Poles that it Owns in the Public Right-of-Way Available for the Installation of DAS and Small Cells

In addition to the tens of thousands utility poles in San Francisco that are owned by private utility companies, all of which a carrier can use for a small cell or DAS facility, San Francisco owns more than 26,000 poles in the public right-of-way. In the last few years, San Francisco has made those poles available for the installation of small cells and DAS facilities.

The San Francisco Public Utilities Commission ("SFPUC"), San Francisco's water, sewer, and power utility, owns nearly 17,000 streetlight poles throughout San Francisco. These streetlight poles are critical to protecting the public health, safety, and welfare. The San Francisco Municipal Transportation Agency ("SFMTA") operates San Francisco's public transportation system, including electric buses and trolley cars. SFMTA owns over 9,500 poles to support its overhead traction cables that provide power to its electric buses and trolley cars.

In 2015, both the SFPUC and SFMTA agreed to make their poles available for the installation of small-cell and DAS facilities by any certificated or licensed telecommunications carrier. After extensive meetings with the carriers, the SFPUC and SFMTA approved form license agreements to use for this purpose.[15] Once a carrier signs the license agreement with one or both of the agencies, the licensee may choose among the thousands of poles owned by that agency to install its facilities.

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[13] *See* S.F. Planning Code § 350 (available at http://forms.sfplanning.org/fee_schedule.pdf).

[14] *See* S.F. Building Code § 110A (available at http://sfdbi.org/fees).

[15] Exhibits A and B hereto are the form agreements used by the SFPUC and SFMTA respectively.

In less than two years, the SFPUC has granted licenses to five carriers[16] and issued pole licenses for over 360 poles. It is processing over 100 additional applications. The SFMTA has granted licenses to four carriers and issued licenses for over 120 poles.[17] It is processing an over 60 additional applications. San Francisco's pole licensing program has been so successful that between April 2015 and June 2016 71% of San Francisco's wireless permits were for poles owned by San Francisco and only 29% were for utility poles.

As pole owners, SFPUC and SFMTA made business decisions to make their poles available for wireless facilities. Both agencies saw the benefits to San Franciscans from better wireless services. In addition, with tightening City budgets, they also view these programs as a way to obtain needed revenues to fund their core programs and to further develop and protect these critical municipal assets.[18] Requiring fair compensation for private use of these valuable assets is not only just and reasonable, it is required by law.[19]

The SFPUC's and SFMTA's license fees start at $4,000 per pole per year. The SFMTA's per pole rates are reduced for licenses covering more than 50 poles. Both agencies' license fees are subject to annual increases. Both agencies also require cost-based fees for processing the initial license and each application for a pole license.

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[16] The SFPUC has signed licensed agreements with ExteNet Systems, LLC, GTE Mobilnet of California LP dba Verizon Wireless, Mobilitie Investments III, LLC, T-Mobile West, LLC and New Cingular Wireless PCS LLC dba AT&T.

[17] The SFMTA has signed licensed agreements with ExteNet Systems, LLC, GTE Mobilnet of California LP dba Verizon Wireless, Mobilitie Investments III, and New Cingular Wireless PCS LLC dba AT&T.

[18] Under San Francisco's Charter, the SFMTA and SFPUC must use these revenues only to fund each agency's own programs. *See* S.F. Charter, § 8A.102(b) (SFMTA); and § 8B.121(a) (SFPUC). The SFMTA and SFPUC cannot use their revenues to fund other San Francisco programs.

[19] The California Constitution, like the constitutions in many other states, prohibits public entities from making a gift of public funds. *See* Cal. Const. art. XVI, § 6; Mich. Const. art. IX § 18; N.D. Const. art. X, § 18; N.Y. Const. art. VIII, § 1; Tex. Const. art. III, § 52; and Wash. Const. art. VII, § 7. *See also Allen v. Hussey*, 101 Cal. App. 2d 457, 472 (1950)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment	WT Docket No. 17-79

In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment	WC Docket No. 17-84

COMBINED REPLY COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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July 17, 2017

ExteNet[35] and the WIA[36] long for the day when the Ninth Circuit used an ellipsis to alter the meaning of section 253(a), even though that approach has been soundly rejected even by the Ninth Circuit. The Ninth Circuit held in *City of Auburn v. Qwest Corp*.: "Section 253(a) preempts 'regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may **. . .** have the effect of prohibiting' the provision of such services.'" [37] The Ninth Circuit's construction of section 253(a) in *City of Auburn* required the district courts to find that section 253(a) preempted on its face local regulations that "'might possibly'" prohibit the provision of telecommunications services.[38]

That the Carrier Commenters approve of this construction is not surprising, because until the Ninth Circuit *en banc* in *Sprint Telephony PCS, L.P. v. City of San Diego* overruled *City of Auburn* district courts in the Ninth Circuit routinely preempted local ordinances based on facial challenges under section 253(a).[39] There is no reason whatsoever that this Commission should now adopt a construction of section 253(c) that has been rejected by the courts and is contrary to the Commission's own construction of the statute.

VI. THE COMMISSION MUST UPHOLD LOCAL GOVERNMENT AUTHORITY UNDER 47 U.S.C. SECTION 253(c) TO REQUIRE COMPLIANCE WITH LOCAL AESTHETIC STANDARDS

Many Carrier Commenters seek to limit local authority to require them to comply with local aesthetic standards when installing small cells, particularly in the public right-of-way.[40] CTIA questions the need for aesthetic regulation because "small cells and DAS systems are designed to blend in to the streetscape with minimal if any visual impact.[41] Verizon flat out asserts that such regulations are completely unnecessary: "Where a small cell meets size limits

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[35] WIA Comments at 35-39.
[36] ExteNet Comments at 24-28.
[37] *City of Auburn v. Qwest Corp*., 260 F.3d 1160, 1175 (9th Cir. 2001) (alteration in original), overruled by, *Sprint Telephony PCS, L.P. v. City of San Diego,* 543 F.3d 571 (9th Cir. 2008) (*en banc*).
[38] *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008).
[39] See *NextG Networks of Cal., Inc. v. Cty. of Los Angeles*, 522 F.Supp.2d 1240, 1248–1254 (C.D. Cal. 2007) (citing cases).
[40] *See* ExteNet Comments at 37; T-Mobile Comments at 39-40; and CTIA Comments at 29.
[41] CTIA Comments at 29.

previously adopted by the Commission for small cells and is mounted on an existing structure or a similar replacement structure designed to accommodate small cells, it will never present an aesthetic concern that will justify denial of a siting application."[42]

In taking this approach, the Carrier Commenters overlook the importance of section 253(c) in addressing any claim that a local requirement prohibits or has the effect of prohibiting the provision of telecommunications services. Section 253(c) provides:

> **(c) State and local government authority**
>
> Nothing in this section affects 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.[43]

It is well settled that section 253(c) provides a "safe harbor" for local regulations that are preempted by section 253(a), provided those local regulations: (i) concern local management of the public rights-of-way; or (ii) "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."[44] As the Eighth Circuit explained:

> Subsection (a), a rule of preemption, articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers. Subsection (c) begins with the phrase "Nothing in this section affects" and then enumerates various protected state and local government acts. Thus, section 253(a) states the general rule and section 253(c) provides the exception-a safe harbor functioning as an affirmative defense-to that rule.[45]

The section 253(c) safe harbor, therefore, can save from preemption local regulations that prohibit or have the effect of prohibiting the provision of telecommunications services. In

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[42] Verizon Comments at 20.
[43] 47 U.S.C. § 253(c) (emphasis added).
[44] *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271–1272 (10th Cir. 2004).
[45] *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 531–532 (8th Cir. 2007) (citations omitted).

this regard, the Commission should not find that the section 253(c) safe harbor is limited to "traditional safety and construction coordination functions."[46] As one court held:

> [T]he City's interest is limited to protecting the integrity of its historic and cultural resources as well as its parks and open spaces. Whether this interest is grounded in concerns for aesthetics, convenience, property values, tourism, or business development is not the issue. Whatever the underlying concern, the City may assert an interest in protecting its valuable resources and it is permissible to regulate telecommunications on the basis of that interest.[47]

Consistent with that decision, the Commission should find that the safe harbor includes managing the public right-of-way to address aesthetic and other proper municipal concerns. Local governments, and the local citizens they represent, are concerned about how their streetscapes look. Cities and counties spend hundreds of millions of dollars to design and install new streets or make streetscape improvements. Persons who live on or use those streets have a right be heard before wireless carriers are allowed to come onto their streets to install their facilities and existing or new poles.

It is also infeasible for the Commission to impose objective standards that would apply in communities throughout the United States. Aesthetic concerns are inherently subjective, and depend on the location of the proposed facility. A wireless facility that might be permitted on a commercial street in an urban environment, might be inappropriate on a residential street or in a historic district. Rural and suburban communities might impose very different requirements than large cities. In San Francisco's case, imposing and enforcing aesthetic standards has neither prohibited nor effectively prohibited any carrier from providing telecommunications services. San Francisco has approved approximately 90% of the more than 1,000 applications it has received to install wireless facilities on utility and other poles in the

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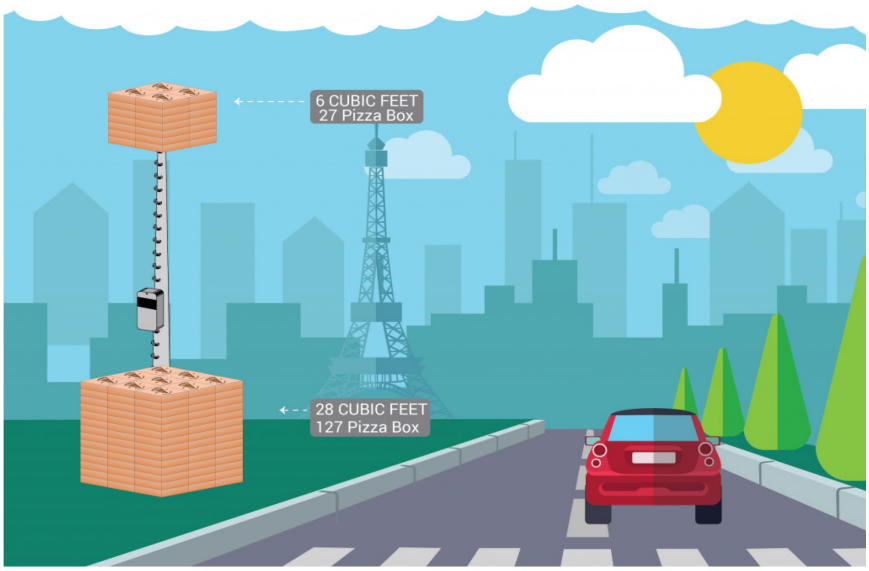
[46] ExteNet Comments at 34.

[47] *Next Networks I*, *supra*, 2008 WL 2563213 at *10; see also *Florida Public Telecommunications Ass'n, Inc. v. City of Miami Beach,* 2001 WL 36406296 at *13 (S.D. Fla., Aug. 17, 2001), *affirmed in part reversed in part on other grounds*, 321 F.3d 1046 (11th Cir. 2003) (finding that ordinance regulating pay telephones in part for aesthetics "relate to Miami Beach's ability to manage the public rights-of-way").

public right-of-way. Those permits were approved efficiently, requiring the payment of only cost-based permit fees. San Francisco only approved those permits after its Planning Department determined that the proposed facilities met the City's applicable compatibility standard.[48]

As San Francisco showed in its comments, wireless facilities can be designed for installation on a utility and other poles to minimize aesthetic impacts.[49] Working with carriers, San Francisco has been able to ensure that is the case—whether the proposed facilities would be installed on utility poles or City-owned street light and transit poles. But Verizon and the other Carrier Commenters are not satisfied with a definition of "small cell" that would meet San Francisco's design standards. They have asked the Commission to define a small cell to include up to six cubic feet of antennas and 28 cubic feet of equipment boxes. Here's what that looks like:[50]



[48] *See* San Francisco Comments at 3-6. Those standards vary depending on the local of the proposed facility. San Francisco is particularly concerned about streets within historic districts or in scenic corridors.
[49] *See* San Francisco Comments at 9-13.
[50] Graphic from Steel in the Air (http://www.steelintheair.com/Blog/2017/04/small-cells-arent-like-a-pizza-box.html/). Twenty-eight cubic feet is the size of a large refrigerator that would be over six-feet tall and nearly three-feet wide and deep. For example an LG Model No. LFC28768ST 28 cubic-foot refrigerator are 35 3/4 inches wide, 35 3/8 inches deep, and 69 3/4 inches high. (*See* http://www.lg.com/us/refrigerators/lg-LFC28768ST-french-3-door-refrigerator).

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March 14, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Promoting Wireless Broadband Deployment by Removing Barriers to Infrastructure Development - WT Docket No. 17-79;
Accelerating Broadband Deployment ("BDAC") -WC Docket No. 17-83

Dear Ms. Dortch:

The Honorable Brenda Bethune, Mayor of the City of Myrtle Beach, South Carolina ("City") and City Attorney Tom Ellenburg met by phone on March 14 with Commissioner Mignon Clyburn and Louis Peraertz, her Senior Legal Advisor for Wireless, International, and Public Safety. The purpose of the meeting was to review the City's efforts to accommodate the needs of wireless providers in the community's rights-of-way while preserving the community's character, which is its economic engine. Joining the Mayor by phone was Joseph Van Eaton, counsel to the City, and the undersigned, in a similar capacity, was present in the Commissioner's office.

The Mayor opened the meeting by sharing Myrtle Beach's desire to be a smart city, with the latest and best wireline and wireless connections for its residents and visitors alike. But in meeting residential and visitor communications needs, the city also sought to preserve the integrity of the community's look, which the City has invested over $110 million to achieve. The Mayor then shared a copy of the City's Request for Proposals For "Safe Harbor Designs for Wireless Deployment in the Rights of Way," a copy of which is attached to this letter.

Mayor Bethune and City Attorney Ellenburg explained the process that the City has employed to develop the "Safe Harbor" model. Highlights include:

- The City involved the industry in a summit, and engaged in a dialogue that has been productive and is currently on track to jointly address small cell deployment as a planning issue affecting all aspects of modern living.

- Industry members, in collaboration with the City's consultants, have been helpful and actively engaged, and expressed that the non-adversarial approach the City has taken to the challenge of achieving small cell deployment has yielded productive insights.

- The City and industry members are approaching resolution to questions surrounding aesthetic goals, physical limitations which pose challenges that must be addressed (some Myrtle Beach rights-of-way are narrow – 5 feet wide or less — raising ADA issues, for example) while at the same time recognizing the community's need for this technology.

- This involvement, engagement, and cooperative process is very likely to result in a solid solution that is cost-effective for industry and expedient for all parties, ensuring everyone gets what they most need.

Mayor Bethune concluded the presentation by thanking Commissioner Clyburn for her leadership and expressing hope that the Myrtle Beach model could be replicated elsewhere. Those efforts will only be possible, however, if the Federal Communications Commission and state legislatures preserve the opportunity for such joint efforts, rather than mandating access to local rights-of-way, a step which leaves no room for meaningful collaboration. As the Mayor explained, developing "safe harbors" means industry obtains quicker approvals, with fewer boards and committees to go through. The expedited treatment is a result of the upfront investment by both local governments and industry, working together to find mutually agreeable solutions, developing essentially preapproved standards to which the industry can build.

Sincerely,

Gerard Lavery Lederer
of BEST BEST & KRIEGER LLP

cc: Louis Peraertz

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September 19, 2018

ELECTRONICALLY FILED

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, DC 20554

Re: *Smart Communities and Special Districts Coalition – Ex Parte Submission: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79;
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Secretary Dortch:

On behalf of the Smart Communities and Special Districts Coalition ("Smart Communities"),[1] we submit this letter and enclosures for inclusion in the above-captioned dockets in response to

[1] Smart Communities are localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia.

Individual members: Ann Arbor, MI; Anne Arundel County, MD; Arcadia, CA; Atlanta, GA; Bellevue, WA; Bloomfield Township, MI; Boston, MA; Burlingame, CA; Dallas, TX; District of Columbia; Fairfax, CA; Gaithersburg, MD; Howard County, MD; Kirkland, WA; Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Meridian Township, MI; City of Monterey, CA; Montgomery County, MD, North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Portland, OR; Rye, NY; San Jacinto, CA; Santa Margarita Water District (CA); Scarsdale, NY; Shafter, CA; Sweetwater Authority (CA); Valley Center Municipal Water District (CA).

Organizations Representing Local Governments: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of more than 75 Michigan communities that focuses on protection of their governance and control over public rights-of-way. The Michigan Townships Association promotes the interests of 1,242 townships by

provider to incur the expense of performing detailed field engineering that may be required in connection with excavation permits for a facility whose location is not yet approved, because if the specific location changes even slightly, the construction plans may need revision to adjust to the new location.[12] And traffic plans are often not prepared until after construction permits are granted, because they are by necessity influenced by the date and time of anticipated construction, which cannot be known without finalized siting approval and building permits. While this may take more than 60 days in whole for a small cell, it is far more efficient economically as it minimizes the extent to which work must be repeated to account for other changes to the project.

If the Commission intends, as the Draft Order appears to indicate, that many, if not most, small cell authorizations must be granted or denied within 60 days of the submission of a wireless application or a local government will have presumptively prohibited deployment, the costs of applying for permits, and for reviewing those permits, will needlessly skyrocket. That is, because local governments will face harsh consequences from failure to meet the shot clocks,[13] they will have to require that all materials, for all authorizations, be prepared in advance and submitted together with the initial application. This will drastically increase provider costs, and cause providers to incur duplicate costs if any portion of the project must be changed. If, for example, a proposed site's initial location does not pass zoning or land use review, the engineering work and traffic plan (which would ordinarily be developed only after land use approval) will have to be re-done; and if the traffic control plan is defective, the proposal as a

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reviews until after an application for placement of wireless facilities had been approved. This meant that resources were not spent on impact studies until the company knew exactly what would be placed and where it would be placed.

[12] *Id.* at 8-9.

[13] Draft Order at ¶ 112.

whole will have to be rejected, or at least be found incomplete, lest the local government run afoul of the shot clock. There will be little opportunity to work cooperatively and resolve problems with small cell applications within a 60-day period. Providers commonly avoid this clear inefficiency today,[14] but under the Draft Order's framework, this will be impossible. The Commission may suggest that the problem is solved by allowing the parties to agree to times for action, but unless it decides that the 60 days actually provides enough time to allow permits to be reviewed as a general matter – and it has no basis in the record for that conclusion – the basic premise of the rule (that the 60 day shot clock establishes a presumptively reasonable time period) is flawed.[15]

While we do not think a shot clock is required or appropriate for franchising or other types of permitting (many permits are issued pursuant to state laws or local rules that specify response times), it should at least be clear that any applicable shot clock must at least run separately for each authorization.

Similarly, requiring all permissions to be granted within 60 days also leads to decreased flexibility for providers in negotiating property access terms. For example, the Draft Order expressly includes "license or franchise agreements to access ROW" within the scope of Section 332.[16] These agreements frequently involve multiple rounds of negotiation, insisted on by providers as much as localities, to arrive at an agreement. Terms such as insurance clauses,

[14] July 2018 Permitting Ex Parte, Attachment at 9 ("Some operators defer detailed, construction type engineering – including historical reviews that may be required under state or federal law – until it is determined whether the facility can be placed at a particular site").

[15] The same is true with respect to the other shortened time frames the Commission proposes to adopt, and the problems are compounded by the new remedy, which the Commission appears to intend to have an effect similar to a "deemed grant."

[16] Draft Order at ¶ 128. We assume for purposes of this discussion that the Commission has authority to dictate the timing of action on applications for a franchise.

indemnification, and termination clauses are frequently modified throughout this process, but under a consolidated 60 day shot clock, localities will not have time to engage in those negotiations – they will have no choice but to insist on take-it-or-leave-it contract terms. If a provider refuses to accept those terms, a community will have no choice but to deny the other permits associated with the facility proposed for installation in the ROW, wasting even more provider effort and incurring further costs on all sides. And note that the terms would need to be resolved in the same time frame that the provider will be responding to questions regarding the placement and design of its facilities.

Reviewing costs will increase; while piece-parting has some disadvantages, the effect of the "everything at once" approach proposed by the Commission is that all submissions must come in at once, and be reviewed at once, and then re-reviewed (at additional cost) if there is a denial. Rather than simplifying the process and reducing costs, it could easily double existing costs, with no actual savings in time (since each rejection will require a resubmission of the package of permits).[17] These burdens are not alleviated by batching, either, as discussed further below and indicated in the record.[18]

While it is important to clarify how the shot clocks work, it is also important to recognize that shortening the shot clock for an expansively defined category of "small wireless facilities," combined with compelled allowance for batch applications, makes the shot clocks unworkable, and arbitrary and capricious in several respects.

First, the rules inherently assume that there is no "gear up time" required to assemble the resources to review one hundred, as opposed to one application at the same time (since it

[17] The Regulatory Flexibility analysis fails to take into account what we believe will be extraordinarily significant costs associated with complying with the new time frames and unlimited batching of applications. *See* Section II.H, *infra*.

[18] *See* Section II.F, *infra*.

requires no prior notice of an intent to submit applications, or notice of an intent to submit batched applications).[19] It assumes that existing staff or existing consultants are in place to handle the work, which the record shows is not the case, particularly for smaller communities where there may be one or two staff members managing planning and land use functions. It assumes that it is simple to engineer attachments to traffic signals and street lights – but there is no indication in the record that this is in fact the case.

Second, the Draft Order's shortening of time creates significant practical and due process concerns. The manner in which the federal shot clock runs – which encourages and allows submission of incomplete applications that eat up time, as the clock never restarts no matter how long the lapse between resubmittals – does not work within the shortened time frame. It is in contrast to shot clocks in states like Minnesota, where the clock is longer and can be further extended to address elevated volumes of applications.[20] The Commission cannot purport to be setting time frames based on state laws, while ignoring key provisions that temper the impact of those time frames in the state law. The Draft Order's new rules not only fail to take into account time lost in the "incompleteness" process;[21] they fail to acknowledge the notice requirements for

[19] Of course, providers are in a position to provide notice that would permit localities to prepare for applications. Where other major projects are planned in the public rights-of-way, that advance planning is the norm, not the exception. That sort of planning was used to schedule and stage deployment of the U-Verse and FiOS networks in many parts of the country, to allow for timely deployment without overwhelming local resources. There is no inherent reason why the same approach cannot be taken with small cell deployments. Indeed, some companies have done this already. *See* Letter from San Jose Mayor Sam Liccardo, WT Docket No. 17-79, WC Docket No. 17-84, at 2 (Sept. 18, 2018). The Commission desires broad network deployment, but develops timelines and practices that act as if each application were a simply one-off, rather than part of a major construction project.

[20] Minn. Stat. § 237.163 Subd. 3(a)(c).

[21] For example, Montgomery County, Maryland finds that reviewing applications for completeness alone takes approximately 13 days of shot clock time, on average, and that more than 200 applications received since July 1 2017 have failed to include required information. Their records also show that, on average, applicants take approximately 38 days to submit that

public hearings, which may be key to a fair process; and times required for administrative appeals.

Further, the assumption that there is little to consider in a small cell application is belied by the definition the Commission adopts for "small wireless facility": while it justifies its rules based on the assumption that many small cells are the size of a pizza box,[22] a pizza box is about 1/2 cu. ft. in size, while the Commission proposes to expedite permitting of equipment cabinets 28 cu. ft. in size – a stack of 56 pizza boxes – on front lawns throughout the country. Considering that the Smart Communities' prior filings show that the addition of facilities of this size diminish property values, it is strange for the Commission to assume that approval can be granted in the regulatory blink of an eye.[23]

B. The Commission Must Clarify Its Holding On Aesthetic Standards.

The Draft Order lacks clarity regarding the expected contents of aesthetic standards.[24] It outlines a (questionable) test to evaluate the acceptability of aesthetic standards, but in light of the discussion of that standard, it creates more issues that it resolves.[25] For example, it notes that providers claim that they are forced to respond to standards that are "vague" but it is unclear as

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additional required information. Providers take, in other words, more than half the total time allotted for local government review under small cell shot clocks, simply to submit the information required by the application in the first place. Montgomery County's data reiterates that this is not an isolated problem, either. 28 applicants submitted at least one incomplete application since July 1, 2017, and of those 28 individuals, not one submitted complete applications more than 35% of the time. One applicant submitted 26 applications, 96% of which were incomplete, and took an average of 47 days to complete each application. The City of Austin, Texas has experienced similar difficulties with carriers who "do not consistently provide required data on permit applications."

[22] Draft Order at fn. 272.

[23] *See also* Section II.E, *infra*.

[24] Draft Order at ¶¶ 81-85.

[25] *Id.* at ¶¶ 81-83.

Gaithersburg
A CHARACTER COUNTS! CITY

September 18, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, District of Columbia 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch,

The City of Gaithersburg would like to express its concerns with the Federal Communications Commission's proposed Declaratory Ruling and Third Report and Order regarding state and local governance of small cell wireless infrastructure deployment.

The City of Gaithersburg has actively engaged our residents and the provider community over a yearlong process to develop appropriate guidelines and regulations regarding small cell wireless deployments. We held numerous public meetings and met with industry providers to try and reach a consensus on the various issues of concern to all stakeholders. The City has adopted these regulations and continues to work the industry and strongly believe we need to retain the ability to address local concerns and changes in the marketplace.

While we appreciate the Commission's efforts to engage with local governments on this issue and share the Commission's goal of ensuring the growth of cutting-edge broadband services for all Americans, we remain deeply concerned about several provisions of this proposal. Local governments have an important responsibility to protect the health, safety and welfare of residents, and we are concerned that these preemption measures compromise that traditional authority and expose wireless infrastructure providers to unnecessary liability.

- **The FCC's proposed new collocation shot clock category is too extreme.** The proposal designates any preexisting structure, regardless of its design or suitability for attaching wireless equipment, as eligible for this new expedited 60 day shot clock. When paired with

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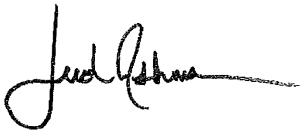
the FCC's previous decision exempting small wireless facilities from federal historic and environmental review, this places an unreasonable burden on local governments to prevent historic preservation, environmental, or safety harms to the community. The addition of up to three cubic feet of antenna and 28 cubic feet of additional equipment to a structure not originally designed to carry that equipment is substantial and may necessitate more review than the FCC has allowed in its proposal.

- **The FCC's proposed definition of "effective prohibition" is overly broad.** The draft report and order proposes a definition of "effective prohibition" that invites challenges to long-standing local rights of way requirements unless they meet a subjective and unclear set of guidelines. While the Commission may have intended to preserve local review, this framing and definition of effective prohibition opens local governments to the likelihood of more, not less, conflict and litigation over requirements for aesthetics, spacing, and undergrounding.

- **The FCC's proposed recurring fee structure is an unreasonable overreach that will harm local policy innovation.** We disagree with the FCC's interpretation of "fair and reasonable compensation" as meaning approximately $270 per small cell site. Local governments share the federal government's goal of ensuring affordable broadband access for every American, regardless of their income level or address. That is why many cities have worked to negotiate fair deals with wireless providers, which may exceed that number or provide additional benefits to the community. Additionally, the Commission has moved away from rate regulation in recent years. The City has concerns that the regulations are not addressing the true market conditions that can vary greatly from community to community.

- **The City of Gaithersburg has worked with the industry to build the best broadband infrastructure possible for our residents while balancing the issues raised by the community.** We oppose this effort to restrict local authority and stymie local innovation, while limiting the obligations providers have to our community. We urge you to oppose this declaratory ruling and report and order.

Respectfully submitted,



Jud Ashman, Mayor
City of Gaithersburg

Seeking Alpha

Transcripts | **Technology**

Verizon Communications Inc. (VZ) Q3 2018 Results - Earnings Call Transcript

Oct. 23, 2018 3:10 PM ET | 2 Likes

by: SA Transcripts

Q3: 10-06-18 Earnings Summary

Press Release *Slides* *10-Q* *Analysis* *News*

EPS of $1.22 beats by $0.03 | Revenue of $32.61B (+ 2.8% Y/Y) beats by $110M

Verizon Communications Inc. (NYSE:VZ) Q3 2018 Earnings Conference Call October 23, 2018 8:30 AM ET

Executives

Brady Connor - SVP, IR

Matthew Ellis - EVP and CFO

Analysts

Brett Feldman - Goldman Sachs

Simon Flannery - Morgan Stanley

David Barden - Bank of America

Philip Cusick - JPMorgan

John Hodulik - UBS

Craig Moffett - MoffettNathanson

Michael Rollins - Citi

Jennifer Fritzsche - Wells Fargo

Jeff Kvaal - Nomura Instinet

Brad, we are ready for the next question please.

Operator

Your next question comes from John Hodulik of UBS. You may go ahead with your question.

John Hodulik

Great. Thanks. Two if I could. You have some commentary in there on the revenue growth or declines at Oath. Any commentary on the losses we got, have you in there for about less than $1 billion this year?

Does the sort of I guess change in approach to Oath mean that you could find some cost savings there as well and maybe get that business closer to profitability as we look out to 2019 and 2020?

And then more broadly on the 5G rollout the FCC passed some small cells citing reform. Does that change the sort of internal targets you have for the rollout of the small cell and 5G infrastructure and possibly allow you to go a little faster as you look out to 2019 and 2020? Thanks.

Matthew Ellis

Thanks John. Yeah on the 5G rollout certainly we were glad to see the FCC rules around the small cell adoption, doesn't necessarily increase the velocity that we see.

Our teams have been engaged with municipalities across the country on getting permits to put up small cells whether for 4G or 5G. Certainly like the fact that they are providing a little more guidance for how quickly that should happen.

But I don't see it having a material impact to our build out plans. We are going as fast as we can. And while the federal level rules are helpful it is still a very local activity municipality-by-municipality. So a lot of good work going on there.

On Oath from a profitability standpoint certainly as we said in the comments revenue not progressing quite as fast as we'd like, but from an EBITDA standpoint the team's made good progress on their synergy targets coming out of the closing on Yahoo over a year ago.

Seeking Alpha

Transcripts | **Technology**

Crown Castle International Corp. (CCI) CEO Jay Brown on Q3 2018 Results - Earnings Call Transcript

Oct. 18, 2018 3:50 PM ET | 2 Likes
by: SA Transcripts

Q3: 10-06-18 Earnings Summary

Press Release *10-Q* *Slides* *News*

Crown Castle International Corp. (NYSE:CCI) Q3 2018 Earnings Conference Call October 18, 2018 10:30 AM ET

Executives

Ben Lowe - VP, Corporate Finance

Jay Brown - CEO

Dan Schlanger - CFO

Analysts

Simon Flannery - Morgan Stanley

Matthew Niknam - Deutsche Bank

David Barden - Bank of America

Jonathan Atkin - RBC Markets

Colby Synesael - Cowen and Company

Ric Prentiss - Raymond James

Amir Rozwadowski - Barclays

Nick Del Deo - MoffettNathanson

Brett Feldman - Goldman Sachs

made a lot of investments over the last couple years and building up necessary fiber and putting the assets in place to capitalize on this opportunity. As we start to think about this opportunity going forward, I mean clearly collocation is going at a faster rate than you folks had anticipated. Do you believe that this provides you with a very differentiated completive opportunity or should I say very sustainable differentiation and capitalizing a greater share of the small cell deployment as network evolve to embrace that type of technology?

Jay Brown

Sure. On your first question, I believe the deployment of both fiber and small cell is forever going to be a very localized business. So what the FCC did last month is helpful to the industry to the wireless carriers and to ourselves by making clear what the underlying fees are associated with deploying and the public right of way and then setting forth some timeline, which municipalities are expected to respond to request in order to do that. So, what it does as it gives a clear line of sight both in terms of cost and timing. But it in no way negates the necessity and the importance of us continuing to work with those municipalities as we manage and deploy the infrastructure in ways that are sensitive to the aesthetic and the needs of the local community.

So I wouldn't look at that and assume that we're going to see a material change in our 18 to 24 month deployment cycle. In fact, we don't believe that will result. But we do believe that it is helpful in some problematic municipalities where they've been absolute basically blockers to the deployment of the technology and the deployment of fiber and small cells in the public right of way. So in some places, we may actually see a little bit of benefit, but I think on the whole what you should expect is our deployment cycle will continue to be in that 18 to 24 months range, and the FCC order is helpful as the scale of the deployment, as I was mentioning earlier moves well past just the top 10 markets and moves across the larger portion of the U.S., as it gives us greater visibility on what the economics are going to look like and the timing of approvals et cetera at the local level.

On your second question, this is very similar our view in the deployment of fiber to what we saw with towers, which is the low cost provider, ultimately wins the day. And we've invested in an asset that can be shared across multiple customers thereby lowering the cost of those customers and whether the customers the university, school district or a wireless carrier who's looking to deploy small cell. That shared fiber asset means that we're able to deliver to them a very low cost provision of that fiber. And in markets where

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
and	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-84

CITY OF SEATTLE, WASHINGTON
AFFIDAVIT IN SUPPORT OF MOTION FOR STAY

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Andrew Strong ("Affiant"), Interim Asset Management and Large Projects Director for Seattle City Light, being of lawful age and being first duly sworn, upon oath, states the following:

1. In Seattle, significant process changes would be necessary to comply with the Commission's Ruling and Order by January 14, 2019.

2. Seattle has been siting small cell facilities since 2005. Over the last two years, Seattle City Light, Seattle's municipal electric utility, has worked extensively to streamline its process to enable faster deployment of small cells. The Commission's Ruling and Order requires a complete revamp of the entire process.

3. Seattle is both a utility pole owner and a regulatory entity. For purposes of this Affidavit, references to utility poles includes both electric distribution poles and street light poles.

4. With strong support in both federal and state law, Seattle currently distinguishes between certain acts it performs in its "proprietary" capacity (e.g., renting space on utility poles) and other acts performed in its "regulatory" capacity (e.g., street use permitting).

5. Seattle City Light has the engineering expertise to evaluate the structural integrity of the proposed small cell facility, whether the pole can withstand the added weight (including wind load and foundational requirements), and compliance with the national electric code standards. The proprietary review and approval process for small cells on Seattle's City Light poles includes preliminary reviews, assistance by the City in finalizing the applicant's scope of work, engineering field work, design and estimates, construction document review and payment, permitting, inspection, and close-out.

6. Because the Commission specifically declined to adopt any distinction between government entities acting in a proprietary capacity as opposed to a regulatory capacity, when providing access to public right of way or authorizing attachments to government-owned property for small cells, Seattle must assume that its proprietary, asset-owner approval is now subject to the shot clocks.

7. Modifying this process to one that can be met in 60 days is already proving to be a tremendous undertaking, and one that most likely cannot be successfully accomplished. Many City departments are meeting several times a week to outline the change in the process, the application of the Commission's Ruling and Order, and the relevant aesthetic standards and application tools necessary to site small cells under the new shot clocks and requirements.

8. For example, because applicants are often unprepared for the permitting process, Seattle City Light's standard practice is to work with applicants through correction cycles until standards are met and a permit can be issued. This applicant-friendly approach has been quite effective in our siting efforts to date,[1] but with only 60 days to process small cell applications, Seattle will not be able to conduct multiple review and correction cycles.

9. Instead, Seattle must develop tools to prepare applicants, including a design catalog, checklist of submittal requirements, design standards, outreach, and training (both internal and external) – activities which themselves cannot be completed by January 14, 2019. The result of a new process that does not allow for collaborative review and correction cycles will likely be more rejections of applications that do not comply with City submittal requirements.

10. Without a stay, each of these process changes would have to be in place before January 14, 2019. And each of these activities involves additional budget for consultants, staff, software, and other related needs to facilitate proper implementation.

11. Furthermore, as a municipal utility that is exempt from federal pole attachment rate regulation under Section 224 of the Communications Act, Seattle City Light's pole attachment fees are based on fair market value. The City has not experienced problems with siting of small cells on utility poles. Clearly, the fair market value rates that are charged in Seattle have not negatively impacted deployment.

12. The Commission's Order requiring all fees to be cost-based means that, without a stay, Seattle would have to perform a financial impact analysis within a matter of weeks to determine costs-incurred by residents and ratepayers. Such an analysis would need to consider how such costs would otherwise be recovered, including the possibility of rate changes for those electricity customers who have been given below market rates for use of the City's proprietary property by a federal agency.

FURTHER AFFIANT SAYETH NOT.

[1] City of Seattle Ex Parte Letter, WT Docket 17-79, WC Docket 17-84 (Sep. 18, 2018).

Dated this 30 day of October, 2018.

Andrew Strong
Interim Asset Management and Large Projects Director
Seattle City Light

Subscribed and sworn to before me this 30 day of October, 2018 by Andrew Strong, Interim Asset Management and Large Projects Director, Seattle City Light

WITNESS MY HAND AND OFFICIAL SEAL.
My Commission Expires: 11-30-2021

NOTARY PUBLIC
Mary Louise Davis
Residing in Edmonds, WA

City of Seattle

September 18, 2018

VIA ELECTRONIC FILING

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW Washington, DC 20554

Re: Ex Parte Letter, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Streamlining Deployment of Small Cell Infrastructure, WT Docket No. 16-421

Dear Secretary Dortch,

We are writing to express the City of Seattle's strong opposition to any FCC action on the above referenced proceedings that would eliminate local control on matters involving access to public right-of-way (ROW), access to municipal property in and out of the ROW, permitting, and related timelines and fees. The City of Seattle is particularly concerned about the recent draft orders that would compromise the safety, security, and reliability of critical electrical infrastructure, by limiting the control of the public utilities who are responsible for maintaining their municipally owned poles. As a member of the National Association of Telecommunication Officers and Advisors (NATOA), Seattle joins other communities across the nation to voice this opposition and to urge protection of local governments' right to be the stewards of our local public assets.

Local Experience Does Not Support Industry Message of Deployment Interference

Repeatedly the telecommunication industry has been telling the Commission that local government ROW practices, wireless facilities siting regulations, and ROW use fees play a significant and negative role in deployment of broadband facilities. This message does not reflect the reality in Seattle. Our City has been working to prepare for the broadband future since 2003[1] and actively supports the deployment of broadband and wireless facilities. We have been working with industry to site small cell facilities since 2005 and we currently have several pole attachment agreements in place with providers. Verizon even named Seattle City Light as its *Partner of the Year* in 2017. As a result of these efforts, we have a thriving telecommunications sector serving our community.

[1] http://www.seattle.gov/tech/initiatives/broadband/studies-and-history

As the broadband and wireless industries have evolved, we've successfully worked with industry to manage the roll-out of changing technologies to achieve the great service levels our residents enjoy today. We have been proactive in our ROW and facilities siting practices, with well-developed and transparent processes to facilitate the deployment of wireless facilities. We understand the ever-increasing demands on wireless networks, and the potential of 5G technology, that requires continued deployment of new and upgraded infrastructure across our City. Holding back that growth would not be beneficial for the long-term health of tech-savvy Seattle and that is not our objective. Instead, our objective is to *ensure that growth continues* in a manner that meets our obligations to *protect the public interest in safety, aesthetics, and fiscal responsibility* for the use of public assets and ROW – an objective that these proceedings threaten.

Local Complexities Require Local Consideration

The City of Seattle owns and operates our electric utility, Seattle City Light ("SCL"), and there are approximately 110,000 utility poles owned in whole, or in part, by the City, that are available for attachment for wireless siting. SCL has approved attachments on, and seen deployment of, over 100 facilities completed in the past few years and is continually instituting process improvements that have already decreased the average review time by 50%. These requests include associated fiber and electric installations, pole replacements, and installation of new poles.

It is critical that the Commission understand the level of effort involved in maintaining balanced use of the ROW and ensuring public safety with these small cell deployments. From the *pole attachment* perspective, each small cell attachment requires City engineering departments to consider and design for:

- the paramount purpose of electrical distribution in a safe and reliable manner
- where replacement poles will go
- whether there is power available for wireless carrier equipment
- where the carrier's fiber backhaul is coming from
- the amount of equipment already on the pole and pole weight- and wind-load issues and whether the pole is near end-of-life
- impacts on line-of-sight for vehicles and pedestrians
- ADA clearances
- proximity and impacts on abutting properties
- impacts to surrounding trees, existing infrastructure and utilities
- meeting safety code requirements

ROW Use/Installation Considerations

From the *installation* perspective, the location and installation "means and methods" impact the complexity of the deployment. Once approved, each small cell device installation requires:

- reservation and use of traffic lanes
- disabling power to the pole
- disabling street lights
- potential sidewalk or street pavement cuts to lay conduit or backhaul fiber
- coordination with pedestrian sidewalk access
- coordination with other carriers already on the pole
- proper traffic control implementation when the pole is on an arterial street.

Conclusion

It is the responsibility of local government to be effective stewards of our local public assets, ensuring they are managed in ways that promote the long-term economic and social health of our community. It is also our responsibility to ensure the benefits of private companies using public property accrue to all residents. Seattle will continue proactively working with companies to ensure the broadband and wireless future of our city. It is critical the FCC respect the fundamental role local government plays in the balanced use of our local assets and ROW for all users and not take any action that preempts or restricts these traditional areas of local authority.

Thank you for your consideration.

Respectfully Submitted,

Jim Baggs, Interim CEO
Seattle City Light

Linea Laird, Acting Director,
Seattle Department of Transportation

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018 I filed the foregoing Appendix with the Clerk of the United States Court of Appeals for the Tenth Circuit through the CM/ECF system. Participants in the cases are all registered CM/ECF and will be served by the CM/ECF system.

Respectfully submitted,

/s/ Joseph Van Eaton
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Counsel for Petitioners and Intervenors

December 17, 2018