

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

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

Comments of the City of Philadelphia

I. INTRODUCTION:

The City of Philadelphia (“City”) respectfully submits these Comments in response to the Commission’s Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment in the above matter (“Wireline NPRM”) and in the matter captioned *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 (“Wireless NPRM”) (collectively, the “Broadband Proceedings”).

As the nation’s sixth most populous city with over 1.5 million residents, hub of a metropolitan region of over 6 million, and home to many technology companies, Philadelphia is committed to promoting broadband technology and broadband deployment for its residents. Philadelphia has long recognized that ubiquitous, affordable broadband service, wireless and wireline, is critical for our economic development and a critically important resource for our citizens. This commitment is reflected in its many policies and initiatives, including a major effort to bring the advantages of broadband to lower income residents. The presence of the many broadband service providers in the public rights-of-way throughout Philadelphia is testament to the fact that City policies have facilitated the development of broadband in the past and continue to do so now. However, Philadelphia also strongly believes that ubiquitous broadband service can and must always be accomplished without impairing the City’s ability to regulate its rights of way, preserve its historic sites and districts, and maintain the public safety. To accomplish these goals, it is essential that control over these central government functions remain with the City.

Philadelphia has authorized many small cell and DAS installations in its public rights-of-way and, for a number of years, has worked with providers to develop creative solutions to

install the infrastructure for this technology in the City, including on City property and facilities, as well as more traditional wireline infrastructure in the rights-of-way. With Philadelphia's successful management of access to municipal property and its public rights-of-way, broadband service is available to households and businesses in most of the geographical area of Philadelphia. The Commission should not interfere with these local policy objectives – shared by the great majority of local governments, large and small, including those filing in these Broadband Proceedings – by imposing preemptive national rules to accommodate an industry that really wants no local regulation of any kind, however reasonable or however responsive to its legitimate needs.

II. THE COMMISSION LACKS THE POWER TO CREATE A “DEEMED-GRANTED” REMEDY AND, IF IT HAD THAT POWER, SUCH A REMEDY WOULD IRREPARABLY HARM LOCAL GOVERNMENTS

1. The Unambiguous Statutory Language Of § 332(c)(7) Does Not Give The Commission The Power To Create A “Deemed-Granted” Remedy

In its Wireless NPRM, the Commission asks for comment on whether it should interpret 47 U.S.C § 332(c)(7) as meaning that if a locality “fails to meet its obligation under Section 332(c)(7)(B)(ii)” to act within a reasonable time then its authority over decisions regarding wireless facilities lapses and the application is deemed granted.¹ Philadelphia's answer is an emphatic “no.” The language of Section 332(c)(7)(B)(v) unambiguously states that the remedy for a party adversely affected by a failure of a state or local government to act is its ability to, within 30 days after such failure to act, “commence an action in any court of competent jurisdiction.” The city then has the opportunity to rebut the presumption that the disputed timeframe is reasonable.

Nowhere does the statute say or imply that a city loses all of its authority to act if it failed to act within a reasonable time. The possibility of a city failing to act within a reasonable time was clearly contemplated by the drafters, and the remedy is explicitly provided in the statute – the party adversely effected may commence an action in any court of competent jurisdiction.” Any deemed granted remedy is inconsistent with the plain language of Section 332(c)(7) and should be rejected.

¹ *Wireless NPRM* at 7, para 14.

2. A “Deemed Granted” Remedy Would Usurp Local Power And Create Unacceptable Risks To Public Safety

The Wireless NPRM invites commenters to address whether it should adopt one of three options discussed as a mechanism for implementing a “deemed granted” remedy if a state or local government fails to act in a “reasonable period of time” on an application to install wireless facilities in the public rights of way.² For the reasons discussed below, any of the three “deemed granted” remedies proposed by the Commission would be inappropriate.

Current FCC policy, as outlined in the Wireless NPRM, follows the plain language of 47 U.S.C. § 332(c)(7)(B)(ii) to provide that state or local agencies must act on small cell siting applications within a “reasonable period of time,” presumptively set at 90 days for *complete* collocation applications generally, 150 days for other types of complete applications³, and 60 days for complete collocation applications that meet certain size and other restrictions.⁴ It also provides that, upon a state or local government agency’s failure to act within a reasonable period, the applicant may sue the agency in federal court. In addition to these strong remedies for tardy review and decision, in place for several years, the Commission now invites commenters to address whether it should adopt a “deemed granted” remedy if state or local governments fail to act in a federally mandated period of time, offering three such remedies for specific comment.

It is the City’s strong belief that *any* deemed granted remedy would usurp regulatory functions that have traditionally been the prerogative of state governments and their political subdivisions. The harm to cities is obvious. “Deemed granted” remedies are an invitation to well-funded industry applicants to exploit tight deadlines to their commercial advantage, ignoring the “complete application” requirements of the current rules and forcing resource-limited local governments to act in too short a time to evaluate even the basic structural issues that go directly to public safety, let alone neighborhood impact. The timeframes in the *2009 Shot Clock Declaratory Ruling* and particularly the 60 days in the *2014 Infrastructure Order* are already short, though local governments have learned to live with them, notwithstanding their limited resources for rapid review. “Deemed granted” remedies will make a challenging situation

² *Wireless NPRM* at 5, para 9.

³ *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14008-10, 14013-14, paras. 37-42, 49-50.

⁴ *2014 Infrastructure Order*, 29 FCC Rcd at 12957, para. 216.

impossible and ensure that reasonable and appropriate review simply cannot happen, to the detriment of the safety of our citizens.

The Commission's suggestion that a one-size-fits-all federal timeframe is appropriate for small-cell siting applications ignores the fact that states and localities vary drastically in size, climate, historic architecture, infrastructure, and volume of siting applications. The level of review reasonable for one municipality will not be appropriate for others with very different conditions. Local governments are best suited to address these different conditions since they have the particularized knowledge about their rights-of-way necessary to determine whether a specific installation in a specific location would be safe.

In this regard, it should be noted that "small cell" typically does not mean facilities weighing a few pounds and a cubic foot or so in size. This technology typically uses pole-mounted antennas of up to three or even six cubic feet in volume with equipment cabinets of 17 cubic feet or more.⁵ Equipment cabinets of that volume can measure two feet by two feet by over four feet, and are not "small" – or *de minimus* in weight – by any accounting, particularly when multiple antennas and cabinets are mounted on a single pole. Some small cell/DAS providers seek to place large numbers of poles with such antennas and cabinets in the public rights of way of congested, densely populated cities like Philadelphia. The safety concerns they present to our citizens are very real and can be addressed only by adequate engineering review. "Deemed granted" remedies, including all of those described by the Commission, will preclude that review.

The Commission asks commenters to address whether the Commission should consider adopting different time frames for review of facility deployments not covered by the Spectrum Act.⁶ The Commission then suggests "harmonizing" the period deemed reasonable for non-Spectrum Act collocation applications by reducing the time from 90 to 60 days.⁷

The City strongly opposes any attempt to "harmonize" reasonable time periods that would further shorten the reasonable period that cities have to act on wireless applications. As

⁵ See e.g. RCW 80.36.375, a recently enacted Washington statute, and CO HB1193, a bill recently signed into law by the Governor of Colorado, each defining "small-cell" wireless technology facilities as those using pole-mounted antennas of up to three cubic feet in volume with equipment cabinets of seventeen cubic feet. The California Senate recently passed SB-649 that would allow for six and twenty-one feet for the antenna and equipment cabinets, respectively. These statutes were crafted with full industry participation, including, we can be sure, industry input on the size requirements of its small cell facilities.

⁶ *Wireless NPRM* at pages 8-9, paras 18.

⁷ *Id.*

noted above, cities are already resource constrained and any further attempt to further limit the current time periods for review of applications will seriously and adversely affect public safety as well as diminish the proper role, under our federalist system, of state and local governments in regulating local rights of way.

3. A “Deemed Granted” Remedy Could Permanently Harm Historic Districts

The Commission acknowledges that many courts have held that municipalities may, without violating Section 332(c)(7), deny siting applications on the grounds that the proposed facilities would adversely affect an area’s aesthetic qualities.⁸ The Commission asks for comments on whether it should provide specific guidance on how to distinguish between legitimate denial of applications based on evidence of specific aesthetic impact of proposed facilities and those based on more “generalized concerns.”⁹ Philadelphia strongly believes that such aesthetic considerations are best left for state and local governments. As the setting for the first Continental Congress, the signing of the Declaration of Independence and drafting of the United States Constitution, Philadelphia has treasured historic sites and historic districts that have been maintained since the birth of the nation. The City is legitimately concerned about the adoption of any federal regulatory scheme that would override its continuing effort to preserve the nature and character of these historic sites and districts.

Further, a deemed granted remedy will hinder broadband access in historical districts and similar environments. Some applicants will seek to install small cell infrastructure with aesthetic elements that could destroy the character of these city spaces. In such situations, cities must rely on art or historical commissions that have the subject matter expertise, and the knowledge of the particular city, to find creative solutions allowing small cell infrastructure to be successfully deployed without impairing the special character of historic neighborhoods. If cities are forced to review applications under an oppressive timeline with a “deemed granted” remedy, there will be no time to work with applicants in consultation with commissions of expertise to find mutually satisfactory solutions that permit deployment while preserving the aesthetic character of historic neighborhoods.

⁸ *Wireless NPRM* at 34, para 92.

⁹ *Id.*

III. NO SHOT CLOCK SHOULD START RUNNING UNTIL APPLICANTS SUBMIT A COMPLETE APPLICATION WITH AN ENGINEERING REVIEW AND STRUCTURAL ANALYSIS

In its Wireless NPRM, the Commission seeks comment on whether it should provide further guidance to address situations in which it is not clear when the shot clock should start running, or in which localities and industry disagree on when the time for processing an application begins.¹⁰ Philadelphia strongly believes that the Commission should provide guidance that, at a very minimum, the shot-clock should never run until a complete application has been submitted by the applicant, accompanied by a full set of engineering drawings showing the placement, size and weight of the equipment, and a fully detailed structural analysis. Because it is impossible for cities to evaluate incomplete applications without such documentation, any period prior to their submissions should not be considered part of any “reasonable period of time” subject to a shot-clock.

The Commission also seeks comment on what siting applicants can or should be required to do to help expedite or streamline the siting review process.¹¹ The longest time in the application review process often is the time required to get engineering information from the applicant sufficient to evaluate the proposed installations. As discussed above, it is a necessary part of the review process, particularly as to the safety of proposed installations. The Commission should clarify its rules to make clear that applicants must submit complete applications that include engineering drawings and detailed structural analyses as a condition of local government review. This will do much to expedite the review process in Philadelphia and all cities.

IV. THE COMMISSION SHOULD NOT ENACT RULES TO CONSTRUE “FAIR AND REASONABLE” COMPENSATION UNDER SECTION 253(c) OF THE TELECOMMUNICATIONS ACT

In its Wireline NPRM, the Commission seeks comments on whether it should enact rules “to promote the deployment of broadband infrastructure” by preempting certain state and local laws.¹² Any attempt to preempt state or local laws should not include preemption of state or local government’s ability to determine what is “fair and reasonable compensation” under 47 U.S.C. §

¹⁰ *Wireless NPRM* at 9, para 20.

¹¹ *Wireless NPRM* at 4, para. 7.

¹² *Wireline NPRM* at pages 31-32, paras. 100-101.

253(c). Section 253(a) forbids state and local governments from creating regulations or local legal requirements that have the effect of prohibiting any entity from providing intrastate telecommunications service. Section 253(c) makes clear that Section 253(a) should not affect the authority of the state or local government from managing the public rights-of-way or to require “fair and reasonable” compensation from telecommunications providers.

The FCC should not enact rules to determine what is considered “fair and reasonable” under the Act because those decisions were intended to and should be left to the courts. As was pointed out in local government comments in a prior Commission proceeding, the FCC does not have authority to determine whether a local government’s right-of-way management fees are “fair and reasonable compensation” under 253(c).¹³ Section 253(c), which deals with rights-of-way compensation and management matters, was deliberately omitted from the provisions subject to preemption in Section 253(d) because Congress intended that any challenge to local rights-of-way requirements should take place in the federal district court in that locality.¹⁴ Decisions on fair and reasonable compensation must reflect local government interests and the particular circumstances of their public rights-of-way. It has never been within the Commission’s expertise to perform the required investigations and carry out the required balancing of interests in each local jurisdiction. Those inquiries belong in the federal district court for the local jurisdiction, as Congress intended. Further, any attempt to limit state or local government’s ability to collect costs would be deeply problematic. Taxpayers should never bear the burden and expense of broadband deployment by subsidizing wealthy for-profit applicants and the Commission should not intervene in a way that would erode the local government’s ability to recoup costs imposed upon it by wireless applicants.

V. CONCLUSION

For the foregoing reasons, the City urges the Commission not to create a “deemed-granted” remedy for wireless applications and opposes any attempt by the Commission to construe what is “fair and reasonable compensation” under Section 253(c) and limit local government’s ability to collect fees in its public rights-of-way. The City respectfully urges the Commission to address the concerns articulated in these Comments, and to investigate the issues it has identified.

¹³ See City of San Antonio et al. Comments, WT Docket No. 16-421 at 22.

¹⁴ See *id.* at 22, *citing* 141 Cong. Rec. S8213 (daily ed. June 13, 1995)(statement of Sen. Gorton).

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Respectfully submitted,

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