**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C.**

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| 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


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AT&T provides these comments in response to the Public Notice released by the Federal Communications Commission ("Commission") on streamlining deployment of small cell infrastructure by improving state and local wireless facilities siting policies.[1]

## I. INTRODUCTION AND SUMMARY

AT&T strongly supports this latest Commission effort to explore actions that would expedite the deployment of next generation wireless networks. Since 2001, the Commission has taken a series of actions to streamline federal, state, and local siting processes. Nonetheless, progress in streamlining wireless siting for small cell facilities has been uneven. Commission actions to reduce *federal* barriers to small cell deployments have not been matched by actions to reduce similar s*tate and local* barriers.[2] As a result, local governments continue to impede small

[1] Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421, *Public Notice*, 31 FCC Rcd 13360 (2016) ("*Public Notice*").

[2] Previous Commission actions to address state and local processes were based primarily on relieving barriers to macro cell sites (i.e. traditional towers and base stations). Commission actions that did focus on small cell deployments streamlined only federal regulatory processes. Additional common sense actions that would further streamline federal processes for small cell facility deployments include (1) limiting National Historic Preservation Act ("NHPA") review to the State Historic Preservation Office when review is required because a support structure exceeds 45 years of age, as there is no need for tribal consultation if NHPA review is triggered only by a structure's potential historic value, and (2) excluding from NHPA review the replacement of existing light,

cell facility deployments, particularly in public rights-of-way ("ROW"), posing obstacles that threaten the promise of new and advanced wireless services. The Commission should promote small cell facility deployments and advance the provision of new and advanced services by clarifying the limits of state and local authority to regulate small cell deployments under Sections 253 and 332 of the Communications Act and signaling its intention to preempt state and local regulations that exceed those limits.[3]

Clarity is needed. AT&T's wireless data traffic grew by 150,000% between 2007 and 2015 and is expected to grow 10x more by 2020.[4] As a whole, U.S. wireless data traffic has grown more than 25-fold since 2010[5] and is expected to grow another 5-fold through 2021.[6] And, between 2016 and 2021, the number of mobile connected devices in the United States will increase from 481 million to 1 billion.[7] Fueled by this insatiable demand for data and connected devices (and the resultant network congestion), service providers are shifting to denser, more efficient, networks by reusing spectrum in smaller cells, closer to the customer. These denser networks will set the

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traffic, and utility poles with new poles that are not a substantial increase in size.

[3] 47 U.S.C. §§253, 332. Small cells will generally provision both voice and data services, giving the Commission authority to take these actions under Section 253 and 332, irrespective of how broadband internet access services are classified.

[4] AT&T Investor Update, 2nd Quarter Earnings Conference Call at 13 (2016), available at https://www.att.com/Investor/Earnings/2q16/slides_2q16.pdf.

[5] CTIA Facts and Infographics, available at http://www.ctia.org/industry-data/facts (last visited on March 4, 2017).

[6] Cisco, VNI Complete Forecast Highlights Tool (2016), available at http://www.cisco.com/c/dam/assets/sol/sp/vni/forecast_highlights_mobile/index.html#~Country (last visited on March 4, 2017). *See also,* Ericsson Mobility Report at 12 (Nov. 2016)(forecasting an 8-fold increase in mobile traffic through 2022), available at https://www.ericsson.com/assets/local/mobility-report/documents/2016/ericsson-mobility-report-november-2016.pdf (last visited March 4, 2017).

[7] *Id.*

foundation for fifth generation ("5G") wireless technologies. Complimented by recently allocated high frequency millimeter wave spectrum,[8] 5G technologies will offer ultra-high data rates and reliability with low latency and power demands, enabling groundbreaking Internet of Things ("IoT") applications, such as wearables, healthcare devices, autonomous driving cars, and home and office automation.

Realizing the promise of 5G technologies (including millimeter wave spectrum that propagates over a relatively short distance) requires the nationwide deployment of small cell networks, composed of 10 to 100 times more antenna nodes than existing networks.[9] For example, AT&T has announced plans to install over 1,000 small cell antennas across the Bay Area alone in 2017,[10] with many other small cell projects underway or planned across the country. Indeed, it has been estimated that the wireless industry will deploy more small cell facilities in the next three and a half years than the number of macro sites it has installed over the last three and half decades![11] Moreover, these small cells will predominantly be deployed in the ROWs, such as on utility poles, street light poles, and traffic lights. ROWs and existing ROW structures present service providers with the only reasonably available, high volume inventory of low-elevation vertical structures that are near the very customers who need increased network capacity and

[8] Use of Spectrum Bands Above 24 GHz For Mobile Radio Services, *et. al.*, GN Docket No. 14-177, et. al., *Report and Order*, 31 FCC Rcd 8014 (2016).

[9] *See* Accenture, Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities, p.1 (2017), available at https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf.

[10] Radio, AT&T Deploys Network of Small Cells in San Francisco (Feb. 21, 2017), available at http://www.radiomagonline.com/mobile/0022/att-deploys-network-of-small-cells-in-san-francisco/38638.

[11] *See* PNS&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016) ("SNL Kagan").

performance.

Some local governments, however, have placed obstacles in the way of wireless facility expansion, even for unobtrusive small cell equipment. Those local barriers significantly delay and increase the cost of small cell deployments, reduce the scope of those deployments (i.e. fewer nodes deployed because of higher costs), and in some cases cause the provider to abandon the project altogether. The impact of these actions can be felt not only in the locality creating the barriers, but also in smaller communities further down the construction schedule. The Commission must act now to remove these deployment barriers so that providers can meet exploding demands on their networks and deploy the infrastructure that will enable the United States to maintain its world leadership in wireless broadband deployment.

The Commission has the authority under Section 253 and Section 332 to remove state and local barriers to wireless deployment. AT&T encourages the Commission to use these tools to further expedite wireless small cell infrastructure by issuing a declaratory ruling that provides:

- State and local action that materially inhibits or limits the ability of any competitor or potential competitor to provide wireless service has the effect of prohibiting the ability of any entity to provide telecommunications service under Section 253(a).

- Burdensome and unreasonable regulations that materially inhibit and limit the ability to provide wireless service include:

    - moratoria and other unreasonable prohibitions on the placement of wireless facilities, such as prohibitions on facilities above-ground, in all or part of a ROW, or on municipally-owned poles;

    - unreasonable prohibitions on adding or upgrading facilities to add *capacity* or *capabilities* even if *coverage* is already available;

    - unreasonable, vague, and subjective aesthetic restrictions that are applied discriminatorily to small cell facilities, but not to the facilities of other entities using the ROWs in a like manner; and

    - unreasonable administrative processes and delays.

- Market-based, rather than cost-based, rates to access the ROW and municipally-owned ROW structures effectively prohibit the ability to provide wireless service and are not "fair and reasonable."

- Siting applications not acted upon within the Section 332 shot clock are deemed granted.

A declaratory ruling that makes the above points clear would promote this goal by eliminating unnecessary barriers to expanded small cell deployment in communities across the country, without unreasonable costs, delays, and burdens, and with minimal adverse (and considerable positive) community impact.

## II. DISCUSSION

Despite prior Commission efforts to streamline wireless facility deployment, many local state and local governments erect obstacles to wireless deployments in the ROW, even in states where wireless providers can access the ROW by right. Below, AT&T provides examples of wireless facility regulations throughout the United States, explains how those regulations violate Section 253, and proposes Commission clarifications in the interpretation and application of Section 253 and Section 332 that would facilitate more predictable, consistent, and streamlined processes for small cell facility deployment.

### A. The Commission has the authority to preempt artificial barriers to wireless facility deployments.

Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[12] The Commission has concluded that state and local action which "materially inhibits or limits the ability of any competitor or potential competitor" to provide telecommunications services acts as an effective

[12] 47 U.S.C. §253(a).

prohibition under Section 253(a).[13] The prohibition need not be complete or absolute.[14] Nonetheless, two federal circuits have articulated a stricter standard for preemption under Section 253(a).[15]

The Commission can and should eliminate the confusion by affirming that Section 253(a)'s "effective prohibition" standard is met when a state or local action materially inhibits or limits the ability of any competitor or potential competitor to provide telecommunications service, and clarifying those actions that are not saved from preemption by the "safe harbors" in Sections 253(b) and (c).[16] Clarification is needed to achieve a primary purpose of Section 253—to remove barriers to deployment of wireless network facilities by hastening the review and approval of siting applications by local land-use authorities.

### B. Commission declarations clarifying Sections 253 can reduce state and local barriers to small cell deployments.

#### 1. Unreasonable direct prohibitions on wireless small cell placement in ROWs violate Section 253.

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[13] In re California Payphone Ass'n, CCB Pol 96-26, *Mem. Op. and Order*, 12 FCC Rcd 14191, 14206 (1997); In re Pittencrieff Communications, Inc., WTB/POL 96-2, *Mem. Op. and Order*, 13 FCC Rcd 1735, 1751-52 (1997); In re TCI Cablevision of Oakland County, Inc., CSR-4790, *Mem. Op. and Order*, 12 FCC Rcd 21396, 21439 (1997).

[14] *See, e.g., Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002)("[A] prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)."); *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) ("Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it."). *See also*; *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1270 (10th Cir. 2004).

[15] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528 (8th Cir. 2007).

[16] *See, e.g., Suggested Guidelines For Petitions For Ruling Under Section 253 of the Communications Act*, FCC 98-295 (1998)(Sections 253(b) and (c) are "safe harbors" functioning as affirmative defenses to federal preemption.).

**a. State and local government efforts to directly restrict small cell deployments.**

The following examples illustrate the different forms of direct prohibitions imposed on the placement of wireless facilities in the ROW.

*Moratoria.* Although a moratorium will not toll the running of the Section 332 or Section 6409[17] shot clocks,[18] municipalities continue to pass them. What was once a six-month ROW wireless siting moratorium adopted by a municipality in Florida has been in effect for over two years.[19] As a result, AT&T has had to cancel multiple projects to deploy approximately 124 nodes. A municipality in Texas issued a moratorium on all wireless facility permits upon receipt of an application for a small cell facility in a ROW, finding that the application constituted a "current and immediate threat to the public health, safety, and welfare," an unsupportable finding in light of extensive above-ground utilities deployed in most areas of the City. That moratorium has also been extended, putting at risk AT&T's four node deployment plan. And, the legislature in one Northeast state is considering a statewide moratorium on small cell deployments.

*ROW prohibitions*. Increasingly, state and local governments are restricting the placement of small cell facilities in the ROW and on structures they control in the ROW, such as light poles and traffic control poles. At least three states have refused requests to place small cell

[17] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, §6409(a) (2012) (codified at 47 U.S.C. § 1455(a)).

[18] *See,* Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting 2012 Biennial Review of Telecommunications Regulations, WT Docket No. 13-238, WC Docket No. 11-59, WT Docket No. 13-32, *Report and Order* 29 FCC Rcd 12865 (2014) ("*2014 Infrastructure Order*").

[19] AT&T works closely with state and local governments on a multitude of issues. In the interest of maintaining those relationships, AT&T provides general references only.

infrastructure in the ROW under their control, impacting state highways, major roads, and some arterial roadways in suburban and urban areas. In one state, such a refusal forced AT&T to alter its plans to locate 16 nodes along a highway ROW. AT&T has faced similar local government barriers in Texas, Massachusetts, and other states targeted at small cell facilities in the ROW. AT&T has delayed a 10 node small cell deployment in one Georgia County that refuses to allow wireless only poles in the ROW. In another glaring example, AT&T's plan to bring a showcase small cell network with about 130 nodes to a Texas municipality has been partially delayed by up to two years. The recently adopted ordinance limits small cell deployments to traffic signal poles, prohibits placement beyond the downtown area for up to two years, limits the number of nodes a carrier can place in that downtown area, and prohibits deployment in parks. These local barriers are particularly impactful because the municipally-owned electric utility currently refuses to allow wireless attachments.

*Above-ground facility prohibitions.* Some municipalities prohibit above-ground placement of wireless facilities. For example, a Texas municipality issued an immediate moratorium on all above-ground wireless facility permits when it received an application to place wireless facilities in the ROW. Two municipalities in Kansas prohibit above-ground facilities. As a result, AT&T's small cell deployment plans in these Texas and Kansas communities are on-hold.

*Location prohibitions.* Even where ROW small cell facilities are allowed, municipalities often arbitrarily limit where they can be located. Local governments in the States of Florida, Texas, Indiana, and Kansas, among others, require a minimum distance (e.g., 100, 300, 500, or 1000 feet) between each small cell facility in the ROW. A local government in Texas currently prohibits small cell facility placements on any municipally-owned light poles in the ROW and in parks. One New York municipality prohibits mid-block placement of small cell facilities, whereas

several municipalities in California do the exact opposite by prohibiting small cell facility placements in the intersections. In one of those California communities, the inability to place small cell facilities in the intersection combined with process burdens delayed AT&T's small cell placements for over two years.

**b. Unreasonable direct prohibitions on the placement of small cells in the ROW violate Section 253.**

Direct prohibitions on small cell facility placement materially inhibit or limit a service provider's ability to offer services that customers seek and thus, have the effect of prohibiting their ability to provide wireless service under Section 253(a). These actions are not saved by the Section 253(b) or (c) safe harbors when not applied in a competitively neutral and nondiscriminatory way. In many communities, such as in urban areas with underground utilities, the ROW and the poles they support are the only readily available locations to deploy small cell facilities. In other communities, such as where a municipally-owned electric utility—exempt from federal pole attachment regulations—refuses to grant access to their poles at reasonable rates, a municipality's refusal to allow access to the ROW or its poles in the ROW could prevent a service provider from providing or upgrading service.

Some municipalities argue that restricting the placement of small cells in ROWs with existing wireless *coverage* (e.g., through a macro cell site) is not an effective prohibition of service under Section 253, even if service level and reliability are impacted. They are off the mark. State and local action that constrains service providers' ability to compete in the provision of quality wireless service falls squarely within Section 253's prohibitions. Congress passed the Telecommunications Act of 1996 (the "1996 Act") "to promote competition and reduce regulation – including state and local regulation – in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new

telecommunications technologies."[20] Section 253 must be interpreted consistent with that goal.[21] Clearly, Section 253 cannot be satisfied by the provision of sub-par, poor quality service, or by service providers' inability to deploy dense 5G networks.

*Moratoria.* A moratorium is an express prohibition on the ability to provide wireless service. Ostensibly passed to allow a municipality to adopt new regulations, moratoria are often extended long beyond the time needed for that purpose. Although a moratorium does not toll the Section 332 or Section 6409 shot clocks, additional clarification is needed that it violates Section 253(a).

*ROW prohibitions.* Prohibiting small cell deployment in a ROW and on municipally-owned poles in the ROW reduces the search rings for candidate sites. In urban areas, along highways and major roadways, and along residential corridors, the ROW (and poles located in the ROW) may be the only viable location where small cells can be deployed due to RF design or the lack of alternative above-ground structures. Even if private property is available, it is operationally impractical to negotiate private contracts with hundreds of thousands of private property owners and undergo an equivalent number of local government approvals, many of which would require special use applications or public hearings. In the absence of alternative sites, service providers would be unable to provision service in and around the ROWs through small cells.

*Above-ground prohibitions.* Usually intended to avoid the visual impact from electric, telephone, and cable lines and big wireless towers, prohibitions on above-ground facilities have a

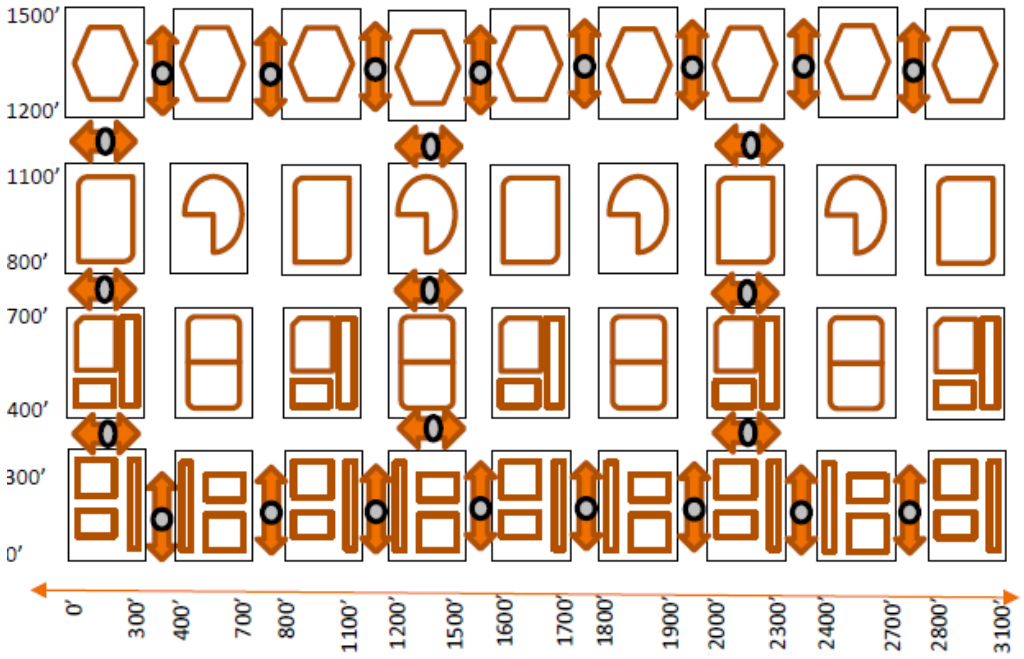
[20] Public Law 104-104, Preamble, 110 Stat. 56 (1996).

[21] In re Classic Tel., Inc., CCBPol 96-10, *Mem. Op. & Order*, 11 FCC Rcd 13082, 13096 (1996)("Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.").

disproportionate impact on the provision of new advanced, reliable wireless services, blocking them entirely. The Commission can facilitate the deployment of 5G networks and the advanced capabilities they will offer by clarifying that a state or local prohibition on above-ground wireless facilities is an effective prohibition of telecommunications service under Section 253(a).[22]

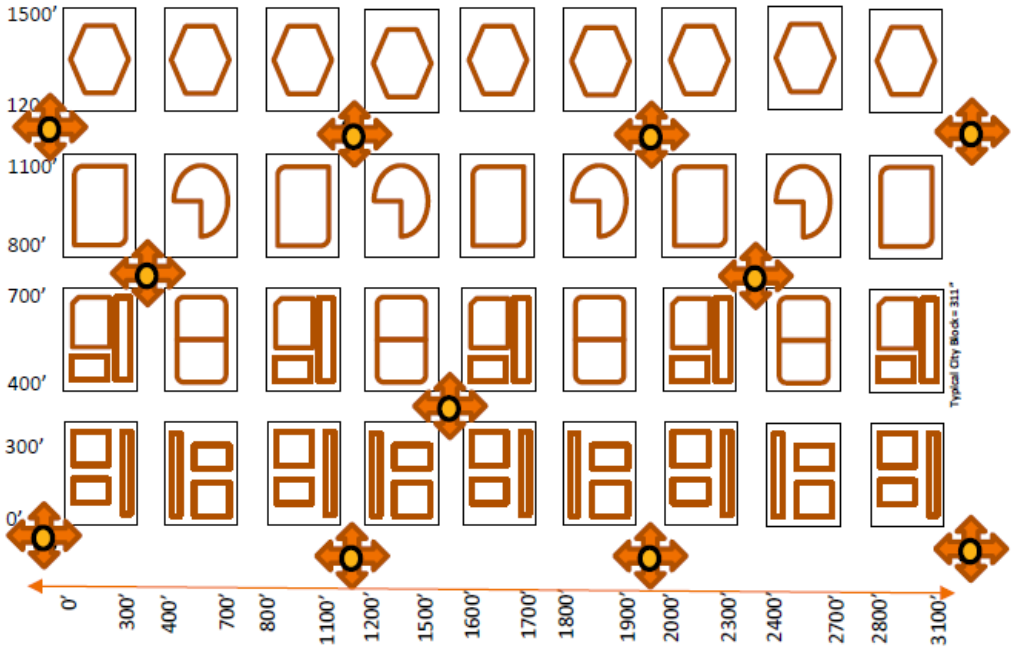
*Location prohibitions.* Location prohibitions materially inhibit or limit the ability of a service provider to offer wireless service. The importance of where a small cell facility is placed is demonstrated in these contrasting illustrative deployments.

**Exhibit 1**
**No Intersection DT Small Cell Deployment**




[22] *See, Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008) ("If an ordinance required . . . that all facilities be underground and . . . to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services."). In neighborhoods with no above-ground facilities, backhaul or fronthaul supporting small wireless facilities would reasonably have to be underground or wireless.

**Exhibit 2**
**Intersection Only DT Small Cell Deployment**




When small cell facilities are placed mid-block only, as in Exhibit 1, more than 25 nodes are required to serve the same area, whereas when small cell facilities are placed in intersections only, as shown in Exhibit 2, only 11 nodes can serve the same downtown area. But, even limiting facilities to intersections—the location that is generally preferred for small cell facilities—can adversely affect the ability to provide service. The lack of available attachment space on existing poles (and the inability to place new poles) at an intersection or RF design constraints may necessitate the placement of a node mid-block. Real-world small cell deployments, which typically involve a combination of intersection and mid-block facilities, are equally impacted by these types of artificial location restrictions.

Local prohibitions, including requiring minimum separation distances between small cell facilities, also preclude competition by restricting the type of networks that can be deployed. For example, requiring a 1,000 foot minimum separation distance between small cell facilities may

preclude the use of millimeter wave spectrum bands, which propagate over shorter distances, and a 300 or 500 foot minimum spacing requirement could arbitrarily limit the number of networks the ROW would support. Some municipalities "solve" this dilemma by limiting ROW access to a single wireless franchisee that opens its neutral host network to all competitors, action that itself would violate Section 253.[23] Clearly, location prohibitions materially inhibit or limit the ability to provide telecommunications service by influencing the networks that can be deployed, the number of nodes needed to effectively serve an area, and the cost of, technical success of, and ultimately customer satisfaction with, a small cell project.

Moreover, most direct prohibitions on the placement of small cell facilities are not saved by Section 253(b) or (c) because they typically are not applied in a competitively neutral or nondiscriminatory manner. For instance, location prohibitions on small cell deployments in the ROW are inherently not competitively neutral because they disadvantage later ROW entrants. There is only one ROW, and arbitrary restrictions on the placement of small cells leave later entrants unable to place facilities in a needed location and provide or enhance services in and around that location.

ROW access restrictions selectively applied to wireless providers only are also inherently discriminatory. Most ROWs support light poles, traffic control poles, utility poles, equipment cabinets, and devices installed on those poles or cabinets, such as electric transformers, sensors, traffic cameras, solar panels, Wi-Fi antennas, and other items placed by cable companies and local government entities. This equipment, often placed at regular intervals along the ROW, is no less,

[23] *See N.J. Payphone Ass'n v. Town of West New York*, 299 F.3d 235, 242 (3d Cir. 2002) ("We find that the exclusivity of the franchise that the Town would grant violates Section 253(a). There can be no question that designating a single company as authorized to provide payphones in the public rights of way in a large geographical area which currently is served by multiple companies . . . constitutes a barrier to entry.")

and typically substantially more, visually obtrusive than small cell antennas. Yet, the small cell facility is often arbitrarily subjected to more onerous restrictions.

In fact, the placement of small cell facilities on ROW structures is consistent with their expected use:

> Utility structures are, by their nature, designed to hold a variety of electrical, communications, or other equipment, and they already hold such equipment. Their inherent characteristic thus incorporates the support of attachments, and their uses have continued to evolve with changes in technology since they were first used in the mid-19th century for distribution of telegraph services. Indeed, we note that other, often larger facilities are added to utility structures without review. For example, deployments of equipment supporting unlicensed wireless operations like Wi-Fi access occur without our Section 106 review in any case, as do installations of non-communication facilities such as municipal traffic management equipment or power equipment such as electric distribution transformers. The addition of DAS or small cell facilities to these structures is therefore fully consistent with their existing use.[24]

State and local actions that ignore this consistency and subject small cell facilities to burdens not imposed on other similar ROW occupants are discriminatory on their face and not protected under Section 253(b) and (c).

Other regulations are discriminatory in application. For example, even when applied equally to all ROW occupants, prohibitions on above-ground deployments have a disproportionate impact on wireless service providers, preventing the use of both current fourth generation ("4G") radio access networks and the future 5G radio access technologies. Those prohibitions completely prohibit a competitor from providing new service or upgrading existing service in an area, a result at odds with the letter of the 1996 Act.

[24] *2014 Infrastructure Order*, 29 FCC Rcd at 12907.

### 2. Unreasonable aesthetic restrictions on wireless small cell facilities in ROWs violate Section 253.

#### a. Local action to control small cell facility aesthetics.

Some municipalities continue to evaluate small cell deployments in the context of their experience with macro facilities and, as a result, impose aesthetic restrictions on their placement, even though small cells are much less obtrusive than macro facilities. Among the more common examples:

- A California municipality approved a single size and configuration for small cell equipment, while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance. As a practical matter, service providers thus must incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the potential one-year delay associated with the approval process[25] and the risk of design rejection after that delay. Local governments in Texas and New York have adopted similar "same size, same appearance" ordinances.
- Elsewhere in California, an AT&T project to install 90 small cell nodes on municipal light poles has been delayed approximately one year waiting for design approval.
- Two local governments in Illinois require wireless equipment to be painted a "color that blends with the surroundings of the pole, structure, or infrastructure on which it is mounted." An ordinance adopted by a local government in Pennsylvania requires a "stealth

[25] While service providers can file suit against a municipality for violating the Section 332 shot clock with respect to facilities not covered by Section 6409, such suits are sparingly used because they damage the relationship between providers and municipalities, are expensive, lead to unpredictable delays, and are not practically scalable for deployments with more than a few nodes.

design" for wireless facilities that makes them "more visually appealing and virtually indistinguishable from the structure that it is mounted to." Similar ordinances throughout the country require service providers to "camouflage" small cell equipment.

- Local governments in California and Pennsylvania prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district, and even if they are categorically excluded from Section 106 review under Commission rules.

**b. Overreaching aesthetic restrictions on small cell deployments in the ROW violate Section 253.**

Unreasonable aesthetic requirements can likewise materially inhibit or limit the ability to provide wireless service, especially if, without an engineering or safety justification, they limit the configuration of equipment so severely as to preclude its deployment technically or require extraordinary efforts to enable a deployment, such as requiring equipment of an exact size or configuration. Moreover, many aesthetic requirements are excessively vague and subjective, giving the local government nearly unfettered discretion to deny each facility, a result that materially inhibits the provision of service.[26] And, all too often, aesthetic restrictions are often a mere subterfuge for rejecting wireless facility placements due to concerns about RF safety, which would violate Section 332(c)(7)(B)(iv).

Like direct prohibitions on small cell facility placements, unreasonable aesthetic restrictions are typically applied solely to wireless services and not to other occupants using the

[26] *See* TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 76-77 (2nd Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (preempting regulation that allowed unfettered discretion to prohibit the provision of services).

ROW in a like manner. In those circumstances, such restrictions are discriminatory and impermissible under Sections 253(b) and (c). The Commission must protect consumers living and working in these areas to ensure that they are not denied the benefits of 5G deployments.

**3. ROW and municipal pole access fees that are not cost-based violate Section 253.**

**a. Municipal fees assessed for small cell deployments.**

Municipalities impose a myriad of charges for wireless facility deployments in the ROW, not all of which contravene Section 253. Below, AT&T provides examples of different types of fees and its general experiences with those fees.

- *Non-recurring charges*: As a general matter, non-recurring fees for processing permit applications are cost-based, tied to review of applications and the performance of other administrative tasks. Thus, they are not the primary barriers to small cell deployments.
  - *Application/Permit fee*. One-time permit application fees of $150 to $1,250 per node are common, depending on whether the support structure is municipally-owned. These charges can be excessive where batched applications are not accepted.
  - *Engineering fee*. Some cities, such as one municipality in Oregon and a township in Pennsylvania, charge third party design or engineering fees. A municipality in California requires a detailed compliance report by a certified RF engineer for each node location, even if standardized small cell antennas and equipment are used throughout the city.
  - *Make-ready charges*. Make-ready charges compensate the municipality for the cost to prepare a municipally-owned structure for the space and load of small cell attachments and are usually site-specific. These charges are cost-based by definition and tend to be cost-based in practice.

- *Bonds*. Some municipalities require a bond, usually reserved for macro sites, for small cell nodes, even without a demonstrated justification and when not applied to other ROW occupants. Like other non-recurring charges, requiring a bond for each node can become onerous when applied to a large scale small cell project.

- *Recurring charges*: Recurring charges take the form of flat fees, revenue-based fees, in-kind contributions, or some combination of them and appear to be set based on a perceived "market rate," a faulty premise when there is no true "market" for access to the ROW. In practice, every municipality has a monopoly of the ROW and the discretion to dictate the terms of access. Thus, municipalities tend to adopt fees as high as they can command.
  - *ROW usage fee*. These fees are charged for the placement of equipment in the ROW. For example: A municipality in Iowa charges an annual fee of $150 per node with an annual 2% escalator and a municipality in Washington State imposes no charge. Other municipalities have adopted excessive flat fees for using the ROW. A Washington local government charges an annual $10,000 per facility fee. Arizona municipalities typically charge annual per-node fees in the range of $3,000 to $4,000. These wide-ranging ROW usage fees extend nationwide and speak to the arbitrary nature in which the amounts are determined.
  - *Municipal structure attachment fee*. This fee is imposed as rent to attach to municipally-owned poles, and is often excessive, acting as an income generator for the local government. Whereas utility pole attachment rates subject to the Commission's Section 224 regulations are below $50 annually, municipalities may charge thousands for a similar attachment. One Missouri city assesses $2,000 annually per node. Three cities in California assess fees up of $2,600, $4,500, and $8,000 annually per

attachment. In Texas, one city charges $2,000 annually per attachment with a 2% annual escalator while another city charges $1,500 per attachment with an unfettered right to raise the fee every two years. A Georgia municipality is considering an annual fee of $6,000 per node, while another local government charges 3% of annual revenue. These exorbitant fees are unsupportable except for the municipalities' monopoly on ROW access.

- *In-kind contributions*. In-kind contributions are negotiated and occur in addition to or instead of ROW usage fees and municipal attachment fees. A municipality in Massachusetts requires small cell operators to provide the City with free dark fiber as a condition of using City light poles, while another local government in Massachusetts requires the transfer of dark fiber to the city when the service provider's access to the ROW ends. Other municipalities saddle small cell service providers with maintenance of the pole and surrounding ROW area.

**b. Excessive fees for small cell deployments in the ROW violate Section 253.**

Service providers are subjected to wildly varying, arbitrary, and excessive one-time and annual fees to access ROWs and poles in the ROW, which distort their decisions about where to deploy facilities and offer advanced services.[27] These distortions encourage service providers to deploy services for reasons other than competition and thus, impede market entry, ultimately harming consumers in both the communities charging the excessive fees and in "downstream" communities with lesser capacity demands. Excessive fees also siphon resources away from

[27] Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240, 5241-42 (2011) ("*National Broadband Plan Order*")("[W]ide disparity in pole rental rates distorts service providers' decisions regarding deployment and offering of advanced services.").

broadband deployment, often causing a service provider to abandon a small cell project, diminish the size of the project, or bypass another community. For example, if as S&P Global Market Intelligence estimates, small cell deployments reach nearly 800,000 by 2026,[28] excessive ROW fees of simply $1,000 per year, a modest sum relative to current ROW access and attachment fees, would result in nearly $800 million *annually* in foregone investment. These results inexorably lead to the conclusion that excessive fees materially inhibit or limit a service provider's ability to provide wireless services.

While these price pressures and disparities have existed for years, wireless providers historically could walk away from a private property owner with unreasonable fee demands, as other candidate sites were available. That situation is much less common with small cell deployments, which present search rings commensurate with the smaller servicing radius of the cells (e.g. +/− 100 feet) for potentially hundreds of nodes.[29] Thus, service providers, with no alternative and a need to avoid delay, have often paid the excessive fees to locate in the ROW, when allowed. Without Commission intervention, this model will remain, as municipalities have little incentive, and service providers no leverage, to change it.

Section 253 allows local governments to charge "fair and reasonable" fees for use of the ROW. The Commission should clarify that a "fair and reasonable" fee is cost-based, related to the local government's cost to process an application (in the case of a ROW permit fee), manage the

[28] *Public Notice*, 31 FCC Rcd at 13364 (citing *SNL Kagan*).

[29] This development has not gone unnoticed by municipal consultants, whose retention is often directly attributable to an increase in rates municipal retention of consultants, which portray wireless service providers as "ripe" for higher ROW fees from cities that hold all of the negotiating leverage. One consultant advises municipal clients that want to discourage small cell deployments to charge $10,000 per node. Another common vehicle for higher fees is the contingency contract where a consultant earns a percentage of increased fees it can generate for attachments to municipally-owned structures.

ROW (in the case of accessing the ROW to place a pole or attach to an investor-owned utility pole), and manage the pole in the ROW (in the case of attaching to a municipal pole). Without a cost-based approach, service providers are locked into a cycle of ever higher fees to access the ROWs and poles in ROWs. Revenue-based fees are particularly egregious, as by definition they are not cost-based or related to management of the ROW, and thus provide a pure windfall to local governments.[30]

Cost-based recurring municipal attachment fees should be nominal. Local governments do not typically conduct, and thus do not incur ongoing costs for, annual pole inspections or maintenance associated with small cell deployments. Thus, there is no justification for the extreme recurring costs that some local governments charge for deploying small cell equipment in the ROW or attaching to municipal poles. For example, AT&T typically pays less than $50 annually per pole when attaching to investor-owned utility poles and AT&T's land line affiliates charge less than $50 annually per pole attachment, rates derived using the Telecom formula under Commission rules[31] or a similar state rule. These rates are fully compensatory and should approximate recurring rates for attachments to municipal vertical structures, light poles and traffic lights.

Section 253(c) also sanctions fair and reasonable ROW access fees that are nondiscriminatory and competitively neutral. Yet, wireless service providers are often subject to fees that fall outside the Section 253(c) safe harbor because they are higher than fees charged to

[30] *See Puerto Rico Tel. Co. Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (franchise fee must be, "at the very least, related" to the costs imposed on the locality); *XO Missouri v. City of Maryland Heights*, 256 F. Supp. 2d 987, 993 (E.D. Mo. 2003) (Section 253(a) invalidates any franchise fee not "directly related to a company's use of the local rights-of-way.").

[31] *See* 47 C.F.R. §§1.1401-1.1424.

other ROW occupants, even though wireless service providers use considerably less of the ROW than other occupants. Nondiscriminatory fees would also assess wireless providers only their share of the costs of management of the ROW, i.e. fees that are proportionate to their use of the ROW. For example, a wireless provider deploying on a single existing pole in the ROW should not be assessed fees that are equivalent to those charged to a ROW occupant using all the poles. Consistent and rationale fees following these principles will allow all wireless providers to compete on an equal basis.

To add regulatory certainty and avoid a piecemeal approach to rates for access to municipal poles in the ROW, the Commission should take the following additional actions:

- Clarify that fair and reasonable cost-based fees for attaching to municipally-owned structures should compensate the local government for only the additional costs of providing the attachment—similar to the Telecom Rate formula, a tried and tested benchmark for just and reasonable compensation for the use of pole space.[32]
- Establish a presumptively reasonable safe harbor fee for use of the ROW and municipally-owned ROW structures. Fees that fall within the safe harbor would be predictable, and thus could be relied on by service providers and municipalities. This option avoids the difficulties frequently associated with calculating individualized cost-based fees for each attachment but preserves a service provider's right under Section 253 to challenge fees below the safe harbor and a local government's right to impose and defend cost-based fees that exceed the safe harbor.
- Clarify that a fair and reasonable municipal pole attachment fee that is applied in a nondiscriminatory and competitively neutral manner would equal the lesser of the safe harbor

[32] *Id.*

fee referenced above (e.g., $50 per facility) and the ROW access fees charged to other ROW occupants for proportional use.

**4. Burdensome permitting processes imposed on small cell facilities violate Section 253.**

**a. Local permitting processes for small cell deployments.**

Some municipalities impose burdensome permitting/zoning processes, such as requiring the submission of detailed maps of all wireless facilities in their jurisdiction, detailed community-wide multi-year wireless development plans, or a list of all of an applicant's affiliates, none of which have any bearing on a proposed facility. Other municipalities refuse to accept batched applications, requiring individual permit applications for each node, even for modifications to existing nodes. In one such California municipality, an AT&T distributed antenna system ("DAS") project took over 800 days to deploy due to municipal staff's desire to scrutinize the design and operational details of each node, including issues such as whether a macro site or DAS node would best cover an area, antenna designs, RF exposure, property values analyses, stealthing, equipment placement (above or below ground level), acoustic noise studies, screening, placement away from intersections, and network performance. These types of node-by-node negotiations will be infeasible going forward due to the scale and scope of upcoming small cell projects.

Other state and local governments have enacted regulations to streamline administrative reviews. Washington State encourages local governments to allow the submission of batched applications and to render decisions for small cell deployments in a single proceeding. Unfortunately, few cities have followed the recommendation. The Virginia Legislature recently passed a bill that allows providers to batch up to 35 nodes in a single application and gives

applicants a deemed approved remedy for untimely review.[33] And, the Minnesota Legislature is considering a similar bill.[34] Batched application processes are more efficient, presenting economies of scale for service providers and local governments.[35] These types of common sense actions applied nationwide would reap significant benefits for both service providers and local governments alike.

**b. Burdensome regulatory processes materially inhibit the timely provision of service and are discriminatorily applied in violation of Section 253.**

"[L]ack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services. There are several reasons for this. First, the process and timeline for negotiating access to poles varies across the various utility companies that own this key infrastructure. The absence of fixed timelines and the potential for delay creates uncertainty that deters investment."[36] These observations apply equally to municipally-owned poles in the ROW. Overly burdensome processes, such as refusing to accept batched applications and requiring community-wide deployment plans and maps, discourage wireless providers from deploying small cells in large numbers, as is needed for 5G technologies, and delays local action on applications that are submitted.

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[33] Virginia Senate Bill 1282 (2017).

[34] Minnesota House Bill No. 739 (2017).

[35] There is a reasonable upper limit on the size of a batch, say 35-50 nodes. In fairness, there are cases where near simultaneous receipt of multiple batches of applications with more than a certain number of nodes (e.g., 35) justify additional review time, such as an additional seven days per additional batch of related nodes.

[36] *National Broadband Plan Order*, 26 FCC Rcd at 5241-42. *See also Shot Clock Ruling*, 24 FCC Rcd at 14008 ("[T]he deployment of facilities without unreasonable delay is vital to promote public safety, including the availability of wireless 911, throughout the nation.").

In its 2014 Infrastructure Order, the Commission took steps to prevent local governments from imposing arbitrary processes when reviewing a Section 6409 covered facility. Specifically, the Commission clarified that a local government could review whether the facility is covered by Section 6409 and complies with local health and safety codes, but could not review the need or business case for the proposed modification.[37] The processing burdens that service providers continue to experience require the Commission to provide a similar clarification for Section 332 and express its intention to exercise its authority under Section 253 to preempt process regulations that violate these tenets. For example, the Commission can significantly streamline small cell deployments by clarifying that prohibiting "batched" applications has the effect of materially inhibiting the provision of wireless services because of consequent delays and higher deployment costs.

### C. A "deemed granted" remedy under Section 332 would provide greater predictability.

AT&T urges the Commission to reconsider its prior refusal to adopt a "deemed granted" remedy for applications that were not processed in accordance with the Section 332(c)(7) shot clock. Local governments intent on blocking wireless facility deployments frequently leverage their ability to force applicants to resort to judicial action for relief from delayed site reviews and approvals. Many applicants, wary of the cost, inherent delays, and uncertainty of litigation and hopeful of a more direct and less contentious path to approval, agree to tolling or other demands from local officials. For example, providers may agree to toll the shot clock, while cities consider applications for the most basic facility modifications, create new or modified wireless ordinances, or ask for more, and often unnecessary, information. Presented with such requests, Commission

[37] *2014 Infrastructure Order*, 29 FCC Rcd at 12955-56.

licensees face a no-win situation—accept the extensive and unforeseeable delays and depletion of resources inherent in acquiescing to the request or accept the potentially longer delays, greater depletion of resources, damaged relationships, and uncertainty of litigation.[38]

Moreover, while litigation may be viable in isolated instances, it is simply not practical to rely on wide-scale litigation when deploying multiple small cell projects with dozens, if not hundreds, of nodes. That is all the more true given that the mere act of initiating litigation against a municipality over one node can sometimes create a state of limbo for all other nodes that are not the subject of the litigation, as the processing of their siting applications comes to a standstill in anticipation of a resolution of the litigation. To remedy this problem and ensure providers have real, workable redress when municipalities throw unnecessary obstacles their way, the Commission should establish a "deemed granted" remedy for applicants if state and local jurisdictions do not comply with the Section 332(c)(7) shot clock, similar to the Section 6409 deemed granted remedy process established by he Commission.

The Commission has refused to adopt a deemed granted remedy in large part because the statute specifies that anyone "adversely affected by any final action or failure to act by a State or local government *may* . . . commence an action in any court of competent jurisdiction."[39] However, a deemed granted remedy would not contravene this language, which provides judicial relief as an avenue an aggrieved party "may" pursue, but does not preclude another remedy fashioned by the Commission to remove barriers to service deployment. Such a clarification would promote

[38] The Commission has previously acknowledged these challenges in the context of pole attachments. *See National Broadband Plan Order*, 26 FCC Rcd at 5241-42 ("[I]f a pole owner does not comply with applicable requirements, the party requesting access may have limited remedies; because of time constraints, cost, or the need to maintain a working relationship with the pole owner, it may not wish to pursue the enforcement process.").

[39] 47 U.S.C. §332(c)(7)(B)(v).

predictability and expeditious resolution of tower siting applications and promote the advancement of timely broadband deployment across the country.

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