EXHIBIT F

Joint Comments of the League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities

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

[appears behind this coversheet]

EXHIBIT F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

IN THE MATTER OF Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	WT Docket No. 17-79

JOINT COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS, LEAGUE OF CALIFORNIA CITIES and LEAGUE OF OREGON CITIES

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STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities (collectively, "Local Governments") offers these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry.[1]

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 241 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

[1] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Notice of Proposed Rulemaking and Notice of Inquiry* (Apr. 20, 2017) [hereinafter "*Wireless NPRM/NOI*"].

EXHIBIT F

I. BALANCED RULES THAT RESPECT THE PROPER ROLE FOR LOCAL GOVERNANCE AND REFLECT REALITIES IN LOCAL REVIEW PROCESSES WILL ACCELERATE WIRELESS BROADBAND DEPLOYMENT

A. Municipalities Support Expanded Wireless Services, but Existing Limitations on Local Review Encourage Some Applicants to "Game" the Shot Clock, Which Ultimately Hinders Wireless Broadband Deployment

Access to wireless broadband services plays an important role in the local economic, educational and social development for cities across the nation. These services play an especially important role in Arizona, California and Oregon, where new and expanded technology firms have significantly expanded employment.[2]

Local Governments recognizes how important infrastructure is to continued growth. Much the same way that communications and commerce brought by the railroads in the 19th century transformed small towns like Los Angeles and Chicago into metropolises,[3] advanced wireless broadband has the potential to help cultivate the places where it is deployed.

To this end, municipalities throughout the United States have taken steps to encourage responsible, community-appropriate wireless infrastructure deployments. In places like Springfield, Oregon, local staff work collaboratively with wireless industry members to update their local codes with the most cutting-edge concealment requirements to open up aesthetically-sensitive areas for new facilities. Cities in California, such as Vista and Lakewood, recently

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[2] *See, e.g.*, Tom Krazit, *Why the Pacific Northwest Will Be a Data Center Powerhouse for Years to Come*, GEEKWIRE.COM (May 31, 2017, 12:56 PM), https://www.geekwire.com/2017/pacific-northwest-will-data-center-powerhouse-years-come/ (noting the multi-billion dollar investment in Oregon tech sector by companies like Intel); George Avalos, *Silicon Valley Economy Slows, but Still Grows*, MERCURYNEWS.COM (Feb. 17, 2017, 3:26 AM), http://www.mercurynews.com/2017/02/16/silicon-valley-economy-pauses-but-still-is-growing/ (noting that Silicon Valley added more than 110,000 new jobs between 2015 and 2016); Chris Camacho, *Why All These Silicon Valley Startups are Moving to Phoenix*, TECHNICAL.LY (Jul. 13, 2016, 12:15 PM), https://technical.ly/2016/07/13/phoenix-tech-startups/ ("Since 2000, tech employment in the [Phoenix] region has grown by nearly 80 percent, with software employment jumping by nearly 30 percent since 2010.").

[3] *See* Oakland Museum of California, *Early Statehood: 1850 – 1880s: The Rise of Los Angeles*, MuseumCa.org, http://picturethis.museumca.org/timeline/early-statehood-1850-1880s/rise-los-angeles/info (last visited June 12, 2017); BENJAMIN W. DREYFUS, THE CITY TRANSFORMED: RAILROADS AND THEIR INFLUENCE ON THE GROWTH OF CHICAGO IN THE 1850S (1995), *available at*: https://www.hcs.harvard.edu/~dreyfus/history.html (last visited June 12, 2017).

amended their municipal codes to allow wireless facilities on existing structures in the public rights-of-way subject to an administrative use permit, or only an encroachment permit for facilities placed on municipal structures under a license agreement.

Unfortunately, not all the interaction between municipalities and the wireless industry has been productive. Complex procedural regulations, with short deadlines and harsh penalties, entice some savvy applicants to "game" the shot clock in order to circumvent legitimate local review processes to deploy more facilities faster. Municipalities often spend time policing applicant misconduct that could be more productively spent facilitating deployment.

Increasingly common tactics include misrepresenting an applicant's regulatory authority; misrepresenting the proposed project; submitting woefully incomplete applications, often without application fees or to the wrong department; changing the project scope after the first completeness review to prevent further tolling; providing inadequate or non-responses to incomplete notices to trigger the 10-day review period; triggering shot clock events before weekends, holidays or other government closures to burn additional days; and even constructing facilities without permits. Comments and Reply Comments filed by the League of Arizona Cities and Towns, *et al.*, in response to *In the Matter of Mobilitie, LLC Petition for Declaratory Ruling* provide more detailed examples and are included with these comments as **Exhibit 1** and **Exhibit 2**, respectively.

One applicant's attempt to "game" the shot clock often causes delay for all similarly situated applicants as local governments who have been burned by misconduct strengthen their policies to prevent further abuses. For example, Hillsborough, California, replaced its open-door policies with a requirement that all applicants submit by appointment after a contractor for Crown Castle tossed eight applications into town hall at approximately 4:50pm on a Friday and left without any explanation. Aggressive tactics by Mobilitie, and the threat of new 120-foot

wood poles in the sidewalks, have caused some jurisdictions to adopt temporary moratoria.[4] Applicant misconduct has become such a problem that even wireless industry members recognize that the delays in deployment are at least partially self-inflicted.[5]

B. Balanced Shot Clock Reforms Will Accelerate Wireless Broadband Deployment

Unfortunately, state and local governments remain the scapegoat for perceived delays in wireless broadband deployment.[6] Even more unfortunately, the proposed rules in the *Wireless NPRM/NOI* appear poised to further exacerbate the regulatory conditions that encourage applicant misconduct and engender conflict between municipalities and service providers who should share a common interest in deployment.

The Commission has the opportunity to accelerate wireless broadband deployment by mitigating perverse incentives to game the shot clock rules. The following subsections offer some specific recommendations the Commission should adopt. Alternatively, the Commission

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[4] *See* Marc Benjamin, *Fresno County to Cellphone Tower Companies: Stay Off Our Land, at Least for Now*, FRESNOBEE.COM (Nov. 20, 2016, 3:01 PM), http://www.fresnobee.com/news/local/article116012318.html.

[5] *See* Colin Gibbs, *Small Cells: Still Plenty of Potential Despite Big Challenges*, FIERCEWIRELESS (Sept. 1, 2016), http://www.fiercewireless.com/wireless/small-cells-still-plenty-potential-despite-big-challenges (noting how backlash to aggressive tactics by firms like Mobilitie and Crown Castle cause delays in deployment); Martha DeGrasse, *Carrier Small Cells Appear Slowly but Surely*, RCRWIRELESS (May 24, 2016), http://www.rcrwireless.com/20160524/carriers/carrier-small-cells-tag4 (quoting a T-Mobile executive's remark that "some companies are being 'a little too cavalier in some instances and messing up [the industry's] ability to deploy small cells.'"); *see also* Martha DeGrasse, *Mobilitie to Increase Transparency for Jurisdictions*, RCRWIRELESS (May 27, 2016), http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4; Martha Degrasse, *Sprint Small Cell Delays Could Impact Other Carriers*, RCRWireless (May 12, 2016), http://www.rcrwireless.com/20160512/network-infrastructure/sprint-small-cell-delays-tag4 (quoting an industry observer's comment about "stories out there and issues with people trying to circumvent the process and go around to get themselves in faster, which doesn't help anybody . . . things stop, the process slows down . . . when some cities start saying 'time out; we need to go look at this' that becomes a major problem for everybody." (internal quotations omitted)).

[6] *See In the Matter of Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, WT Docket No. 16-421, *Petition for Declaratory Ruling* (Nov. 15, 2016); *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, *Public Notice*, 2016 WL 7410755 (Dec. 22, 2016).

should direct the Broadband Deployment Advisory Committee to study these issues and produce recommended reforms to mitigate the delays caused by shot-clock gaming.

1. *The Commission Should Define a "Duly Filed" Application as a "Complete" Application Submitted in Accordance with Applicable Local Procedures*

Obligations under § 332(c)(7)(B)(ii) are not triggered until the state or local government receives a "duly filed" application.[7] However, it appears that neither the *2009 Declaratory Ruling* nor the *2014 Infrastructure Order* properly took into account the fact that the "reasonable time" for a decision does not begin to run until and unless the state or local government receives a "duly filed" application.[8] As a result, the Commission found that the shot clock commences after an application is "submitted" but made no provisions as to whether such submittal was "duly filed."

Ambiguities in the prerequisites for a "submitted" application have engendered counterproductive conduct because some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate the submittal may be. Despite the Commission's rule from the *2014 Infrastructure Order* that local governments must publicly

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[7] *See* 47 U.S.C. § 332(c)(7)(B)(ii); *Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d 687 (3d Cir. 2002) (holding that the application could not claim a failure to act because it never filed an application); *see also ATP Orlando/Tampa, Inc. v. Orange Cnty.*, No. 97-891-CIV-ORL-22, 1997 WL 33320573, *4 (M.D. Fla. Dec. 10, 1997) (finding that claims under § 332(c)(7) are not ripe without an application).

[8] *Compare* 47 U.S.C. § 332(c)(7)(B)(ii) (requiring state and local governments to "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" (emphasis added)), *with In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14015, ¶ 52 (Nov. 18, 2009) (finding that the shot clock commences when an application is "submitted" without any discussion about whether an incomplete application is "duly filed") [hereinafter "*2009 Declaratory Ruling*"], *and In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, *Report and Order*, 29 FCC Rcd. 12865, 12970, ¶ 258 (Oct. 17, 2014) (reiterating that the shot clock commences upon submittal without consideration as to whether an incomplete application may be considered "duly filed") [hereinafter "*2014 Infrastructure Order*"].

state all application requirements in advance, woefully incomplete applications have become the rule rather than the exception.[9] Given that the Commission's other rules already bar *ex post facto* application requirements, carriers should be expected (and required by the Commission) to tender complete submittals and there should be no excuse for an incomplete application—and certainly no incentive.[10]

As the following examples illustrate, incomplete and/or improperly filed applications create significant costs and delays for all parties involved:

- In Springfield, Oregon, Mobilitie submitted two encroachment permit applications on February 2, 2017. Both applications were incomplete, and one involved an installation on a utility pole owned by a third party but did not include any documentation that the third party consented to the application. The city cannot issue an encroachment permit to install equipment on third-party poles without the pole owners consent because it would create potential inverse-condemnation liabilities.[11] On March 27, 2017, city staff sent written incomplete notices. Mobilitie never responded and, on April 5, 2017, city staff re-sent the same notice. To date, after more than 76 days, Mobilitie has still not contacted the city to discuss the applications.

- The California Street Light Association ("CALSLA") compiled comments from its constituent California cities and counties documenting, among other things, that Mobilitie has (1) failed to provide accurate project descriptions or equipment specifications upon request by local officials, (2) submitted incomplete applications, (3) terminated communications with local officials after submitting incomplete applications, (4) erroneously claimed exemptions from permitting procedures, local regulations and state environmental compliance laws and (5) complained of high fees without explaining why the fees would be unreasonable.[12] CALSLA's full response appears in an attachment to **Exhibit 1** to these comments.

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[9] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12964 ¶ 260 ("[I]n order to toll the timeframe for review on grounds of incompleteness, a municipality's request for additional information must specify the code provision, ordinance, application instruction, or otherwise publically-stated [sic] procedures that require the information to be submitted.").

[10] *See id.*

[11] *See generally Vokoun v. City of Lake Oswego*, 76 P.3d 677, 684 (Or. Ct. App. 2003) ("An action for inverse condemnation is one for damages asserted against a governmental entity with the power of eminent domain that has taken private property for public use without initiating condemnation proceedings, that is, without paying just compensation.").

[12] *See* Letter from Jean A. Bonander, CALSLA, to Michael Johnston, Telecom Law Firm PC (Feb. 15, 2017).

- Mobilitie's representative hand-delivered to the City of Pleasanton, California, a letter styled as an introduction with 12 plan sets for new facilities attached.[13] Rather than follow the city's publicly-stated application process, Mobilitie treated the letter as a single application filed for all 12 sites. The letter was dated and delivered on a Friday. Under California state law, any application for a wireless installation may be deemed-approved if the local government fails to act within the applicable shot-clock timeframe.[14] The apparent intent behind the letter was to submit an "application" that would trigger the shot clock but not be seriously reviewed by the local government staff, which would likely result in a deemed-approval. The same scenario played out in several other Northern California cities, including Antioch, Brentwood, Concord, Richmond, San Pablo, and Pittsburg. Mobilitie's representative also delivered a letter to the City of Fresno, California, which at that time did not require a special permit for installations on unpaved road shoulders, on a Friday.[15]

- In Richmond, California, Mobilitie's representative submitted encroachment applications for 13 new wireless facilities even though the Richmond Municipal Code expressly required a prior authorization from the Community Development Department.[16] A month later, Mobilitie emailed the city project plans for three additional sites but did not submit any additional applications or fees. Two sites were proposed to be located on city-owned streetlights without prior authorization from the city. City staff also discovered that one site was proposed to be located on private property. Although city staff suggested some potential alternative locations on private electric company poles, Mobilitie ultimately withdrew its applications.

- In Brentwood, California, Mobilitie's representative submitted a letter to the city's Public Works Department with project plans, an insurance certificate and a check for $144, but not an application for a use permit as expressly required by the Brentwood Municipal Code.[17] Again, Mobilitie tendered the "application" on a Friday. Although the letter described the project plans as "construction drawings," the attached plans stated on each page: "PRELIMINARY NOT FOR CONSTRUCTION."[18]

- In Goleta, California, Mobilitie's representative emailed that city project plans for six new wireless facilities, but with no application or fees. The email acknowledged that the city requires a "Right-of-Way Access Agreement" (*i.e.*, a standard document required for all entities that carry on operations in the public rights-of-way that sets out maintenance, insurance, safety and other operational requirements, but does not require any fees), but Mobilitie claimed that "our CPCN . . . can serve in lieu of a City-specific ROW

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[13] *See* Letter from Richard Tang, Mobilitie, LLC, to Jenny Soo, City of Pleasanton, Cal. (Oct. 14, 2016).
[14] *See* CAL. GOV'T CODE § 65964.1.
[15] *See* Letter from Rebecca Eichinger, Mobilitie, LLC, to Andrew Benelli, City of Fresno, Cal. (Jun. 3, 2016).
[16] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Richmond, Cal. (Aug. 29, 2016). This letter was dated on a Monday, but Mobilitie's representative hand delivered the applications on a Wednesday (the city closes on Fridays due to State budget shortfalls).
[17] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Brentwood, Cal., Public Works Department (Aug. 2, 2016). The letter was received on August 19, 2016, as evidenced by the city's in-take stamp.
[18] *See id.*

Access/Franchise Agreement."[19] The email also requested that the city confirm who owns the poles to which Mobilitie wanted to attach their equipment.[20] This email made clear that Mobilitie did not positively know who owned the pole before it submitted applications for attachments.

- In Richmond, California, ExteNet submitted 31 encroachment permit applications for small cells without first obtaining a use permit from the city, which was required by the City's recently adopted ordinance that was effective and published before ExteNet submitted its applications.[21] These applications were received by the city on a Thursday.

- ExteNet submitted 10 applications to Concord, California, for facilities throughout both residential and commercial neighborhoods that it alleged should all be subject to administrative approval, despite local regulations that required public notice with a possible public hearing for highly visible wireless facilities placed in close proximity to residential uses.[22]

- In Gresham, Oregon, Mobilitie submitted a single application for six of its sites without addressing the criteria clearly set out in the local code. Subsequently, a Mobilitie representative acknowledged that the applications were submitted without reviewing the applicable code provisions.[23]

- In early April 2016, Mobilitie submitted four encroachment permit applications to the City of Antioch, California, for installations on city-owned streetlights without any prior authorization from the city to use its streetlights. The applications listed the owner as "N/A."

- In Sacramento, California, Mobilitie requested to meet with Public Works staff and brought 40 incomplete applications, which included applications for fifteen 120-foot steel poles. When staff informed Mobilitie that it could not accept 40 incomplete applications, Mobilitie's representative left the packet on the security desk in the lobby in an apparent attempt to be able to later claim that the shot clock had been started.[24]

- In Yuma, Arizona, after receiving a letter from the city that outlined how Mobilitie's initial application failed to satisfy the city's code for obtaining a city telecommunications license, Mobilitie resubmitted its application with general responses that appeared

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[19] *See* Email from Ben Johnson, Mobilitie, LLC, to Marti Milan, City of Goleta, Cal. (Jan. 31, 2017, 4:13 PM).
[20] *See id.*
[21] *See* Letter from Yader Bermudez, City of Richmond, Cal., to Matt Yergovich, ExteNet Sys. (Cal.) LLC (Nov. 15, 2016).
[22] In this case, ExteNet's representative submitted both the initial applications and his responses to the city's incomplete notices on Mondays. Although the applications were misfiled and incomplete, it does not appear that their representative attempted to intentionally game the shot clock in the same manner as those who routinely submit on Fridays.
[23] *See* Email from David R. Ris, City of Gresham, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 23, 2017, 3:56 PM).
[24] *See* Email from Darin Arcolino, City of Sacramento, to Omar Masry, City of San Francisco (July 7, 2016, 12:35 PM).

> intended to avert answering the city's questions. After a second letter from the city, Mobilitie's third submission continued to provide vague and inadequate responses to the city's questions on items as basic as what infrastructure Mobilitie intended to install in the city's right-of-way. When the city sent a third letter to Mobilitie explaining the deficiencies, Mobilitie never responded.

In addition to the delays in deployment, improperly filed applications, incomplete applications and applicants who disappear from the review process drain municipal staff resources. The Commission can mitigate delays (and the costs) associated with improperly filed applications if it clarifies that a "duly filed" application means a "complete" application filed in accordance with the procedures, if any, established by the state or local government.

The Communications Act does not define "duly filed" and so its ordinary meaning controls.[25] "Duly" ordinarily means to be in accordance with what is required or appropriate.[26] The root word "due" may also refer to an enforceable or actionable item.[27] Thus, the most natural interpretation for a "duly filed" application is one on which the state or local government may take action.

This interpretation would be more consistent with state and federal procedural rules for application submittals.[28] Moreover, this interpretation would also be more consistent with

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[25] *See Clark v. Rameker*, 134 S.Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012).

[26] *Definition of Duly*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/duly (last visited June 12, 2017) (defining "duly" as "in a due manner or time"); *Definition of Due*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/due#h1 (last visited June 12, 2017) (defining "due" as "according to accepted notions or *procedures*" (emphasis added)); *see also* BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 301 (3d ed. 2011) (defining the word "duly" in the phrase "duly authorized" as "properly").

[27] *See* GARNER, *supra* note 26 at 300 (defining "due" as "immediately enforceable"); BLACK'S LAW DICTIONARY 227 (3d pocket ed. 2006) (defining "due" as "[j]ust, proper, regular, and reasonable" or "[i]mmediately enforceable").

[28] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-835 (authorizing cities to establish separate timeframes for "administrative completeness review" and "substantive review"); CAL. GOV'T CODE § 65943 (providing that the timeframe for action does not commence until the applicant submits a complete application or the application is deemed-complete by law); OR. REV. STAT. § 227.178 (requiring action within a specified timeframe "after the application is deemed complete"); 47 C.F.R. § 1.746(a) (authorizing the Commission to reject "defective" applications); *see also id.* § 1.1114(a)(1) (authorizing the Commission to dismiss an application if submitted without the appropriate fee).

Congress' intent that wireless applications should not be given "preferential treatment . . . or . . . to subject their requests to any but the generally applicable time frames for zoning decision."[29]

2. *A More Flexible "Publicly Stated" Rule Would Reduce Unnecessary Costs and Delays in Application Preparation and Review*

To be sure, the publicly-stated rule provides applicants with fair notice as to what will be required for a complete application. Rather than eliminate the rule altogether, the Commission should amend and clarify the rule to allow greater flexibility in the completeness review process.

An inflexible rule tends to encourage local governments to develop exhaustive checklists that require applicants to produce materials that could potentially be necessary even if the project could be approved without such materials.

The publicly-stated rule should also account for multi-step review processes in which different materials may be required at each step. For example, in a jurisdiction that requires the planning department to determine whether an eligible facilities request would defeat the concealment elements at an existing monopine before the building department can issue construction permits, it would be more cost efficient to require preliminary zoning drawings (or "ZDs") at the initial stage before the applicant produced signed and stamped construction drawings (or "CDs") that would be necessary for the construction permit. However, the publicly-stated rule could be interpreted to mean that the jurisdiction must require the CDs upfront, which would be an economic waste if the applicant mistakenly believes that the project qualifies as an eligible facilities request.

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[29] *See* H.R. CONF. REP. NO. 104–458, at 208.

3. *The Commission Should Dispense with the 10-Day Resubmittal Review Period and the "One-Bite" Rule*

Some applicants attempt to game the shot clock through the Commission's procedures for incomplete notices, and specifically the 10-day resubmittal review period and the so-called "one-bite" rule. The Commission should eliminate them.

As a practical matter, these rules engender conflict because they do not reflect basic norms in the permit review process. They might make sense if only one department handled application reviews; however, local governments often route applications through multiple departments with expertise in the various disciplines implicated in a single project. For example, a planning department, with its expertise in community development and aesthetics, may require an approval for design and placement; a building department, with expertise in construction, may require a building permit to ensure structural safety; and a public works department may require an encroachment permit to coordinate work with utilities and other entities in the public rights-of-way. Each department may have its own requirements, perform its own completeness review, and issue its own incomplete notice. Moreover, these reviews may occur simultaneously or sequentially.

The one-bite rule in particular forces these departments to act in concert, even when it may not be in anyone's best interest to do so. For example, if an applicant must obtain an approval from the planning department and the building department for a new facility, any resources expended by the building department would be completely wasted if the planning department determined that the installation would be better suited on a nearby rooftop than as a freestanding tower. However, if the building department does not commence its review upon

submittal, the applicant may later claim that any subsequent incomplete notices are barred by the one-bite rule.[30]

These rules do not reflect the practical realities in the review process. Accordingly, the Commission should dispense with the 10-day resubmittal period and the "one-bite" rule.

4. *Déjà vu All Over Again: Municipalities Need Reasonable Moratoria to Adjust to New Deployments that Require New Siting Processes*

Many wireless industry members complain that municipalities continue to evaluate "small cell" applications under standards and procedures devised for "macrocell" facilities.[31] A similar disruptive change occurred after Congress enacted the Telecommunications Act.[32] Many state and local governments adopted moratoria as local officials studied the then-new technologies and evaluated policies and procedures to review and approve macrocells.[33]

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[30] *See, e.g.*, Letter from Joseph M. Parker, counsel for Crown Castle, to Afshan Hamid, City of Concord, Cal. (Apr. 12, 2017) (asserting that the city cannot require Crown to submit *anything* further for any other permits after the city determined that a project qualified for approval under § 6409).

[31] *See, e.g.*, *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of AT&T*, at 15 (Mar. 8, 2017) (noting that "[s]ome municipalities continue to evaluate small cell deployments in the context of their experience with macro facilities"); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of Sprint Corp.*, at 5 (Mar. 8, 2017) (noting that many regulations applied to small cells were designed for macrocells); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of T-Mobile USA, Inc.*, at 7 (Mar. 8, 2017) ("Often municipalities still review small cells the same way they review macrocells because they have either a telecommunications siting process designed for macrocells or no special process for telecommunications facilities."); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of Verizon*, at 20 (Mar. 8, 2017) (noting that many jurisdictions have not yet adopted specific policies for small cells).

[32] *See generally* Malcom J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 FED. COMM. L.J. 887, 897 (1999) (estimating that more than 300 communities adopted a moratorium after the TCA to study wireless facilities siting issues); Shannon L. Lopata, Note, *Monumental Changes: Stalling Tactics and Moratoria on Cellular Tower Siting*, 77 WASH. U. L. REV. 193, 199–202 (1999) (describing how a "recent flood of cellular tower applications has forced local municipalities and governments throughout the United States to balance the desire to modernize against concerns about citizens' property rights"); Timothy L. Gustin, Note, *The Perpetual Growth and Controversy of the Cellular Superhighway*, WM. MITCHELL L. REV. 1001, 1009 (1997); Susan L. Martin, Note, *Communications Tower Sitings: The Telecommunications Act of 1996 and the Battle for Community Control*, 12 BERKELEY TECH. L.J. 483, 492 (1997).

[33] *See, e.g.*, *Sprint Spectrum, LP v. Jefferson Cnty.*, 968 F. Supp. 1457, 1461 (N.D. Ala. 1997) (finding that applications for cell sites "virtually tripled" immediately after the TCA); *Sprint Spectrum, LP v. City of Medina*, 924 F. Supp. 1036, 1037 (W.D. Wash. 1996) ("On February 13, 1996—five days after the TCA became law—the

However, the Commission's effective prohibition on moratoria denies municipalities the traditional tool used to establish new rules for new developments.

Moratoria serve an important and essential function. These procedural devices temporarily pause new development activities to allow local officials to study any potential impacts on the community and establish standards and procedures to review and approve new projects.[34] Municipalities generally cannot adopt a moratoria without specific findings that the moratoria is necessary to respond to new developments and narrowly tailored to avoid unnecessary delays.[35]

Without moratoria, many municipalities face an impossible choice. Either attempt to comprehend the issues, evaluate existing regulations and adopt new rules within the shot clock timeframe, continue to evaluate small cells under potentially ill-suited standards or simply deny projects that cannot reasonably be reviewed within the applicable shot clock. These conditions do not accelerate broadband deployment.

The Commission should relax its restrictions on local moratoria, or at least consult with the Broadband Deployment Advisory Committee to develop model ordinances that reasonably preserve local review, to allow municipalities a reasonable opportunity to adapt to small cell

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Medina City Council, seeking time to deal with an expected flurry of applications, adopted a six-month moratorium on the issuance of new special use permits for wireless communications facilities.").

[34] *See, e.g.*, CAL. GOV'T CODE § 65858(a) (authorizing municipalities to adopt an "interim ordinance" to prohibit certain uses while local officials study the issue for up to 45 days); OR. REV. STAT. §§ 197.520(3)–(4) (authorizing municipalities to adopt a "moratorium" for up to 120 days when "existing development ordinances or regulations and other applicable law [are] inadequate to prevent irrevocable public harm from development"); *see also* ARIZ. REV. STAT. ANN. § 9-463.06 (authorizing municipalities to adopt a "moratorium" to address a shortage in essential public facilities for up to 120 days).

[35] *See* ARIZ. REV. STAT. ANN. § 9-463.06; CAL. GOV'T CODE § 65858; OR. REV. STAT. §§ 197.520(1)–(3) (setting out specific requirements for a moratorium, with specialized requirements for moratoria on developments in urban and rural areas, and for moratoria for reasons other than essential public facilities shortages); *see also Thunderbird Hotels, LLC v. City of Portland*, 180 P.2d 87, 94–95 (Or. Ct. App. 2008) ("[A]lthough a local government is authorized to delay or stop development, it may not do so in an *ad hoc* manner or without following the express procedures and requirements for moratoria.").

deployments. To the extent that any abuses may occur, courts can discern a reasonable moratorium from one imposed in bad faith.[36]

If the Commission finds it necessary to adopt formal rules, it should look to the *Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process* developed in cooperation by industry and municipal stakeholders in response to changes that followed the Telecom Act.[37] Principles for reasonable moratoria in the *Implementation Guidelines* are simple and effective:

1. Moratoria may be mutually beneficial when used to establish or amend local regulations in response to new technologies.
2. Moratoria should be for a fixed timeframe.
3. Local governments should continue to accept applications during the moratorium.
4. All stakeholders should cooperatively participate in the regulatory development process.
5. Pending applications should be processed in accordance with the new regulations.

An ounce of prevention is worth a pound of cure. The Commission should allow for reasonable moratoria to enable state and local governments to adjust their policies and procedures for new technologies and deployments.

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[36] *See, e.g., Merrick Gables Ass'n, Inc. v. Town of Hempstead*, 691 F. Supp. 2d 355 (E.D.N.Y. 2010) (noting that a moratorium imposed as a means to regulate wireless facilities based on RF emissions would violate § 332(c)(7)(B)(iv)); *Masterpage Commc'ns, Inc. v. Town of Olive*, 418 F. Supp. 2d 66, 81 (N.D.N.Y. 2005) (granting injunctive relief after the town adopted successive moratoria to indefinitely delay action on an application); *Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1196 (W.D.N.Y. 2003) (finding that a permit denial without substantial evidence, coupled with a moratorium, effectively prohibited wireless services); *Sprint Spectrum, LP v. Town of Farmington*, No. 3:97 CV 863 (GLG), 1997 WL 631104, *5–6 (D. Conn. Oct. 6, 1997) (finding that a nine month moratorium enacted in part due to concerns about the effects that RF emissions would have on property values violated the TCA).

[37] *See* LSGAC, CTIA, PCIA and AMTA, *Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process* (Aug. 5, 1998), available at: https://transition.fcc.gov/statelocal/agreement.txt [hereinafter "*Implementation Guidelines*"].

II. A DEEMED-GRANTED REMEDY FOR § 332(c)(7)(B)(ii) WOULD BE BOTH IMPERMISSIBLE AND IMPRUDENT

The Commission should not adopt a deemed-granted remedy for the mere failure to act because Congress already specified the exclusive judicial remedy. Even if the statute were ambiguous, any potential ambiguities would not fairly allow for a deemed granted remedy given the statutory remedy and supporting Congressional history. In short, a deemed-granted remedy under § 332(c)(7)(B)(ii) would be "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law."[38]

A. The Proposed Deemed-Granted Remedies Would Exceed the Commission's Interpretive Authority Because Congress Already Specified Expedited Judicial Review as the Exclusive Recourse for a Failure to Act

All three deemed-granted theories exceed the Commission's interpretive authority because "Congress has directly spoken to the precise question at issue."[39] Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any . . . failure to act . . . that is inconsistent with this subparagraph may . . . commence an action in any court of competent jurisdiction."[40]

Although the Commission notes that § 332(c)(7)(B)(v) "does not explicitly state that [its] enforcement mechanisms are *exclusive*,"[41] the Congressional record specifically provides otherwise.[42] Courts will construe the ordinarily-permissive word "may" as mandatory when the legislative history and the statutory structure demonstrate that the drafters meant "shall."[43] As the Conference Report unequivocally stated:

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[38] *See* 5 U.S.C. § 706(2)(A).
[39] *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).
[40] 47 U.S.C. § 332(c)(7)(B)(v).
[41] *See Wireless NPRM/NOI* at ¶ 14 (emphasis in original).
[42] *See* H.R. CONF. REP. NO. 104–458, at 208.
[43] *See, e.g.*, *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 198–99 (2000); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 376 (2d ed. 1980) (stating that "where a statute directs the doing of a thing for the sake of justice, or the public good, the word *may* is the same as the word *shall*" (emphasis in original)).

> It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 *the courts shall have exclusive jurisdiction* over all other disputes arising under this section.[44]

The fact that Congress also provided that "[a]ny person adversely affected by an act or failure to act . . . that is inconsistent with clause (iv) may petition the Commission" does not require that the word "may" be construed as permissive. The Conference Report clarified that:

> [t]he limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications . . . .[45]

Indeed, the conferees explicitly rejected a proposed amendment that would centralize authority over wireless facilities in the Commission. The adopted version "*prevents Commission preemption of local and State land use decisions* and preserves the authority of State and local governments over zoning and land use matters."[46]

Taken together, the statute and the Conference Report show that § 332(c)(7)(B)(v) directed disputes related to state and local land use regulations and decisions to the courts but created an exception for disputes that arose from state or local attempts to regulate RF emissions that could be resolved by the Commission. This framework closely resembles a similar division in § 253(d), which authorizes the Commission to preempt barriers to competitive telecommunication services except when such barriers arise from local rights-of-way management practices.[47]

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[44] *See* H.R. CONF. REP. NO. 104–458, at 208 (emphasis added).
[45] *See id.* at 209.
[46] *See id.* at 207–08 (emphasis added); *see also Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 407 (3rd Cir. 1999).
[47] *See* 47 U.S.C. § 253(d); *see also* 141 CONG. REC. S8305 (Aug. 4, 1995) (statement of Sen. Feinstein) (arguing that Commission preemption over local issues under § 253 should be curtailed and litigated in local district court instead).

Accordingly, the Commission lacks authority to interpret a deemed-granted remedy for a mere failure to act because § 332(c)(7)(B)(v), as confirmed by the Conference Report, unequivocally establishes the courts as the exclusive venue for disputes over a failure to act.

B. Any Ambiguity in § 332(c)(7)(B)(ii) Does Not Fairly Allow for a Deemed-Granted Remedy for a Mere Failure to Act

Section 332(c)(7)(B)(v) directly answers the precise question at issue. But even if it did not, a deemed-granted remedy would be an impermissible interpretation because § 332(c)(7)(B)(ii) requires State and local governments to "act" on—but not necessarily "approve"—an application, and any alleged violations must be resolved by the courts. All three deemed-granted theories aim to force an approval, usurp the courts' exclusive role or both, and therefore seek to reach a result Congress would not have sanctioned.

1. *Proposed Interpretations Would Receive "Considerably Less Deference" Because They Depart from Consistently Held Views by the Commission and the Courts for Nearly 20 Years*

As a threshold matter, any deemed-granted interpretation would be subject to more scrutiny because it departs from the long-held view by the Commission and the courts that judicial remedies are the exclusive enforcement mechanism for failures to act within a reasonable time. Although the Commission may change its position, it must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[48] That basis for change in view "is 'entitled to considerably less deference' than a consistently held agency view."[49] The theories advanced in the *Wireless NPRM/NOI*, while

[48] *See Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).
[49] *See INS v. Cardoza–Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); *see also State Farm*, 463 U.S. at 42 ("If Congress established a presumption from which judicial review should start, that presumption . . . [is] *against* changes in current policy that are not justified by the rulemaking record." (emphasis in original)).

certainly a "fresh look" at the issues, lack a reasoned basis to depart from the Commission's and the courts' consistently held view.[50]

All three deemed-granted theories conflict with the Commission's long-held views that § 332(c)(7) limits its authority over land use decisions and does not support a deemed-granted remedy.[51] In the *Rural Services Order*, for example, the Commission stated:

> With respect to preemption, as discussed above, *Section 332(c)(7) generally preserves local authority over land use decisions, and limits the Commission's authority in this area.* In appropriate cases, the Commission or its Bureaus have considered petitions alleging that particular regulations impinge on areas within the Commission's exclusive jurisdiction.[52]

Consistent with this position, the Commission stated in the *2009 Declaratory Ruling*, and reiterated in the *2014 Infrastructure Order*, that courts should craft case-specific remedies.[53]

Although the Commission points out that neither the *2009 Declaratory Ruling* nor the *2014 Infrastructure Order* expressly stated that courts were the exclusive enforcement mechanism for § 332(c)(7)(B) violations, the Commission's own website currently does. At the time these comments were filed, the Commission's own website stated that:

> [A]llegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be *resolved exclusively by the courts* (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than in RF

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[50] *See Wireless NPRM/NOI* at ¶ 8.

[51] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12978, ¶ 284; *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39; *In re Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order and Notice of Further Rulemaking*, 19 FCC Rcd. 19078, 19143, ¶ 123 (2004) [hereinafter "*Rural Services Order*"]; *see also id.* at 19143, ¶ 123 n.368 (noting that "courts have exclusive jurisdiction over most complaints under Section 332(c)(7)(B)").

[52] *Rural Services Order*, 19 FCC Rcd. at 19143, ¶ 123 (emphasis added, internal footnotes omitted). With respect to the "areas within the Commission's exclusive jurisdiction," the Fifth Circuit in *Arlington I* found that this statement "makes clear that the limitation to which the FCC was referring was § 332(c)(7)(B)(v)'s grant of exclusive jurisdiction to the courts over most disputes arising under § 332(c)(7)(B)." *See City of Arlington v. FCC*, 668 F.3d 229, 254 (5th Cir. 2012) ("*Arlington I*").

[53] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12978 ¶ 284; *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39.

> emissions cases, the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation.[54]

Accordingly, the proposed deemed-granted remedies would be inconsistent with the Commission's long-held view that judicial remedies are the exclusive enforcement mechanism for § 332(c)(7)(B)(ii) violations.

The Commission's prior view also coincides with long-standing judicial interpretations. Although wireless industry members often cite to various judicial decisions as alleged support for the proposition that an injunction is appropriate relief under § 332(c)(7)(B), "case law does not establish that an injunction granting the application is always or presumptively appropriate when a 'failure to act' occurs."[55]

Courts grant injunctive relief only when inaction, coupled with some conduct that manifests an intention not to approve the application, amounts to a *de facto* denial that violates other provisions in § 332(c)(7)(B).[56] For example, the Sixth Circuit in *Tennessee ex. rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392 (6th Cir. 2005), ordered Chattanooga to issue permits after the city verbally informed the applicant that it would not approve the proposed project and failed to act for more than nine months.[57] However, the mere failure to act did not trigger the mandamus. As the court made clear, "[Chattanooga]'s fatal flaw

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[54] *See Tower and Antenna Siting*, FCC (Sept. 20, 2016), https://www.fcc.gov/general/tower-and-antenna-siting (last visited on June 11, 2016) (emphasis added).
[55] *See 2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39; *see also* Plaintiff's Reply Brief in Support of Motion for Partial Summary Judgment on the First Cause of Action of the Complaint at 2, *GTE Mobilnet of Cal. Ltd. P'ship v. City of Watsonville*, No. 16-cv-03987-NC (filed Oct. 11, 2016) (claiming that courts have "almost uniformly held" that injunctive relief is appropriate for a mere failure to act without citing case law that stands for such proposition).
[56] *See, e.g., Tennessee ex. rel. Wireless Income Props., LLC v. City of Chattanooga*, 403 F.3d 392, 398–99 (6th Cir. 2005).
[57] *See id.*

here was that it failed to issue a written decision supported by substantial evidence."[58] At least four other circuits also require some more serious violation than a mere failure to act.[59]

2. *Nothing in § 332(c)(7)(B)(ii) Suggests that Congress Intended State and Local Governments to Reach Anything Other than a Decision within a Reasonable Time*

Unlike other statutes in which the Commission found a basis for a deemed-granted remedy, such as the Spectrum Act, § 332(c)(7)(B)(ii) does not compel state or local governments to reach a specific result. Congress merely required that state and local government's act within a reasonable time.

Congress knows how to compel a specific outcome when it chooses to do so.[60] Deemed-granted rules for eligible facilities requests, cable franchises, pole attachments and requests for regulatory forbearance all derive from statutes that compel an approval for a very specific application.[61] Section 332(c)(7)(B)(ii) merely imposes an obligation to "act" within a reasonable

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[58] *See id.* at 400 n.6.

[59] *See Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1221–1222 (11th Cir. 2002) (granting injunctive relief because the county denied an application without substantial evidence); *See Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24–25 (1st Cir. 2002) (granting injunctive relief because the board's denials effectively prohibited personal wireless services); *See Pine Grove Twp.*, 181 F.3d at 409–10 (granting injunctive relief because the township denied an application without substantial evidence); *See Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2nd Cir. 1999) (granting injunctive relief because the town denied an application without substantial evidence); *see also T-Mobile Ne. LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 463 (S.D.N.Y. 2009). (distinguishing procedural and substantive Telecom Act violations and granting an injunction because the plaintiff showed a substantive violation occurred); *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 214 n.7 (S.D.N.Y. 2004) (finding that a mere failure to act can be mooted by a decision during the pendency of litigation).

[60] *Cf. Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994).

[61] *See* 47 U.S.C. § 1455(a) ("[A] State or local government *may not deny, and shall approve*, any eligible facilities request . . . ." (emphasis added)); *id.* § 541(a)(1) ("[A] franchising authority *may not . . . unreasonably refuse to award* an additional competitive franchise." (emphasis added)); *id.* § 537 ("If the franchising authority fails to render a final decision on the request within 120 days, such request shall be *deemed granted* unless the requesting party and the franchising authority agree to an extension of time." (emphasis added)); *id.* § 224(f)(1) ("A utility *shall provide a cable television system or any telecommunications carrier with nondiscriminatory access* to any pole, duct, conduit, or right-of-way owned or controlled by it." (emphasis added)); *id.* § 160(c) ("Any such petition *shall be deemed granted* if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission." (emphasis added)).

time and covers all applications for all new and modified personal wireless service facilities.[62] The plain language expresses no preference or opinion as to what the decision should be.

In this regard, the Commission's view that § 332(c)(7) and the Spectrum Act are not materially different (insofar as Congress did not intend facilities under either framework to be "mired in [a] protracted approval process") appears misplaced.[63] Section 332(c)(7) requires that state and local governments process wireless applications in the same manner as they process other zoning applications—no slower and no faster, whereas the Spectrum Act mandates approval whether the proposed project complies with local zoning rules.[64] Although § 332(c)(7)(B)(v) requires the *courts* to hear complaints on an "expedited" basis, this does not affect the "reasonable" time state and local governments have to act under § 332(c)(7)(B)(ii). Accordingly, an interpretation that would mandate an approval would be manifestly contrary to the plain language that compels only a decision within a reasonable time.

3. *Congress Did Not Intend the Commission to Act for States or Local Governments Who Fail to Act Within a Reasonable Time*

The Conference Report also makes clear that Congress did not intend for the Commission to preemptively step in and make "zoning and land use decisions" after a failure to act within a reasonable time.[65] However, whether by an "irrebuttable" presumption, a lapse in local authority or wholesale preemption, all three deemed-granted theories in the *Wireless NPRM/NOI* usurp the

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[62] *See id.* § 332(c)(7)(B)(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." (emphasis added)).

[63] *See Wireless NPRM/NOI* at ¶ 12.

[64] *Compare* H.R. CONF. REP. NO. 104-458, at 208, *with* 47 U.S.C. § 1455(a); *see also 2014 Infrastructure Order*, 29 FCC Rcd. at ¶ 201 (permitting Section 6409(a) modifications to legal non-conforming structures that would otherwise be prohibited under local zoning laws).

[65] *See* H.R. CONF. REP. NO. 104–458, at 207–08.

state or local government's role as the primary decision-maker. Such an expansive construction that would fundamentally change the regulatory scheme laid out in the statute must be incorrect.[66]

The Commission's reliance on *Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) ("*Arlington I*"), and *Arlington v. FCC*, 133 S.Ct. 1863 (2013) ("*Arlington II*"), for the proposition that "courts must follow" Commission interpretations appears overstated.[67] The Fifth Circuit in *Arlington I* upheld the Commission's guidance to the courts in the *2009 Declaratory Ruling* because the court found the word "reasonable" contained an ambiguity that fairly allowed for the presumptively reasonable timeframes.[68] The Supreme Court in *Arlington II* addressed an even narrower question as to whether *Chevron* deference applied to agency interpretations that could enlarge the agency's jurisdiction.[69] Neither case expressed any opinion as to potential ambiguities in § 332(c)(7)(B)(v), or whether such ambiguities, if any, fairly allowed for a deemed-granted remedy.

Accordingly, even if § 332(c)(7)(B)(v) did not directly foreclose deemed-granted remedies, the proposed remedies would exceed the Commission's interpretive authority because all three theories go further than any ambiguity in the statute would allow.

4. *An "Irrebuttable" Presumption Creates a New Substantive Limitation on State and Local Authority that Impermissibly Instructs the Courts How to Rule in a Particular Case*

In addition to the fatal flaws noted above, the Commission's proposed "irrebuttable" presumption would impermissibly create a new substantive limitation on state and local governments and instruct the courts how to rule in individual cases. Even if the Commission's

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[66] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *MCI Telecommns. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 224 (1994).
[67] *See Wireless NPRM/NOI* at ¶ 10.
[68] *See Arlington I*, 668 F.3d at 259–60.
[69] *See Arlington v. FCC*, 133 S.Ct. 1863, 1867–1868 (2013) ("*Arlington II*") ("We granted certiorari . . . limited to the first question presented: 'Whether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction.'" (internal citation omitted)).

proposed rule did not obviate the courts' role altogether, the Commission cannot create new substantive limitations that effectively dictate outcomes in a judicial proceeding.

Section 332(c)(7)(B) contains the *only* limitations on state and local authority with respect to personal wireless service facilities.[70] Unlike a rebuttable presumption, which merely shifts the burden of proof from one litigant to another, an irrebuttable presumption establishes a new substantive law.[71] Thus, the Commission cannot interpret § 332(c)(7)(B)(ii) to contain a silent irrebuttable presumption because it would create a new substantive limitation on state and local authority.

Moreover, the irrebuttable presumption binds the courts' discretion and effectively instructs it how to rule. Although proponents may claim that an irrebuttable presumption does not eliminate the judiciary's role because shot clock disputes would still be heard in court, the rule would render the proceedings a meaningless exercise and substitute the Commission's desired outcome for the judge's reasoned opinion as to the facts and the law. Congress cannot instruct the courts how to rule in any case, and the Commission cannot do what Congress could not do itself.[72] Therefore, an irrebuttable presumption is forbidden because it would impermissibly instruct the courts how to interpret and apply the law to the circumstances in a case.[73]

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[70] *See T-Mobile S. LLC v. City of Roswell*, 135 S.Ct. 808, 816 (2014) (finding that "the enumerated limitations [in § 332(c)(7)(B)] to set out an exclusive list").

[71] In adopting the rebuttable presumption, Chairman Genachowski stressed that "the process we establish does not dictate any substantive outcome in any particular case, or otherwise limit state and local governments' fundamental authority over local land use." *2009 Declaratory Ruling*, 24 FCC Rcd. at 14030 (statement of Chairman Julius Genachowski).

[72] *See Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1322–1323 (2016) (holding that Article III "blocks Congress from requiring federal courts to exercise the judicial power in a manner that Article III forbids" (internal punctuation omitted)).

[73] *See id.* at 1323; *see also In re Taxable Municipal Bond Securities Litigation*, 796 F. Supp. 954, 960 (E.D. La. 1992) ("Congress unquestionably possesses the power to change or make law. What Congress cannot do is instruct the court on how to decide the merits of a particular controversy without changing the legal rules that prescribe the rights of the parties.").

5. *State and Local Government Police Powers Cannot "Lapse"*

Lastly, the proposed interpretation that state and local authority lapses after a failure to act stretches the statutory text beyond its breaking point.[74] When Congress provides that applicants may sue a state or local government that fails to act within a reasonable time, it does not ordinarily mean that state and local governments forfeit all their authority if they fail to act within a reasonable time. Especially when the same statute generally preserves all state and local authority, the Commission's proposed lapsed-authority interpretation would violate the doctrine that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[75]

Any argument that Congress impliedly intended state and local land use authority to lapse would face a significantly uphill challenge in the courts to overcome the presumption against preemption in traditionally local matters unless preemptive intent is "unmistakably clear" in the statutory text.[76] Section 332(c)(7) clearly does not preempt the field because § 332(c)(7)(A) expressly preserves state and local authority over land use decisions.[77] Likewise, no express intent to preempt state or local authority after some timeframe elapses appears anywhere in the statute. The Commission would need to rely on implied preemption, which Congress forbids.[78]

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[74] *See Wireless NPRM/NOI* at ¶ 13.
[75] *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").
[76] *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1996).
[77] *See* 47 U.S.C. § 332(c)(7)(A); *Sprint Tel. PCS LP v. Cnty. of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008) [hereinafter "*Sprint II*"]; *see also Hillsborough Cnty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) ("The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme.").
[78] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (Feb. 8, 1996) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."); *City of Dallas v. FCC*, 165 F.3d 341, 347–48 (5th Cir. 1999).

C. Any Deemed-Granted Remedies for Discretionary Authorizations Must Incorporate Due Process Protections

To the extent that the Commission does attempt to impose some deemed-granted rules, it should ensure that no requests for authorization under § 332(c)(7) may be automatically approved without prior notice and an opportunity to be heard. Land use decisions implicate due process protections insofar as new developments diminish property interests.[79] Under both federal and state law, prior notice and an opportunity to be heard is an essential due process protection.[80]

The plain language in § 332(c)(7)(B)(ii) and its legislative history show that Congress envisioned enough space for due process in wireless siting. Under § 332(c)(7)(B)(ii), the timeframe for review depends on the "nature and scope of [the] request." The Conference Report explains that this feature was intended to facilitate a "public hearing or comment process" when required under local law.[81]

Wireless facilities are not exempt from due process concerns. For example, in *American Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014), the Ninth Circuit held that applications to renew three macrocells could not be deemed approved under California state law without due process because the court had "little trouble finding that the automatic approval . . . would constitute a substantial or significant deprivation of other landowners' property interests .

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[79] *See, e.g., Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1049 (9th Cir. 2014) (quoting *Horn v. Cnty. of Ventura*, 596 P.2d 1134, 1140 (Cal. 1979)).

[80] *See* U.S. CONST. Amends. V and XIV; ARIZ. CONST. art. II, § 4 ("No person shall be deprived of life, liberty, or property without due process of law."); CAL. CONST. art. 1, § 7 ("[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws"); *Londoner v. Denver*, 210 U.S. 373, 386 (1908).

[81] *See* H.R. CONF. REP. NO. 104-458, at 208

. . ."[82] Thus, decisions to approve (or renew) authorizations for wireless facilities subject to local discretion under § 332(c)(7) require prior notice and an opportunity to be heard.

Procedural protections are a common feature in deemed-approved provisions under state law.[83] Accordingly, any deemed-granted rule imposed by the Commission should not become effective without proper notice and an opportunity to be heard.

III. THE COMMISSION SHOULD NOT ADOPT NEW OR SHORTER SHOT CLOCKS

The wireless deployment process thrives on cooperation among all stakeholders. Just as the Commission found in the *2009 Declaratory Ruling* that too much time for review hindered deployment, it should now recognize that too little time for review threatens to grind cooperative efforts—and deployment—down. Similarly, the Commission should not adopt new shot clock classifications based on over-simplified assumptions about what impacts review periods.

A. Commission Authority to Define "Reasonable" Timeframes for Review is Not Unlimited, and Cannot Frustrate Ordinary Zoning Procedures

Nowhere in the *Wireless NPRM/NOI* does the Commission question its authority to create new or shorter shot clocks.[84] Although the Supreme Court in *Arlington v. FCC*, 133 S.Ct. 1863 (2013), upheld the Commission's authority to interpret a "reasonable" timeframe, the actual interpretations must always be "based on a permissible construction of the statute."[85]

Shot clocks cannot be so short that they frustrate ordinary permitting processes within a given jurisdiction. The obligation to act within a reasonable time must be read in conjunction with Congress' stated intent that "[i]f a request . . . involves a zoning variance or a public hearing

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[82] *See Am. Tower Corp.*, 763 F.3d at 1050–1051.
[83] *See, e.g.*, CAL. GOV'T CODE § 65964.1(a)(2) (prohibiting deemed approvals without all notices required for the application); 53 PA. CONS. STAT. ANN. § 10908(9) (authorizing a deemed approval only after the notice required by law has occurred).
[84] *See Wireless NPRM/NOI* at ¶¶ 16–19.
[85] *See Arlington II*, 133 S.Ct. at 1874 (quoting *Chevron*, 467 U.S. at 842) (internal quotations omitted).

or comment process, the time period for rendering a decision will be the usual period under such circumstances."[86] Congress intended the "reasonable" time to allow for "the generally applicable time frames for zoning decision . . . ."[87] Any new interpretations that effectively foreclose traditional zoning processes for wireless facilities would go "further than the ambiguity [in § 332(c)(7)(B)(ii)] will fairly allow."[88]

B. Over-Granulized Shot Clock Classifications Proposed in the *Wireless NPRM/NOI* Are Based on False or Over-Simplified Assumptions about Which Facilities Require More or Less Time for Review

As a general matter, the Commission should not further granulize shot-clock classifications. More specifically, the Commission's proposed classifications distort the reasons why some facilities require a lengthier review than others. Although distinctions such as overall height, equipment size and location may impact the review process, the most important factor is whether the proposed deployment complies with local zoning codes.

1. *Overall Height*

The Commission should not create a new shot clock classification based on overall height. Whether a tower at a particular overall height will create aesthetic concern depends on context. Structures with the same overall height have a greater aesthetic impact in a hilly area than in a flat area due to relative vantage points throughout the neighborhood.[89] A 50-foot tower in an industrial park may not require the same public process as a 50-foot tower in the public

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[86] *See* H.R. CONF. REP. NO. 104-458, at 208; *see also 2009 Declaratory Ruling*, 24 FCC Rcd. at 14010, ¶ 42 (finding that "Congress intended the decisional timeframe to be the 'usual period' under the circumstances for resolving zoning matters").
[87] *See* H.R. CONF. REP. NO. 104-458, at 208.
[88] *See Arlington II*, 133 S.Ct. at 1874.
[89] *See, e.g.*, John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME L.J. ETHICS & PUB. POL'Y 537, 549 (2009) (noting hillsides as a location associated with greater aesthetic impacts); Sandy Bond, *Cell Phone Tower Proximity Impacts on House Prices: a New Zealand Case Study*, 13 PAC. RIM PROP. RESEARCH J. 63, 84 (2007) (noting that topographical differences between neighborhoods impacted public opinions about aesthetic concerns).

rights-of-way. To be sure, tall towers tend to raise more general concerns, but location and context matters far more than overall height.

Moreover, delays in approvals due to height generally have more to do with the fact that the proposed tower exceeds the zone height limit. Different communities adopt different zone heights for the same zone classifications; the limit in a residential zone in Scottsdale, Arizona, may be 35 feet whereas the limit in the same zone classification in Hermosa Beach, California, may be 25 feet.[90] Height limits may also widely differ within the same general zone classification for specific sub-classifications, such as in Portland, Oregon, where overall height limits across various commercial zones range from 35 feet to 75 feet.[91]

Accordingly, a shot clock classification based on overall height would not reflect the interactions between height, context and code compliance. Any attempt to account for these diverse factors in a meaningful way would be nearly impossible.

2. *Zone Classifications*

The Commission should not create a new shot clock classification for zone classifications. Timeframes that incent certain deployments over others based on zone classifications alone would intrude on state and local authority to determine which locations would be most appropriate for particular facilities.

Moreover, increasingly common mixed-use zones, design overlay districts, environmental preservation districts and other special zoning classifications would inevitably outpace the Commission's rules and create further confusion about the applicable shot clock

[90] *Compare* SCOTTSDALE, ARIZ., CODE § 5.014(D), *with* HERMOSA BEACH, CAL., CODE § 17.08.030(A).
[91] *See* PORTLAND, OR., CODE § 33.130.210, Table 130-3.

timeframe. For example, both Portland, Oregon, and Tucson, Arizona, each have 28 separate zone classifications.[92] Los Angeles, California, has 68 separate zone classifications.[93]

3. *Utility Structures and the Public Rights-of-Way*

The Commission should not create a new shot clock classification for utility structures and deployments in the public rights-of-way. Shorter timeframes for facilities on utility structures or in the public rights-of-way would conflict with the Commission's prior determination that such deployments "are *more* likely to raise aesthetic, safety, and other issues" than traditional towers.[94]

- ***Wireless facilities on utility structures and in the public rights-of-way are more difficult to conceal.*** Slim concrete or wooden poles and bare lattice towers significantly curtail concealment options for wireless attachments. Moreover, these locations are often highly visible because utilities and rights-of-way are naturally close to where people live and work. Applicants often strongly resist concealment techniques that work well, such as decorative replacement poles, underground equipment or landscape screening for ground-mounted equipment.

- ***Additional structures in the public rights-of-way create additional potential hazards to the public.*** A common concern among public works directors is that pole proliferation in the public rights-of-way threatens public safety. For example, overbuilt towers and pole attachments can cause severe damage, as happened in 2007 in California when a utility pole overloaded with wireless transmission equipment collapsed and started a fire that ravaged nearly 4,000 acres and caused millions of dollars in property damage.[95]

- ***Work in the public rights-of-way generally requires greater coordination with third parties than as compared with deployments on private property.*** Both new structures and new attachments to existing structures must ensure proper separations from existing utilities and other uses, which often requires a technical review.[96] When a deployment requires excavation, such as for new wireline utilities, hand holes or reinforced pole foundations, local officials must ensure that the proposed work does not damage or

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[92] *See* City of Portland, Bureau of Planning & Sustainability, *Zoning Map* (Jan. 1, 2017), *available at:* https://www.portlandoregon.gov/bps/article/59265; TUCSON, ARIZ., DEV. CODE § 4.5.

[93] *See* City of Los Angeles, Dept. of Building and Safety, *Generalized Summary of Zoning Regulations* (Jan. 24, 2006), *available at:* https://planning.lacity.org/zone_code/Appendices/sum_of_zone.pdf.

[94] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12948, ¶ 195.

[95] *See* Melissa Caskey, *CPUC Approves $51.5-Million Malibu Canyon Fire Settlement*, MALIBU TIMES (Sep. 23, 2013), *available at* http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html.

[96] *See, e.g.*, Cal. Pub. Utils. Comm'n, *Rules for Overhead Electric Line Construction*, General Order No. 95 (Jan. 2015), *available at:* http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M146/K646/146646565.pdf (last visited June 15, 2017).

interfere with any pre-existing underground utilities. Sidewalk closure and traffic control plans may also be necessary to ensure that the construction, excavation or installation work does not disrupt pedestrian and vehicular traffic.

4. *DAS and Small Cells*

The Commission should not establish special shot clock rules for DAS or small cells. Such rules would be inevitably discriminatory against other technologies and based on the false premise that all DAS and small cells are smaller or less obtrusive.

First, the Commission should not create new shot-clock classifications that discriminate based on the technological configuration proposed. This proposal would reverse long-standing Commission policies that favor technologically neutral rules, and create incentives for competitive carriers to prefer DAS and small cell technologies over others. State and local governments could not discriminate in this manner,[97] and neither should the Commission.

Second, a shorter shot clock for DAS or small cells apparently stems from the false premise that these facilities are "small" and uniform in appearance. A "small" cell can be just as large and intrusive as a "macro" cell because the word "small" refers to the coverage area rather than the equipment. Although some DAS and small cell deployments may involve pizza box-sized antennas,[98] the vast majority do not and many use the same equipment as traditional macro sites. Indeed, the Commission's own volume-based definition for a "small cell" could contain more than 76 large pizza boxes.[99]

As the example photographs below show, DAS and small cell deployments come in all sizes and shapes:

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[97] *See, e.g., New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105-106 (2nd Cir. 2010) (invalidating a local ordinance that made it virtually impossible to deploy any facilities other than a DAS).

[98] *See* Letter from Brian M. Josef, CTIA, to Marlene H. Dortch, FCC (April 13, 2017).

[99] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12907, ¶ 92 n. 251 (defining a small cell as an installation with no more than six cubic feet in antenna volume and no more than 17 cubic feet in equipment volume). The average large pizza box is approximately 0.30 cubic feet (16.25" x 16.25" x 2.00").

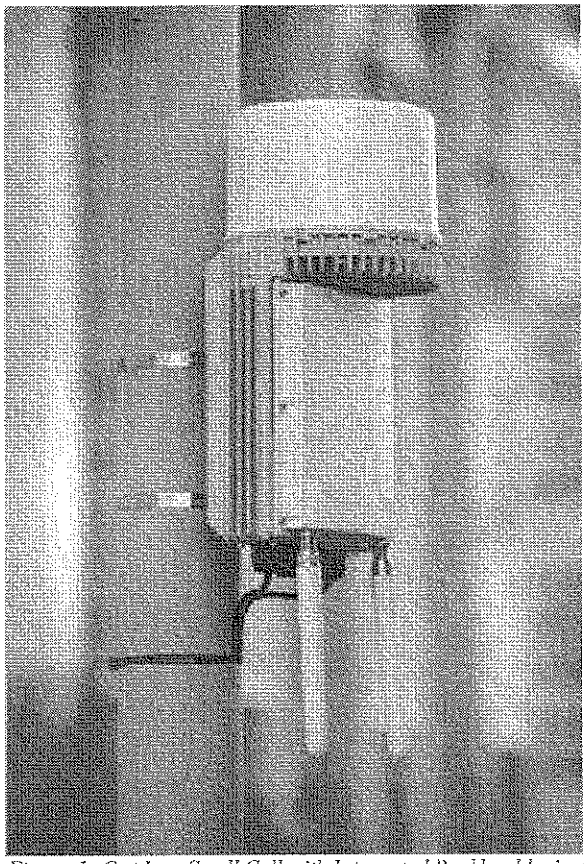

Figure 1: Outdoor Small Cell with Integrated Backhaul by ip.access in the United Kingdom.

The equipment depicted in Figure 1 provides outdoor LTE services with an integrated wireless backhaul solution.

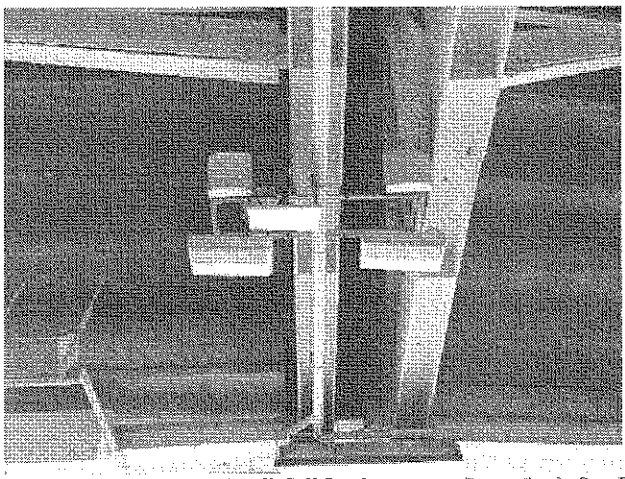

Figure 2: CommScope Small Cell Deployment at Petco Park, San Diego, Cal. (Photo Robert C. May III)

The "pizza box" antennas shown in Figure 2 are typically used indoors or at venues such as shopping malls and stadiums. Not visible in this example are the remote radio units, equipment racks and cables that support these antennas.

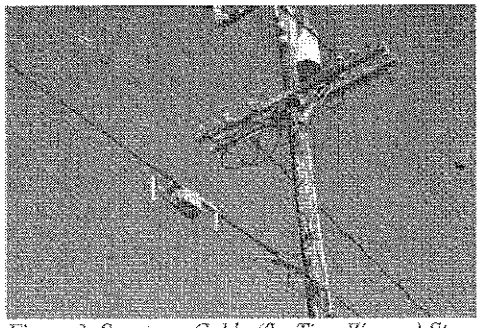

Figure 3: Spectrum Cable (fka Time Warner) Strand-mounted Node in Santa Monica, Cal. (Photo by Dr. Jonathan L. Kramer)

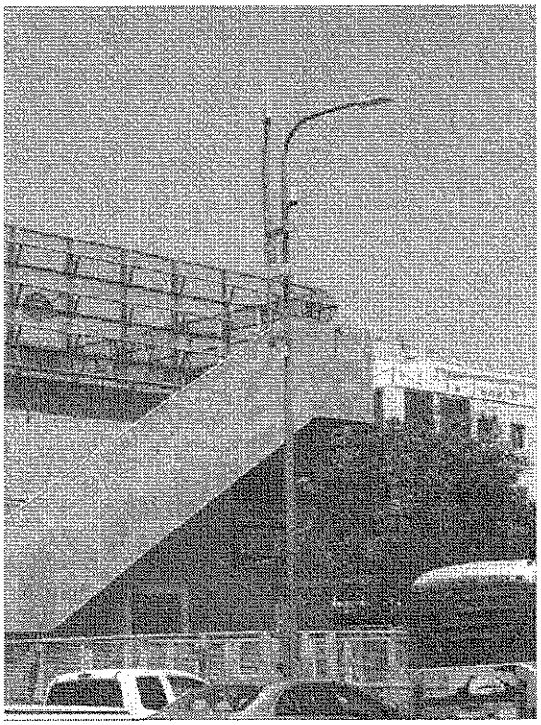

Figure 4: Mobilitie Small Cell in Los Angeles (Photo by Dr. Jonathan L. Kramer)

EXHIBIT F

Figure 5: Crown Castle Small Cell in Riviera Beach (Susan Salisbury, *New: Is Fast Digital Service Worth Placing a Pole in Front of Your Home?*, PalmBeachPost.com (Mar. 20, 2017 8:45AM), *available at:* http://www.palmbeachpost.com/business/new-fast-digital-service-worth-placing-pole-front-your-home/bw1EEYC4loOlyJGk0yQqKJ/.)

EXHIBIT F

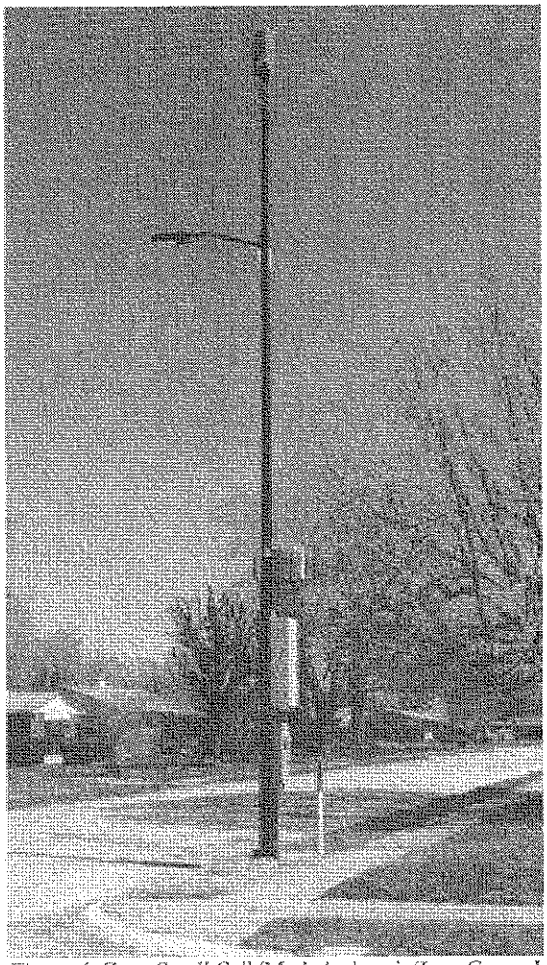

Figure 6: Zayo Small Cell (Mark Ambrogi, *Zayo Group Installing Small Cell Equipment Around Town to Enhance Mobile Coverage*, CurrentInZionsville.com (Sept. 13, 2016), available at: http://www.currentzionsville.com/2016/09/13/zayo-group-installing-small-cell-equipment-around-town-to-enhance-mobile-coverage/.)

EXHIBIT F

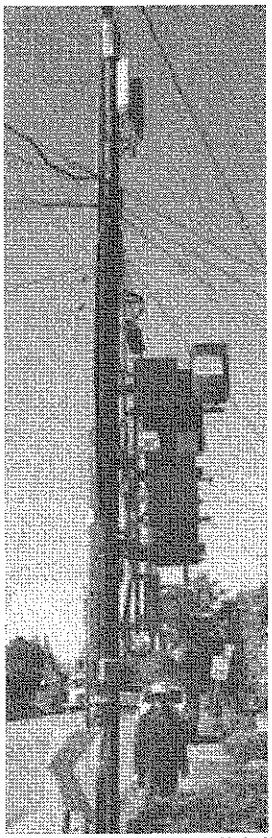

Figure 7: AT&T "Small Cell" in Oakland, Cal. (Photo by Omar Masry)

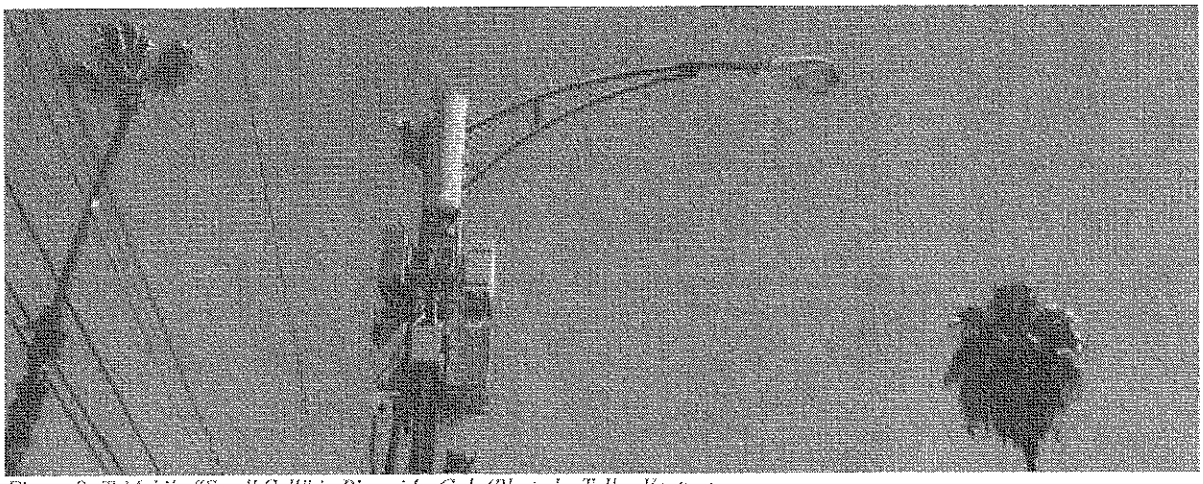

Figure 8: T-Mobile "Small Cell" in Riverside, Cal. (Photo by Tellus Venture = http://www.tellusventure.com/images/2017/5/tmobile_small_cell_alessandro_riverside.jpg)

EXHIBIT F

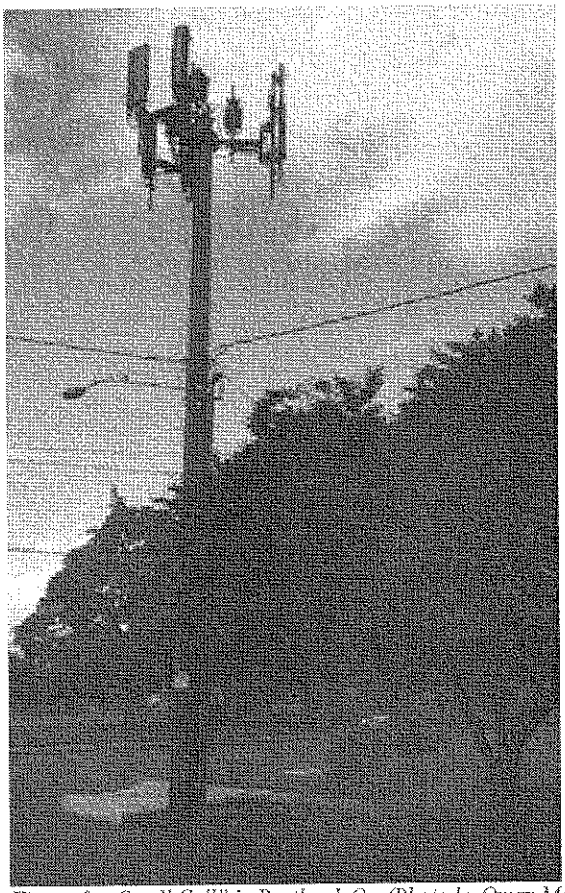

Figure 9: "Small Cell" in Portland, Or. (Photo by Omar Masry)

To the extent that DAS and small cells use the same or similar large equipment as macro sites, these facilities often implicate the same aesthetic concerns as traditional deployments. Moreover, applicants typically seek to place these facilities in the public rights-of-way where the equipment will be even more visible and less screened than it might be on private property.[100] Narratives that DAS and small cells do not raise the same aesthetic or safety concerns as "traditional, larger . . . equipment" are simply not true.[101]

5. *Batched Applications*

[100] *Compare Clarkstown*, 612 F.3d at 101–02 (describing a local ordinance that incentivized DAS), *with NewPath Networks LLC v. City of Irvine*, No. SACV 06–550–JVS (ANx), 2009 WL 9050819, *19 (C.D. Cal. Dec. 23, 2009) (describing local opposition to DAS because it would be in close proximity to residences).
[101] *See Wireless NPRM/NOI* at ¶ 18.

The Commission should encourage experimentation with batched applications, but should not adopt any rigid classifications or mandatory rules. Although batched applications may be an appropriate solution under some circumstances, it may mutate into a problem if local governments are required to accept more applications than their resources would allow them to process within the applicable timeframe. The Commission should allow local governments to serve as laboratories for innovation and determine whether sufficient resources are available to handle batched applications.

Batched applications should not require local governments to issue a single permit for multiple sites. At least some individualized review will be necessary no matter how similar the batched installations may seem. Poles that seem identical may have different structural capacities, may be placed on streets with higher traffic volumes or may be in more visually prominent locations. Moreover, many public works departments track encroachments in the public rights-of-way by individual permit numbers.

This common tracking system allows local governments to ensure that conditions specific to an individual permit can be recorded and monitored during the installation process. A common problem local governments encounter when considering a blanket permit approach is that permit-tracking software generally does not contemplate this function, and customized upgrades can be prohibitively expensive for some smaller jurisdictions. This approach would inevitably leave some local governments that cannot afford expensive software upgrades without the tools to effectively monitor a permittee's compliance with public health and safety laws.

EXHIBIT F

IV. LOCAL GOVERNMENT RESPONSES TO THE NOTICE OF INQUIRY

Local Governments appreciate the Commission's effort to harmonize the provisions in §§ 253 and 332(c)(7), as similar statutes should be whenever possible.[102] We also respectfully remind the Commission that:

> [i]t would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.[103]

Although different interpretations may have emerged for superficially similar terms, sections 253 and 332(c)(7) concern two different technologies at two different stages in market development at the time Congress adopted the Telecommunications Act. Given the dissimilarities between the facilities and services covered under each statute, it may be a more reasonable approach to admit that these statutes are simply different.

A. Congress Never Intended Sections 253 and 332 to be Simultaneously Applied to Both Wireless and Wireline Facilities

Congress created two different statutory frameworks to govern the interaction between federal, state and local authority over different services: one for "telecommunication services" in general under § 253 and another for wireless telecommunications services under § 332. These frameworks bear a certain resemblance. Both contain a general prohibition on state and local laws that would prohibit or effectively prohibit competitive market entry; both contain safe harbors for state laws necessary for universal service and consumer protections; and both contain safe harbors for state and local land use and construction regulations.[104] However, these

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[102] *See Wireless NPRM/NOI* at ¶ 85; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole' . . . .").

[103] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

[104] *Compare* 47 U.S.C. § 253(a) ("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."), *with id.* § 332(c)(3)(A) ("[N]o State or local government shall have any authority to

frameworks also contain important differences that show Congress never intended both to be simultaneously applicable to wireless and wireline services.

First, Congress created a narrower classification for wireless services within the broader telecommunications services class and afforded wireless service providers *broader* protections from state-level regulations for universal service and consumer protections. Section 332(c)(3) only subjects commercial mobile services to the same state regulations as other telecommunication services "where such services are a substitute for land line telephone exchange service . . . within such State . . . ."[105] Thus, Congress understood that wireless services *could potentially* be a substitute for landline services but needed additional protections until and unless wireless could compete against landline services.

Second, Congress afforded wireless service providers *narrower* protections from state and local land use and construction regulations. For example, the plain text in § 253 expressly preserves only "non-discriminatory" rights-of-way management practices but Congress saw fit to allow state and local governments to reasonably discriminate among functionally equivalent services under § 332(c)(7). Moreover, unlike § 332(c)(3), state and local authority over land use and construction specifically preserved over wireless facilities never reverts to the analogous (but less robust) safe harbor applicable to telecommunication services in general no matter how competitive wireless services may be with landline services. Thus, Congress understood that

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regulate the entry of . . . any commercial mobile service or any private mobile service . . . ."); *compare id.* § 253(b) (preserving state authority "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"), *with id.* § 332(c)(3)(A) (preserving state authority to impose "requirements . . . necessary to ensure the universal availability of telecommunications service at affordable rates"); *and compare id.* § 253(c), *with id.* § 332(c)(7)(A).

[105] *See* 47 U.S.C. § 332(c)(3)(A). This section also contains a procedure in which the state can regulate commercial mobile services in the same manner as other telecommunication services when the Commission finds that wireless and wireline services are in effective competition within that particular state. *See id.* §§ 332(c)(3)(A)(i)–(ii).

wireless facilities would always implicate different land use and construction issues than wireline facilities and should therefore be regulated under different rules.

Accordingly, the Commission should approach any attempt to harmonize the provisions in §§ 253 and 332(c)(7) with the understanding that Congress created different statutes, with different standards, as a vehicle to recognize the real differences between wireless and wireline telecommunications. Moreover, the Commission should not attempt to harmonize these statutes to the extent that it would eviscerate the more specific protections Congress created for state and local land use and construction regulations applicable to wireless facilities.[106]

B. Effective Prohibitions

1. *Section 253(a) Requires an Actual Prohibition, and Earlier Decisions that Set a Lower Bar Have Been Generally Overruled or Isolated to Their Facts*

The plain language in § 253(a) bans "prohibitions" rather than mere burdens.[107] As the Ninth Circuit explained:

> Section 253(a) provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting . . . provi[sion of] . . . telecommunications service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect.[108]

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[106] *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (citations omitted) (holding "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.").

[107] *See* 47 U.S.C. § 253(a).

[108] *See Sprint II*, 543 F.3d at 578; *see also Level 3 Commc'ns LLC v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir. 2007) (holding that a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition" to prevail under § 253(a)).

Although earlier decisions misread § 253(a), at least one court expressly reversed its approach and others have trended in the same direction.[109]

Decisions from the First, Second and Tenth Circuit cited in the *Wireless NPRM/NOI* all stemmed from *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000), which never actually interpreted the provisions in § 253(a). The court in *RT Communications* merely reviewed a challenge to how the Commission interpreted "competitively neutral" under § 253(b) in *In re Silver Star* under the deferential *Chevron* deference standard.[110] Although the decision in *RT Communications* did not even address "effective prohibitions" under § 253(a), the Second Circuit in *TCG New York, Inc. v. White Plains*, 305 F.3d 67 (2nd Cir. 2002) cited it as the only circuit court decision available and the First Circuit subsequently followed suit.[111]

Perhaps in recognition that *White Plains* adopted the wrong approach, decisions from the Second Circuit have since gradually moved toward the approach adopted in the Eighth and Ninth Circuits. In 2010, the court affirmed a lower court decision that expressly adopted the Ninth Circuit approach.[112] Last year, the court in *Global Network Communications, Inc. v. New York*, 562 F.3d 145 (2nd Cir. 2016), isolated *White Plains* to its facts.[113] Thus, case law from other

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[109] *See Sprint II*, 543 F.3d at 578 (overruling *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001); *Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006); and *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004)); *Global Network Commc'ns Inc. v. City of New York*, 562 F.3d 145, 152 (2nd Cir. 2016) (distinguishing *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002), and limiting its impact to its facts).

[110] *See RT Commc'ns Inc. v. FCC*, 201 F.3d 1264, 1267–1268 (10th Cir. 2000).

[111] *See Puerto Rico Tel. Co. Inc. v. Mun. of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004), which relied on *RT Commc'ns Inc.*, 201 F.3d at 1268); *City of Santa Fe*, 380 F.3d at 1269 (citing *RT Commc'ns Inc.*, 201 F.3d at 1268); *White Plains*, 305 F.3d at 76 (citing *RT Commc'ns Inc.*, 201 F.3d at 1268).

[112] *See New York SMSA Ltd. P'ship. v. Town of Clarkstown*, 603 F. Supp. 2d 715, 731 (S.D.N.Y. 2009) (adopting the reasoning in *Sprint II*), *aff'd* 612 F.3d 97 (2nd Cir. 2010) (approving the district court's decision but not directly addressing whether to adopt the reasoning in *Sprint II*).

[113] *See Global Network Commc'ns, Inc.*, 562 F.3d at 152; *see also Telebeam Telecomms. Cotelerp. v. City of New York*, 194 F. Supp. 3d 178, 183 (E.D.N.Y. 2016).

circuits that relied on either *RT Communications* or *White Plains* would likely be decided differently today.

2. *Although Different Circuits Interpret § 332(c)(7)(B)(i)(II) Differently, All Require More than a Potential or Hypothetical Prohibition and Share Other Important Similarities that Should be Retained*

Similar to the standard under § 253(a), courts properly require plaintiffs to show more than a merely hypothetical prohibition to prevail under § 332(c)(7)(B)(i)(II).[114] Every circuit court to interpret this provision requires that the plaintiff show that the local government denied its request despite (1) a technical need and (2) a demonstration that their proposal is either the least intrusive or only reasonable solution.[115]

Various circuits phrase these requirements slightly differently. With respect to the technical-need element, the First, Second, Third, Seventh, Eighth, Ninth and Tenth circuits require a plaintiff to show a "significant gap" in its service, whereas the Fourth Circuit requires a plaintiff to show "no effective coverage."[116] As to the second element, the Second, Third, Eighth, Ninth and Tenth circuits follow the "least intrusive means" approach and the First, Fourth and Seventh circuits follow the "no reasonable alternatives" approach.[117]

The salient technical difference between approaches to § 332(c)(7)(B)(i)(II) is how the courts allocate evidentiary burdens between the parties. A least intrusive means analysis involves

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[114] *See, e.g.*, *Sprint II*, 543 F.3d at 578.

[115] *See AT&T Mobility Servs. LLC v. Village of Corrales*, 642 Fed. Appx. 886 (10th Cir. 2016); *T-Mobile Northeast LLC v. Loudoun Cnty. Bd. of Supervisors*, 748 F.3d 185 (4th Cir. 2014); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715 (9th Cir. 2005); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003); *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002); *Sprint Spectrum LP v. Willoth*, 176 F.3d 630 (2nd Cir. 1999); *ATP Pittsburgh Ltd. P'ship v. Penn Twp. Butler Cnty.*, 196 F. 3d 469 (3rd Cir. 1999).

[116] *Compare Village of Corrales*, 642 Fed. Appx. at 890; *City of Des Moines*, 465 F.3d at 825; *San Francisco*, 400 F.3d at 725; *VoiceStream*, 342 F.3d at 834; *Town of Pelham*, 313 F.3d at 635; *Willoth*, 176 F.3d at 643; *ATP Pittsburgh Ltd. P'ship*, 196 F. 3d at 480, *with Loudoun Cnty.*, 748 F.3d at 200.

[117] *Compare Village of Corrales*, 642 Fed. Appx. at 890; *Des Moines*, 465 F.3d at 825; *San Francisco*, 400 F.3d at 725; *Willoth*, 176 F.3d at 643; *ATP Pittsburgh Ltd. P'ship*, 196 F. 3d at 480, *with Loudoun Cnty.*, 748 F.3d at 200; *VoiceStream*, 342 F.3d at 834; *Town of Pelham*, 313 F.3d at 635.

a burden-shifting framework between applicants and local reviewers, whereas the burden of production always remains with the applicant under a no reasonable alternatives approach.

Under the least intrusive means approach, the burden of production shifts back and forth between the parties as one side establishes a presumption and the other rebuts. At the outset, the applicant must submit evidence that it evaluated alternatives to establish its *prima facie* case. If the local government disputes those alternatives or believes additional alternatives exist, it must say so. The applicant may then reestablish the presumption with a meaningful comparative analysis to show those alternatives are either not technically feasible or not potentially available. Subject to the shot clock timeframes, this process continues until an acceptable site is identified or the parties exhaust the ascertainable alternatives. If more than one alternative is technically feasible and potentially available, the local government may choose among them.

Under the no reasonable alternatives approach, the burden of production remains with the applicant. To satisfy this burden, the plaintiff must show "a lack of reasonable alternative sites from which to provide coverage or that 'further reasonable efforts to gain approval for alternative facilities would have been fruitless.'"[118] That burden becomes "particularly heavy" when the plaintiff already provides service in the area.[119] Although this approach still evaluates whether the plaintiff adequately investigated the technical feasibility and potential availability, the burden to produce such evidence exists whether the local government identifies potential alternatives or not.[120]

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[118] *See Loudoun Cnty.*, 748 F.3d at 200 (quoting *T-Mobile Northeast LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 266 (4th Cir. 2012)).
[119] *See Loudoun Cnty.*, 748 F.3d at 198; *Town of Pelham*, 313 F.3d at 629.
[120] *See, e.g., 360° Commc'ns Co. of Charlottesville v. Bd. of Sup'rs of Albemarle Cnty.*, 211 F.3d 79, 88 (4th Cir. 2000) (assuming that plaintiff did not investigate all possible alternatives because the record only contained six potential sites).

Despite their different verbal formulations and evidentiary burdens for the second element, many substantive interpretations—and the manner in which they are applied—are often virtually identical. The following paragraphs describe some important similarities that the Commission should retain in any interpretation for an effective prohibition under § 332(c)(7)(B).

Plaintiffs Must Define Their Technical Objectives. As noted above, all judicial interpretations begin with the same question: what purpose or technical objective does the proposed facility serve? Applicants must be required to disclose the technical service objective that it intends to achieve so that local governments can accurately evaluate whether potential alternatives would be technically feasible. It would make little sense for local planners to look for alternatives all over town if the applicant's only objective is to serve a single busy intersection. If an applicant discloses that its subscribers drop calls in an area that lacks a dominant server, planners would know that a technically feasible solution needs a clear view to that particular location on the cell edge. To find a solution, you must first understand the problem.

Courts Evaluate Alleged Technical Need under the One Provider Rule. Consistent with the *2009 Declaratory Ruling*, courts evaluate whether a technical need exists based on the *applicant's* service levels in a given area.[121] Although some commenters complain that the Fourth Circuit has not expressly adopted the one-provider rule,[122] courts within that jurisdiction

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[121] *See, e.g.*, *T-Mobile Cent. LLC v. Charter Twp. of West Bloomfield*, 691 F.3d 794, 807 (6th Cir. 2012) (adopting the one-provider rule); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 49 (1st Cir. 2009) ("In this circuit we consider whether a significant gap in coverage exists within the individual carrier's network."); *San Francisco*, 400 F.3d at 733 ("[W]e elect to follow the district court's lead and formally adopt the First Circuit's rule that a significant gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant gap in *its own* service coverage." (emphasis in original)); *VoiceStream*, 342 F.3d at 834; *see also T-Mobile Cent. LLC v. Unified Gov't of Wyandotte Cnty/Kansas City*, 528 F. Supp. 2d 1128, 1154 (D. Kan. 2007) (adopting the one-provider rule).

[122] *See* Andrew J. Erber, Note, *The Effective Prohibition Preemption in Modern Wireless Tower Siting*, 66 FED. COMM. L.J. 357, 365–66 (2014).

consistently evaluate the plaintiff's service without regard to any services provided by others in the same area.[123]

Whether a Technical Need Exists Depends on a Fact-Intensive and Case-by-Case Review, that Considers Both Service Coverage and Capacity Levels. Not all gaps or deficits in service justify preemption.[124] Courts uniformly consider the gap's geographic size, uses within the gap area, whether the gap impacts a heavily trafficked commuter corridor, how many potential users the gap might impact and how many dropped connections occurred.[125] Moreover, courts increasingly agree that both service coverage and capacity levels are appropriate factors to determine whether a technical need exists.[126]

Plaintiffs Cannot Rely on Bald Conclusions that Their Preferred Site is the Best or Only Feasible Solution. Courts require actual, valid reasons why a plaintiff could not comply with the local zoning regulations. Consider examples from the Ninth Circuit's decision in *American Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014), and the Seventh Circuit's decision in *VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818 (7th Cir. 2003). In both cases, the applicants requested approval for tall towers in locations where tall

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[123] *See, e.g., Loudoun Cnty.*, 748 F.3d at 199; *T-Mobile Northeast LLC v. Howard Cnty. Bd. of Appeals*, 524 Fed. Appx. 9, 15 (4th Cir. 2013); *Fairfax Cnty.*, 672 F.3d at 267–68.

[124] *See Fairfax Cnty.*, 672 F.3d at 277-78; *City of Cranston*, 586 F.3d at 49; *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 727 (9th Cir. 2009); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006); *San Francisco*, 400 F.3d at 725; *Willoth*, 176 F.3d at 644.

[125] *See, e.g., Village of Corrales*, 642 Fed. Appx. at 891; *Orange Cnty.-Poughkeepsie Ltd. P'ship v. Town of East Fishkill*, 632 Fed. Appx. 1, 2–3 (2nd Cir. 2015); *Loudoun Cnty.*, 748 F.3d at 199; *West Bloomfield*, 691 F.3d at 807; *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 727 (9th Cir. 2009); *City of Cranston*, 586 F.3d at 49; *Des Moines*, 465 F.3d at 825; *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 n.2 (3rd Cir. 1999).

[126] *See, e.g., Village of Corrales*, 648 Fed. Appx. at 891 (recognizing capacity as a factor to be considered); *Loudoun Cnty.*, 748 F.3d at 199; *T-Mobile West Corp. v. City of Huntington Beach*, No. CV 10–2835 CAS (Ex), 2012 WL 4867775, *6 (C.D. Cal. Oct. 10, 2012); *T-Mobile West Corp. v. City of Agoura Hills*, No. CV 09-9077 DSF (PJWx), 2010 WL 5313398, *8–*9 (C.D. Cal. Dec. 20, 2010); *see also MetroPCS New York, LLC v. Village of East Hills*, 764 F. Supp. 2d 441, 454–55 (E.D.N.Y 2011); *T-Mobile Northeast LLC v. City of Lowell*, No. 11-11551-NMG, 2012 U.S. Dist. LEXIS 180210, *10 (D. Mass. Nov. 27 2012); *USCOC of New Hampshire RSA No. 2 v. Town of Dunbarton*, No. Civ.04–CV–304–JD, 2005 WL 906354, *2 (D.N.H. Apr. 20, 2005).

towers would be prohibited, and the applicants refused to consider multiple smaller structures as an alternative.[127] Both courts upheld denials in each case because the applicants provided only "conclusory statements" that the preferred alternative would not work or were not less intrusive.[128]

3. *If the Commission Finds it Necessary to Endorse One Effective Prohibition under § 332(c)(7), It Should Favor the Ninth Circuit's Significant Gap/Least Intrusive Means Approach*

To the extent that the Commission feels compelled to endorse one approach over the others, the Commission should favor the least intrusive means approach. As the majority rule among the circuit courts, this test strikes an appropriate balance between the dual policies of the Communications Act, provides greater certainty, better enables judicial review and incentivizes the parties to actively engage in the alternatives evaluation process.

First, the least intrusive means approach balances the national interest in infrastructure deployment with the local interest in land use regulation. Local governments cannot flatly refuse to permit facilities necessary to address a significant gap, and the applicant cannot deploy whatever and wherever it chooses. The parties must work together to find a solution that respects both legitimate interests.

Second, this approach offers a settled rule that clearly establishes who must do what and when. Both applicants and local governments know with greater certainty how a judge might rule on the merits if a dispute arises, which may help avoid needless litigation.

Third, the burden-shifting framework naturally creates a more robust record for expedited judicial review. Each step in the process—whether the *prima facie* case, a rebuttal with additional alternatives or a surrebuttal with a meaningful comparative analysis on feasibility or

[127] *See VoiceStream*, 342 F.3d at 836.
[128] *See id.*

availability—requires documentation. Courts can more easily trace the events and evaluate whether a particular party satisfied its evidentiary burden.

Lastly, the presumptions create incentives for the parties to actively engage in the alternatives evaluation process. Applicants are encouraged to evaluate alternatives before they even submit their proposal. Local government staff cannot sit on the sidelines if they believe better alternatives exist, and applicants cannot stonewall suggested alternatives. Anyone who refuses to engage in the process almost inevitably loses when they complain about the outcome.

4. *The Commission Should Clarify that § 253(c) Preserves State and Local Zoning Regulations*

The Commission requested comment on whether it should provide further guidance on the *California Payphone* standard for an effective prohibition, and the proper role for aesthetic regulations.[129] Consistent with the Commission's statement in the *Wireless NPRM/NOI* that "aesthetic considerations [are] not inherently improper,"[130] the Commission's earliest gloss on local rights-of-way management regulations in *Classic Telephone* recognized that localities may continue to enforce zoning regulations. As the Commission stated:

> The legislative history sheds light on permissible management functions under section 253(c). During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that . . . (4) "*enforce local zoning regulations*;" . . . .[131]

Accordingly, the Commission should take this opportunity to harmonize its decisions in *California Payphone* with *Classic Telephone* and clarify that § 253(c) also preserves state and local zoning regulations.

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[129] *See Wireless NPRM/NOI* at ¶¶ 86, 88.
[130] *See id.* at ¶ 88.
[131] *In the Matter of Classic Telephone, Inc.*, CCB Pol 96-10, *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, 13103, ¶ 39 (Oct. 1, 1996) (quoting 141 CONG. REC. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)) (emphasis added).

C. Provisions in the Communications Act Refer Exclusively to Regulatory Acts or Requirements by State and Local Governments

Sections 253 and 332(c)(7) both recognize the distinction between regulatory and proprietary government functions.[132] The Commission should find that Congress intended the words "statutes," "regulations," "legal requirements" and "decisions" refer only to regulatory behavior because proprietary acts fall outside the federal government's preemptive scope.

1. *State and Local Governments Increasingly Both Perform Proprietary and Regulatory Functions in Connection with Wireless Facilities*

Many municipalities in Arizona, California and Oregon have carried on ordinary landlord-tenant relationships with wireless carriers and infrastructure companies for decades. Indeed, community centers, parks and fire stations commonly lease space to macrocells because these locations are often exempt from zoning regulations and situated near restrictive residential areas.

The fact that a wireless tenant may lease municipal property does not negate the separate regulatory relationship between the parties. Facilities on municipal property must still obtain all necessary permits and approvals, and pay all required regulatory fees. Municipalities in their regulatory capacities cannot afford special treatment to particular entities or facilities merely because they happen to be on municipal property.

Despite the long-settled distinction between proprietary and regulatory functions in the macrocell context, the wireless industry appears reluctant to recognize is that state and local governments have property rights in the places and structures where small cells are commonly

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[132] *See, e.g.*, *City of Portland*, 385 F.3d at 1240 (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

located—streets, sidewalks, light poles, traffic signals, bus shelters and other similar improvements in the public rights-of-way.[133] State and local governments have an increasingly proprietary role (in addition to their regulatory role) in the deployment process as installations largely move from largely private property to spaces and structures owned by the state or local governments.

Different small cell proposals can implicate different property interests. A proposed installation in the public rights-of-way may implicate the local government's *real property* interest in the land that comprises the public rights-of-way, its *personal property* interest in the government-owned improvements placed within the public rights-of-way or, in some cases, both. For example, if a wireless provider seeks to attach an antenna to a private (investor-owned) electric company's distribution pole, the local government may have a real property interest in generalized access to the streets for a commercial purpose, but would not likely have a personal property interest in that specific pole. On the other hand, the local government might have both a real property interest and a personal property interest if the proposal involved a city-owned streetlight in the public right-of-way.

Whether and to what extent local government may have a proprietary interest in the public rights-of-way also differs based on state law. Some states, such as Arizona and Oregon, grant municipalities the right to receive compensation from telecommunication service providers that use the municipality's real property, subject to certain limits.[134] Local governments may also

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[133] *See City of Huntington Beach*, 738 F.3d at 194; *City of Rome v. Verizon Commc'ns Inc.*, 362 F.3d 168, 174 (2nd Cir. 2004) ("The text and legislative history of Section 253 of the Telecommunications Act indicate that Congress intended to retain a sphere in which states and localities could negotiate and make agreements with telecommunications companies without being automatically subject to federal jurisdiction.").

[134] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C) (authorizing an annual fee for undergrounded conduit on a linear-foot basis); OR. REV. STAT. § 221.515 (authorizing municipalities to collect up to a seven percent gross-revenues privilege tax); *see also* N.M. STAT. ANN. § 62-1-3 (authorizing counties and municipalities to grant franchises, but limiting county franchise fees to "reasonable and actual costs" to grant and administer the franchise).

be permitted to charge a separate fee for installations on their streetlights and other government-owned structures. Other states, like California, grant so-called "state-wide franchises" that prohibit local franchise fees for access to the real property in the public rights-of-way, but do not prohibit private proprietary agreements with telecommunications providers for attachments to municipally-owned structures within the public rights-of-way.[135]

Failure to appreciate these nuances in how municipalities exercise their proprietary functions in the public rights-of-way can explain why firms like Mobilitie perceive costs and decisions timelines as unreasonable compared to their past experiences in a pre-small cell world.[136] However, at bottom, the same familiar distinction from the macrocell context applies in the small cell context: municipalities enter into proprietary agreements to grant access to their property, and separately perform the ordinary regulatory functions that would be required for to permit the facilities no matter who owned the underlying property.

2. *State and Local Property Rights are Protected under the Constitution, and the Commission Cannot Rewrite the Market Participant Exception to Adjust the Line between Proprietary and Regulatory*

The Commission requested comment on how it should draw the distinction between proprietary and regulatory functions when wireless facilities use municipal property.[137] The simple answer to this question is that the Commission cannot rewrite the Constitutional protections that insulate state and local proprietary functions from federal preemption.[138]

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[135] *See, e.g.*, CAL. PUB. UTILS. CODE § 7901; *Williams Commc'ns, Inc. v. Riverside*, 8 Cal. Rptr. 3d 96, 107–08 (Cal. Ct. App. 2003) (construing § 7901 as "a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration").

[136] See Iain Gillott, *Sprint's New Plan: Network Suicide*, LINKEDIN (Jan. 25, 2016), https://www.linkedin.com/pulse/sprints-new-plan-network-suicide-iain-gillott (describing abandoned past attempts to site wireless facilities in the rights-of-way for various reasons related to property ownership).

[137] *See Wireless NPRM/NOI* at ¶ 90.

[138] *See Bldg. & Constr. Trades Council of the Metro. Dist. v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226–27 (1993).

The Supreme Court holds that a state or local government crosses the line between proprietary and regulatory functions when it either does not actually participate in the affected market or when the challenged action is tantamount to regulation or policymaking.[139] A local government that leases space on a streetlight or rooftop to a wireless carrier participates in the wireless infrastructure market just as much as Crown Castle, American Tower or any other infrastructure provider. Moreover, a local government that charged less than market rates for such access would appear less like other private actors and more like a regulator seeking to achieve some policy objective.[140]

Accordingly, arms-length agreements on market rates, terms and conditions for access to government-owned property, including property in the public rights-of-way, are proprietary in nature. The Commission cannot rewrite the market participant exception to expand its preemptive authority.

3. *"Statutes, Regulations and Legal Requirements" under § 253(a) Are Not Coextensive with "Decisions" under § 332(c)(7)*

The Commission requested comment on whether it could equate "legal requirements" and "decisions" as each is used in § 253 and § 332(c)(7). "[L]egal requirements" under § 253 are not coextensive with "decisions" under § 332(c)(7) because Congress employed a "different term [that] denotes a different idea."[141] As used in the Telecommunications Act, the terms "legal

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[139] *See id.* at 229 ("[A] State may act without offending the pre-emption principles . . . when it acts as a proprietor and its acts therefore are not 'tantamount to regulation' or policymaking."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) ("The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.").

[140] *Cf. Bldg. & Constr. Trades Council*, 507 U.S. at 229 (noting that private actors without a profit motive can be said to affect the marketplace is a regulatory fashion).

[141] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (1st ed. 2012); *see also See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997)) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

requirements" refer to legislative-type acts whereas "decision" refers to judicial-type act.[142] Although both "decision" and "regulation" may be susceptible to multiple definitions, their true meaning can be discerned by reading them "in context and with a view to their place in the overall statutory scheme."[143]

The word "decision" means a "determination arrived at after consideration."[144] In the zoning context, a decision refers to the "exercise [of] an adjudicative function that involves applying land use rules to individual property owners."[145] Section 332(c)(7)(B)(iii) provides that "[a]ny *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."[146] After a dispute arises from that decision, "[t]he court shall hear and *decide* such action on an expedited basis."[147] The same word, used in the same statute, refers to a result reached after deliberation.

The word "regulation" means "an authoritative rule."[148] In the zoning context, this refers to legislative "plans and zoning maps that affect the classification and use of property

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[142] *See City of Huntington Beach*, 738 F.3d at 194 ("In addressing land use *regulations* and *decisions* related to the installation of wireless communication facilities, the TCA closely tracks the typical division of land use decision making." (emphasis added)); *cf. Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (contrasting "[t]he sort of land use regulations" that "involved essentially legislative determinations classifying entire areas of the city," with a city's "adjudicative decision to condition petitioner's application for a building permit on an individual parcel").

[143] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. The Communications Act does not explicitly define these terms, and so their ordinary meaning controls. *See Clark v. Rameker*, 134 S.Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). Although these terms also appear in the Communications Act, the Supreme Court rejected the notion that how Congress used these terms in 1934 would shed any persuasive light on how Congress used them decades later in 1996. *See City of Roswell*, 135 S.Ct. at 817 n.5.

[144] *Definition of Decision*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/decision (last visited June 15, 2017); *see also* BLACK'S, *supra* note 27 at 182 (defining "decision" as "[a] judicial determination after consideration of the facts and the law").

[145] *See City of Huntington Beach*, 738 F.3d at 194.

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

[147] *See id.* § 332(c)(7)(B)(v) (emphasis added).

[148] *Definition of Regulation*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/regulation (last visited June 15, 2017); *see also* BLACK'S, *supra* note 27 at 182 (defining "regulation" as "[t]he act or process of controlling by rule or restriction").

generally."[149] As used in § 253(b), the word "requirement" refers to legal rules other than statutes or regulations.[150] The term "legal requirement" does not appear anywhere in § 332. The most closely analogous usage in that section appears in § 332(c)(3)(A) and refers to "requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."[151] Accordingly, Congress uses the phrase "legal requirements" as a catch-all for laws other than statutes or regulations.

4. *The Term "Legal Requirements" in § 253 Does Not Encompass All Public-Private Agreements*

The Commission requested comment on whether "legal requirements" properly spans the divide between proprietary and regulatory capacities. Although we acknowledge that the line between proprietary and regulatory capacities must be drawn on a case-by-case basis, we strongly recommend to the Commission that it revisit its decision in *Minnesota Preemption Order* because not all public-private agreements are "legal requirements."

The term "legal requirements" must be construed in context with the words "statute" and "regulation" that appear in the same list.[152] Although legal requirements may be susceptible to broad interpretations, general items must be read with reference to more specific items in the same list.[153] Given that statutes and regulations flow from police powers, a "legal requirement" subject to § 253 must likewise refer to some obligation imposed on the service provider through the state or local government's regulatory authority.[154]

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[149] *See City of Huntington Beach*, 738 F.3d at 194.
[150] *See* 47 U.S.C. § 253(b); *see also id.* § 254 (using the word "requirements" in reference to legal standards).
[151] *See id.* § 332(c)(3)(A).
[152] *See Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).
[153] *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980).
[154] Other usage within § 253 confirms this conclusion. Section 253(b) preserves state authority to "impose . . . *requirements* necessary to preserve and advance universal service, protect the public safety and welfare, ensure the

Although we respectfully disagree with the Commission's overbroad interpretation in the *Minnesota Preemption Order* that "legal requirement" reaches proprietary agreements, the Commission may have reached the correct result for the wrong reason. That case involved an agreement with a single service provider for exclusive access to the entire state highway system, which can hardly be characterized as a "narrow scope" intended to "address a specific proprietary problem" rather than "encourage a general policy . . . ."[155] Accordingly, an analysis under § 253 may have been appropriate because the agreement was a regulatory act, but not merely because the matter involved a public-private agreement.

Similarly, the Commission should recognize that the process and standards a state or local government uses to enter into proprietary agreements may superficially appear to be "regulatory" in nature. As the Ninth Circuit recognized in *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013), formalities required by municipal corporations prior to contract execution fall "outside the City's framework for land use decision making because it does not implicate the regulatory and administrative structure established by the City's general plans and zoning and subdivision code."[156] Municipal corporations must follow its formalities, just as any other corporation must adhere to its bylaws for any major decision or disposition. The Commission should not consider these decisions or dispositions to

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continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b) (emphasis added); *see WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. 2007) ("It is clear that states have authority under the Telecommunications Act to adopt their own universal service standards and create funding mechanisms sufficient to support those standards, as long as the standards are not inconsistent with the FCC's rules, and as long as the state program does not burden the federal program.").

[155] *See In the Matter of the 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 the State Freeway Rights-of-Way*, CC Docket No. 98-1, *Memorandum Opinion and Order*, 14 FCC Rcd. 21697, 21708–21716, ¶¶ 20–36 (Dec. 23, 1999) [hereinafter "*In re Minnesota Preemption*"]; *accord In the Matter of Amigo.net*, CC Docket No. 00-220, *Memorandum Opinion and Order*, 17 FCC Rcd. 10964, 10967, ¶ 8 (June 13, 2002) (finding that the agreement in the *Minnesota Preemption Order* "would violate section 253(a) because it gave to one party exclusive physical access to the only feasible and cost-effective rights-of-way, and therefore potentially deprived other parties, specifically facilities-based competitors, of the ability to provide telecommunications services.").

[156] *See City of Huntington Beach*, 738 F.3d at 200–01.

be "legal requirements" under the *Minnesota Preemption Order* approach merely because the formalities resemble legislative or adjudicative procedures.

D. "Functionally Equivalent Services" for Unreasonable Discrimination Purposes under § 332(c)(7)(B)(i)(I) Means Wireless Services in Competition with One Another

The Commission need not adopt any hyper-technical definition for "functionally equivalent services." The Conference Report specifies that the phrase "functionally equivalent services . . . refer[s] only to *personal wireless services* as defined in [§ 332(c)(7)] that directly compete against one another." *See* H. CONF. REP. 104-458 at 207–08.

Wireless and wireline facilities are not functional equivalents.[157] Although wireless and wireline connections can technically deliver the same content to the end user, the consumer does not regard them as substitute goods. Wireless reception may be a consideration in an office manager's decision to rent commercial space, but access to fiber optic connections matter far more.

Moreover, wireless and wireline facilities cannot be subject to the same regulations because their equipment has different characteristics. Whereas wireless antennas generally cannot be placed underground, virtually all wireline facilities can be. To subject these two different technologies to the same regulations threatens to undermine substantial investment in underground utility districts. If wireless facilities physically cannot be placed underground, and wireline facilities are entitled to equal regulatory treatment, then neither can be placed underground. This is not consistent with Congress' intent that § 253(c) respect local zoning and undergrounding ordinances.

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[157] *See Mills*, 65 F. Supp. 2d at 157 (rejecting "Sprint's argument that landline services are 'functionally equivalent' to the wireless services provided by Sprint and reject[ing] Sprint's claim of discrimination on the grounds that it is barred from competing with conventional landline telephone services").

Lastly, not all "wireless" services are functional equivalents.[158] The Ninth Circuit rejected American Tower's argument that San Diego's permit requirements unreasonably discriminated against commercial wireless facilities because the city exempted similar-looking towers for governmental use. The court reasoned that the facilities were not functionally equivalent because "[i]n contrast to [American Tower]'s telecommunication operations, which are entirely commercial, the City's telecommunication operations are primarily public in nature."[159] The Commission should respect the distinction and not burden public safety radio facilities with the same regulatory treatment as commercial radio facilities.

V. CONCLUSION

Local Governments applauds the Commission's desire to promote expanded and advanced wireless broadband services, but has serious concerns about the Commission's proposed rules. Limitations on local authority have encouraged applicants to "game" the shot clock and discouraged collaborative efforts to permit facilities that meet the carriers' needs and respect local community values. Further limitations, like a deemed granted remedy and over-granulized shot clocks, would only exacerbate conflicts that impede deployment. The Commission should not adopt the proposed rules in the *Wireless NPRM*.

In addition, proposals to harmonize interpretations under §§ 332(c)(7) and 253 would conflict with Congress' clear intent to treat wireless and wireline services differently, and the Commission's precedents that classify wireless broadband as an information service not subject to § 253. Although these statutes contain some similar provisions, the Commission should ultimately conclude that different interpretations are warranted because §§ 332(c)(7) and 253 govern two different services provided through technologically different facilities.

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[158] *See In re Cell Tower Litigation*, 807 F. Supp. 2d at 936–37.
[159] *See Am. Tower Corp.*, 763 F.3d at 1055–1056.

EXHIBIT F

Respectfully submitted,

Dated: June 15, 2017

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