FEDERAL COMMUNICATIONS

COMMISSION Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of:

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

REPLY COMMENTS OF THE CITY OF MINNEAPOLIS, MINNESOTA

Introduction

The City of Minneapolis files these Comments in Reply to Comments filed in response to the Public Notice:

> "Comments sought on streamlined deployment of small cell infrastructure by improving wireless facilities citing policies; Mobilitie, LLC's Petition for Declaratory (sounds like Ruined), dated December 22, 2016."

The City of Minneapolis files these Reply Comments to respond to some of the lead industry comments on this matter. The City notes that hundreds of comments have been filed by various companies, local governments and individuals. The City is responding to only a few of these comments, and in no way concedes the statements or the claims made in comments that are not being responded to. The City previously filed initial comments on March 6, 2017. The City of Minneapolis makes reply comments as follows:

1. Alternative to Proscriptive Regulations.

Minneapolis particularly takes note of the comment of NTCA--the Rural Broadband Association on page 7 of its comments when it says:

> "Rather than proscriptive federal rules and regulations, that given the number of public and municipal comments already filed, are likely to be the subject of lengthy litigation, the Commission should consider creative ways to incent states, municipalities and tribal authorities to adopt laws, rules and regulations that fit within Commission created guidelines."

Minneapolis agrees that federal mandates issued to states and subdivisions of states, whether cities, counties or otherwise, are likely to be the subject of lengthy litigation and to spark lengthy ongoing controversy regarding statutory and administrative law issues, and to spark lengthy constitutional litigation over the sovereignty of states, regulation of State property and State subdivisions and the authority of special purpose federal agencies to interfere with the ownership and use of state and state subdivision property. Minneapolis believes that this would be unfortunate and unproductive. Minneapolis encourages the Commission to come up with a solution that is collaborative, and that has to the extent possible, everyone working toward a speedy roll out of modern telecommunications, while preserving the nation's transportation network, urban and rural street network, street lighting systems, street signal systems, street traffic, urban planning, and historic preservation. Many industry commenters are suggesting austere federal mandates to be directed to governmental units that are not part of the federal sovereign. If this is ever effective, it will not be effective in the short term. We suggest that the NTCA--the Rural Broadband Association has it right that a solution other than proscriptive federal rules and regulations needs to be worked out.

2. Expediting the roll-out of small cell.

The City of Minneapolis has tried to expedite the roll-out of small cell facilities within the City of Minneapolis, in part, in anticipation of a number of major events coming to

Minneapolis, including the Super Bowl and the Final Four. In the midst of the run up to a locally hosted MLB All Star Game, the City began the process of drafting and enacting an ordinance and rules, a fee schedule, and compliance and hold harmless agreements, to allow for an efficient non-discriminatory process to allow the use of City infrastructure in the public right of way. The City has made thousands of city light poles potentially available for this use. Some other city infrastructure could be made available, if necessary, under the provisions of Chapter 451 of the Minneapolis Code of Ordinances.

3. The City is acting as an owner and operator of State and City Property.

Some industry commenters are claiming that the city, in passing ordinances and rules regarding use of city owned and operated lighting, signal, message and signage systems is not acting as an owner and operator of that property, but as a regulator. That is simply not true. This misunderstands how municipal law works. Cities in Minnesota and the City of Minneapolis, pursuant to its Charter, act by ordinance or in some cases by resolution. That, however, is how cities, particularly cities with a strong city council form of government like Minneapolis, conduct their business. Minneapolis passes hundreds of administrative ordinances to manage its employees and to manage its properties. Ordinances can be either administrative or regulatory. Passage of an ordinance doesn't mean Minneapolis' is acting in a regulatory role. It is acting in a proprietary role in managing its personnel and its property.

4. Minneapolis manages its' roadway systems in the public interest as determined by the State.

Minneapolis is acting as a subdivision of the State and pursuant to State direction in managing it roadways and roadway systems in the public interest. Pursuant to Minnesota case law, as cited in our initial comments, it is required to act that way in managing public rights of way. The State has the power to direct that action and has done so. It needs to be remembered, however, that the light poles in the city (other than the many tens of thousands owned by the

power company) have in most cases been purchased, maintained and operated by the City of Minneapolis as city owned and operated personal property. Some of them have been assessed, in part, to neighboring property owners as part of funding street improvement projects. These light poles, which are connected to power, to city control boxes, and mounted in the streets are a "living" system of the City of Minneapolis. It is total fiction to suggest, as many industry commenters have, that the light poles are somehow the same as the ground under them. They are not. The same is clearly true of other city systems in the street such as the traffic signal system and the variable message board system.

5. The FCC should not mandate private 3rd party use of sovereign state property.

Many industry commenters are suggesting that the FCC should intervene in State and City management of its property, and mandate that the City and State permit use of public property acquired, owned and operated by cities and states for the benefit of third-party corporations involved in the telecommunications business. It is an extraordinary suggestion. As argued in our initial comments, the U.S. Constitution does not permit this approach. It is a taking of State property in derogation of the rights of a sovereign state.

It certainly wouldn't be a defense for an individual to say that they didn't take someone else's property because even though that other person or entity had acquired the property, owned the property and was operating the property that such interest could be ignored because the owner was "only managing the property." Operation of municipal infrastructure in the public right of way cannot be diminished in this way. This infrastructure occurs only because state and local governments have acquired this property and established it for the benefit of the citizens of the sovereign state in which they are located.

6. 47 U.S.C. 253(a) only applies to states and their subdivisions in their regulatory role.

Many of the Industry commenters are grossly misrepresenting the text and meaning and also the history of 47 U.S.C § 253(a). The first thing to notice about this paragraph is the first clause. It says:

> "No state or **local statute or regulation**, or other State or **local legal requirement**, …." [emphasis added]

The commenters forget to mention that this provision limits or conditions the use of the "prohibit or have the effect of prohibiting" language later in the paragraph to regulatory functions of state and local governments. That is what is meant when Section 253(a) talks about "local statute" or "regulation" or "local legal requirement." It is distinctly not talking about any government action of a state or local government that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service if the action of the state or local government is not a regulatory action as to other parties. Any other reading would allow claims that the mere location or design of city streets, city property, or city systems may offend Section 253(a) or that any other government action has that affect and is prohibited under federal law. That issue is not reached, however, because § 253(a) applies only to regulatory actions. This language is not intended to apply to a state or its subdivisions actions in making rules for the use of its own property or rules as to the conduct of its personnel in using its own property. This means regulation of the conduct of third parties. It needs to be remembered that when interpreting § 253(a) we should understand our long established precedent that we interpret it in a way that would avoid creating a conflict

between federal and state authority. As it was said in *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140, 124 S.Ct. 1555, 1565, 158 LEd.2d 291 (2004) there is: a "…working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own government should be treated with great skepticism, and read in a way that preserves the states chosen disposition of its own power, in the absence of a plain statement *Gregory* requires [*Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 LEd.2d 410 (1991)]." A regulation that directed that third parties could use the property of states and/or their subdivisions would be unconstitutional under *Printz v. United States*, 521 U.S. 898, 928, 117 Sup. Ct. 2365, 2381, 138 LEd.2d 9140 (1997) and *New York v. United States*, 505 U.S. 144, 163, 112 S.Ct. 2408, 2421, 120 L.Ed.2d 120 (1992).

Section 253(a), despite the comments of industry commenters, does not restrict the ability of state governments and their subdivisions in managing their property located in the public right of way to exercise their discretion, unfettered or otherwise, to operate and use that property in a way that the democratically elected government of the state and/or subdivision determines acting through its employees and other agents charged with using and operating government infrastructure in the public right of way.

Industry commenters make it seem like light poles and traffic signals are simply static, immovable, unbreakable, permanently enduring objects out in the world. This is completely inaccurate. They are living city systems. They cost money to acquire and they cost money to maintain. Professional judgments need to be made about how they can best be used and how they will interact with other systems. These systems include sidewalks and streets on which living and breathing people are relying upon the governmental unit to protect them and to

provide a top quality urban environment.

Once you have determined that a state or one of its subdivisions has a statute or regulation or local legal requirement that regulates third parties, then and only then do you need to interpret the scope of the language in Section 253(a) that says:

> "…may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

7. Local government management of rights of way not affected.

When you complete the analysis of Section 253(a), then you get to analysis of 47 U.S.C. § 253(c). This paragraph makes it clear that this section is not intended to affect "…the authority of a state or local government to manage public rights of way." It also makes it clear that governments can "…require fair and reasonable compensation from telecommunication providers" but that it must be done on a "competitively neutral and non-discriminatory basis". No part of 47 U.S.C. § 253 mandates private use of public property, whether the right of way itself, or public assets in the right of way. There is no mention of any private right to operate on state or state subdivision equipment systems, or other assets for the benefit of third-party telecommunications operators. Such requirement would have been a complete non-starter. No analysis of 47 U.S.C. § 253(c) is required if you do not find a violation of 47 U.S.C. § 253(a). *Level Three Communications v. City of St. Louis*, 477 F.3rd 528 (8th Cir. 2007).

8. Operating public infrastructure.

Industry commenters, time and again fail to understand what goes into making a decision to install a small wireless facility on a specific piece of public property. They keep saying that they are often no different than the equipment already deployed on utility poles. That may or may not be. However, that does not mean that putting attachments elevated on public poles does not have a physical effect on that pole. It also does not mean that we are not learning lessons from some of the equipment already deployed on public poles or the risks

associated with public poles generally. It doesn't mean that going forward we are not going to develop a pole attachment permit process that protects our residents and other users of our rights of way and our systems within the right of way designed to serve our residents and other users of the right of way. In Minneapolis, one of the bridges across the Mississippi River is the Broadway Avenue Bridge in North Minneapolis. Attachments A-1, A-2 and A-3 show a light pole that fell off the Broadway Avenue Bridge in Minneapolis and that is shown hanging down by the river. You can see on this light pole in the pictures that it has a couple of attachments already on it. They are small attachments, a camera and an antenna of some kind. You can also see that the base of the pole is rusted. It is a 30 to 32 year old pole. We cannot take for granted that all poles in the city are appropriate for attachment of additional facilities, even if they are relatively small. This applies to small cell and it applies to other things that are being attached. See also Attachment B.

Part of the reason the City of Minneapolis enacted Chapter 451 and the Rules relating thereto, is to establish a base treatment and procedure going forward for use of city facilities as there is more and more pressure to attach equipment to them. More and more work needs to be done as more and more items seek to locate on City infrastructure. This treatment, however, necessarily involves the professional judgment of city staff as to which poles are safe and appropriate for a given attachment. Following the pole falling off the Broadway Avenue Bridge, the City needed to re-evaluate all of the light poles on the Broadway Avenue Bridge. These were all 30 to 32 year old poles. City staff decided that as a reasonable precaution the City needed to replace all of them. City personnel make professional judgments about what can go where based on individual facts. A flat rule, "one size fits all", that allows small cell facilities on any class of city infrastructure is absolutely inappropriate.

The City has received requests to attach to some poles that were believed to be 60 years

old. This reinforced the need for the City field inspect poles intending to be used for attachments. Staff knowledge of infrastructure age, pole design and specification, and how deterioration can occur or accelerate over time provide the City with knowledge to screen out poles that would not adequately support attachments now or in the foreseeable future.

In Minneapolis, when someone applies to put something on city infrastructure, after the enactment of Chapter 451 in 2015, the application is reviewed by an engineering technician. That engineering technician requires a structural engineering report on the pole that certifies it can support the load proposed under the conditions that are anticipated for that pole in that location. The application is reviewed by a professional engineer, both as to the structural appropriateness of the pole, and as to the electrical hook-up. The electrical hook-up is performed by a professional electrician. The proposed electrical design has to be consistent with the city's specification for the system it is being attached to. Individual facts will determine whether or not an attachment is appropriate in any given location. It is the presence of these individual facts and the strong safety component that make an automatic grant of a permit absolutely inappropriate.

Industry commenters are suggesting that they should get an automatic permanent permit to put a small cell facility on another entity's property simply because a community, which may only have one part-time employee, or which may have other justifications, has failed to act within a certain period of time. However, even when a deadline is missed, any facility being attached to public property in the right of way needs to be evaluated for its safety to pedestrians and traffic who are in not part of the application and siting process. It is a public trust, both for the right of way manager and for any regulatory agency seeking to intervene in the process and compel issuance of a permit. Physics can be an ugly teacher. If you attach weight hanging out from a pole, it changes the whole nature of the physics. Levers, laws of physics and wind

loading come into play as do unseen defects in public structures. In Minneapolis and other established cities where many of the poles are quite old, they were not designed for anything other than their original use and may not be suitable for anything else. Automatic grants of permits cannot be allowed irrespective of the condition of the pole, the location of the pole, the use suitability of the pole or the connection of the electrical system.

In addition to being totally unauthorized by law, such a practice would be in total violation of the mandating agency's obligation to provide a safe environment to those who use the nation's rights of way. In Minneapolis this point was emphasized again in early March of 2017 when a 30 foot pole suddenly fell across 50th Street South in Southwest Minneapolis striking a car. 50th Street South is one of the major east west arteries in the southwestern section of the city. Not all poles are ready or appropriate for attachments. Past errors in this regard, if they occurred, do not merit future errors in this regard. It is totally unacceptable to have automatic grants of permits that may endanger public safety.

9. The process of approving an attachment site.

Industry commenters are drastically underestimating the costs to cities of having installations on their poles. In Minneapolis we believe applications to locate on City equipment require careful scrutiny by City staff. Under Chapter 451 of our ordinances, when someone is applying to use City infrastructure in the right-of-way, they do not need to acquire permission pursuant to the Zoning Code. The Public Works Department has responsibility for the reviewing and granting or denying those applications. Applications are screened by an engineering technician. The application and any required structural analysis are also reviewed by a professional engineer. If the proposal is to use an existing pole then a field inspection is conducted. Staff visit the pole and attempt to confirm the observations and conclusions of the structural engineers report submitted by the applicant. This may involve "sounding out the

pole" with a hammer as to structural strength. Additionally, an engineer reviews the interaction of the poles electrical equipment with the electrical equipment of the City that will be connected to and/or adjacent to City electrical or control boxes. In some cases these reviews determined that the electrical control boxes cannot accommodate wireless infrastructure without control modification or replacement. The City uses a professional electrician to hook the attachment up to the City's electrical system.

In Minneapolis, electricity for these attachments is provided by the City. Minneapolis is trying to accelerate deployment of these facilities as a result of all the various activities that are taking place in Minneapolis and the generally increasing demand. Hooking these facilities up to Minneapolis provided power made sense in an effort to expedite deployment. It is the practical resolution that was reached with the cell phone industry. It does have some problems, however. The power provided to the facilities located on City infrastructure costs money. It is a cost to the City. Typically there is not a separate power meter for the small cell facility. Additionally, the City does not have the ability to sell metered power to the entity desiring to attach electrically operated facilities to City infrastructure. Minnesota Statutes §216B.37 et seq. makes clear that in any part of Minnesota there is only one permissible provider of electric power. In Minneapolis that provider of electric power is Xcel Energy. It is not the City of Minneapolis.

The City and interested applicants have determined that it is not practical for each applicant to run power to its attachment form Xcel and have a separate meter. As a result we have agreed with the applicants that they can use City power (provided to the City by Xcel). It does have a cost to the City, but we cannot act as a re-seller of metered power. These facilities are typically operated around the clock and do consume significant power. We have estimated that our costs for power and other on-going costs can currently be fairly approximated at $65.00 per month. It may now and in the future be up to or over $100 per month, just for the costs of

electricity, for some of the next generation small cells that are being or will be installed. Some future next generation small cells may require a cost based rent of $163 per month (including power). We currently bill rent for conventional installations annually at $763.85 ($63.65 per month) with a three percent per year escalator. We believe this is a reasonable fee.

We also charge an establishment fee. We do not charge the fee merely for applying. We charge it only when a permit is granted. The fee is significant at $4,000.00 per pole but does include costs associated with establishing electric cable and connections, employing an electrician, using a professional engineer, using an engineering tech and otherwise ensuring a safe installation. We do not believe this is an unreasonable fee. However, the reasonableness of it may change as large numbers of applications are received and we can further evaluate the amounts being collected against our labor and other costs.

We do, however, ardently disagree with the industry commenters' narrow view of fees. They don't want there to be any consideration of the costs to the system of these facilities being added on, of the labor costs caused by them, and they particularly don't want to share in the cost of purchasing, deploying, installing, and maintaining the pole. If private facilities are going to be located on public poles, they should be sharing all of these costs. In any event, it is the City's position that the management, leasing, and use of state and state subdivision infrastructure in the public right of way is the province of sovereign state governments and their subdivisions and is not the province of a federal agency. This is particularly true when there is no clear statement in federal law that such a use of state property is intended. Section 47 U.S.C. §253 specifically reserves to states and their subdivisions rights to manage public rights-of-way from a regulatory perspective and doesn't address in any way, as it shouldn't, the obvious state and state subdivision right to manage the use of state and state subdivision property.

10. There is no Commission authority to mandate local zoning changes.

A number of industry commenters have insisted that their commission should issue mandates to local governments regarding their authority to require approval of installations under the local zoning code. They point to no Congressional authority to issue mandates to states or their subdivisions nullifying their authority to engage in land use planning through the use of a zoning code. There is no indication of Congressional intent to trench on the states' arrangements for conducting their own government through state authorized land use planning. Such action would be contrary to the basic division of power in our constitutional scheme. *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140, 124 S.Ct. 1555, 1565, 158 LEd.2d 291 (2004). Often included in local zoning codes or as otherwise administered by state governmental units are heritage preservation provisions. Small cell installations were not an original part of historic sites. It is legitimate for state and local governments to preserve their historic sites by minimizing the impact of intrusive modern installations wherever reasonably possible to do so. This may be by camouflage, by requirements of using consistent colors on poles, or by carefully determining what spaces are appropriate for such installations. These actions are a proper part of state and local governments' functions in managing the right of way.

11. Timelines for small cell requests.

Industry commenters are concerned about the time lag in responding to requests to locate small cell and other facilities on public infrastructure in the right of way. Minneapolis is aware of the urgency in responding to these requests. The industry underestimates the scope of the necessary review and the manpower, expertise, and time required to conduct the review. We have been able to get city review and approval of a final permit on city infrastructure in the public right of way down to about an average of 19 business days if properly submitted. We are not saying that we can do that in all cases. It depends upon the particular circumstances and the

amount of applications. We do understand the concern. Since we handle applications on a first come, first served basis, a large bulk application for numerous sites could delay subsequent applications. However, if we can charge reasonable establishment fees and if we can reasonably forecast applications for these sites, then we can hire appropriate staff and expedite the processing of applications. We do not agree that federal statutes give any authority to regulate the use of state or local subdivision systems by the federal government.

12. State Legislation.

The Wireless Infrastructure Association on page 69 of its comments, notes that several states have adopted statutes specifically limiting local governments cost recovery. They cite to Minnesota Statutes §§ 237.163 and 237.162 as an example. These statutes, however, do not apply to locations on existing city systems or on city personal property. They apply to the right of way itself. They are not designed to talk about hooking up to city power and interacting with city assets with their own individual histories and capabilities. They do make a good point, however. The good point is that the place for restrictions on local governments and on states in managing their own infrastructure is in state legislation. The cell phone industry has launched a massive campaign across the country to introduce state legislation furthering their interests. Local governing bodies and state legislatures are the proper place for this part of the debate. The Commission is not the proper place for such limitations on state governments and their subdivisions. The states can control their own property and their own subdivision's use of property. The Commission cannot.

13. State regulation of State subdivisions.

T-Mobile, on page 24 of its comments, mentions that co-location zoning must be processed within 60 days in Minnesota. States can regulate their subdivisions in many cases. The FCC is not a state. Additionally, the statute referred to does not apply to the management

and use of state and local government property. It applies only to regulatory decisions.

14. Municipal poles and right of ways as State managed public property.

T-Mobile, on page 31 of its comments, points out that municipal poles and right of ways are public property intended to serve as the locations for public services. It is true that municipal poles in the public right of way are intended to provide a number of specific services and are managed by state and local governments. They may or may not be suitable for providing additional services to be provided by third-party private companies like T-Mobile. They are, however, under the supervision of a sovereign state that is providing the service as opposed to the federal government. They are held by the city in trust for the public, but it is the public through the state sovereign. The cell phone industry is recognizing this fact through their vigorously pursued proposals at the various state legislatures.

On page 33 of T-Mobile's comments, they say, "If congress meant to exclude municipal-owned poles, or ROW from the statutes, it would have done so explicitly." T-Mobile has this exactly backwards. See the prior quote from *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140, 124 S.Ct. 1555, 1565, 158 LEd.2d 291 (2004). It would be extraordinary for Congress to issue mandates regarding management and use of state or municipal owned poles. If that had been the intent, that should have been specified in the legislation. On the contrary, a fair reading of both § 253 and § 332 is that state or local government management, particularly of their own facilities, is protected under federal law. It is also protected in the U.S. Constitution.

15. Administrative ordinances are not "regulatory".

Mobilitie, LLC comments on page 21 that the fact that localities typically have adopted numerous ordinances and regulations governing right of way underscores that they are engaging in regulatory functions in managing those rights of way. This shows the lack of understanding

of Mobilitie, LLC about how municipalities function. Municipalities govern even their own property and their own employees often by ordinance because that's what their charter requires. Minneapolis has hundreds of administrative ordinances. Ordinances detailing how cities will use their own property are not regulatory and don't come within 47 U.S.C. 253(a). They are instructions from the city council to the staff of those cities on how to operate. They are part of a proprietary operation for a governmental unit that functions pursuant to rules that are set out through ordinances.

16. The City has a right to rent out their property.

Cities have been renting out their property in the right of way for many years. See *St. Louis v. Western Union Telegraph Company*, 148 U.S. 92, 97 (1893). This is a legitimate practice in managing the right of way. 47 U.S.C. § 253 recognizes this pre-existing concept of reasonable compensation. The house debates show that members of Congress thought the legislation guaranteed that cities and local governments would have the right to not only control access within their city limits, but also to set the compensation level for use of the right of way. See 141 Cong. Rec. H8460-01 (statement of Representative Barton).

17. Mandates to cities are not the answer.

Industry commenters are proposing a scheme for use of public infrastructure in the right of way. This is not supported by the authority of 47 U.S.C. 253 or 47 U.S.C. 332. It is unconstitutional as applied to states and their subdivisions. What these industry commenters are looking for, between fee restrictions, mandated placements, and automatic grant provisions, amounts to a massive subsidy from state and local governments at the direction of a federal agency. There is no statutory or constitutional basis for it. As the city suggested at the beginning of these reply comments, the answer is probably the one suggested on page 7 of the comments of NTCA--The Rural Broadband Association when they suggest avoiding

proscriptive federal rules and regulations that are likely to lead to lengthy litigation and consider creative ways to give incentive to states, municipalities and tribal authorities to adopt laws, rules and regulations that fit within commission suggested guidelines. That should be the answer for the Commission.

Meanwhile, Minneapolis continues to expedite deployment in Minneapolis, processing scores of applications to locate small cell facilities on Minneapolis infrastructure in the public right of way.

Dated: April 7, 2017

SUSAN L. SEGAL

City Attorney
By:

/s/ Corey M. Conover
COREY M. CONOVER
Assistant City Attorney
350 S. Fifth Street Room
210, City Hall
Minneapolis, MN 55415
Corey.Conover@minneapolismn.gov
(612) 673-2182
Attorneys for City of Minneapolis

Exhibit A-1

Exhibit A-2

Exhibit A-3

Exhibit B