Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The City and County of San Francisco ("San Francisco" or "City") submits these comments in this proceeding in which the Federal Communications Commission ("Commission" or "FCC") is exploring actions the Commission could take to remove regulatory barriers to infrastructure investment at the federal, state, and local level.[1] San Francisco, like many local governments, supports efforts to deploy the infrastructure necessary to make sure that San Francisco's businesses, residents, and visitors have access to the most advanced broadband networks available—whether those networks are wireless or wireline. San Francisco understands that high-speed internet access fuels business growth and makes our neighborhoods and communities better.

When Congress enacted the Telecommunications Act of 1996, the state of the art for wireless facilities was to install large base stations on towers or tall buildings to provide coverage over large geographic areas. Wireless carriers had significant coverage gaps, even in major cities. Congress could not have contemplated that some twenty years later coverage would no longer be a major concern, but instead, wireless carriers would need to address capacity issues. Nor could Congress have contemplated that wireless carriers would seek access to the public right-of-way to install and maintain small cells to increase capacity.

Since 2007, San Francisco has been a leader in enabling telecommunications carriers to deploy wireless facilities, particularly "small cells" and distributed antenna systems ("DAS"), on utility and other poles in the public right-of-way. Recently, San Francisco has seen an explosion in the number of such facilities being installed in the public right-of-way. That growth will likely continue as the carriers move forward with their 5G deployment. San Francisco intends to support that growth through an efficient permitting process and by making its own assets available for such use.

However, San Francisco believes that such growth should not be at the expense of the public health, safety, or welfare. Local governments should not be required to allow wireless carriers to install facilities in locations or in a manner that impairs public vistas, detracts from scenic and historic

[1] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 2017 WL 1443827 (2017) ("*Wireless NPRM/NOI*").

resources, or blights neighborhoods. Nor should local governments be required to make municipal assets available for use by wireless carriers at regulated rates. The wireless carriers should fully compensate local governments for using their streetlight and other poles to install and maintain wireless facilities.

In these comments, San Francisco will discuss: (i) how its permitting program for small cell and DAS facilities in the public right-of-way is expeditious and requires the carriers to pay only the City's cost-based fees; and (ii) how its new licensing program for such facilities has enabled carriers to expand their networks at a reasonable cost by allowing them to use City assets. These comments will also show how these programs have enabled San Francisco to protect its historic resources and neighborhoods by regulating the location and appearance of these facilities.

With regard to the Commission's Notice of Proposed Rulemaking, San Francisco addresses the Commission's suggestion to add new remedies to its shot clock ruling. San Francisco shows that the Commission has not identified a legal basis for rejecting its prior finding that applicable statutory language does not support such a remedy. San Francisco also asks the Commission to make clear that the installation of wireless facilities on utility poles that do not have existing wireless facilities are not collocations—therefore the 150-day shot clock applies to applications to install DAS facilities or small cells on such utility poles.

There is also no need for the Commission to require a shorter shot clock for small cells and DAS facilities or a separate shot clock for "batched" applications. While San Francisco has been able to process those applications within 90 days, it has done so only by limiting the number of applications each carrier can submit each week. However, these facilities still require significant local review. Many local governments could be hard-pressed to meet shot clock deadlines shorter than 90 days for collocations and 150 days for new wireless facilities.

Finally, with respect to the Commission's Notice of Inquiry, San Francisco does not see the need for the Commission to further examine 47 U.S.C. section 253 and section 332(c)(7) in order to provide any new or updated guidance or determinations as to the scope and meaning of those provisions. The Commission's prior rulings, and dozens of court decisions, have made the purpose, scope, and meaning of those provisions clear to the industry and state and local governments. Nor

should the Commission consider whether it has the authority under section 253 to regulate the license fees local governments charge for telecommunication carriers to use their assets to install and maintain wireless facilities. As the Commission has already found, preemption does not apply to local actions taken in a proprietary capacity.

II. STATEMENT OF FACTS

A. San Francisco Has Permitted Hundreds of Wireless Facilities on Utility Poles in an Expeditious Manner and at Reasonable Cost

When the first DAS provider approached San Francisco in 2002 about installing its facilities on existing utility poles in the public right-of-way, San Francisco had no specific mechanism in place for approving the use of its public right-of-ways for this purpose.[2] In 2007, San Francisco enacted S.F. Administrative Code § 11.9, which authorized its Department of Public Works to issue permits to allow telephone corporations[3] to install wireless facilities on existing utility poles.[4]

Section 11.9 ensured that any permitted wireless facilities would meet San Francisco's aesthetic criteria. In particular, San Francisco was concerned about the installation of wireless facilities in public right-of-ways that are in scenic corridors, in front of parks or historic buildings, and in historic districts. As with all San Francisco permits, section 11.9 included a provision allowing members of the public to participate in the permitting process by protesting the issuance of the permit.

In 2011, San Francisco improved the permitting process for wireless facilities by repealing Administrative Code § 11.9 and replacing it with Public Works Code Article 25.[5] Like its predecessor,

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[2] See *NextG Networks of Cal., Inc. v. City & Cnty. of San Francisco*, 2006 WL 1529990 (N.D. Cal. June 2, 2006); and *GTE Mobilnet of Cal. L.P. v. City & Cnty. of San Francisco*, 2007 WL 420089 (N.D. Cal. Feb. 6, 2007).

[3] To be an eligible telephone corporation, an entity could either be certificated by the California Public Utilities Commission to provide telecommunications services in California or be licensed by the FCC to use spectrum in San Francisco to provide wireless services.

[4] See generally, *NextG Networks of Cal., Inc. v. City & Cnty. of San Francisco*, 2008 WL 2563213 (N.D. Cal. June 23, 2008*), on reconsideration*, 2009 WL 5469914 (N.D. Cal. Sept. 25, 2009). In that case, the district court found that San Francisco's ordinance was not preempted by 47 U.S.C. § 253(a).

[5] Article 25 is available at http://library.amlegal.com/nxt/gateway.dll/California/publicworks/publicworkscode?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1.

Article 25 authorizes the Department of Public Works to issue permits for wireless facilities on utility poles. Article 25 also authorizes the Department of Public Works to issue permits for wireless facilities on streetlight poles and transit poles. It also ensures that all permitted wireless facilities would comply with certain aesthetic criteria.

Article 25 allows for the installation of wireless facilities in the public right-of-way in any part of San Francisco. Applicants for wireless permits can apply to install wireless facilities in any zoning district (including residential) and even in sensitive areas such as historic districts and near parks and open spaces. An applicant for an Article 25 permit does not need to describe the technology it intends to deploy (i.e. small cell or DAS), the intended use of the facility, whether the facility is needed to fill a significant gap in coverage, or whether the applicant explored other means for filing a purported gap in coverage. San Francisco only looks at the location and design of the proposed facility to make sure it meets the City's compatibility standards.

Under Article 25, an application for a permit to install a wireless facility on a utility pole is submitted online and first reviewed by the Department of Public Works. Public Works has 30 days to determine if the application is complete. Once the application is complete, Public Works will refer the application to the Department of Public Health, to verify that radio frequency emissions from the proposed facility comply with FCC standards and that noise levels from the proposed facility comply with San Francisco's requirements. Public Works will also refer most applications to the Planning Department to determine whether the proposed facility meets San Francisco's neighborhood compatibility standards. In instances where a proposed wireless facility is near a park or plaza, the Recreation and Park Department will also review the application.

If all reviewing departments approve the application, Public Works will issue a notice of tentative approval, which is then mailed to local residents and posted near the proposed location of the wireless facility. Absent a protest, Public Works will grant the permit. If local residents file a

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In *T-Mobile West LLC v. City & Cnty. of San Francisco*, 3 Cal. App. 5th 334 (2016), *review granted*, 2016 WL 7436414 (December 21, 2016), the California Court of Appeal found that applicable state law granting telephone corporations a franchise right to install and maintain telephone lines in the public right-of-way did not preempt Article 25. The Court found that the state law did not prohibit San Francisco from enforcing its aesthetic concerns when reviewing applications to install wireless facilities on utility poles.

protest, a hearing will be held. Following the hearing, the Director of Public Works will issue an order approving or disapproving the application. If the Director approves the application, Public Works will issue the permit. Under San Francisco's Charter, local residents may appeal the permit. The applicant may also appeal a permit denial.[6]

Despite review by many departments, and the potential for a protest and a public hearing, San Francisco's permitting process for wireless facilities on utility poles has been expeditious. The average number of days it took San Francisco to process those applications was 76.[7] San Francisco has also worked with carriers when special circumstances required them to install a large number of new facilities in a short time period.[8]

San Francisco's permitting program for wireless facilities on utility poles has been quite successful. Since 2007, San Francisco has received more than 1,000 applications for such permits. San Francisco granted nearly 90 percent of those applications.

San Francisco's permitting process for wireless facilities on utility poles has also ensured reasonable costs for the permittees.[9] Permit fees for wireless facilities do not generate revenues that San Francisco can use for other municipal purposes. Nor does San Francisco impose franchise fees or any type of right-of-way use or access fees.[10] San Francisco's wireless permit fees only allow

[6] S.F. Charter § 4.106(b). The appeal process can run an additional 40 days or so.

[7] That does not necessarily mean that wireless carriers will immediately deploy. It takes the permittees an average of 210 days to notify San Francisco that installation is complete.

[8] As an example, for the 2016 Super Bowl, for which Verizon Wireless was a major sponsor, Verizon Wireless wanted to make sure that its customers enjoying Super Bowl week festivities in San Francisco had the coverage they needed. To meet that demand, between June 2014 and September 2015 San Francisco granted applications for Verizon Wireless to install 67 facilities on utility poles in the downtown area.

[9] San Francisco's fees are set forth in Article 25. They are as follows: (a) an application fee of $450; (b) when required, a Planning Department fee of $190 plus time and materials; (c) when required, a Recreation and Park Department fee of $125 plus time and materials; (d) a Department of Public Health fee of $181 plus time and materials; and (e) an inspection fee of $150. There is an additional fee if a hearing is required.

[10] Like many states, for over 100 years California has prohibited local governments from charging franchise or other fees to telephone corporations for the privilege of using the public right-of-way. See *County of Los Angeles v. Southern Cal. Tel. Co.,* 32 Cal. 2d 378, 384 (1948).

San Francisco to recover its costs for reviewing the permit applications and inspecting the facilities after installation. [11]

B. San Francisco Has a Two-Tiered Permitting Process for Wireless Facilities on Private Property

San Francisco's Planning Code establishes permitting requirements for wireless facilities on private property. In parts of San Francisco that are zoned commercial or industrial, the Planning Code generally requires the applicant to obtain only a building permit to install its facility on private property. The building permit process can be as short as 30 days if the initial application is complete. Within 30 days after receiving an application, the Planning Department will notify the applicant whether the application is complete and, if not, what additional information is needed. At that point, timing is under the applicant's control. The Planning Department will generally complete its review of revisions to the application within ten days. Once a building permit is approved, the applicant may begin construction of the facility.

In parts of San Francisco that are zoned residential or neighborhood-commercial, the Planning Code requires a conditional use authorization ("CUA") to install a wireless facility on private property, in addition to a building permit. The CUA process can take six to nine months depending on how complete an application is when submitted and how long it takes the applicant to respond to the Planning Department's notice that the application is deficient.

Once the Planning Department has determined that the application is complete, which means that all of the Planning Department's concerns have been addressed and all required documents have been submitted, the Planning Department will calendar the matter for a public hearing before the Planning Commission. If the Planning Commission grants the CUA, local residents then have 30 days to appeal the Planning Commission's decision to the Board of Supervisors.[12] The applicant may

[11] This is a requirement of California law. *See* Cal. Gov. Code § 50030.

[12] It has been many years since the Board of Supervisors heard an appeal from the Planning Commission's issuance of a CUA for a wireless facility—let alone voted to uphold the appeal. In the past, a number of wireless carriers sued San Francisco under 47 U.S.C. § 332(c)(7) after the Board of Supervisors upheld such appeals. See, e.g., T-*Mobile West Corp. v. City & Cnty. of San Francisco*, 2011 WL 570160 (N.D. Cal. Feb. 14, 2011); *MetroPCS, Inc. v. City & Cnty. of San* Francisco, 2006 WL 1699580 (N.D. Cal. June 16, 2006); and *Bay Area Cellular Tel. Co. v. City & Cnty. of San Francisco*, 2005 WL 3157490 (N.D. Cal. Nov. 23, 2005). No court ever found that federal law preempted San Francisco's determination.

also appeal a CUA denial. Once those 30 days have passed, the applicant may submit an application for a building permit so that construction can begin.

The Planning Department's fees to review applications to install wireless facilities on private property are consistent with the department's fees for other CUAs. They include a base fee of $5,332.00.[13] The Planning Department could also charge the applicant for extra time and materials. Building permit fees are based on construction costs.[14]

San Francisco has permitted over 700 wireless facilities on private property. Of those, nearly 300 required a CUA and over 400 required only a building permit.

C. San Francisco Has Made More than 26,000 Poles that it Owns in the Public Right-of-Way Available for the Installation of DAS and Small Cells

In addition to the tens of thousands utility poles in San Francisco that are owned by private utility companies, all of which a carrier can use for a small cell or DAS facility, San Francisco owns more than 26,000 poles in the public right-of-way. In the last few years, San Francisco has made those poles available for the installation of small cells and DAS facilities.

The San Francisco Public Utilities Commission ("SFPUC"), San Francisco's water, sewer, and power utility, owns nearly 17,000 streetlight poles throughout San Francisco. These streetlight poles are critical to protecting the public health, safety, and welfare. The San Francisco Municipal Transportation Agency ("SFMTA") operates San Francisco's public transportation system, including electric buses and trolley cars. SFMTA owns over 9,500 poles to support its overhead traction cables that provide power to its electric buses and trolley cars.

In 2015, both the SFPUC and SFMTA agreed to make their poles available for the installation of small-cell and DAS facilities by any certificated or licensed telecommunications carrier. After extensive meetings with the carriers, the SFPUC and SFMTA approved form license agreements to use for this purpose.[15] Once a carrier signs the license agreement with one or both of the agencies, the licensee may choose among the thousands of poles owned by that agency to install its facilities.

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[13] *See* S.F. Planning Code § 350 (available at http://forms.sfplanning.org/fee_schedule.pdf).

[14] *See* S.F. Building Code § 110A (available at http://sfdbi.org/fees).

[15] Exhibits A and B hereto are the form agreements used by the SFPUC and SFMTA respectively.

In less than two years, the SFPUC has granted licenses to five carriers[16] and issued pole licenses for over 360 poles. It is processing over 100 additional applications. The SFMTA has granted licenses to four carriers and issued licenses for over 120 poles.[17] It is processing an over 60 additional applications. San Francisco's pole licensing program has been so successful that between April 2015 and June 2016 71% of San Francisco's wireless permits were for poles owned by San Francisco and only 29% were for utility poles.

As pole owners, SFPUC and SFMTA made business decisions to make their poles available for wireless facilities. Both agencies saw the benefits to San Franciscans from better wireless services. In addition, with tightening City budgets, they also view these programs as a way to obtain needed revenues to fund their core programs and to further develop and protect these critical municipal assets.[18] Requiring fair compensation for private use of these valuable assets is not only just and reasonable, it is required by law.[19]

The SFPUC's and SFMTA's license fees start at $4,000 per pole per year. The SFMTA's per pole rates are reduced for licenses covering more than 50 poles. Both agencies' license fees are subject to annual increases. Both agencies also require cost-based fees for processing the initial license and each application for a pole license.

[16] The SFPUC has signed licensed agreements with ExteNet Systems, LLC, GTE Mobilnet of California LP dba Verizon Wireless, Mobilitie Investments III, LLC, T-Mobile West, LLC and New Cingular Wireless PCS LLC dba AT&T.

[17] The SFMTA has signed licensed agreements with ExteNet Systems, LLC, GTE Mobilnet of California LP dba Verizon Wireless, Mobilitie Investments III, and New Cingular Wireless PCS LLC dba AT&T.

[18] Under San Francisco's Charter, the SFMTA and SFPUC must use these revenues only to fund each agency's own programs. *See* S.F. Charter, § 8A.102(b) (SFMTA); and § 8B.121(a) (SFPUC). The SFMTA and SFPUC cannot use their revenues to fund other San Francisco programs.

[19] The California Constitution, like the constitutions in many other states, prohibits public entities from making a gift of public funds. *See* Cal. Const. art. XVI, § 6; Mich. Const. art. IX § 18; N.D. Const. art. X, § 18; N.Y. Const. art. VIII, § 1; Tex. Const. art. III, § 52; and Wash. Const. art. VII, § 7. *See also Allen v. Hussey*, 101 Cal. App. 2d 457, 472 (1950)

D. San Francisco's Regulatory and Licensing Requirements for Installation of Wireless Facilities in the Public Right-of-Way Ensure that Wireless Facility Locations and Appearances Are Consistent with Local Standards

San Francisco's concerns about the aesthetic impacts that wireless facilities could have on its streetscapes were made clear by the Board of Supervisors when it adopted Article 25 of the Public Works Code. At that time, the Board of Supervisors made the following finding:

> (1) Surrounded by water on three sides, San Francisco is widely recognized to be one of the world's most beautiful cities. Scenic vistas and views throughout San Francisco of both natural settings and human-made structures contribute to its great beauty.
>
> (2) The City's beauty is vital to the City's tourist industry and is an important reason for businesses to locate in the City and for residents to live here. Beautiful views enhance property values and increase the City's tax base. The City's economy, as well as the health and well-being of all who visit, work or live in the City, depends in part on maintaining the City's beauty.[20]

The types of wireless facilities providers install in the public right-of-way can vary considerably in size and appearance. San Francisco does not regulate the technologies used to provide personal wireless services and has no intention to do so. However, San Francisco regulates *the location and appearance* of such facilities in order to prevent providers from installing wireless facilities in the public right-of-way that are incompatible with San Francisco's General Plan, which includes an Urban Design Element, and its Better Streets Policy and Better Streets Plan.[21]

Article 25 has fulfilled its purpose. Below are examples of wireless facilities installed on utility poles in San Francisco before San Francisco started imposing its Article 25 design standards:[22]

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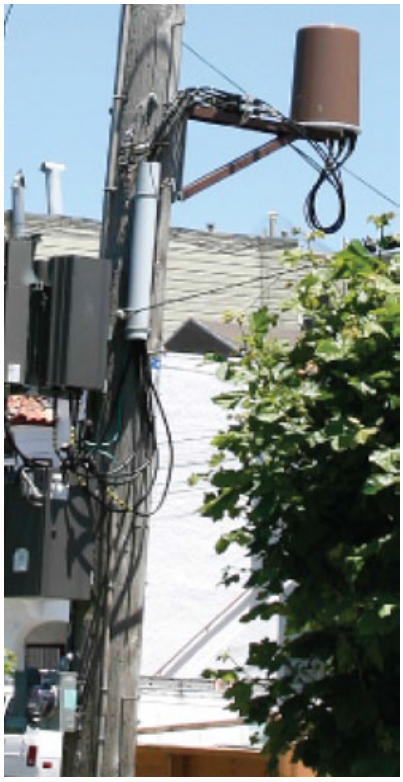
[20] A copy of the Legislative Digest for Article 25 is attached hereto as Exhibit C.

[21] Among other things, the Urban Design Element of the San Francisco General Plan identifies those parts of San Francisco that merit special protection including view corridors (available at http://generalplan.sfplanning.org/I5_Urban_Design.htm).

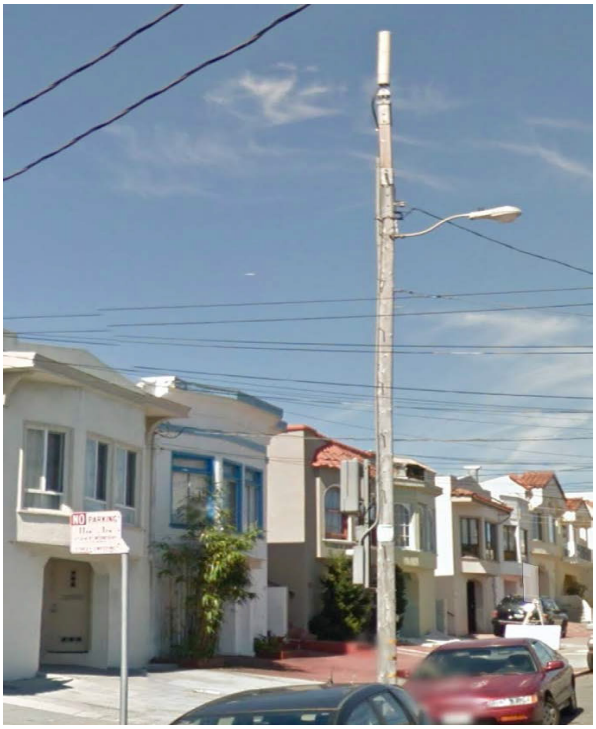
The Better Streets Policy requires that any approval for a public or private project in the public right-of-way consider and include the Better Streets design principles. S.F. Admin. Code § 98.1(d). The ordinance specifically calls for reducing visual clutter on the streets. *Id*. at § 98.1(d)(5). Following the adoption of the Better Streets Policy, San Francisco adopted its Better Streets Plan (available at http://www.sf-planning.org/ftp/BetterStreets/proposals.htm#Final_Plan).

[22] The City's authority over the placement of wireless facilities on utility poles is limited by California Public Utilities Commission ("CPUC") General Order 95, which establishes statewide utility pole safety requirements to protect both utility workers and the public. Under General Order 95, the CPUC requires that antennas be mounted at least six feet below or two feet above electrical supply lines (at the top of the pole) and at least two-feet from the center of the pole (when attached below

the supply lines). General Order 95, § IX, Rule 94.4 (available at http://www.cpuc.ca.gov/gos/GO95/go_95_rule_94_4.html).



This is in contrast with designs the Planning Department approved under Article 25:



As shown above, the Planning Department favors designs where: (a) the antennas are at the top of the pole; (b) the equipment boxes are no wider than the pole; (c) the equipment is painted to match the color of the pole; and (d) there is minimal signage. These requirements lead to designs that do not unduly affect local streetscapes, but still allow the carriers to meet their coverage and capacity needs.

E. Carriers Have Developed Designs with Minimal Visual Impact

As previously noted, the SFPUC and SFMTA are licensing poles they own in the public right-of-way to telecommunications carriers installing wireless facilities. The SFPUC's and SFMTA's license agreements require the licensees to obtain approval of all equipment to be installed on their poles. This is important both for safety issues—to make sure the pole can withstand the additional load—and for aesthetic reasons—to make sure the designs are consistent with community standards. For pole safety issues, both the SFPUC and SFMTA rely on their own engineers. For aesthetic concerns, both agencies rely on the advice of the Planning Department.

As shown below, the Planning Department worked with the carriers to develop a design that would have minimal aesthetic impact on the surrounding neighborhood while enabling the carriers to provide the coverage and capacity they need.

SFPUC STREET LIGHT POLE

SFMTA TRANSIT POLE

III. COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

The Commission's *2009 Declaratory Ruling* Provides Adequate Remedies under 47 U.S.C. Section 332(c)(7)(B)(ii) for Delays in Issuing Final Determinations for Applications for Wireless Permits

A. The Commission Has Not Identified a Valid Reason for Revisiting its Prior Determination that Congress Did Not Authorize the Commission To Adopt a Deemed Granted Remedy or Irrebuttable Presumption for Delays in Processing Applications for Wireless Permits. Nor Can the Commission Force a Waiver of Local Government Authority

Congress included a requirement in the Telecommunications Act of 1996 that a state or local government permitting authority "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed. . . taking into account the nature and scope of such request."[23] Congress also included a requirement that any claim by a telecommunications provider that "a final action or failure to act by a State or

[23] 47 U.S.C. § 332(c)(7)(B)(ii).

local government or any instrumentality thereof that is inconsistent" with 47 U.S.C. Section 332(c)(7) may be brought "in any court of competent jurisdiction."[24] In 2009, the Commission determined that a state or local permitting authority would have failed to act "within a reasonable period of time" if it did not issue a final determination within 150 days for new wireless facilities and 90 days for collocations.[25] The Commission also determined that a failure to act within these timeframes would establish a presumption that could be rebutted "in any given case that comes before a court."[26]

At that time, the Commission considered and rejected the industry's proposal to "either deem an application granted when a State or local government had failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application."[27] [28] The Commission did so because of the language of section 332(c)(7)(B)(v). That section provides that when a failure to act has occurred aggrieved parties should file a complaint with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis." As the Commission stated in 2009, "[t]his provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies."[29] In addition, the Commission had to give effect to Congress's use of the phrase "taking into account the nature and scope of such request" in section 332(c)(7)(B)(ii) by allowing a permitting authority to come into court and try to "rebut the presumption that the established timeframes are reasonable."[30] [31]

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[24] 47 U.S.C. § 332(c)(7)(B)(v).

[25] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review, Declaratory Ruling*, 24 FCC Rcd. 13994, 14012, ¶ 45 (2009) ("*2009 Declaratory Ruling*"), aff'd, *City of Arlington v. F.C.C.*, 668 F.3d 229 (5th Cir. 2012), aff'd, 133 S. Ct. 1863 (2013).

[26] *2009 Declaratory Ruling*, *supra*, 24 FCC Rcd. at 14010, ¶ 42.

[27] *Id*. at 14012, ¶ 45.

[28] California has adopted its own "deemed granted" remedy for wireless facilities using the time limits contained in the *2009 Declaratory Ruling*. *See* Cal. Gov. Code § 65964.1.

[29] *Id*.

[30] *Id*. at 14010, ¶ 42.

[31] In construing a statute, it is a court's duty "to give effect, if possible, to every clause and word of a statute". *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 60 (2007) (internal quotation marks and alteration omitted).

It is settled law that an agency cannot change course without a reasoned explanation. As the Supreme Court has held:

> A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.[32]

Here, the Commission suggests that it might have inappropriately relied on the legislative history of the Telecommunications Act of 1996 when it determined that the only appropriate remedy under section 332(c)(7)(B)(ii) was a rebuttable presumption.[33] While the Commission discussed the legislative history in the *2009 Declaratory Ruling*, nothing in that ruling suggests the legislative history factored into its determination. Nor was the legislative history even necessary. Section 332(c)(7)(B)(v) clearly expresses Congress's intend that violations of section 332(c)(7)(B)(ii) be heard by a court. Those parts of section 332(c)(7) are not ambiguous. The Commission's initial construction of that language was correct, and the Commission has not identified a valid reason to adopt a different construction now.

Nor can the Commission rely on its construction of the Spectrum Act[34] as a basis for now imposing a deemed granted remedy under section 332(c)(7).[35] The Spectrum Act provides that "a State or local government may not deny, and shall approve" applications to deploy or modify certain types of wireless facilities.[36] Based on that language, the Commission determined that a deemed granted remedy is appropriate:

> In this Report and Order, we have defined objectively the statutory criteria for determining whether an application is entitled to a grant under this provision. Given the objective nature of this assessment, then, we conclude that withholding a decision on an application indefinitely, even if an applicant can seek relief in court or in another tribunal, would be tantamount to denying it,

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[32] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 41–42 (1983) (internal quotation marks and citations omitted).

[33] *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *6, ¶ 16.

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

[35] *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *5, ¶ 13.

[36] 47 U.S.C. § 1455(a).

> in contravention of the statute's pronouncement that reviewing authorities "may not deny" qualifying applications. We therefore find that the text of Section 6409(a) supports adoption of a deemed granted remedy, which will directly serve the broader goal of promoting the rapid deployment of wireless infrastructure.[37]

In affirming the Commission's construction of the Spectrum Act, the Court of Appeal found that the "purpose and effect" of the act was to "bar states from interfering with the expansion of wireless networks."[38] The court found that, because the act "bars states from denying facility modification applications that meet certain standards" the Commission's deemed granted remedy "does no more than implement that statute."[39]

The Commission's suggestion that there is nothing about section 332(c)(7) that is "materially different" from the Spectrum Act is incorrect.[40] The statutory language the Commission relied on to impose a deemed granted remedy under the Spectrum Act is absent from sections 332(c)(7). In contrast with the Spectrum Act, nothing in section 332(c)(7) establishes objective criteria for siting wireless facilities or requires a state or local permitting authority to grant an application that meets any particular criteria. Rather, section 332(c)(7) preserves state and local zoning authority. Consistent with that purpose, the courts have repeatedly construed that section to allow a state or local permitting authority to rely on discretionary criteria to deny an application for a wireless permit.[41]

Nor can the Commission now construe section 332(c)(7)(B)(ii) to establish an "irrebuttable presumption" that the permitting agency had failed to act within a reasonable time.[42] For the same reasons discussed above, such a presumption would preclude the courts from "taking into account the nature and scope of such request" as required by that section. Furthermore, the Supreme Court

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[37] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865, 12961, ¶ 227 (2014) ("*2014 Infrastructure Order*"), aff'd, *Montgomery Cnty. v. F.C.C.*, 811 F.3d 121 (4th Cir. 2015).

[38] *Montgomery Cnty*., *supra*, 811 F.3d at 128.

[39] *Id*.

[40] See *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *5, ¶ 13.

[41] See, e.g., *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 992–993 (9th Cir. 2009); *Southwestern Bell Mobile Sys. v. Todd*, 244 F.3d 51, 61 (1st Cir. 2001); and *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494–495 (2d Cir. 1999).

[42] See *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *4–*5, ¶¶ 10–12.

has repeatedly expressed concerns that irrebuttable presumptions offend notions of due process.[43] As the Supreme Court held, the government's "interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from the invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the state's objective is premised."[44] [45]

Nor would it be appropriate for the Commission to find that a state or local government had "defaulted its authority over such applications" by failing to act within the requisite shot clock period.[46] This is nothing but a different name for the same thing. Like the deemed granted remedy and irrebuttable presumption, such a forced waiver would improperly take the ultimate determination out of the hands of a court of law, where Congress said it should be.

Finally, in the event the Commission approves any of these remedies, it is imperative that the Commission make clear that state and local permitting authorities may include conditions in those permits in order to protect the public health, safety, and welfare.[47] Otherwise, the permittee could install a wireless facility that did not comply with the application, and the permitting authority would have no recourse. The permittee might also insist that a local government's time, place, and manner regulations for construction do not apply. Even if an application for a wireless facility permit were approved by operation of federal law, the permittee would still need to comply with all applicable laws that a local permitting authority imposes on other permittees.

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[43] See *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

[44] *Id*. at 451.

[45] Most cases addressing irrebuttable presumptions concern challenges to state or local laws. There seem to be very few instances in which Congress or a federal administrative agency has established in irrebuttable presumption. The Interstate Commerce Commission promulgated regulations establishing an "irrebuttable presumption of an employment relationship between a driver of a leased vehicle furnished by a contractor-lessor and a carrier-lessee." *Baker v. Roberts Exp., Inc*., 800 F. Supp. 1571, 1574 (S.D. Ohio 1992), *citing*, 49 C.F.R. § 1057.12(c)(1). Congress established an irrebuttable presumption that a coal miner diagnosed with certain conditions is either "totally disabled due to pneumoconiosis or. . . his death was due to pneumoconiosis, or. . . at the time of his death he was totally disabled by pneumoconiosis." 30 U.S.C. § 921(c)(3); see *Usery v. Turner Elkhorn Mining Co*. 428 U.S. 1 (1976). Both of those presumptions protected persons who suffered injuries or death.

[46] *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *5, ¶ 14.

[47] See *id*. at *8, ¶ 21.

For all of these reasons, the Commission should not add any new remedies to the shot clock set out in the *2009 Declaratory Ruling*. At the very least, should it impose any additional remedies the Commission must provide a mechanism for allowing local governments to require compliance with their reasonable permitting requirements for any permit that was approved by operation of federal law.

B. The Commission Should Clarify that the Installation of a Wireless Facility on a Utility or Other Pole that Does Not Have an Existing Wireless Facility Is Not a Collocation as that Term is Used in the *2009 Declaratory Ruling*

As the Commission correctly notes, there are now three separate timeframes for acting on applications to construct wireless facilities. Under *the 2009 Declaratory Ruling*, local governments have 150 days for new facilities and 90 days for collocations. Under the *2014 Infrastructure Order*, local governments have 60 days for collocation applications that fall within the Spectrum Act.[48] In asking whether the Commission should consider whether a reasonable time for all collocations should be the 60 days required under the Spectrum Act (rather than 90), the Commission states:

> [W]e seek comment on whether we should harmonize the shot clocks for applications that are not subject to the Spectrum Act with those that are, so that, for instance, the time period deemed reasonable for non-Spectrum Act collocation applications would change from 90 days to 60 days. Alternatively, should we establish a 60-day shot clock for some subset of collocation applications that are not subject to the Spectrum Act, for example, *applications that meet the relevant dimensional limits but are nevertheless not subject to the Spectrum Act because they seek to collocate equipment on non-tower structures that do not have any existing antennas*?[49]

In these sentences, the Commission seems to suggest that the installation of a wireless facility on a utility pole that does not have an existing wireless facility is a collocation subject to the Commission's 90-day shot clock—not a new wireless facility installation subject to the Commission's 150-day shot clock. Such a determination would be incorrect because: (i) for over 20 years, Congress, the Commission, and the telecommunications industry have used the word collocation to mean installing telecommunications equipment on a structure or within a building where there are existing telecommunications facilities; and (ii) in the *2014 Infrastructure Order* the Commission

[48] *Id*. at *6, ¶ 17.

[49] *Id.* at *6, ¶ 18 (footnotes omitted; italics added).

recognized that local governments must have approved the use of a building or structure for a wireless facility for the building or structure to be considered a collocation site.

In the Telecommunications Act of 1996, when Congress allowed competitive local exchange carriers ("CLEC") to enter into the market, Congress defined the term "collocation" to mean the "physical collocation of equipment necessary for interconnection or access to unbundled network elements" of the incumbent local exchange carrier ("ILEC") by a CLEC.[50] The Commission and the telecommunications industry have developed similar definitions for wireless facilities.[51]

With respect to wireless carriers, the Commission subsequently made clear that collocation means the "[s]haring of structures by several wireless providers."[52] In fact, when the Commission first adopted the shot clock it found that "an application is a request for collocation if it does not involve a substantial increase in the size of a tower."[53] As used in this context, the word tower would mean a structure that either had existing wireless facilities or was at least constructed solely for that purpose. It would not mean a utility or other pole in the public right-of-way that did not have an existing wireless facility. Unlike towers, such poles were not constructed for the sole purpose of supporting wireless facilities.

In fact, local governments argued that the word collocation as used in the Spectrum Act should be "limited to mounting equipment on structures that already have transmission equipment on them." [54] In rejecting that argument, the Commission noted that such a limitation was "not consistent with the Collocation Agreement's[55] definition of 'collocation' and would not serve any

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[50] 47 U.S.C. § 251(c)(6) (definition of collocation).

[51] *See* 47 C.F.R. § 51.5 (definition of "physical collocation"); 47 C.F.R. § 51.323 ("Standards for physical collocation and virtual collocation")*; and* Harry Newton*, Newton's Telecom Dictionary* (17th ed.) (definition of collocation).

[52] FCC Fact Sheet #2, National Wireless Facilities Siting Policies (September 17, 1996), at p. 8 (available at http://wireless.fcc.gov/siting/fact2.pdf).

[53] *2009 Declaratory Ruling*, *supra,* 24 FCC Rcd. at 14012, ¶ 46 (internal quotation marks omitted).

[54] *2014 Infrastructure Order*, *supra*, 29 FCC Rcd. at 12939, ¶ 179.

[55] See *Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures*, 16 FCC Rcd. 5574, § 1.A (2001). That agreement has since been amended. See *Wireless Telecommunications Bureau Announces Execution of First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, 2016 WL 4195718 (2016).

reasonable purpose as applied to towers built for the purpose of supporting transmission equipment."[56]

Implicit in the Commission's statement, however, is the understanding that the towers where collocation could occur *even without a pre-existing wireless facility* are facilities that "were built for the purpose of supporting telecommunications equipment." In other words, collocation applies to installing wireless facilities on existing towers built *solely* to support wireless telecommunications facilities—regardless of whether such towers had existing wireless facilities. The Commission noted that, for structures *other* than towers, the Commission's "approach leads to the same result in the case of 'base stations;' since [the Commission's] *definition of that term includes only structures that already support or house base station equipment*, Section 6409(a) will not apply to the first deployment of transmission equipment on such structures."[57] At least for those other structures, therefore, the Commission was using the term collocation in the same way it has been used since 1996. The Commission properly recognized that collocation would *only* occur where the buildings or poles have existing telecommunications facilities—not on utility or other poles that did not have such facilities already.[58]

San Francisco's concern about this overly broad and illogical use of the term collocation is not merely theoretical. It could affect San Francisco's review of hundreds of applications for permits to install wireless facilities on buildings and structures. Applications to construct new towers are rare in San Francisco. Should the Commission adopt this broad collocation, virtually every application to install new wireless facilities in San Francisco would be a collocation that must be processed within 90 days.

Like other large cities and counties, San Francisco must process hundreds of applications for the construction of wireless facilities each year. In 2016, San Francisco's Department of Public Works

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[56] *2014 Infrastructure Order*, *supra*, 29 FCC Rcd. at 12939, ¶ 179.

[57] *Id*.

[58] In fact, due to space and load limitations it is unlikely that more than one carrier would seek to place its small cell or DAS facilities on the same utility or street light pole.

received 222 applications to install wireless facilities on existing utility or other poles in the public right-of-way.[59] The Commission should clarify that these applications are not for collocations.

C. The Commission Should Neither Shorten the Time Allowed for Review of Different Wireless Facility Deployments, Nor Expand on the *2009 Declaratory Ruling* and *2014 Infrastructure Order* by Allowing for Additional Time to Review Small Cell Applications Submitted in Batches

The Commission seeks comments on whether it should reconsider the time allowed for review of wireless facility deployments that the Commission established in *the 2009 Declaratory Ruling*, including by establishing a different shot clock for so-called "batched" applications.[60] San Francisco continues to believe that the 90-day and 150-day shot clocks are appropriate and necessary, and the Commission should allow local governments to find ways to meet the deadlines for batched applications.

For three reasons, San Francisco has been able to process most applications to install small cells on utility poles well within the Commission's 150-day shot clock. First, as a reasonably large-sized city, San Francisco has been able to provide the resources necessary to process these types of applications in an expeditious manner. Second, unlike many cities, San Francisco has completely separate laws and processes for reviewing applications to construct wireless facilities in the public right-of-way and applications to construct them on private property. Different City departments also do those reviews. For small cells on utility poles on the public right-of-way, San Francisco requires a permit from its Department of Public Works under its Public Works Code. For large wireless facilities on private property, San Francisco requires a building permit from its Department of Building Inspection, under its Building Code, and, in some locations, a conditional use authorization from its Planning Department, under its Planning Code. Third, as discussed below, San Francisco limits how many applications it will start processing each week.

The Commission should not expedite review for these small cell permits. They still need to be thoroughly reviewed. San Francisco's small cell permit applications are reviewed by its Department

[59] Thirty of those applications are for wireless facilities at new sites. The rest of the applications are for modifications to existing wireless facilities.

[60] *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *7, ¶ 18.

of Public Works and Department of Public Health, in all instances, its Planning Department, in most instances, and its Recreation and Parks Department, in some instances. The permit applications require public notice, opportunity to submit a protest, a public hearing if a protest is submitted, and a possible appeal. These facilities can have substantial impact in a dense, urban setting, particularly one like San Francisco with hundreds of historic buildings and many national, state, and local historic districts. It would be shortsighted and arbitrary for the Commission to find that local governments should be able to approve these facilities any faster than is already required, just because the facilities are small.

In fact, even before the Commission adopted the *2009 Declaratory Ruling* and *2014 Infrastructure Order*, San Francisco was concerned about processing dozens of applications to install wireless facilities on existing utility poles. San Francisco now limits the number of such applications that may be submitted at one time. As shown above, due to this limitation San Francisco has been able to complete its processing of applications for small cell permits on poles in the public right-of-way well within the 150-day required period. San Francisco expects that other local governments have found, or will find, similar ways to meet the shot clock when numerous carriers want to submit dozens of applications at the same time. While the idea of an extended shot clock for batched applications sounds attractive in the abstract, San Francisco does not believe that the Commission could adopt a one-size-fits all approach for all cities—large and small. Rather, the Commission should allow local governments to come up with their own solutions to ensure timely processing of permits.

IV. COMMENTS ON THE NOTICE OF INQUIRY

A. Congress Did Not Intend Section 253(a) to Preempt Local Regulating of Over Siting Wireless Facilities in the Public Right-of-Way. Rather, Wireless Carriers Must Challenge Individual Siting Decisions under 47 U.S.C. Section 332(c)(7)

In the Telecommunications Act of 1996, Congress for the first time opened the door for CLECs to provide local telecommunications services in competition with the ILECs.[61] Congress intended 47

[61] See generally *AT & T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part); and *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006).

U.S.C. section 253 to prohibit local regulations that would prevent these new CLECs from competing with the ILECs.[62] To accomplish its purpose, in section 253(a) Congress preempted local "statutes or regulations" that "may prohibit or have the effect of prohibiting" the provision of "telecommunications services". In light of the statutory language, it is not surprising the reported cases under section 253 largely concern claims that a local government ordinance or other regulation imposed a barrier to a CLEC's efforts to enter the market. [63] [64]

Both this Commission and the federal courts generally agree that the pertinent test under section 253(a) is "'whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" [65] [66] This test does not establish a threshold that is easily met. An effective prohibition should not be based on a showing that local government regulations imposed minor inconveniences or delays in entering the market to provide services, or that a provider that has already entered the market to provide services had been denied an application to install a single facility.

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[62] *See* 47 U.S.C. § 253; and *Cablevision of Boston, Inc. v. Public Imp. Comm. of City of Boston*, 184 F.3d 88, 97 (1st Cir. 1999).

[63] See, e.g., *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002); and *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).

[64] As competition among CLECs waned, so did the number of cases brought seeking to preempt local ordinances under section 253. A Westlaw search on June 7, 2017 of "253 /s telecommunications and DATE (before 2010)" came up with 242 reported federal cases, while a search of "253 /s telecommunications and DATE (after 2009)" came up with only 46 reported federal cases.

[65] *Puerto Rico Tel. Co.*, *supra*, 450 F.3d at 15; *Qwest Corp.*, *supra*, 380 F.3d at 1270; and *TCG New York, supra,* 305 F.3d at 76 [all quoting *In the Matter of California Payphone Association Petition for Preemption of CCB Pol 96-26 Ordinance No. 576 NS of the City of Kuntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, Memorandum Opinion and Order* 12 F.C.C. Rcd. 14191 (1997)]; see also *Sprint Telephony PCS, L.P. v Cnty. of San Diego,* 543 F.3d 571 (9th Cir. 2008); and *Level 3 Commc'ns, supra*, 477 F.3d at 533 (both relying on that decision).

[66] In *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), the Ninth Circuit held that section 253 preempts local "regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that may ... have the effect of prohibiting the provision of such services." *City of Auburn*, *supra*, 260 F.3d at 1175 (internal quotation marks omitted; alterations in original). While the Ninth Circuit later rejected that test in *Sprint Telephony*, *supra*, 543 F.3d at 577–578, the Commission suggests that the First, Second, and Tenth Circuits still rely on. See *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *30, ¶ 91. However, as noted above, the First, Second, and Tenth Circuits all cite the test adopted by the Commission in *California Payphone Ass'n*.

Unlike section 253(a), in section 332(c)(7) Congress addressed concerns over the deployment of wireless facilities by individual carriers, which at that time largely occurred on large towers and tall buildings. For that reason, section 332(c)(7) preempts state and local land use *decisions* that violate the express requirements of that section. Section 332(c)(7) authorizes the federal courts to scrutinize local land-use decisions related to wireless facility siting much more closely than other land-use decisions.[67]

As wireless carriers have increasingly moved their facilities into the public right-of-way, a number of courts have been called on to decide whether section 253(a) can preempt a local ordinance that regulates their use of the public right-of-way for that purpose.[68] The language of section 332(c)(7), however, is clear that wireless carriers cannot seek relief under section 253(a), but must file their claims solely under section 332(c)(7):

> (A) General authority
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> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

As one district court held, "the most reasonable interpretation of the word 'decisions' [in section 332(c)(7)(A)] is that it refers only to individual zoning decisions."[69]

For that reason, cases construing the "effective prohibition" language in section 332(c)(7)(B)(i)(II) have established a different test than those looking at section 253. Section 332(c)(7)(B)(i)(II) allows a court to overturn a local land use decision that would "prohibit or have the effect of prohibiting the provision of personal wireless services."[70] The federal courts have almost uniformly followed the Second Circuit's 1999 decision in *Sprint Spectrum. L.P. v. Willoth*[71] and will

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[67] *Cellular Tel. Co., supra*, 166 F.3d at 493.

[68] *See*, *e.g*. *Sprint Telephony*, *supra*, 543 F.3d at 579; *New York SMSA L.P. v. Town of Clarkstown*, 603 F. Supp. 2d 715, 731 (S.D.N.Y. 2009); and *Verizon Wireless LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1335–1339 (D.N.M. 2007).

[69] *Verizon Wireless*, *supra*, 476 F. Supp. 2d at 1337.

[70] It took longer for the number of cases brought under section 332(c)(7) to slow down than it did for section 253 cases. A Westlaw search of "332(c)(7) /s wireless and DATE(after 2010)" came up with 92 reported cases, while a search of "332(c)(7) /s wireless and DATE(before 2011)" came up with 301 cases.

[71] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643–644 (2d Cir.1999).

look to whether the decision would prevent a carrier "from closing a significant gap in service coverage."[72] [73]

The approach the federal courts have taken with respect to the similar language contained in section 253(a) and section 332(c)(7)(B)(i)(II) makes perfect sense when put in this context. CLECs filing claims under section 253(a) are seeking to preempt local ordinances or regulations that bar their entry into the market. Unlike wireless carriers, CLECs cannot provide services without access to the public right-of-way. CLECs generally need a state or local franchise (or perhaps both) in order to use the public right-of-way to provide services.

Until recently, wireless carriers filing claims under section 332(c)(7)(B)(i)(II) were challenging individual zoning decisions.[74] For many years, these carriers served their customers without obtaining installing any facilities in the public right-of-way. They did not need a state or local franchise or other authority to enter into the local market. Just because they are now using the public right-of-way for their facilities, does not mean they should be able to claim that a single citing decision is somehow an effective prohibition under section 253. At best, they could rely on section 253 to challenge local ordinances that prohibited or effectively prohibited them from using the public right-of-way to install wireless facilities.[75]

In light of the differences between the two statutes, the Commission should not attempt to come up with a singular test or construction. For example, Verizon offers wireless services in San Francisco. San Francisco has authorized Verizon to use the public right-of-way to install and maintain

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[72] *T-Mobile Cent., LLC v. Charter Township of West Bloomfield,* 691 F.3d 794, 806 (6th Cir. 2012); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 731–733 (9th Cir. 2005); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 834–835 (7th Cir. 2003); and *APT Pittsburgh L.P. v. Penn Township*, 196 F.3d 469, 478–480 (3d Cir.1999).

[73] The Fourth Circuit held that section 332(c)(7)(B)(i)(II) applies only "to blanket prohibitions and general bans or policies, not to individual zoning decisions." *AT & T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998).

[74] But see *GTE Mobilnet of Cal. L.P. v. City & Cnty. of San Francisco,* 440 F. Supp. 2d 1097, 1102 (N.D. Cal. 2006) (finding that the term "'placement' in section 332(c)(7) is broad enough to cover permits . . . that would allow a carrier to place antennas at a variety of locations").

[75] See *NextG Networks of Cal., Inc. v. Cnty. of Los Angeles*, 522 F. Supp. 2d 1240, 1249 (C.D. Cal. 2007) (finding that plaintiff is likely to succeed on its claim that section 253 preempts a local ordinance requiring a conditional use authorization to install a wireless facility in the public right-of-way).

telecommunications facilities. In addition to dozens of facilities on private property, San Francisco has issued Verizon and DAS providers installing facilities for Verizon hundreds of permits to install facilities on utility and other poles. A denial of a single application from Verizon or one of those providers to install a wireless facility on a utility pole in San Francisco would not "prohibit of have the effect of prohibiting" the provision of wireless telecommunications services under section 253(a), because it would not have barred Verizon from entering into the market. But that same determination could be an effective prohibition under section 332(c)(7)(B)(i)(II) to the extent it prevented Verizon from filing a significant gap in coverage.

Attempting to reconcile the two statutes also ignores the important role section 253(c) plays in any case claiming a prohibition under section 253(a). Section 253(c) provides in part: "[n]othing in this section affects the authority of a State or local government . . . to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

Section 253(c) provides a safe harbor that could serve to preserve a local law that might otherwise be preempted under § 253(a).[76] If a telecommunications provider establishes that section 253(a) preempts a local ordinance or regulation, then the burden shifts to the local government to establish that the safe harbor provision of section 253(c) applies—that any fees it charges telecommunications providers for access to the public right-of-way are fair, reasonable, and nondiscriminatory under section 253(c).[77] The fact that there is no equivalent provision in section 332(c)(7) further underscores the differences between the two provisions.

The Commission should continue to recognize the differences between section 253(a) and section 332(c)(7)(B)(i)(II), and should not rely on similar language in the two statutes as a basis for harmonizing their meanings and purposes.

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[76] *Cablevision of Boston, supra*, 184 F.3d at 98.

[77] *Qwest*, *supra*, 380 F.3d at 1272–1273; *Puerto Rico Tel. Co.*, *supra*, 450 F.3d at 15; and *TCG New York, supra,* 305 F.3d at 76–77.

B. The Commission Should Not Regulate How State and Local Governments Impose and Enforce Aesthetic Criteria When Permitting Wireless Facilities

The Commission seeks comments on the "proper role for aesthetic considerations in the local approval process."[78] It is settled law that aesthetics constitute a valid basis for the exercise of the police power.[79] Local governments may properly consider aesthetic concerns in the wireless facility-siting context, whether the proposed wireless facility would be installed on private property[80] or in the public right-of-way.[81] Citing cases construing local authority under section 332(c)(7), however, the Commission asks whether it needs to provide "specific guidance on how to distinguish legitimate denials based on evidence of specific aesthetic impacts of proposed facilities, on the one hand, from mere 'generalized concerns,' on the other."[82]

In dozens of cases challenging denials of zoning permits to install wireless facilities on private property under section 332(c)(7), the courts have been able to determine whether the evidence in the record amounted to specific concerns over the aesthetics of proposed facility or mere general concerns. A good example is the district court's decision in *New York SMSA L.P. v. Village of Floral Park Board of Trustees* in which the court found a local decision to deny an application for a special use permit to construct a wireless facility on private property was not supported by substantial evidence.[83] With regard to the defendants' findings related to aesthetic concerns, the court held:

> The only evidence in opposition was generalized objections from residents of the Village about the negative impact on the environment and their health, the aesthetics of the town, and property values. The general aesthetic objections were not directed at the actual proposed Facility, but rather about how the Facility would set a precedent that could lead to the construction of future telecommunications facilities that would collectively have a negative aesthetic impact on the Village. Such objections are not a basis for denial insofar as a "few generalized expressions of concern" about aesthetics by residents that are grounded in speculation about future facilities as opposed to direct

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[78] *Wireless NPRM/N0I*, 2017 WL 1443827, at *31, ¶ 92.

[79] See *Members of the City Council v. Taxpayers for Vinc*ent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values.")

[80] See, e.g., *Cellular Tel. Co., supra*, 166 F.3d at 494.

[81] See *NextG Networks*, *supra*, 2008 WL at 2563213, *9-*10.

[82] *Wireless NPRM/NOI*, *supra*, 2017 WL 1443827, at *31, ¶ 9.

[83] *New York SMSA L.P. v. Village of Floral Park Bd. of Trustees*, 812 F. Supp. 2d 143 E.D.N.Y. 2011).

> critiques of the actual proposal "cannot serve as substantial evidence on which the [Village] could base the denials."[84]

Aesthetic concerns have also played a role in section 253 cases. In considering a section 253 challenge to a San Francisco ordinance, the district court found that San Francisco could address aesthetic concerns over the impact that wireless facilities would have on the public's enjoyment of city streets:

> [T]he City does not assert any possible unnamed and unspecified interest it may have in regulating wireless facilities. Instead, the City's interest is limited to protecting the integrity of its historic and cultural resources as well as its parks and open spaces. Whether this interest is grounded in concerns for aesthetics, convenience, property values, tourism, or business development is not the issue. Whatever the underlying concern, the City may assert an interest in protecting its valuable resources and it is permissible to regulate telecommunications on the basis of that interest.[85]

These cases make clear that aesthetic concerns are inherently local and subjective. Local governments in large cities have very different concerns and needs than do local governments in small cities, suburbs, or rural areas. A one-size-fits-all approach simply would not be viable. The Commission should not use this proceeding as a vehicle for establishing standards that local governments must use to determine whether a proposed wireless facility meets local aesthetic concerns.

C. This Commission Has No Authority to Regulate Local Government Fees for Use of Their Infrastructure by Telecommunications Providers

The Commission asks for comments on whether sections 253 and 332(c)(7) apply to States and localities acting in their "proprietary versus regulatory capacity" and "what constitutes regulatory capacity."[86] As the Commission correctly notes, in addressing this issue in the *2014 Infrastructure Order* the Commission found that its rules implementing the Spectrum Act apply only to local governments acting in their regulatory capacity--not "when acting as managers of land or property that they own and operate primarily in their *proprietary* roles."[87] In this proceeding, the

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[84] *Id.* at 157, quoting *Cellular Tel. Co., supra*, 166 F.3d at 496.

[85] *NextG Networks*, *supra*, 2008 WL 2563213, at *10

[86] *Wireless NPRM/NOI*, 2017 WL 1443827, at *32, ¶ 96.

[87] *Id*. (emphasis in original).

Commission has not suggested any legitimate basis for reconsidering that determination, which is clearly supported by applicable law.

Local governments, like other property owners, may establish fees for use of their property. Even if this Commission finds that local government regulatory fees for the installation of wireless facilities on utility-owned poles in the public right-of-way fall under the section 253(c) umbrella, there is no basis for the Commission to find that local government license fees for occupying space for wireless facilities on poles owned by a local government do.[88] Federal preemption principles do not apply when local governments are acting in a proprietary capacity. The Commission cannot require local governments to allow carriers to use their poles or limit the fees local governments can charge for such use.[89] "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."[90]

A determination here that section 253(c)'s prohibition on unfair and unreasonable fees applies to local governments' license fees for use of their infrastructure would likely violate the U.S. Constitution and require local governments in many states to violate their own state constitutions. The Commission cannot regulate how local governments choose to use their property under the guise of preemption. The Takings Clause to the Fifth Amendment to the United States Constitution states "nor shall private property be taken for public use, without just compensation." As the Supreme Court has held, the Takings Clause applies both to government condemnation of private property and regulations that allow for the use of another's property: "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public

[88] The Commission noted the distinction between local governments acting in a regulatory versus proprietary capacities when it considered the applicable time period to approve modifications of wireless facilities under the Spectrum Act. See *2014 Infrastructure Order*, *supra*, 29 FCC Rcd. at 12964, ¶¶ 237-40.

[89] See *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 418–420 (2d Cir. 2002), citing *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218, 224 (1993); and *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) ["Not all actions by state or local government entities ... constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace."].

[90] *Building & Constr. Trades Council*, *supra*, 507 U.S. at 231–232.

interests that it may serve."[91] The Supreme Court has also found the Takings Clause applies when the federal government takes property owned by state and local governments:

> [W]hen the Federal Government ... takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned.[92]

Commission action in this regard could also require local governments to violate their own state constitutions.[93] The California Constitution, like the constitutions in many other states, prohibits public entities from making a gift of public funds.[94] The California courts have construed this provision to prohibit leasing publicly-owned property for rates that are below market.[95] Local government contracts that violate this California constitutional principle are void.[96] While the "Supremacy clause controls" when there "is an unavoidable conflict between the Federal and a State Constitution,"[97] this Commission should avoid a construction of section 253(c) that creates such a conflict.[98]

V. CONCLUSION

San Francisco appreciates the opportunity to participate in this proceeding and to address its concerns. As set forth above, San Francisco does not see the need for the Commission to take steps to preempt local government authority over the deployment of wireless facilities—particularly local government authority to regulate the use of the public right-of-way for that purpose. Over the years,

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[91] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 426 (1982).

[92] *United States v. Carmack*, 329 U.S. 230, 242 (1946).

[93] In 2011, the California Legislature required California's publicly-owned utilities ("POUs") to make their utility poles available for use by telephone and cable television corporations. The Legislature also limited the POUs' fees to the costs incurred for use of the poles. Ca. Pub. Util. Code § 9510, *et seq*.

[94] *See* Cal. Const. art. XVI, § 6; Mich. Const. art. IX § 18; N.D. Const. art. X, § 18; N.Y. Const. art. VIII, § 1; Tex. Const. art. III, § 52; and Wash. Const. art. VII, § 7.

[95] *Allen v. Hussey*, 101 Cal. App. 2d 457, 472 (1950).

[96] *Id*.; see *County of Alameda v. Ross*, 32 Cal. App. 2d 135, 146–147 (1939).

[97] *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

[98] *Jones v. United States*, 526 U.S. 227, 239 (1999). Furthermore, a court might not give deference to an FCC interpretation of section 253(c) that preempted state constitutional provisions. See *Bell v. Blue Cross & Blue Shield of Oklahoma*, 823 F.3d 1198, 1202–1203 (8th Cir. 2016).

San Francisco has supported the deployment of wireless facilities both in its regulatory and proprietary capacities. San Francisco intends to continue to support the deployment of 5G technology.

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