Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF MOBILITIE, LLC

Christopher Glass
Senior Vice President and General Counsel
D. Kirk Jamieson
Senior Vice President, Government Affairs
Mobilitie, LLC
2220 University Drive
Newport Beach, CA 92660
(877) 999-7070

Bryan N. Tramont
John T. Scott, III
Wilkinson Barker Knauer LLP
1800 M Street, NW Suite 800N
Washington, DC 20036
(202) 783-4141

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TABLE OF CONTENTS

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Mobilitie, LLC respectfully submits these comments on the Commission's Public Notice in this proceeding,[1] which asks for input on actions the Commission can take to expedite the deployment of wireless infrastructure. Broadband holds tremendous promise to benefit citizens in every community across the nation. Broadband is essential today to commerce and daily life; 5G will interweave mobile access through all elements of our lives. Local governments that erect regulatory barriers to advanced broadband networks forget their charter to serve their citizens. They deprive citizens, visitors, schools, organizations and businesses of the benefits that broadband can deliver. Mobilitie urges the Commission to take immediate, comprehensive actions to remove the regulatory barriers that are obstructing deployment of advanced wireless broadband networks.

I. SUMMARY

Reliable and ubiquitous advanced wireless services hold tremendous promise for the nation. But they require massive expansion of the networks needed to transmit the exploding volume of traffic at the speeds that advanced services demand. Mobilitie is ready to invest in

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

constructing and operating the new, densified networks that are essential to accommodating advanced services, and many cities are welcoming that investment to create the future – wireless infrastructure in the rights of way including small cells, relay equipment and fiber.

Many others, however, are imposing exorbitant charges for access to rights of way – charges that discriminate against Mobilitie and other new entrants and deter investment. Many localities are also delaying access to the rights of way not simply month after month, but quarter after quarter. Others outright block deployment. These localities are preventing their own citizens from benefitting from advanced, robust and ubiquitous broadband services.

The Commission correctly recognizes in the Public Notice that it has authority under the Communications Act of 1934 as amended ("Act") to issue declaratory rulings and take other actions to promote critically needed investment in wireless networks. It can do so while fully respecting the legitimate role of localities in overseeing the installation of new infrastructure.

Mobilitie urges the Commission to act quickly. We have been working furiously month after month to bring the benefits of broadband to communities across the nation, yet many jurisdictions have failed to act on our site applications, preventing us from investing in new infrastructure. Others have demanded complex licensing agreements, unreasonable conditions and high fees that threaten to make many deployments cost-prohibitive. We have seen little or no progress in many jurisdictions. And every month that goes by means another month of delay in expanding the broadband networks that hold so much promise to benefit the lives of all Americans. The Commission should thus promptly issue a declaratory ruling interpreting the Act as follows:

First, it should grant Mobilitie's petition and attack the growing problem of excessive and discriminatory local rights of way fees that are severely deterring network deployment. It should interpret Section 253(c) as follows:

- "Fair and reasonable compensation" means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way. Additional charges or those not related to actual use of the right of way, such as fees based on carriers' revenues, are unlawful.

- "Competitively neutral and nondiscriminatory" means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.

- Localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.

Second, the Commission should strike down the barriers that some localities have erected which directly block deployment, or effectively accomplish that result, and thus violate Section 253(a). It can eradicate these barriers by interpreting Section 253(a) as follows:

- Localities may not enforce moratoria, either in the form of ordinances that explicitly block reviews of siting permits, or de facto moratoria in which localities refuse to act on permits.

- They may not prohibit the installation of new poles along rights of way by restricting deployments only to attachments to existing poles, or by imposing minimum distance requirements based on the location of competing providers' facilities. Such restrictions interfere with a provider's design of its network and undermine its ability to provide the most reliable, high-quality and robust service.

- And they may not require a provider to demonstrate there is a coverage gap or other business need in the area to be served by the new site. Such requirements effectively prohibit service, directly violating Section 253(a), because small cells are not installed to eliminate coverage gaps but to enhance network capacity, speeds, and reliability.

Third, the Commission should alleviate siting delays by shortening the "shot clocks" that currently apply to local review of wireless facilities. It adopted the shot clocks to set reasonable

periods of time for localities to act on applications to construct new large cell towers and collocate macrocells on existing towers. They were not designed as reasonable time periods for reviewing far less visually intrusive small cells, microcells, and the short poles those facilities are located on. There is no reason why localities cannot act on small cell permits much faster. The Commission has the authority to modify the shot clocks to reflect the realities of wireless deployment today. And, the compelling public interest in rapid deployment of essential new infrastructure to support broadband networks supplies a strong public policy basis for tightening the shot clocks. The Commission should thus issue a declaratory ruling that:

- Delay in acting on a small cell siting permit is presumptively unreasonable if it extends beyond 60 days.
- If a locality determines a provider must secure a citywide license or franchise before it can access rights of way, the shot clock applies to that process. Otherwise, cities will continue to leverage their assertion that a license or franchise is required to delay or block deployment of new infrastructure.
- The new shot clock applies to permits that seek access to rights of way and to municipal streetlight and traffic poles and other structures located in rights of way.

Each of these actions is solidly grounded in the Commission's "statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless services to consumer throughout the United States."[2] And each of them will discharge the Commission's "responsibility to ensure that this deployment of network facilities does not become subject to delay caused by unnecessarily time-consuming and costly siting review processes that may be in conflict with the Communications Act."[3]

The Public Notice broadly asks for other actions that the Commission can take to streamline small cell siting in addition to addressing local regulatory barriers. It should reform

[2] Public Notice at 2.

[3] *Id.*

the existing procedures for tribal reviews of wireless facilities, because those procedures impose significant costs and delays that are frustrating deployment of new infrastructure. Many small cell sites are subject to tribal reviews, and some tribes leverage those reviews to demand substantial payments from applicants in return for completing or waiving those reviews. But there is no basis for tribes to seek reviews or to request fees for small cells, because when these facilities are installed in an active right of way they rarely if ever could affect tribal interests. Unlike traditional macrocells which may be constructed on undisturbed land and thus could potentially be of interest to tribes, small cells are installed along existing roads and on utility structures, where the land underneath has already been disturbed, often multiple times over many years, and thus could not implicate tribal interests. The Commission should thus reform its tribal review procedures to exempt small cells that are installed along existing rights of way.

II. RAPID AND AFFORDABLE ACCESS TO RIGHTS OF WAY IS CRITICAL TO ACHIEVE THE PROMISE OF BROADBAND.

Mobilitie was built on the vision that the United States needs a huge investment in telecommunications networks if it is to reap the benefits that broadband can deliver. It is the largest privately-held infrastructure provider in the United States, with more than 2,000 employees. It funds, installs and operates indoor and outdoor WiFi and wireless networks using small cells, microwave spectrum, and fiber. It is making substantial investments in building new telecommunications infrastructure nationwide to support the fast-growing demand for advanced wireless communications.

As Mobilitie explained in its Petition for Declaratory Ruling,[4] wireless broadband is the essential public service for the 21st Century – just as important as landline telephone networks were in the 20th Century. People increasingly depend on access to wireless broadband to get an education, to apply for a job, to obtain health care, and to learn about services their federal, state and local governments provide. It is particularly essential for those citizens who depend on wireless to stay connected, including millions of low-income citizens. New technologies and services, including 5G and the Internet of Things, will enhance the capabilities of fire, rescue and police departments to protect the safety of their communities' residents.

As the Public Notice recognizes,[5] in order to achieve the promise of broadband, new networks need to be deployed in large part along local roads and streets. They are by far the best location because every resident and every business is located close to a road. Many of the new wireless broadband technologies will rely on high-band spectrum, which has immense capacity but short signal propagation which requires closely-spaced facilities, again making the use of rights of way essential. Moreover, the network to support many of the new broadband services like connected vehicles and traffic management must be installed along those streets.

Congress too has recognized that access to state and local rights of way are essential for new communications networks, not just traditional utilities. In enacting the Telecommunications Act of 1996 which amended the Act, it prohibited barriers that impeded new services. And, it extended access rights well beyond traditional telephone utilities in order to achieve its fundamental goal of promoting new services to benefit all Americans. The Public Notice correctly observes that Congress enacted Section 253 of that Act and other laws "to address

[4] Petition for Declaratory Ruling, Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way (filed Nov. 15, 2016).

[5] Public Notice at 3-5.

concerns about state and local governments' unduly restrictive zoning rules and unfounded denials or delays in the processing of permit applications for constructing wireless facilities."[6] Congress balanced local government's traditional authority to manage its rights of way with ensuring that they would be available for new telecom services at affordable prices that would not deter investment. It thus granted rights of way access to all carriers, such as wireless providers and companies like Mobilitie which build and operate small cell facilities and the transport networks supporting other carriers.

Small cell networks are essential to accelerate broadband infrastructure for the smart cities of tomorrow. They provide the increased network capacity and speeds the many new technologies require. The possibilities are nearly infinite: remote health, education, and entertainment; efficient grid power management; remote house and office systems management; automated highway traffic management; and robust public safety communications simply start the list. This massive investment in a resilient and secure broadband future does not require government funding; it can be readily supported by the ground-breaking technology and competitive marketplace of the wireless industry. Mobilitie and other providers are ready to invest billions of dollars immediately to place millions of small cells throughout the country.

That investment is, however, being frustrated by unwarranted as well as unlawful local regulatory barriers. As Chairman Pai has stated:

> Future 5G technologies will require 'densification' of wireless networks. That means providers are going to deploy hundreds of thousands of new antennas and cell sites, and they are going to deploy many more miles of fiber to carry all of this traffic. Without a paradigm shift in our nation's approach to wireless siting

[6] *Id.* at 5.

> and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back.[7]

Commissioners Clyburn and O'Rielly have also noted the critical importance to the public of building new networks to accommodate broadband and, soon, 5G. As Commissioner Clyburn has stated:

> Lack of affordability remains one of the larger barriers to connected communities in this country. . . . Streamlining deployment is central to this effort. We must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace.[8]

And Commissioner O'Rielly has said the Commission may need to invoke its statutory authority to remove barriers to deployment:

> Standing in the way of progress … are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.[9]

The Public Notice acknowledges that "[t]he successful deployment of wireless networks depends in large part on how quickly providers are able to obtain the necessary regulatory approvals."[10] But the simple fact is that localities are *not* lowering barriers to reflect far less intrusive small cell technologies – to the contrary, many are raising those barriers, which take the form of burdensome requirements, greater restrictions, longer reviews, and higher fees. The

[7] FCC Commissioner Ajit Pai, Remarks at the Brandery: A Digital Empowerment Agenda, at 2 (Sept. 13, 2016) ("Digital Empowerment Agenda").

[8] FCC Commissioner Mignon L. Clyburn, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 4 (Oct. 19, 2016).

[9] FCC Commissioner Michael O'Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, Oversight of the Federal Communications Commission, at 1-2 (Sept. 15, 2016).

[10] Public Notice at 5.

Commission rightly finds that it is time for it to address those obstacles to fulfill its statutory mandate to promote ubiquitous telecommunications networks to serve the American public.

III. MANY LOCALITIES HAVE IMPOSED OBSTACLES THAT ARE SEVERELY IMPEDING INVESTMENT IN CRITICAL WIRELESS INFRASTRUCTURE.

Mobilitie is working cooperatively with many communities to deliver available and affordable broadband services to their residents and thereby promote the objectives of the Communications Act. Many cities recognize the tremendous benefits to their citizens of using rights of way to deliver broadband, and Mobilitie is successfully partnering with them.

However, many localities are frustrating deployment and thereby impeding ubiquitous, affordable wireless broadband. They are, among other practices, imposing unreasonable, excessive and discriminatory fees that deter Mobilitie from building new infrastructure. Mobilitie thus sought relief from the Commission in its Petition, which supplies numerous examples of unreasonable and discriminatory charges. These include requirements that Mobilitie pay a percentage of its gross revenues; annual fees in the thousands of dollars for each small cell that far exceed any possible costs to the locality; and fees that are imposed on Mobilitie but not imposed on competing providers, impeding the provision of competitive new services. Section 253(c) of the Act specifically requires that in order to fit within that provision, rights of way frees must constitute "fair and reasonable compensation," be "competitively neutral and nondiscriminatory," and be "publicly disclosed." Mobilitie asked the Commission to interpret these statutory phrases consistent with their plain meaning and the goals of the Act.[11]

The Public Notice seeks comment on Mobilitie's Petition as well as on any other laws, regulations and practices that adversely affect wireless deployment. It correctly notes that while

[11] Mobilitie did not ask the Commission to preempt any specific state or local law or regulation. Rather, it only seeks a ruling that addresses what constitute reasonable and nondiscriminatory – and thus permissible – fees under federal law.

excessive and discriminatory fees are one type of barrier, there are others that can impede or block new investment, and asks for what types of such obstacles exist as well as illustrations as to how they have been imposed. Given that Mobilitie supplied numerous examples of excessive and discriminatory fees in its Petition, it will not repeat those examples here, but expects that other providers will supply many additional examples to illustrate the breadth of this problem.

Instead, Mobilitie submits these comments to respond to the Commission's request for information about additional deployment barriers. They unfortunately go well beyond exorbitant fees that impair broadband deployment, and impose barriers and extremely long procedures that delay new service or deny it altogether. Such barriers are equally unlawful, and the Commission should adopt a declaratory ruling to take them down.

A. Both Explicit and Effective Moratoria Unlawfully Block Deployment in Violation of Section 253(a).

Section 253(a) of the Communications Act is based on Congress' determination that state and local laws, regulations or practices that obstruct the deployment of telecommunications services disserve the public interest and must be curtailed. And the scope of this section is broad – it reaches not only laws or regulations that may expressly prohibit service, but also those that may "have the effect of prohibiting" services.

Moratoria on building facilities unquestionably violate Section 253(a) because they expressly prohibit new service. They have stopped Mobilitie from constructing the facilities needed for its networks. For example:

- A Florida locality enacted a moratorium prohibiting new wireless facilities in 2014, but it is still in effect three years later.
- Two other Florida jurisdictions enacted moratoria in September 2016 that remain in effect.

- An Iowa locality issued an indefinite moratorium in August 2016 on small cell permitting to develop a small cell ordinance.

- A California locality passed an indefinite moratorium in August 2016 prohibiting new wireless facilities.

- A Minnesota locality issued a moratorium in August 2016 prohibiting approval of or wireless and small cell/DAS systems without any end date.

- A Washington state locality passed a moratorium in September 2016 prohibiting the approval of any wireless facilities until at least August 2017.

Mobilitie has also confronted local practices which, while not taking the form of explicit moratoria, still have the same practical impact, because they stop it from securing the permits the locality requires and thus effectively stymie installation of new facilities. These practices take various forms, including refusals to process site permit applications, refusals to negotiate master rights of way agreements which the locality insists are a prerequisite to its willingness to process site permits, or simple inaction. Some cities say they cannot consider Mobilitie's applications until they develop an administrative review process, but then fail to create that process, leaving Mobilitie with no path forward. These failures to act have the same effect as express moratoria. For example:

- Four Arizona jurisdictions have told Mobilitie that they will not process ROW siting applications s until the state legislature determines whether to enact siting legislation.

- Two other Arizona jurisdictions have stated that they will not process applications because of this Commission proceeding.

- Approximately 30 California localities are refusing to negotiate ROW access agreements and permits, stating that they first want to acquire street lights owned by a privately-owned investor utility. Why the city's desire to acquire these facilities should block Mobilitie from securing permits has never been explained.

- Three Michigan jurisdictions will not allow deployment of facilities in their ROWs at all.

- A Minnesota locality told Mobilitie last year it will not accept small cell applications until it adopts a new ordinance for permitting small cells, but has recently stated that it will take at least another year to enact the ordinance.

- A New York city is denying ROW access for small cells because it has no permitting process in place but has not stated when that process will be completed.

- An Ohio city is denying ROW access without providing an explanation.

- An Oregon city requires a franchise agreement before it will consider small cell permit applications, but will not negotiate the franchise agreement.

- Three state departments of transportation are refusing to permit Mobilitie's facilities along highway ROWs.

Both express and *de facto* moratoria directly undercuts the purpose of Section 253(a), to ensure that localities do not block the deployment of new telecommunications services. They are accordingly unlawful.

B. Regulations or Practices that Restrict New Small Cell Facilities Also Violate Section 253(a).

Many other localities do not enforce express or *de facto* moratoria, but impose severe restrictions that effectively deter new infrastructure. The most common type of restriction prohibits Mobilitie from installing new poles in rights of way on which to attach its antennas, fiber and other necessary equipment, and allows it only to attach equipment to existing poles. Other restrictions require Mobilitie's equipment to be spaced minimal distances from other providers' facilities. Those limits preclude Mobilitie from deploying small cells at locations that are needed to provide reliable coverage. And others require Mobilitie to demonstrate a network "coverage gap," despite the fact that small cells are not intended to fill geographic gaps, but to fill "capacity gaps" where the available bandwidth is or will soon be inadequate to accommodate the exploding volume of traffic and the fast speeds customers expect. For example:

- A California locality requires all facilities to be underground, and thus will not allow Mobilitie to install new poles or even small cells attached to existing poles.

- Nearly 40 California localities require propagation maps that demonstrate the need for additional wireless infrastructure to fill a coverage gap.

- An Illinois city required Mobilitie to make a large cash deposit before it would even begin negotiations, but then refused to work with the company or even discuss an agreement.

- Another Illinois city is requiring Mobilitie to attach city-owned equipment at Mobilitie's own cost as a condition of being able to install new poles.

- Another Illinois city is conditioning ROW access on Mobilitie's waiver of its rights to seek judicial review of city permitting decisions.

- Two other Illinois cities require propagation maps in order to prove a need for new infrastructure.

- Two Michigan localities will not allow Mobility to deploy small cells because they require all telecommunications facilities to be installed underground.

- Five Minnesota jurisdictions require propagation maps that demonstrate the need for additional wireless infrastructure.

- Two Nevada counties have imposed minimum spacing requirements between small cell facilities that impair network coverage.

- Two Ohio jurisdictions require propagation maps that demonstrate the need for additional wireless infrastructure.

- Two Oregon localities require Mobilitie to provide an alternative site analysis showing why it cannot locate small cell facilities on private property.

- A number of Washington localities are requesting that applicants for new small cell facilities using ROWs demonstrate a significant gap in coverage, show why using ROWs is the least intrusive means to fill that gap, and/or produce an analysis of the feasibility of alternative sites that do not use ROWs.

These types of restriction are no more lawful than small cell siting moratoria. They effectively prohibit service in many locations, because existing poles are either insufficiently tall or have loading restrictions and cannot bear the weight of the new equipment. Alternatively, the poles are in the wrong locations to achieve reliable, robust network coverage. More

fundamentally, such restrictions impermissibly inject localities into the design of telecommunications networks. Section 253(a) grants them no such authority.

C. Many Localities Are Imposing Long Delays, First to Execute A Rights of Way Access Agreement, and Then to Process Individual Siting Permits

The Public Notice seeks information as to the length of time that localities take to process applications. It correctly notes that, given the far smaller visual and other impacts of small cells, processing times should be correspondingly faster. But in Mobilitie's experience, processing times are extremely slow – and often involve not one but two lengthy periods of delay, one following the other, and each lasting months and many well over a year. Many localities require Mobilitie to obtain a city-wide license or franchise merely to have the right to access their rights of way. However, that license or franchise is *in addition to* the city's *separate* requirement that Mobilitie secure permits for each individual site. The result is that Mobilitie must secure not only a city-wide license but also individual permits. This two-step process imposes extensive delays as well as costly and burdensome conditions that frustrate deployment.

The license or franchise agreement negotiation process is lengthy. While cities are requiring them for rights of way access, few have agreements that are designed for small cell deployments and thus must create them. These agreements are typically extensive contracts, often thirty pages or more, which impose detailed obligations and restrictions on Mobilitie, and address matters that go well beyond the locality's legitimate interest in managing its rights of way. For example, they require Mobilitie to pay a franchise fee based on a percentage of the company's gross revenues, require Mobilitie to demonstrate a business need for its service or a gap in wireless coverage, impose design requirements, or seek to regulate Mobilitie's dealings with its customers.

Over 340 jurisdictions have taken over six months to establish a process or agreement for access to the right of way – measured not from the time of first discussion but from the time a template process or draft agreement was first exchanged. Of these at least 75 localities have taken over twelve months to establish a process or agreement, and at least 11 have taken over a year and one half. At least two have taken more two years or more. And these localities do not include those that enacted moratoria that completely block new infrastructure. Examples of license agreement delays abound:

- In California, Mobilitie has been waiting for one city to move ahead with an agreement for two years, and for a second city for more than eighteen months. It has been seeking an agreement with a third city for more than one year.
- In Florida, one jurisdiction has stalled the agreement process for over two years.
- In Georgia, discussions began in one locality a year ago; no agreement is yet in place.
- In Illinois, Mobilitie began negotiations with a locality eleven months ago but was unable to get responses for months and still has no agreement.
- In Iowa, one locality notified Mobilitie ten months ago that an agreement would be required but no agreement has yet been reached.
- Similarly, a Maryland locality informed Mobilitie eleven months ago that an agreement would be required but put the agreement on hold.
- In Massachusetts, discussions with one city have been ongoing for eighteen months.

The "benefit" of the rights of way license or franchise is no more, though, than the opportunity to file permits one by one – in a work stream that can require dozens of sites for each build. In many of these jurisdictions, after Mobilitie has started to file applications for the individual permits that will finally allow it to build, it must again wait – and generally for not months but quarters – before the applications it files are granted or denied. For well over half of these facilities, the process has taken over six months, and many have been awaiting approval for over a year. This glacial pace is the result both of time working with jurisdictions as they change

or create application requirements and processes, and of delay after applications are complete. Every one of these delays frustrates deployment of needed new infrastructure to serve these communities. Examples of standard delays for eight months or more are common, and one city has a year-long permitting process:

- One jurisdiction in southern California has a permit review period of one year even following an executed ROW Access agreement.
- A northeastern jurisdiction is still reviewing applications that have been submitted without response for over eight months.
- Mobilitie submitted applications to one mid-Atlantic locality last June but is still waiting for it to act – nine months later.
- One midwest jurisdiction has been willing to work with Mobilitie on the proposed deployment, but the pace has been extremely slow pace allowing eight months to pass without any successful permitting.
- One jurisdiction in the south is working with us, but has a very restrictive and slow process requiring Mobilitie to jump through several hoops that has lasted eight months to date.
- A city in the west is requiring a very lengthy process involving environmental reviews, design commission approval, and numerous other deliverables to be first approved by the city's Department of Transportation and ultimately, the City Council; which add up to more than six months.

IV. THE COMMISSION SHOULD INVOKE ITS AUTHORITY TO REMOVE THESE BARRIERS TO BROADBAND DEPLOYMENT.

Chairman Pai has declared:

> [T]he FCC must aggressively use its statutory authority to ensure that local governments don't stand in the way of broadband deployment. In section 253 of the Communications Act, for example, Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or wireless service. So where states or localities are imposing fees that are not "fair and reasonable" for access to local ROWs, the FCC should preempt them. Where local ordinances erect barriers to broadband deployment (especially as applied to new entrants), the FCC should eliminate them. And where local governments are not transparent

about their application processes, the FCC should require some sunlight. These processes need to be public and streamlined.[12]

The most effective and efficient way for the Commission to apply that statutory authority is to issue a declaratory ruling under Section 1.2 of its Rules, interpreting Section 253. As the Public Notice observes, the Commission unquestionably has that authority,[13] and courts have upheld its use of declaratory rulings to construe and apply the Act, including specifically to promote the deployment of new wireless services.[14] Moreover, a declaratory ruling will by definition have national impact, unlike rulings on particular disputes, and thus conserve all parties' resources. And, it will provide far more certainty and clarity to localities and providers as to their respective rights and obligations.

The Commission should address three discrete problems: Excessive charges for access to rights of way, moratoria and other barriers to deployment, and unreasonably protracted siting permit review periods.

First, it should grant the relief Mobilitie sought in its Petition. It should interpret Section 253(c) of the Act to implement the balance that Congress struck in that provision. It should ensure that localities can charge fees that fully compensate them for the costs they incur due to providers' access to rights of way, but cannot extract higher fees or impose fees that discriminate against newer providers: Specifically, the Commission should:

- Declare that the phrase "fair and reasonable compensation" in Section 253(c) means charges for rights of way application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing the rights of way.

[12] Digital Empowerment Agenda, at 7.

[13] Public Notice at 6; *see* 47 C.F.R. § 1.2; 5 U.S.C. § 554(c) (an "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.").

[14] *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229, 247-54 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

- Declare that the phrase "competitively neutral and nondiscriminatory" in Section 253(c) means charges imposed on a provider for access to rights of way that do not exceed the charges imposed on other providers for similar access.

- Declare that that localities must disclose to a provider seeking access to rights of way the charges that they previously assessed on others for access.[15]

Second, it should outlaw barriers that localities have erected that block deployment of new infrastructure. Section 253(a)'s fundamental purpose is to eradicate obstacles to new telecommunications services, whether they use wireless or wireline technology.[16] It should rule that Section 253(a) prohibits not only express moratoria but also *de facto* moratoria, in which cities simply refuse to act on applications or permits to install new infrastructure. It should also declare that three specific forms of barriers localities have erected that stop new small cells and other facilities are unlawful under Section 253(a):

- Localities may not prohibit the installation of new poles along rights of way by restricting deployments only to attachments to existing poles. Such a prohibition interferes with a provider's design of its network and compromises its ability to provide the most reliable, high-quality and robust service.

- They may not impose minimum distance requirements which are based on the location of competing providers' facilities. These restrictions are not competitively neutral because they disadvantage new entrants and saddle them with restrictions that did not apply to prior applicants. And they also intrude on providers' right to design their networks to best serve customers.

- And they may not require a provider to demonstrate there is a coverage gap in the area to be served by the new site. Such a requirement effectively prohibits service in direct violation of Section 253(a), because small cells are not installed to eliminate coverage gaps but to enhance network capacity, speeds, and reliability.

[15] *See* Mobilitie Petition at 24-35 for the legal basis and rationale for each of these rulings.

[16] Section 332(c)(7)(B) of the Act contains a parallel provision outlawing state or local regulations which prohibit or have the effect of prohibiting the provision of personal wireless services, and the Commission can thus similarly address the scope of that provision in its declaratory ruling.

Third, it should shorten and consolidate the shot clocks that it previously adopted to determine when localities' delays in acting on applications for new wireless facilities constitute unreasonable day, and declare that the new shot clock applies to small cell siting along rights of way. The Commission adopted those shot clocks more than seven years ago, in 2009, when nearly all wireless facilities were comprised of macrocells, often installed on tall towers.[17] It determined that 150 days was a presumptively reasonable time period for new facilities and that 90 days was appropriate for collocations.

The Public Notice correctly observes that "[t]he presumptive timelines established in the *2009 Declaratory Ruling* may be longer than necessary and reasonable to review a small cell siting request."[18] They are in fact far too long and should be tightened. Today, nearly all wireless facilities consist of small cells and microcells, which have minimal visual impact and do not need to be located on large towers, but are typically placed on utility poles, streetlight poles or traffic signaling and signage facilities. Mobilitie urges the Commission to set a new shot clock of no more than 60 days for all small cell installations, whether they are placed on new poles or attached to existing structures. Given that the poles themselves will join other rights of way structures, there is no need for a longer review process. Sixty days is more than ample time for localities to issue a permit.

It is equally important that the Commission extend this 60-day shot clock to any and all local processes governing installation of wireless facilities in rights of way. As documented above, different local governments have very different procedures for granting access to rights of way: Some have multiple permit application processes; some require providers to secure a

[17] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *aff'd sub nom. City of City of Arlington v. FCC*, 668 F.3d 229, 247-54 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[18] Public Notice at 11.

license or franchise, and some require both. Most assert that unless and until the provider accepts the often onerous terms of a license or franchise, its siting permits will not be considered. The practical impact is to inject substantial delays that impede investment in new facilities and can drive away that investment altogether.

Section 332(c)(7)(B) was intended to streamline and expedite the deployment of new wireless facilities, while preserving localities' role in reviewing siting applications. That balanced approach is undermined when localities circumvent the statute's "reasonable time" requirement by subjecting providers to licensing or franchising mandates that tie them up in endless delays. The Commission should thus adopt a ruling declaring that, whatever the siting review procedures a local government may have, the same 60-day shot clock will apply to all of those procedures together. In short, a locality's failure to act on any and all licenses and/or permits it requires within 60 days will be presumptively unreasonable.

Finally, the Commission should rule that its new shot clock applies to all rights of way as well as to all local government facilities that are located in those rights of way. Given that some localities have asserted that they are under no obligation to consider, let alone grant, permits to use rights of way, it is essential that the Commission intervene. Rights of way and municipal utility poles, streetlights and traffic facilities are ideal locations for small cells. In many cases, they are the only feasible way to provide sufficient capacity because of the need for connecting to fiber and other backhaul facilities which are located under local streets. And, in cities which have required undergrounding of all private utilities, municipal facilities are the only available locations for small cells. Moreover, municipal rights of way and structures within them are public property that serves public functions; they are not in any way "private" or "proprietary" the way a privately-owned building is.

The Commission has a sufficient legal basis to adopt this ruling. Section 332(c)(7) applies to state and local "regulation" that can impede timely siting of wireless facilities, but this term is not defined. Some localities have told Mobilitie that they are acting in their "proprietary" rather than "regulatory" capacity in controlling access to rights of way and municipal poles in those rights of way. That position, however, creates a gaping loophole because, if it were correct, cities would be immune from complying with the requirements of the Act that apply to rights of way, undercutting one of the Act's key objectives. Moreover, the fact that localities typically have adopted numerous ordinances and regulations governing rights of way underscores that they are engaging in regulatory functions in managing those rights of way.

In short, the Commission should alleviate the delays that currently afflict the small cell siting process by declaring that:

- Delay in acting on a small cell permit is presumptively unreasonable if it extends beyond 60 days.
- If a locality determines a provider must secure a citywide license or franchise before it can access rights of way, the shot clock applies to that entire process. Otherwise, cities will continue to leverage their assertion that a license or franchise is required in order to delay action on permit applications.
- The new shot clock applies to permits that seek access to rights of way and to municipal streetlight and traffic poles and other structures located in rights of way.

V. CONCLUSION

For the above reasons and those set forth in Mobilitie's Petition, the Commission should take prompt and comprehensive action against the excessive fees, long delays, and other barriers that are blocking wireless broadband from achieving its many benefits to the American public.

Respectfully submitted,

MOBILITIE, LLC

/s/ *D. Kirk Jamieson*

Christopher Glass
Senior Vice President and General Counsel
D. Kirk Jamieson
Senior Vice President, Government Affairs
Mobilitie, LLC
2220 University Drive
Newport Beach, CA 92660
(877) 999-7070

Bryan N. Tramont
John T. Scott, III
Wilkinson Barker Knauer LLP
1800 M Street, NW Suite 800N
Washington, DC 20036
(202) 783-4141

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