

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

IN THE MATTER OF

Accelerating Wireless Broadband Deployment
by Removing Barriers to Infrastructure
Investment

WT Docket No. 17-79

**JOINT COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS,
LEAGUE OF CALIFORNIA CITIES and LEAGUE OF OREGON CITIES**

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STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities (collectively, “Local Governments”) offers these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry.¹

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon’s 241 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon’s cities before the legislative assembly and state and federal courts.

¹ See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Notice of Proposed Rulemaking and Notice of Inquiry* (Apr. 20, 2017) [hereinafter “*Wireless NPRM/NOI*”].

I. BALANCED RULES THAT RESPECT THE PROPER ROLE FOR LOCAL GOVERNANCE AND REFLECT REALITIES IN LOCAL REVIEW PROCESSES WILL ACCELERATE WIRELESS BROADBAND DEPLOYMENT

A. Municipalities Support Expanded Wireless Services, but Existing Limitations on Local Review Encourage Some Applicants to “Game” the Shot Clock, Which Ultimately Hinders Wireless Broadband Deployment

Access to wireless broadband services plays an important role in the local economic, educational and social development for cities across the nation. These services play an especially important role in Arizona, California and Oregon, where new and expanded technology firms have significantly expanded employment.²

Local Governments recognizes how important infrastructure is to continued growth. Much the same way that communications and commerce brought by the railroads in the 19th century transformed small towns like Los Angeles and Chicago into metropolises,³ advanced wireless broadband has the potential to help cultivate the places where it is deployed.

To this end, municipalities throughout the United States have taken steps to encourage responsible, community-appropriate wireless infrastructure deployments. In places like Springfield, Oregon, local staff work collaboratively with wireless industry members to update their local codes with the most cutting-edge concealment requirements to open up aesthetically-sensitive areas for new facilities. Cities in California, such as Vista and Lakewood, recently

² See, e.g., Tom Krazit, *Why the Pacific Northwest Will Be a Data Center Powerhouse for Years to Come*, GEEKWIRE.COM (May 31, 2017, 12:56 PM), <https://www.geekwire.com/2017/pacific-northwest-will-data-center-powerhouse-years-come/> (noting the multi-billion dollar investment in Oregon tech sector by companies like Intel); George Avalos, *Silicon Valley Economy Slows, but Still Grows*, MERCURYNEWS.COM (Feb. 17, 2017, 3:26 AM), <http://www.mercurynews.com/2017/02/16/silicon-valley-economy-pauses-but-still-is-growing/> (noting that Silicon Valley added more than 110,000 new jobs between 2015 and 2016); Chris Camacho, *Why All These Silicon Valley Startups are Moving to Phoenix*, TECHNICALLY (Jul. 13, 2016, 12:15 PM), <https://technical.ly/2016/07/13/phoenix-tech-startups/> (“Since 2000, tech employment in the [Phoenix] region has grown by nearly 80 percent, with software employment jumping by nearly 30 percent since 2010.”).

³ See Oakland Museum of California, *Early Statehood: 1850 – 1880s: The Rise of Los Angeles*, MuseumCa.org, <http://picturethis.museumca.org/timeline/early-statehood-1850-1880s/rise-los-angeles/info> (last visited June 12, 2017); BENJAMIN W. DREYFUS, *THE CITY TRANSFORMED: RAILROADS AND THEIR INFLUENCE ON THE GROWTH OF CHICAGO IN THE 1850S* (1995), available at: <https://www.hcs.harvard.edu/~dreyfus/history.html> (last visited June 12, 2017).

amended their municipal codes to allow wireless facilities on existing structures in the public rights-of-way subject to an administrative use permit, or only an encroachment permit for facilities placed on municipal structures under a license agreement.

Unfortunately, not all the interaction between municipalities and the wireless industry has been productive. Complex procedural regulations, with short deadlines and harsh penalties, entice some savvy applicants to “game” the shot clock in order to circumvent legitimate local review processes to deploy more facilities faster. Municipalities often spend time policing applicant misconduct that could be more productively spent facilitating deployment.

Increasingly common tactics include misrepresenting an applicant’s regulatory authority; misrepresenting the proposed project; submitting woefully incomplete applications, often without application fees or to the wrong department; changing the project scope after the first completeness review to prevent further tolling; providing inadequate or non-responses to incomplete notices to trigger the 10-day review period; triggering shot clock events before weekends, holidays or other government closures to burn additional days; and even constructing facilities without permits. Comments and Reply Comments filed by the League of Arizona Cities and Towns, *et al.*, in response to *In the Matter of Mobilitie, LLC Petition for Declaratory Ruling* provide more detailed examples and are included with these comments as **Exhibit 1** and **Exhibit 2**, respectively.

One applicant’s attempt to “game” the shot clock often causes delay for all similarly situated applicants as local governments who have been burned by misconduct strengthen their policies to prevent further abuses. For example, Hillsborough, California, replaced its open-door policies with a requirement that all applicants submit by appointment after a contractor for Crown Castle tossed eight applications into town hall at approximately 4:50pm on a Friday and left without any explanation. Aggressive tactics by Mobilitie, and the threat of new 120-foot

wood poles in the sidewalks, have caused some jurisdictions to adopt temporary moratoria.⁴

Applicant misconduct has become such a problem that even wireless industry members recognize that the delays in deployment are at least partially self-inflicted.⁵

B. Balanced Shot Clock Reforms Will Accelerate Wireless Broadband Deployment

Unfortunately, state and local governments remain the scapegoat for perceived delays in wireless broadband deployment.⁶ Even more unfortunately, the proposed rules in the *Wireless NPRM/NOI* appear poised to further exacerbate the regulatory conditions that encourage applicant misconduct and engender conflict between municipalities and service providers who should share a common interest in deployment.

The Commission has the opportunity to accelerate wireless broadband deployment by mitigating perverse incentives to game the shot clock rules. The following subsections offer some specific recommendations the Commission should adopt. Alternatively, the Commission

⁴ See Marc Benjamin, *Fresno County to Cellphone Tower Companies: Stay Off Our Land, at Least for Now*, FRESNOBEE.COM (Nov. 20, 2016, 3:01 PM), <http://www.fresnobee.com/news/local/article116012318.html>.

⁵ See Colin Gibbs, *Small Cells: Still Plenty of Potential Despite Big Challenges*, FIERCEWIRELESS (Sept. 1, 2016), <http://www.fiercewireless.com/wireless/small-cells-still-plenty-potential-despite-big-challenges> (noting how backlash to aggressive tactics by firms like Mobilitie and Crown Castle cause delays in deployment); Martha DeGrasse, *Carrier Small Cells Appear Slowly but Surely*, RCRWIRELESS (May 24, 2016), <http://www.rcrwireless.com/20160524/carriers/carrier-small-cells-tag4> (quoting a T-Mobile executive's remark that "some companies are being 'a little too cavalier in some instances and messing up [the industry's] ability to deploy small cells.'"); see also Martha DeGrasse, *Mobilitie to Increase Transparency for Jurisdictions*, RCRWIRELESS (May 27, 2016), <http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4>; Martha Degrasse, *Sprint Small Cell Delays Could Impact Other Carriers*, RCRWireless (May 12, 2016), <http://www.rcrwireless.com/20160512/network-infrastructure/sprint-small-cell-delays-tag4> (quoting an industry observer's comment about "stories out there and issues with people trying to circumvent the process and go around to get themselves in faster, which doesn't help anybody . . . things stop, the process slows down . . . when some cities start saying 'time out; we need to go look at this' that becomes a major problem for everybody." (internal quotations omitted)).

⁶ See *In the Matter of Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, WT Docket No. 16-421, *Petition for Declaratory Ruling* (Nov. 15, 2016); *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*; *Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, *Public Notice*, 2016 WL 7410755 (Dec. 22, 2016).

should direct the Broadband Deployment Advisory Committee to study these issues and produce recommended reforms to mitigate the delays caused by shot-clock gaming.

1. *The Commission Should Define a “Duly Filed” Application as a “Complete” Application Submitted in Accordance with Applicable Local Procedures*

Obligations under § 332(c)(7)(B)(ii) are not triggered until the state or local government receives a “duly filed” application.⁷ However, it appears that neither the *2009 Declaratory Ruling* nor the *2014 Infrastructure Order* properly took into account the fact that the “reasonable time” for a decision does not begin to run until and unless the state or local government receives a “duly filed” application.⁸ As a result, the Commission found that the shot clock commences after an application is “submitted” but made no provisions as to whether such submittal was “duly filed.”

Ambiguities in the prerequisites for a “submitted” application have engendered counterproductive conduct because some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate the submittal may be. Despite the Commission’s rule from the *2014 Infrastructure Order* that local governments must publicly

⁷ See 47 U.S.C. § 332(c)(7)(B)(ii); *Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d 687 (3d Cir. 2002) (holding that the application could not claim a failure to act because it never filed an application); see also *ATP Orlando/Tampa, Inc. v. Orange Cnty.*, No. 97-891-CIV-ORL-22, 1997 WL 33320573, *4 (M.D. Fla. Dec. 10, 1997) (finding that claims under § 332(c)(7) are not ripe without an application).

⁸ Compare 47 U.S.C. § 332(c)(7)(B)(ii) (requiring state and local governments to “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 with such government” (emphasis added)), with *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14015, ¶ 52 (Nov. 18, 2009) (finding that the shot clock commences when an application is “submitted” without any discussion about whether an incomplete application is “duly filed”) [hereinafter “*2009 Declaratory Ruling*”], and *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, *Report and Order*, 29 FCC Rcd. 12865, 12970, ¶ 258 (Oct. 17, 2014) (reiterating that the shot clock commences upon submittal without consideration as to whether an incomplete application may be considered “duly filed”) [hereinafter “*2014 Infrastructure Order*”].

state all application requirements in advance, woefully incomplete applications have become the rule rather than the exception.⁹ Given that the Commission's other rules already bar *ex post facto* application requirements, carriers should be expected (and required by the Commission) to tender complete submittals and there should be no excuse for an incomplete application—and certainly no incentive.¹⁰

As the following examples illustrate, incomplete and/or improperly filed applications create significant costs and delays for all parties involved:

- In Springfield, Oregon, Mobilitie submitted two encroachment permit applications on February 2, 2017. Both applications were incomplete, and one involved an installation on a utility pole owned by a third party but did not include any documentation that the third party consented to the application. The city cannot issue an encroachment permit to install equipment on third-party poles without the pole owners consent because it would create potential inverse-condemnation liabilities.¹¹ On March 27, 2017, city staff sent written incomplete notices. Mobilitie never responded and, on April 5, 2017, city staff re-sent the same notice. To date, after more than 76 days, Mobilitie has still not contacted the city to discuss the applications.
- The California Street Light Association (“CALSLA”) compiled comments from its constituent California cities and counties documenting, among other things, that Mobilitie has (1) failed to provide accurate project descriptions or equipment specifications upon request by local officials, (2) submitted incomplete applications, (3) terminated communications with local officials after submitting incomplete applications, (4) erroneously claimed exemptions from permitting procedures, local regulations and state environmental compliance laws and (5) complained of high fees without explaining why the fees would be unreasonable.¹² CALSLA's full response appears in an attachment to **Exhibit 1** to these comments.

⁹ See *2014 Infrastructure Order*, 29 FCC Rcd. at 12964 ¶ 260 (“[I]n order to toll the timeframe for review on grounds of incompleteness, a municipality's request for additional information must specify the code provision, ordinance, application instruction, or otherwise publically-stated [sic] procedures that require the information to be submitted.”).

¹⁰ See *id.*

¹¹ See generally *Vokoun v. City of Lake Oswego*, 76 P.3d 677, 684 (Or. Ct. App. 2003) (“An action for inverse condemnation is one for damages asserted against a governmental entity with the power of eminent domain that has taken private property for public use without initiating condemnation proceedings, that is, without paying just compensation.”).

¹² See Letter from Jean A. Bonander, CALSLA, to Michael Johnston, Telecom Law Firm PC (Feb. 15, 2017).

- Mobilitie’s representative hand-delivered to the City of Pleasanton, California, a letter styled as an introduction with 12 plan sets for new facilities attached.¹³ Rather than follow the city’s publicly-stated application process, Mobilitie treated the letter as a single application filed for all 12 sites. The letter was dated and delivered on a Friday. Under California state law, any application for a wireless installation may be deemed-approved if the local government fails to act within the applicable shot-clock timeframe.¹⁴ The apparent intent behind the letter was to submit an “application” that would trigger the shot clock but not be seriously reviewed by the local government staff, which would likely result in a deemed-approval. The same scenario played out in several other Northern California cities, including Antioch, Brentwood, Concord, Richmond, San Pablo, and Pittsburg. Mobilitie’s representative also delivered a letter to the City of Fresno, California, which at that time did not require a special permit for installations on unpaved road shoulders, on a Friday.¹⁵
- In Richmond, California, Mobilitie’s representative submitted encroachment applications for 13 new wireless facilities even though the Richmond Municipal Code expressly required a prior authorization from the Community Development Department.¹⁶ A month later, Mobilitie emailed the city project plans for three additional sites but did not submit any additional applications or fees. Two sites were proposed to be located on city-owned streetlights without prior authorization from the city. City staff also discovered that one site was proposed to be located on private property. Although city staff suggested some potential alternative locations on private electric company poles, Mobilitie ultimately withdrew its applications.
- In Brentwood, California, Mobilitie’s representative submitted a letter to the city’s Public Works Department with project plans, an insurance certificate and a check for \$144, but not an application for a use permit as expressly required by the Brentwood Municipal Code.¹⁷ Again, Mobilitie tendered the “application” on a Friday. Although the letter described the project plans as “construction drawings,” the attached plans stated on each page: “PRELIMINARY NOT FOR CONSTRUCTION.”¹⁸
- In Goleta, California, Mobilitie’s representative emailed that city project plans for six new wireless facilities, but with no application or fees. The email acknowledged that the city requires a “Right-of-Way Access Agreement” (*i.e.*, a standard document required for all entities that carry on operations in the public rights-of-way that sets out maintenance, insurance, safety and other operational requirements, but does not require any fees), but Mobilitie claimed that “our CPCN . . . can serve in lieu of a City-specific ROW

¹³ See Letter from Richard Tang, Mobilitie, LLC, to Jenny Soo, City of Pleasanton, Cal. (Oct. 14, 2016).

¹⁴ See CAL. GOV’T CODE § 65964.1.

¹⁵ See Letter from Rebecca Eichinger, Mobilitie, LLC, to Andrew Benelli, City of Fresno, Cal. (Jun. 3, 2016).

¹⁶ See Letter from Richard Tang, Mobilitie, LLC, to City of Richmond, Cal. (Aug. 29, 2016). This letter was dated on a Monday, but Mobilitie’s representative hand delivered the applications on a Wednesday (the city closes on Fridays due to State budget shortfalls).

¹⁷ See Letter from Richard Tang, Mobilitie, LLC, to City of Brentwood, Cal., Public Works Department (Aug. 2, 2016). The letter was received on August 19, 2016, as evidenced by the city’s in-take stamp.

¹⁸ See *id.*

Access/Franchise Agreement.”¹⁹ The email also requested that the city confirm who owns the poles to which Mobilitie wanted to attach their equipment.²⁰ This email made clear that Mobilitie did not positively know who owned the pole before it submitted applications for attachments.

- In Richmond, California, ExteNet submitted 31 encroachment permit applications for small cells without first obtaining a use permit from the city, which was required by the City’s recently adopted ordinance that was effective and published before ExteNet submitted its applications.²¹ These applications were received by the city on a Thursday.
- ExteNet submitted 10 applications to Concord, California, for facilities throughout both residential and commercial neighborhoods that it alleged should all be subject to administrative approval, despite local regulations that required public notice with a possible public hearing for highly visible wireless facilities placed in close proximity to residential uses.²²
- In Gresham, Oregon, Mobilitie submitted a single application for six of its sites without addressing the criteria clearly set out in the local code. Subsequently, a Mobilitie representative acknowledged that the applications were submitted without reviewing the applicable code provisions.²³
- In early April 2016, Mobilitie submitted four encroachment permit applications to the City of Antioch, California, for installations on city-owned streetlights without any prior authorization from the city to use its streetlights. The applications listed the owner as “N/A.”
- In Sacramento, California, Mobilitie requested to meet with Public Works staff and brought 40 incomplete applications, which included applications for fifteen 120-foot steel poles. When staff informed Mobilitie that it could not accept 40 incomplete applications, Mobilitie’s representative left the packet on the security desk in the lobby in an apparent attempt to be able to later claim that the shot clock had been started.²⁴
- In Yuma, Arizona, after receiving a letter from the city that outlined how Mobilitie’s initial application failed to satisfy the city’s code for obtaining a city telecommunications license, Mobilitie resubmitted its application with general responses that appeared

¹⁹ See Email from Ben Johnson, Mobilitie, LLC, to Marti Milan, City of Goleta, Cal. (Jan. 31, 2017, 4:13 PM).

²⁰ See *id.*

²¹ See Letter from Yader Bermudez, City of Richmond, Cal., to Matt Yergovich, ExteNet Sys. (Cal.) LLC (Nov. 15, 2016).

²² In this case, ExteNet’s representative submitted both the initial applications and his responses to the city’s incomplete notices on Mondays. Although the applications were misfiled and incomplete, it does not appear that their representative attempted to intentionally game the shot clock in the same manner as those who routinely submit on Fridays.

²³ See Email from David R. Ris, City of Gresham, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 23, 2017, 3:56 PM).

²⁴ See Email from Darin Arcolino, City of Sacramento, to Omar Masry, City of San Francisco (July 7, 2016, 12:35 PM).

intended to avert answering the city's questions. After a second letter from the city, Mobilitie's third submission continued to provide vague and inadequate responses to the city's questions on items as basic as what infrastructure Mobilitie intended to install in the city's right-of-way. When the city sent a third letter to Mobilitie explaining the deficiencies, Mobilitie never responded.

In addition to the delays in deployment, improperly filed applications, incomplete applications and applicants who disappear from the review process drain municipal staff resources. The Commission can mitigate delays (and the costs) associated with improperly filed applications if it clarifies that a "duly filed" application means a "complete" application filed in accordance with the procedures, if any, established by the state or local government.

The Communications Act does not define "duly filed" and so its ordinary meaning controls.²⁵ "Duly" ordinarily means to be in accordance with what is required or appropriate.²⁶ The root word "due" may also refer to an enforceable or actionable item.²⁷ Thus, the most natural interpretation for a "duly filed" application is one on which the state or local government may take action.

This interpretation would be more consistent with state and federal procedural rules for application submittals.²⁸ Moreover, this interpretation would also be more consistent with

²⁵ See *Clark v. Rameker*, 134 S.Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012).

²⁶ *Definition of Duly*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/duly> (last visited June 12, 2017) (defining "duly" as "in a due manner or time"); *Definition of Due*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/due#h1> (last visited June 12, 2017) (defining "due" as "according to accepted notions or *procedures*" (emphasis added)); see also BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 301 (3d ed. 2011) (defining the word "duly" in the phrase "duly authorized" as "properly").

²⁷ See GARNER, *supra* note 26 at 300 (defining "due" as "immediately enforceable"); BLACK'S LAW DICTIONARY 227 (3d pocket ed. 2006) (defining "due" as "[j]ust, proper, regular, and reasonable" or "[i]mmediately enforceable").

²⁸ See, e.g., ARIZ. REV. STAT. ANN. § 9-835 (authorizing cities to establish separate timeframes for "administrative completeness review" and "substantive review"); CAL. GOV'T CODE § 65943 (providing that the timeframe for action does not commence until the applicant submits a complete application or the application is deemed-complete by law); OR. REV. STAT. § 227.178 (requiring action within a specified timeframe "after the application is deemed complete"); 47 C.F.R. § 1.746(a) (authorizing the Commission to reject "defective" applications); see also *id.* § 1.1114(a)(1) (authorizing the Commission to dismiss an application if submitted without the appropriate fee).

Congress' intent that wireless applications should not be given "preferential treatment . . . or . . . to subject their requests to any but the generally applicable time frames for zoning decision."²⁹

2. *A More Flexible "Publicly Stated" Rule Would Reduce Unnecessary Costs and Delays in Application Preparation and Review*

To be sure, the publicly-stated rule provides applicants with fair notice as to what will be required for a complete application. Rather than eliminate the rule altogether, the Commission should amend and clarify the rule to allow greater flexibility in the completeness review process.

An inflexible rule tends to encourage local governments to develop exhaustive checklists that require applicants to produce materials that could potentially be necessary even if the project could be approved without such materials.

The publicly-stated rule should also account for multi-step review processes in which different materials may be required at each step. For example, in a jurisdiction that requires the planning department to determine whether an eligible facilities request would defeat the concealment elements at an existing monopine before the building department can issue construction permits, it would be more cost efficient to require preliminary zoning drawings (or "ZDs") at the initial stage before the applicant produced signed and stamped construction drawings (or "CDs") that would be necessary for the construction permit. However, the publicly-stated rule could be interpreted to mean that the jurisdiction must require the CDs upfront, which would be an economic waste if the applicant mistakenly believes that the project qualifies as an eligible facilities request.

²⁹ See H.R. CONF. REP. NO. 104-458, at 208.

3. *The Commission Should Dispense with the 10-Day Resubmittal Review Period and the “One-Bite” Rule*

Some applicants attempt to game the shot clock through the Commission’s procedures for incomplete notices, and specifically the 10-day resubmittal review period and the so-called “one-bite” rule. The Commission should eliminate them.

As a practical matter, these rules engender conflict because they do not reflect basic norms in the permit review process. They might make sense if only one department handled application reviews; however, local governments often route applications through multiple departments with expertise in the various disciplines implicated in a single project. For example, a planning department, with its expertise in community development and aesthetics, may require an approval for design and placement; a building department, with expertise in construction, may require a building permit to ensure structural safety; and a public works department may require an encroachment permit to coordinate work with utilities and other entities in the public rights-of-way. Each department may have its own requirements, perform its own completeness review, and issue its own incomplete notice. Moreover, these reviews may occur simultaneously or sequentially.

The one-bite rule in particular forces these departments to act in concert, even when it may not be in anyone’s best interest to do so. For example, if an applicant must obtain an approval from the planning department and the building department for a new facility, any resources expended by the building department would be completely wasted if the planning department determined that the installation would be better suited on a nearby rooftop than as a freestanding tower. However, if the building department does not commence its review upon

submittal, the applicant may later claim that any subsequent incomplete notices are barred by the one-bite rule.³⁰

These rules do not reflect the practical realities in the review process. Accordingly, the Commission should dispense with the 10-day resubmittal period and the “one-bite” rule.

4. *Déjà vu All Over Again: Municipalities Need Reasonable Moratoria to Adjust to New Deployments that Require New Siting Processes*

Many wireless industry members complain that municipalities continue to evaluate “small cell” applications under standards and procedures devised for “macrocell” facilities.³¹ A similar disruptive change occurred after Congress enacted the Telecommunications Act.³² Many state and local governments adopted moratoria as local officials studied the then-new technologies and evaluated policies and procedures to review and approve macrocells.³³

³⁰ See, e.g., Letter from Joseph M. Parker, counsel for Crown Castle, to Afshan Hamid, City of Concord, Cal. (Apr. 12, 2017) (asserting that the city cannot require Crown to submit *anything* further for any other permits after the city determined that a project qualified for approval under § 6409).

³¹ See, e.g., *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of AT&T*, at 15 (Mar. 8, 2017) (noting that “[s]ome municipalities continue to evaluate small cell deployments in the context of their experience with macro facilities”); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of Sprint Corp.*, at 5 (Mar. 8, 2017) (noting that many regulations applied to small cells were designed for macrocells); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of T-Mobile USA, Inc.*, at 7 (Mar. 8, 2017) (“Often municipalities still review small cells the same way they review macrocells because they have either a telecommunications siting process designed for macrocells or no special process for telecommunications facilities.”); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of Verizon*, at 20 (Mar. 8, 2017) (noting that many jurisdictions have not yet adopted specific policies for small cells).

³² See generally Malcom J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 FED. COMM. L.J. 887, 897 (1999) (estimating that more than 300 communities adopted a moratorium after the TCA to study wireless facilities siting issues); Shannon L. Lopata, Note, *Monumental Changes: Stalling Tactics and Moratoria on Cellular Tower Siting*, 77 WASH. U. L. REV. 193, 199–202 (1999) (describing how a “recent flood of cellular tower applications has forced local municipalities and governments throughout the United States to balance the desire to modernize against concerns about citizens’ property rights”); Timothy L. Gustin, Note, *The Perpetual Growth and Controversy of the Cellular Superhighway*, WM. MITCHELL L. REV. 1001, 1009 (1997); Susan L. Martin, Note, *Communications Tower Sitings: The Telecommunications Act of 1996 and the Battle for Community Control*, 12 BERKELEY TECH. L.J. 483, 492 (1997).

³³ See, e.g., *Sprint Spectrum, LP v. Jefferson Cnty.*, 968 F. Supp. 1457, 1461 (N.D. Ala. 1997) (finding that applications for cell sites “virtually tripled” immediately after the TCA); *Sprint Spectrum, LP v. City of Medina*, 924 F. Supp. 1036, 1037 (W.D. Wash. 1996) (“On February 13, 1996—five days after the TCA became law—the

However, the Commission’s effective prohibition on moratoria denies municipalities the traditional tool used to establish new rules for new developments.

Moratoria serve an important and essential function. These procedural devices temporarily pause new development activities to allow local officials to study any potential impacts on the community and establish standards and procedures to review and approve new projects.³⁴ Municipalities generally cannot adopt a moratoria without specific findings that the moratoria is necessary to respond to new developments and narrowly tailored to avoid unnecessary delays.³⁵

Without moratoria, many municipalities face an impossible choice. Either attempt to comprehend the issues, evaluate existing regulations and adopt new rules within the shot clock timeframe, continue to evaluate small cells under potentially ill-suited standards or simply deny projects that cannot reasonably be reviewed within the applicable shot clock. These conditions do not accelerate broadband deployment.

The Commission should relax its restrictions on local moratoria, or at least consult with the Broadband Deployment Advisory Committee to develop model ordinances that reasonably preserve local review, to allow municipalities a reasonable opportunity to adapt to small cell

Medina City Council, seeking time to deal with an expected flurry of applications, adopted a six-month moratorium on the issuance of new special use permits for wireless communications facilities.”).

³⁴ See, e.g., CAL. GOV’T CODE § 65858(a) (authorizing municipalities to adopt an “interim ordinance” to prohibit certain uses while local officials study the issue for up to 45 days); OR. REV. STAT. §§ 197.520(3)–(4) (authorizing municipalities to adopt a “moratorium” for up to 120 days when “existing development ordinances or regulations and other applicable law [are] inadequate to prevent irrevocable public harm from development”); see also ARIZ. REV. STAT. ANN. § 9-463.06 (authorizing municipalities to adopt a “moratorium” to address a shortage in essential public facilities for up to 120 days).

³⁵ See ARIZ. REV. STAT. ANN. § 9-463.06; CAL. GOV’T CODE § 65858; OR. REV. STAT. §§ 197.520(1)–(3) (setting out specific requirements for a moratorium, with specialized requirements for moratoria on developments in urban and rural areas, and for moratoria for reasons other than essential public facilities shortages); see also *Thunderbird Hotels, LLC v. City of Portland*, 180 P.2d 87, 94–95 (Or. Ct. App. 2008) (“[A]lthough a local government is authorized to delay or stop development, it may not do so in an *ad hoc* manner or without following the express procedures and requirements for moratoria.”).

deployments. To the extent that any abuses may occur, courts can discern a reasonable moratorium from one imposed in bad faith.³⁶

If the Commission finds it necessary to adopt formal rules, it should look to the *Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process* developed in cooperation by industry and municipal stakeholders in response to changes that followed the Telecom Act.³⁷ Principles for reasonable moratoria in the *Implementation Guidelines* are simple and effective:

1. Moratoria may be mutually beneficial when used to establish or amend local regulations in response to new technologies.
2. Moratoria should be for a fixed timeframe.
3. Local governments should continue to accept applications during the moratorium.
4. All stakeholders should cooperatively participate in the regulatory development process.
5. Pending applications should be processed in accordance with the new regulations.

An ounce of prevention is worth a pound of cure. The Commission should allow for reasonable moratoria to enable state and local governments to adjust their policies and procedures for new technologies and deployments.

³⁶ See, e.g., *Merrick Gables Ass'n, Inc. v. Town of Hempstead*, 691 F. Supp. 2d 355 (E.D.N.Y. 2010) (noting that a moratorium imposed as a means to regulate wireless facilities based on RF emissions would violate § 332(c)(7)(B)(iv)); *Masterpage Commc'ns, Inc. v. Town of Olive*, 418 F. Supp. 2d 66, 81 (N.D.N.Y. 2005) (granting injunctive relief after the town adopted successive moratoria to indefinitely delay action on an application); *Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1196 (W.D.N.Y. 2003) (finding that a permit denial without substantial evidence, coupled with a moratorium, effectively prohibited wireless services); *Sprint Spectrum, LP v. Town of Farmington*, No. 3:97 CV 863 (GLG), 1997 WL 631104, *5–6 (D. Conn. Oct. 6, 1997) (finding that a nine month moratorium enacted in part due to concerns about the effects that RF emissions would have on property values violated the TCA).

³⁷ See LSGAC, CTIA, PCIA and AMTA, *Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process* (Aug. 5, 1998), available at: <https://transition.fcc.gov/statelocal/agreement.txt> [hereinafter “*Implementation Guidelines*”].

II. A DEEMED-GRANTED REMEDY FOR § 332(c)(7)(B)(ii) WOULD BE BOTH IMPERMISSIBLE AND IMPRUDENT

The Commission should not adopt a deemed-granted remedy for the mere failure to act because Congress already specified the exclusive judicial remedy. Even if the statute were ambiguous, any potential ambiguities would not fairly allow for a deemed granted remedy given the statutory remedy and supporting Congressional history. In short, a deemed-granted remedy under § 332(c)(7)(B)(ii) would be “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.”³⁸

A. The Proposed Deemed-Granted Remedies Would Exceed the Commission’s Interpretive Authority Because Congress Already Specified Expedited Judicial Review as the Exclusive Recourse for a Failure to Act

All three deemed-granted theories exceed the Commission’s interpretive authority because “Congress has directly spoken to the precise question at issue.”³⁹ Section 332(c)(7)(B)(v) provides that “[a]ny person adversely affected by any . . . failure to act . . . that is inconsistent with this subparagraph may . . . commence an action in any court of competent jurisdiction.”⁴⁰

Although the Commission notes that § 332(c)(7)(B)(v) “does not explicitly state that [its] enforcement mechanisms are *exclusive*,”⁴¹ the Congressional record specifically provides otherwise.⁴² Courts will construe the ordinarily-permissive word “may” as mandatory when the legislative history and the statutory structure demonstrate that the drafters meant “shall.”⁴³ As the Conference Report unequivocally stated:

³⁸ See 5 U.S.C. § 706(2)(A).

³⁹ See *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

⁴⁰ 47 U.S.C. § 332(c)(7)(B)(v).

⁴¹ See *Wireless NPRM/NOI* at ¶ 14 (emphasis in original).

⁴² See H.R. CONF. REP. NO. 104–458, at 208.

⁴³ See, e.g., *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 198–99 (2000); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 376 (2d ed. 1980) (stating that “where a statute directs the doing of a thing for the sake of justice, or the public good, the word *may* is the same as the word *shall*” (emphasis in original)).

It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 *the courts shall have exclusive jurisdiction* over all other disputes arising under this section.⁴⁴

The fact that Congress also provided that “[a]ny person adversely affected by an act or failure to act . . . that is inconsistent with clause (iv) may petition the Commission” does not require that the word “may” be construed as permissive. The Conference Report clarified that:

[t]he limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission’s general authority over radio telecommunications⁴⁵

Indeed, the conferees explicitly rejected a proposed amendment that would centralize authority over wireless facilities in the Commission. The adopted version “*prevents Commission preemption of local and State land use decisions* and preserves the authority of State and local governments over zoning and land use matters.”⁴⁶

Taken together, the statute and the Conference Report show that § 332(c)(7)(B)(v) directed disputes related to state and local land use regulations and decisions to the courts but created an exception for disputes that arose from state or local attempts to regulate RF emissions that could be resolved by the Commission. This framework closely resembles a similar division in § 253(d), which authorizes the Commission to preempt barriers to competitive telecommunication services except when such barriers arise from local rights-of-way management practices.⁴⁷

⁴⁴ See H.R. CONF. REP. NO. 104–458, at 208 (emphasis added).

⁴⁵ See *id.* at 209.

⁴⁶ See *id.* at 207–08 (emphasis added); see also *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 407 (3rd Cir. 1999).

⁴⁷ See 47 U.S.C. § 253(d); see also 141 CONG. REC. S8305 (Aug. 4, 1995) (statement of Sen. Feinstein) (arguing that Commission preemption over local issues under § 253 should be curtailed and litigated in local district court instead).

Accordingly, the Commission lacks authority to interpret a deemed-granted remedy for a mere failure to act because § 332(c)(7)(B)(v), as confirmed by the Conference Report, unequivocally establishes the courts as the exclusive venue for disputes over a failure to act.

B. Any Ambiguity in § 332(c)(7)(B)(ii) Does Not Fairly Allow for a Deemed-Granted Remedy for a Mere Failure to Act

Section 332(c)(7)(B)(v) directly answers the precise question at issue. But even if it did not, a deemed-granted remedy would be an impermissible interpretation because § 332(c)(7)(B)(ii) requires State and local governments to “act” on—but not necessarily “approve”—an application, and any alleged violations must be resolved by the courts. All three deemed-granted theories aim to force an approval, usurp the courts’ exclusive role or both, and therefore seek to reach a result Congress would not have sanctioned.

1. *Proposed Interpretations Would Receive “Considerably Less Deference” Because They Depart from Consistently Held Views by the Commission and the Courts for Nearly 20 Years*

As a threshold matter, any deemed-granted interpretation would be subject to more scrutiny because it departs from the long-held view by the Commission and the courts that judicial remedies are the exclusive enforcement mechanism for failures to act within a reasonable time. Although the Commission may change its position, it must “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”⁴⁸ That basis for change in view “is ‘entitled to considerably less deference’ than a consistently held agency view.”⁴⁹ The theories advanced in the *Wireless NPRM/NOI*, while

⁴⁸ See *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

⁴⁹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); see also *State Farm*, 463 U.S. at 42 (“If Congress established a presumption from which judicial review should start, that presumption . . . [is] *against* changes in current policy that are not justified by the rulemaking record.” (emphasis in original)).

certainly a “fresh look” at the issues, lack a reasoned basis to depart from the Commission’s and the courts’ consistently held view.⁵⁰

All three deemed-granted theories conflict with the Commission’s long-held views that § 332(c)(7) limits its authority over land use decisions and does not support a deemed-granted remedy.⁵¹ In the *Rural Services Order*, for example, the Commission stated:

With respect to preemption, as discussed above, *Section 332(c)(7) generally preserves local authority over land use decisions, and limits the Commission’s authority in this area.* In appropriate cases, the Commission or its Bureaus have considered petitions alleging that particular regulations impinge on areas within the Commission’s exclusive jurisdiction.⁵²

Consistent with this position, the Commission stated in the *2009 Declaratory Ruling*, and reiterated in the *2014 Infrastructure Order*, that courts should craft case-specific remedies.⁵³

Although the Commission points out that neither the *2009 Declaratory Ruling* nor the *2014 Infrastructure Order* expressly stated that courts were the exclusive enforcement mechanism for § 332(c)(7)(B) violations, the Commission’s own website currently does. At the time these comments were filed, the Commission’s own website stated that:

[A]llegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be *resolved exclusively by the courts* (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than in RF

⁵⁰ See *Wireless NPRM/NOI* at ¶ 8.

⁵¹ See *2014 Infrastructure Order*, 29 FCC Rcd. at 12978, ¶ 284; *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39; *In re Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order and Notice of Further Rulemaking*, 19 FCC Rcd. 19078, 19143, ¶ 123 (2004) [hereinafter “*Rural Services Order*”]; see also *id.* at 19143, ¶ 123 n.368 (noting that “courts have exclusive jurisdiction over most complaints under Section 332(c)(7)(B)”).

⁵² *Rural Services Order*, 19 FCC Rcd. at 19143, ¶ 123 (emphasis added, internal footnotes omitted). With respect to the “areas within the Commission’s exclusive jurisdiction,” the Fifth Circuit in *Arlington I* found that this statement “makes clear that the limitation to which the FCC was referring was § 332(c)(7)(B)(v)’s grant of exclusive jurisdiction to the courts over most disputes arising under § 332(c)(7)(B).” See *City of Arlington v. FCC*, 668 F.3d 229, 254 (5th Cir. 2012) (“*Arlington I*”).

⁵³ See *2014 Infrastructure Order*, 29 FCC Rcd. at 12978 ¶ 284; *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39.

emissions cases, the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation.⁵⁴

Accordingly, the proposed deemed-granted remedies would be inconsistent with the Commission's long-held view that judicial remedies are the exclusive enforcement mechanism for § 332(c)(7)(B)(ii) violations.

The Commission's prior view also coincides with long-standing judicial interpretations. Although wireless industry members often cite to various judicial decisions as alleged support for the proposition that an injunction is appropriate relief under § 332(c)(7)(B), "case law does not establish that an injunction granting the application is always or presumptively appropriate when a 'failure to act' occurs."⁵⁵

Courts grant injunctive relief only when inaction, coupled with some conduct that manifests an intention not to approve the application, amounts to a *de facto* denial that violates other provisions in § 332(c)(7)(B).⁵⁶ For example, the Sixth Circuit in *Tennessee ex. rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392 (6th Cir. 2005), ordered Chattanooga to issue permits after the city verbally informed the applicant that it would not approve the proposed project and failed to act for more than nine months.⁵⁷ However, the mere failure to act did not trigger the mandamus. As the court made clear, "[Chattanooga]'s fatal flaw

⁵⁴ See *Tower and Antenna Siting*, FCC (Sept. 20, 2016), <https://www.fcc.gov/general/tower-and-antenna-siting> (last visited on June 11, 2016) (emphasis added).

⁵⁵ See *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39; see also Plaintiff's Reply Brief in Support of Motion for Partial Summary Judgment on the First Cause of Action of the Complaint at 2, *GTE Mobilnet of Cal. Ltd. P'ship v. City of Watsonville*, No. 16-cv-03987-NC (filed Oct. 11, 2016) (claiming that courts have "almost uniformly held" that injunctive relief is appropriate for a mere failure to act without citing case law that stands for such proposition).

⁵⁶ See, e.g., *Tennessee ex. rel. Wireless Income Props., LLC v. City of Chattanooga*, 403 F.3d 392, 398–99 (6th Cir. 2005).

⁵⁷ See *id.*

here was that it failed to issue a written decision supported by substantial evidence.”⁵⁸ At least four other circuits also require some more serious violation than a mere failure to act.⁵⁹

2. *Nothing in § 332(c)(7)(B)(ii) Suggests that Congress Intended State and Local Governments to Reach Anything Other than a Decision within a Reasonable Time*

Unlike other statutes in which the Commission found a basis for a deemed-granted remedy, such as the Spectrum Act, § 332(c)(7)(B)(ii) does not compel state or local governments to reach a specific result. Congress merely required that state and local government’s act within a reasonable time.

Congress knows how to compel a specific outcome when it chooses to do so.⁶⁰ Deemed-granted rules for eligible facilities requests, cable franchises, pole attachments and requests for regulatory forbearance all derive from statutes that compel an approval for a very specific application.⁶¹ Section 332(c)(7)(B)(ii) merely imposes an obligation to “act” within a reasonable

⁵⁸ See *id.* at 400 n.6.

⁵⁹ See *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1221–1222 (11th Cir. 2002) (granting injunctive relief because the county denied an application without substantial evidence); See *Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24–25 (1st Cir. 2002) (granting injunctive relief because the board’s denials effectively prohibited personal wireless services); See *Pine Grove Twp.*, 181 F.3d at 409–10 (granting injunctive relief because the township denied an application without substantial evidence); See *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2nd Cir. 1999) (granting injunctive relief because the town denied an application without substantial evidence); see also *T-Mobile Ne. LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 463 (S.D.N.Y. 2009). (distinguishing procedural and substantive Telecom Act violations and granting an injunction because the plaintiff showed a substantive violation occurred); *Omnipoint Commc’ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 214 n.7 (S.D.N.Y. 2004) (finding that a mere failure to act can be mooted by a decision during the pendency of litigation).

⁶⁰ Cf. *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994).

⁶¹ See 47 U.S.C. § 1455(a) (“[A] State or local government *may not deny, and shall approve*, any eligible facilities request . . .” (emphasis added)); *id.* § 541(a)(1) (“[A] franchising authority *may not . . . unreasonably refuse to award* an additional competitive franchise.” (emphasis added)); *id.* § 537 (“If the franchising authority fails to render a final decision on the request within 120 days, such request shall be *deemed granted* unless the requesting party and the franchising authority agree to an extension of time.” (emphasis added)); *id.* § 224(f)(1) (“A utility *shall provide a cable television system or any telecommunications carrier with nondiscriminatory access* to any pole, duct, conduit, or right-of-way owned or controlled by it.” (emphasis added)); *id.* § 160(c) (“Any such petition *shall be deemed granted* if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission.” (emphasis added)).

time and covers all applications for all new and modified personal wireless service facilities.⁶² The plain language expresses no preference or opinion as to what the decision should be.

In this regard, the Commission’s view that § 332(c)(7) and the Spectrum Act are not materially different (insofar as Congress did not intend facilities under either framework to be “mired in [a] protracted approval process”) appears misplaced.⁶³ Section 332(c)(7) requires that state and local governments process wireless applications in the same manner as they process other zoning applications—no slower and no faster, whereas the Spectrum Act mandates approval whether the proposed project complies with local zoning rules.⁶⁴ Although § 332(c)(7)(B)(v) requires the *courts* to hear complaints on an “expedited” basis, this does not affect the “reasonable” time state and local governments have to act under § 332(c)(7)(B)(ii). Accordingly, an interpretation that would mandate an approval would be manifestly contrary to the plain language that compels only a decision within a reasonable time.

3. *Congress Did Not Intend the Commission to Act for States or Local Governments Who Fail to Act Within a Reasonable Time*

The Conference Report also makes clear that Congress did not intend for the Commission to preemptively step in and make “zoning and land use decisions” after a failure to act within a reasonable time.⁶⁵ However, whether by an “irrebuttable” presumption, a lapse in local authority or wholesale preemption, all three deemed-granted theories in the *Wireless NPRM/NOI* usurp the

⁶² See *id.* § 332(c)(7)(B)(ii) (“A State or local government or instrumentality thereof *shall 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 with such government or instrumentality, taking into account the nature and scope of such request.” (emphasis added)).

⁶³ See *Wireless NPRM/NOI* at ¶ 12.

⁶⁴ Compare H.R. CONF. REP. NO. 104-458, at 208, with 47 U.S.C. § 1455(a); see also *2014 Infrastructure Order*, 29 FCC Rcd. at ¶ 201 (permitting Section 6409(a) modifications to legal non-conforming structures that would otherwise be prohibited under local zoning laws).

⁶⁵ See H.R. CONF. REP. NO. 104-458, at 207-08.

state or local government’s role as the primary decision-maker. Such an expansive construction that would fundamentally change the regulatory scheme laid out in the statute must be incorrect.⁶⁶

The Commission’s reliance on *Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) (“*Arlington I*”), and *Arlington v. FCC*, 133 S.Ct. 1863 (2013) (“*Arlington II*”), for the proposition that “courts must follow” Commission interpretations appears overstated.⁶⁷ The Fifth Circuit in *Arlington I* upheld the Commission’s guidance to the courts in the *2009 Declaratory Ruling* because the court found the word “reasonable” contained an ambiguity that fairly allowed for the presumptively reasonable timeframes.⁶⁸ The Supreme Court in *Arlington II* addressed an even narrower question as to whether *Chevron* deference applied to agency interpretations that could enlarge the agency’s jurisdiction.⁶⁹ Neither case expressed any opinion as to potential ambiguities in § 332(c)(7)(B)(v), or whether such ambiguities, if any, fairly allowed for a deemed-granted remedy.

Accordingly, even if § 332(c)(7)(B)(v) did not directly foreclose deemed-granted remedies, the proposed remedies would exceed the Commission’s interpretive authority because all three theories go further than any ambiguity in the statute would allow.

4. An “Irrebuttable” Presumption Creates a New Substantive Limitation on State and Local Authority that Impermissibly Instructs the Courts How to Rule in a Particular Case

In addition to the fatal flaws noted above, the Commission’s proposed “irrebuttable” presumption would impermissibly create a new substantive limitation on state and local governments and instruct the courts how to rule in individual cases. Even if the Commission’s

⁶⁶ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *MCI Telecommns. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 224 (1994).

⁶⁷ See *Wireless NPRM/NOI* at ¶ 10.

⁶⁸ See *Arlington I*, 668 F.3d at 259–60.

⁶⁹ See *Arlington v. FCC*, 133 S.Ct. 1863, 1867–1868 (2013) (“*Arlington II*”) (“We granted certiorari . . . limited to the first question presented: ‘Whether . . . a court should apply *Chevron* to . . . an agency’s determination of its own jurisdiction.’” (internal citation omitted)).

proposed rule did not obviate the courts' role altogether, the Commission cannot create new substantive limitations that effectively dictate outcomes in a judicial proceeding.

Section 332(c)(7)(B) contains the *only* limitations on state and local authority with respect to personal wireless service facilities.⁷⁰ Unlike a rebuttable presumption, which merely shifts the burden of proof from one litigant to another, an irrebuttable presumption establishes a new substantive law.⁷¹ Thus, the Commission cannot interpret § 332(c)(7)(B)(ii) to contain a silent irrebuttable presumption because it would create a new substantive limitation on state and local authority.

Moreover, the irrebuttable presumption binds the courts' discretion and effectively instructs it how to rule. Although proponents may claim that an irrebuttable presumption does not eliminate the judiciary's role because shot clock disputes would still be heard in court, the rule would render the proceedings a meaningless exercise and substitute the Commission's desired outcome for the judge's reasoned opinion as to the facts and the law. Congress cannot instruct the courts how to rule in any case, and the Commission cannot do what Congress could not do itself.⁷² Therefore, an irrebuttable presumption is forbidden because it would impermissibly instruct the courts how to interpret and apply the law to the circumstances in a case.⁷³

⁷⁰ See *T-Mobile S. LLC v. City of Roswell*, 135 S.Ct. 808, 816 (2014) (finding that "the enumerated limitations [in § 332(c)(7)(B)] to set out an exclusive list").

⁷¹ In adopting the rebuttable presumption, Chairman Genachowski stressed that "the process we establish does not dictate any substantive outcome in any particular case, or otherwise limit state and local governments' fundamental authority over local land use." *2009 Declaratory Ruling*, 24 FCC Rcd. at 14030 (statement of Chairman Julius Genachowski).

⁷² See *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1322–1323 (2016) (holding that Article III "blocks Congress from requiring federal courts to exercise the judicial power in a manner that Article III forbids" (internal punctuation omitted)).

⁷³ See *id.* at 1323; see also *In re Taxable Municipal Bond Securities Litigation*, 796 F. Supp. 954, 960 (E.D. La. 1992) ("Congress unquestionably possesses the power to change or make law. What Congress cannot do is instruct the court on how to decide the merits of a particular controversy without changing the legal rules that prescribe the rights of the parties.").

5. *State and Local Government Police Powers Cannot “Lapse”*

Lastly, the proposed interpretation that state and local authority lapses after a failure to act stretches the statutory text beyond its breaking point.⁷⁴ When Congress provides that applicants may sue a state or local government that fails to act within a reasonable time, it does not ordinarily mean that state and local governments forfeit all their authority if they fail to act within a reasonable time. Especially when the same statute generally preserves all state and local authority, the Commission’s proposed lapsed-authority interpretation would violate the doctrine that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”⁷⁵

Any argument that Congress impliedly intended state and local land use authority to lapse would face a significantly uphill challenge in the courts to overcome the presumption against preemption in traditionally local matters unless preemptive intent is “unmistakably clear” in the statutory text.⁷⁶ Section 332(c)(7) clearly does not preempt the field because § 332(c)(7)(A) expressly preserves state and local authority over land use decisions.⁷⁷ Likewise, no express intent to preempt state or local authority after some timeframe elapses appears anywhere in the statute. The Commission would need to rely on implied preemption, which Congress forbids.⁷⁸

⁷⁴ See *Wireless NPRM/NOI* at ¶ 13.

⁷⁵ See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001); see also *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

⁷⁶ See *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1996).

⁷⁷ See 47 U.S.C. § 332(c)(7)(A); *Sprint Tel. PCS LP v. Cnty. of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008) [hereinafter “*Sprint II*”]; see also *Hillsborough Cnty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) (“The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme.”).

⁷⁸ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (Feb. 8, 1996) (“This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”); *City of Dallas v. FCC*, 165 F.3d 341, 347–48 (5th Cir. 1999).

C. Any Deemed-Granted Remedies for Discretionary Authorizations Must Incorporate Due Process Protections

To the extent that the Commission does attempt to impose some deemed-granted rules, it should ensure that no requests for authorization under § 332(c)(7) may be automatically approved without prior notice and an opportunity to be heard. Land use decisions implicate due process protections insofar as new developments diminish property interests.⁷⁹ Under both federal and state law, prior notice and an opportunity to be heard is an essential due process protection.⁸⁰

The plain language in § 332(c)(7)(B)(ii) and its legislative history show that Congress envisioned enough space for due process in wireless siting. Under § 332(c)(7)(B)(ii), the timeframe for review depends on the “nature and scope of [the] request.” The Conference Report explains that this feature was intended to facilitate a “public hearing or comment process” when required under local law.⁸¹

Wireless facilities are not exempt from due process concerns. For example, in *American Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014), the Ninth Circuit held that applications to renew three macrocells could not be deemed approved under California state law without due process because the court had “little trouble finding that the automatic approval . . . would constitute a substantial or significant deprivation of other landowners’ property interests .

⁷⁹ See, e.g., *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1049 (9th Cir. 2014) (quoting *Horn v. Cnty. of Ventura*, 596 P.2d 1134, 1140 (Cal. 1979)).

⁸⁰ See U.S. CONST. Amendments V and XIV; ARIZ. CONST. art. II, § 4 (“No person shall be deprived of life, liberty, or property without due process of law.”); CAL. CONST. art. 1, § 7 (“[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws”); *Londoner v. Denver*, 210 U.S. 373, 386 (1908).

⁸¹ See H.R. CONF. REP. NO. 104-458, at 208

...”⁸² Thus, decisions to approve (or renew) authorizations for wireless facilities subject to local discretion under § 332(c)(7) require prior notice and an opportunity to be heard.

Procedural protections are a common feature in deemed-approved provisions under state law.⁸³ Accordingly, any deemed-granted rule imposed by the Commission should not become effective without proper notice and an opportunity to be heard.

III. THE COMMISSION SHOULD NOT ADOPT NEW OR SHORTER SHOT CLOCKS

The wireless deployment process thrives on cooperation among all stakeholders. Just as the Commission found in the *2009 Declaratory Ruling* that too much time for review hindered deployment, it should now recognize that too little time for review threatens to grind cooperative efforts—and deployment—down. Similarly, the Commission should not adopt new shot clock classifications based on over-simplified assumptions about what impacts review periods.

A. Commission Authority to Define “Reasonable” Timeframes for Review is Not Unlimited, and Cannot Frustrate Ordinary Zoning Procedures

Nowhere in the *Wireless NPRM/NOI* does the Commission question its authority to create new or shorter shot clocks.⁸⁴ Although the Supreme Court in *Arlington v. FCC*, 133 S.Ct. 1863 (2013), upheld the Commission’s authority to interpret a “reasonable” timeframe, the actual interpretations must always be “based on a permissible construction of the statute.”⁸⁵

Shot clocks cannot be so short that they frustrate ordinary permitting processes within a given jurisdiction. The obligation to act within a reasonable time must be read in conjunction with Congress’ stated intent that “[i]f a request . . . involves a zoning variance or a public hearing

⁸² See *Am. Tower Corp.*, 763 F.3d at 1050–1051.

⁸³ See, e.g., CAL. GOV’T CODE § 65964.1(a)(2) (prohibiting deemed approvals without all notices required for the application); 53 PA. CONS. STAT. ANN. § 10908(9) (authorizing a deemed approval only after the notice required by law has occurred).

⁸⁴ See *Wireless NPRM/NOI* at ¶¶ 16–19.

⁸⁵ See *Arlington II*, 133 S.Ct. at 1874 (quoting *Chevron*, 467 U.S. at 842) (internal quotations omitted).

or comment process, the time period for rendering a decision will be the usual period under such circumstances.”⁸⁶ Congress intended the “reasonable” time to allow for “the generally applicable time frames for zoning decision”⁸⁷ Any new interpretations that effectively foreclose traditional zoning processes for wireless facilities would go “further than the ambiguity [in § 332(c)(7)(B)(ii)] will fairly allow.”⁸⁸

B. Over-Granulized Shot Clock Classifications Proposed in the *Wireless NPRM/NOI* Are Based on False or Over-Simplified Assumptions about Which Facilities Require More or Less Time for Review

As a general matter, the Commission should not further granulize shot-clock classifications. More specifically, the Commission’s proposed classifications distort the reasons why some facilities require a lengthier review than others. Although distinctions such as overall height, equipment size and location may impact the review process, the most important factor is whether the proposed deployment complies with local zoning codes.

1. Overall Height

The Commission should not create a new shot clock classification based on overall height. Whether a tower at a particular overall height will create aesthetic concern depends on context. Structures with the same overall height have a greater aesthetic impact in a hilly area than in a flat area due to relative vantage points throughout the neighborhood.⁸⁹ A 50-foot tower in an industrial park may not require the same public process as a 50-foot tower in the public

⁸⁶ See H.R. CONF. REP. NO. 104-458, at 208; *see also 2009 Declaratory Ruling*, 24 FCC Rcd. at 14010, ¶ 42 (finding that “Congress intended the decisional timeframe to be the ‘usual period’ under the circumstances for resolving zoning matters”).

⁸⁷ See H.R. CONF. REP. NO. 104-458, at 208.

⁸⁸ See *Arlington II*, 133 S.Ct. at 1874.

⁸⁹ See, e.g., John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME L.J. ETHICS & PUB. POL’Y 537, 549 (2009) (noting hillsides as a location associated with greater aesthetic impacts); Sandy Bond, *Cell Phone Tower Proximity Impacts on House Prices: a New Zealand Case Study*, 13 PAC. RIM PROP. RESEARCH J. 63, 84 (2007) (noting that topographical differences between neighborhoods impacted public opinions about aesthetic concerns).

rights-of-way. To be sure, tall towers tend to raise more general concerns, but location and context matters far more than overall height.

Moreover, delays in approvals due to height generally have more to do with the fact that the proposed tower exceeds the zone height limit. Different communities adopt different zone heights for the same zone classifications; the limit in a residential zone in Scottsdale, Arizona, may be 35 feet whereas the limit in the same zone classification in Hermosa Beach, California, may be 25 feet.⁹⁰ Height limits may also widely differ within the same general zone classification for specific sub-classifications, such as in Portland, Oregon, where overall height limits across various commercial zones range from 35 feet to 75 feet.⁹¹

Accordingly, a shot clock classification based on overall height would not reflect the interactions between height, context and code compliance. Any attempt to account for these diverse factors in a meaningful way would be nearly impossible.

2. *Zone Classifications*

The Commission should not create a new shot clock classification for zone classifications. Timeframes that incent certain deployments over others based on zone classifications alone would intrude on state and local authority to determine which locations would be most appropriate for particular facilities.

Moreover, increasingly common mixed-use zones, design overlay districts, environmental preservation districts and other special zoning classifications would inevitably outpace the Commission's rules and create further confusion about the applicable shot clock

⁹⁰ Compare SCOTTSDALE, ARIZ., CODE § 5.014(D), with HERMOSA BEACH, CAL., CODE § 17.08.030(A).

⁹¹ See PORTLAND, OR., CODE § 33.130.210, Table 130-3.

timeframe. For example, both Portland, Oregon, and Tucson, Arizona, each have 28 separate zone classifications.⁹² Los Angeles, California, has 68 separate zone classifications.⁹³

3. *Utility Structures and the Public Rights-of-Way*

The Commission should not create a new shot clock classification for utility structures and deployments in the public rights-of-way. Shorter timeframes for facilities on utility structures or in the public rights-of-way would conflict with the Commission's prior determination that such deployments "are *more* likely to raise aesthetic, safety, and other issues" than traditional towers.⁹⁴

- ***Wireless facilities on utility structures and in the public rights-of-way are more difficult to conceal.*** Slim concrete or wooden poles and bare lattice towers significantly curtail concealment options for wireless attachments. Moreover, these locations are often highly visible because utilities and rights-of-way are naturally close to where people live and work. Applicants often strongly resist concealment techniques that work well, such as decorative replacement poles, underground equipment or landscape screening for ground-mounted equipment.
- ***Additional structures in the public rights-of-way create additional potential hazards to the public.*** A common concern among public works directors is that pole proliferation in the public rights-of-way threatens public safety. For example, overbuilt towers and pole attachments can cause severe damage, as happened in 2007 in California when a utility pole overloaded with wireless transmission equipment collapsed and started a fire that ravaged nearly 4,000 acres and caused millions of dollars in property damage.⁹⁵
- ***Work in the public rights-of-way generally requires greater coordination with third parties than as compared with deployments on private property.*** Both new structures and new attachments to existing structures must ensure proper separations from existing utilities and other uses, which often requires a technical review.⁹⁶ When a deployment requires excavation, such as for new wireline utilities, hand holes or reinforced pole foundations, local officials must ensure that the proposed work does not damage or

⁹² See City of Portland, Bureau of Planning & Sustainability, *Zoning Map* (Jan. 1, 2017), available at: <https://www.portlandoregon.gov/bps/article/59265>; TUCSON, ARIZ., DEV. CODE § 4.5.

⁹³ See City of Los Angeles, Dept. of Building and Safety, *Generalized Summary of Zoning Regulations* (Jan. 24, 2006), available at: https://planning.lacity.org/zone_code/Appendices/sum_of_zone.pdf.

⁹⁴ See *2014 Infrastructure Order*, 29 FCC Rcd. at 12948, ¶ 195.

⁹⁵ See Melissa Caskey, *CPUC Approves \$51.5-Million Malibu Canyon Fire Settlement*, MALIBU TIMES (Sep. 23, 2013), available at http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html.

⁹⁶ See, e.g., Cal. Pub. Utils. Comm'n, *Rules for Overhead Electric Line Construction*, General Order No. 95 (Jan. 2015), available at: <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M146/K646/146646565.pdf> (last visited June 15, 2017).

interfere with any pre-existing underground utilities. Sidewalk closure and traffic control plans may also be necessary to ensure that the construction, excavation or installation work does not disrupt pedestrian and vehicular traffic.

4. *DAS and Small Cells*

The Commission should not establish special shot clock rules for DAS or small cells. Such rules would be inevitably discriminatory against other technologies and based on the false premise that all DAS and small cells are smaller or less obtrusive.

First, the Commission should not create new shot-clock classifications that discriminate based on the technological configuration proposed. This proposal would reverse long-standing Commission policies that favor technologically neutral rules, and create incentives for competitive carriers to prefer DAS and small cell technologies over others. State and local governments could not discriminate in this manner,⁹⁷ and neither should the Commission.

Second, a shorter shot clock for DAS or small cells apparently stems from the false premise that these facilities are “small” and uniform in appearance. A “small” cell can be just as large and intrusive as a “macro” cell because the word “small” refers to the coverage area rather than the equipment. Although some DAS and small cell deployments may involve pizza box-sized antennas,⁹⁸ the vast majority do not and many use the same equipment as traditional macro sites. Indeed, the Commission’s own volume-based definition for a “small cell” could contain more than 76 large pizza boxes.⁹⁹

As the example photographs below show, DAS and small cell deployments come in all sizes and shapes:

⁹⁷ See, e.g., *New York SMSA Ltd. P’ship v. Town of Clarkstown*, 612 F.3d 97, 105-106 (2nd Cir. 2010) (invalidating a local ordinance that made it virtually impossible to deploy any facilities other than a DAS).

⁹⁸ See Letter from Brian M. Josef, CTIA, to Marlene H. Dortch, FCC (April 13, 2017).

⁹⁹ See *2014 Infrastructure Order*, 29 FCC Rcd. at 12907, ¶ 92 n. 251 (defining a small cell as an installation with no more than six cubic feet in antenna volume and no more than 17 cubic feet in equipment volume). The average large pizza box is approximately 0.30 cubic feet (16.25" x 16.25" x 2.00").



Figure 1: Outdoor Small Cell with Integrated Backhaul by ip.access in the United Kingdom.

The equipment depicted in Figure 1 provides outdoor LTE services with an integrated wireless backhaul solution.



Figure 2: CommScope Small Cell Deployment at Petco Park, San Diego, Cal. (Photo Robert C. May III)

The “pizza box” antennas shown in Figure 2 are typically used indoors or at venues such as shopping malls and stadiums. Not visible in this example are the remote radio units, equipment racks and cables that support these antennas.



Figure 3: Spectrum Cable (fka Time Warner) Strand-mounted Node in Santa Monica, Cal. (Photo by Dr. Jonathan L. Kramer)



Figure 4: Mobilitie Small Cell in Los Angeles (Photo by Dr. Jonathan L. Kramer)



Figure 5: Crown Castle Small Cell in Riviera Beach (Susan Salisbury, New: Is Fast Digital Service Worth Placing a Pole in Front of Your Home?, PalmBeachPost.com (Mar. 20, 2017 8:45AM), available at: <http://www.palmbeachpost.com/business/new-fast-digital-service-worth-placing-pole-front-your-home/bw1EEYC4loOlyJGk0yQqKJ/>.)



Figure 6: Zayo Small Cell (Mark Ambrog, Zayo Group Installing Small Cell Equipment Around Town to Enhance Mobile Coverage, CurrentInZionsville.com (Sept. 13, 2016), available at: <http://www.currentzionsville.com/2016/09/13/zayo-group-installing-small-cell-equipment-around-town-to-enhance-mobile-coverage/>.)



Figure 7: AT&T “Small Cell” in Oakland, Cal. (Photo by Omar Masry)



Figure 8: T-Mobile “Small Cell” in Riverside, Cal. (Photo by Tellus Venture = http://www.tellusventure.com/images/2017/5/tmobile_small_cell_alessandro_riverside.jpg)



Figure 9: “Small Cell” in Portland, Or. (Photo by Omar Masry)

To the extent that DAS and small cells use the same or similar large equipment as macro sites, these facilities often implicate the same aesthetic concerns as traditional deployments. Moreover, applicants typically seek to place these facilities in the public rights-of-way where the equipment will be even more visible and less screened than it might be on private property.¹⁰⁰ Narratives that DAS and small cells do not raise the same aesthetic or safety concerns as “traditional, larger . . . equipment” are simply not true.¹⁰¹

5. *Batched Applications*

¹⁰⁰ Compare *Clarkstown*, 612 F.3d at 101–02 (describing a local ordinance that incentivized DAS), with *NewPath Networks LLC v. City of Irvine*, No. SACV 06–550–JVS (ANx), 2009 WL 9050819, *19 (C.D. Cal. Dec. 23, 2009) (describing local opposition to DAS because it would be in close proximity to residences).

¹⁰¹ See *Wireless NPRM/NOI* at ¶ 18.

The Commission should encourage experimentation with batched applications, but should not adopt any rigid classifications or mandatory rules. Although batched applications may be an appropriate solution under some circumstances, it may mutate into a problem if local governments are required to accept more applications than their resources would allow them to process within the applicable timeframe. The Commission should allow local governments to serve as laboratories for innovation and determine whether sufficient resources are available to handle batched applications.

Batched applications should not require local governments to issue a single permit for multiple sites. At least some individualized review will be necessary no matter how similar the batched installations may seem. Poles that seem identical may have different structural capacities, may be placed on streets with higher traffic volumes or may be in more visually prominent locations. Moreover, many public works departments track encroachments in the public rights-of-way by individual permit numbers.

This common tracking system allows local governments to ensure that conditions specific to an individual permit can be recorded and monitored during the installation process. A common problem local governments encounter when considering a blanket permit approach is that permit-tracking software generally does not contemplate this function, and customized upgrades can be prohibitively expensive for some smaller jurisdictions. This approach would inevitably leave some local governments that cannot afford expensive software upgrades without the tools to effectively monitor a permittee's compliance with public health and safety laws.

IV. LOCAL GOVERNMENT RESPONSES TO THE NOTICE OF INQUIRY

Local Governments appreciate the Commission's effort to harmonize the provisions in §§ 253 and 332(c)(7), as similar statutes should be whenever possible.¹⁰² We also respectfully remind the Commission that:

[i]t would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.¹⁰³

Although different interpretations may have emerged for superficially similar terms, sections 253 and 332(c)(7) concern two different technologies at two different stages in market development at the time Congress adopted the Telecommunications Act. Given the dissimilarities between the facilities and services covered under each statute, it may be a more reasonable approach to admit that these statutes are simply different.

A. Congress Never Intended Sections 253 and 332 to be Simultaneously Applied to Both Wireless and Wireline Facilities

Congress created two different statutory frameworks to govern the interaction between federal, state and local authority over different services: one for "telecommunication services" in general under § 253 and another for wireless telecommunications services under § 332. These frameworks bear a certain resemblance. Both contain a general prohibition on state and local laws that would prohibit or effectively prohibit competitive market entry; both contain safe harbors for state laws necessary for universal service and consumer protections; and both contain safe harbors for state and local land use and construction regulations.¹⁰⁴ However, these

¹⁰² See *Wireless NPRM/NOI* at ¶ 85; see also *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole' . . .").

¹⁰³ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

¹⁰⁴ Compare 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."), with *id.* § 332(c)(3)(A) ("[N]o State or local government shall have any authority to

frameworks also contain important differences that show Congress never intended both to be simultaneously applicable to wireless and wireline services.

First, Congress created a narrower classification for wireless services within the broader telecommunications services class and afforded wireless service providers *broader* protections from state-level regulations for universal service and consumer protections. Section 332(c)(3) only subjects commercial mobile services to the same state regulations as other telecommunication services “where such services are a substitute for land line telephone exchange service . . . within such State”¹⁰⁵ Thus, Congress understood that wireless services *could potentially* be a substitute for landline services but needed additional protections until and unless wireless could compete against landline services.

Second, Congress afforded wireless service providers *narrower* protections from state and local land use and construction regulations. For example, the plain text in § 253 expressly preserves only “non-discriminatory” rights-of-way management practices but Congress saw fit to allow state and local governments to reasonably discriminate among functionally equivalent services under § 332(c)(7). Moreover, unlike § 332(c)(3), state and local authority over land use and construction specifically preserved over wireless facilities never reverts to the analogous (but less robust) safe harbor applicable to telecommunication services in general no matter how competitive wireless services may be with landline services. Thus, Congress understood that

regulate the entry of . . . any commercial mobile service or any private mobile service”); *compare id.* § 253(b) (preserving state authority “to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers”), *with id.* § 332(c)(3)(A) (preserving state authority to impose “requirements . . . necessary to ensure the universal availability of telecommunications service at affordable rates”); *and compare id.* § 253(c), *with id.* § 332(c)(7)(A).

¹⁰⁵ See 47 U.S.C. § 332(c)(3)(A). This section also contains a procedure in which the state can regulate commercial mobile services in the same manner as other telecommunication services when the Commission finds that wireless and wireline services are in effective competition within that particular state. See *id.* §§ 332(c)(3)(A)(i)–(ii).

wireless facilities would always implicate different land use and construction issues than wireline facilities and should therefore be regulated under different rules.

Accordingly, the Commission should approach any attempt to harmonize the provisions in §§ 253 and 332(c)(7) with the understanding that Congress created different statutes, with different standards, as a vehicle to recognize the real differences between wireless and wireline telecommunications. Moreover, the Commission should not attempt to harmonize these statutes to the extent that it would eviscerate the more specific protections Congress created for state and local land use and construction regulations applicable to wireless facilities.¹⁰⁶

B. Effective Prohibitions

1. *Section 253(a) Requires an Actual Prohibition, and Earlier Decisions that Set a Lower Bar Have Been Generally Overruled or Isolated to Their Facts*

The plain language in § 253(a) bans “prohibitions” rather than mere burdens.¹⁰⁷ As the Ninth Circuit explained:

Section 253(a) provides that “[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting . . . provi[sion of] . . . telecommunications service.” In context, it is clear that Congress’ use of the word “may” works in tandem with the negative modifier “[n]o” to convey the meaning that “state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.” Our previous interpretation of the word “may” as meaning “might possibly” is incorrect.¹⁰⁸

¹⁰⁶ See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (citations omitted) (holding “[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.”).

¹⁰⁷ See 47 U.S.C. § 253(a).

¹⁰⁸ See *Sprint II*, 543 F.3d at 578; see also *Level 3 Commc’ns LLC v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir. 2007) (holding that a plaintiff “must show actual or effective prohibition, rather than the mere possibility of prohibition” to prevail under § 253(a)).

Although earlier decisions misread § 253(a), at least one court expressly reversed its approach and others have trended in the same direction.¹⁰⁹

Decisions from the First, Second and Tenth Circuit cited in the *Wireless NPRM/NOI* all stemmed from *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000), which never actually interpreted the provisions in § 253(a). The court in *RT Communications* merely reviewed a challenge to how the Commission interpreted “competitively neutral” under § 253(b) in *In re Silver Star* under the deferential *Chevron* deference standard.¹¹⁰ Although the decision in *RT Communications* did not even address “effective prohibitions” under § 253(a), the Second Circuit in *TCG New York, Inc. v. White Plains*, 305 F.3d 67 (2nd Cir. 2002) cited it as the only circuit court decision available and the First Circuit subsequently followed suit.¹¹¹

Perhaps in recognition that *White Plains* adopted the wrong approach, decisions from the Second Circuit have since gradually moved toward the approach adopted in the Eighth and Ninth Circuits. In 2010, the court affirmed a lower court decision that expressly adopted the Ninth Circuit approach.¹¹² Last year, the court in *Global Network Communications, Inc. v. New York*, 562 F.3d 145 (2nd Cir. 2016), isolated *White Plains* to its facts.¹¹³ Thus, case law from other

¹⁰⁹ See *Sprint II*, 543 F.3d at 578 (overruling *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001); *Qwest Commc’ns Inc. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006); and *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004)); *Global Network Commc’ns Inc. v. City of New York*, 562 F.3d 145, 152 (2nd Cir. 2016) (distinguishing *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002), and limiting its impact to its facts).

¹¹⁰ See *RT Commc’ns Inc. v. FCC*, 201 F.3d 1264, 1267–1268 (10th Cir. 2000).

¹¹¹ See *Puerto Rico Tel. Co. Inc. v. Mun. of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004), which relied on *RT Commc’ns Inc.*, 201 F.3d at 1268); *City of Santa Fe*, 380 F.3d at 1269 (citing *RT Commc’ns Inc.*, 201 F.3d at 1268); *White Plains*, 305 F.3d at 76 (citing *RT Commc’ns Inc.*, 201 F.3d at 1268).

¹¹² See *New York SMSA Ltd. P’ship. v. Town of Clarkstown*, 603 F. Supp. 2d 715, 731 (S.D.N.Y. 2009) (adopting the reasoning in *Sprint II*), *aff’d* 612 F.3d 97 (2nd Cir. 2010) (approving the district court’s decision but not directly addressing whether to adopt the reasoning in *Sprint II*).

¹¹³ See *Global Network Commc’ns, Inc.*, 562 F.3d at 152; see also *Telebeam Telecomms. Cotelerp. v. City of New York*, 194 F. Supp. 3d 178, 183 (E.D.N.Y. 2016).

circuits that relied on either *RT Communications* or *White Plains* would likely be decided differently today.

2. *Although Different Circuits Interpret § 332(c)(7)(B)(i)(II) Differently, All Require More than a Potential or Hypothetical Prohibition and Share Other Important Similarities that Should be Retained*

Similar to the standard under § 253(a), courts properly require plaintiffs to show more than a merely hypothetical prohibition to prevail under § 332(c)(7)(B)(i)(II).¹¹⁴ Every circuit court to interpret this provision requires that the plaintiff show that the local government denied its request despite (1) a technical need and (2) a demonstration that their proposal is either the least intrusive or only reasonable solution.¹¹⁵

Various circuits phrase these requirements slightly differently. With respect to the technical-need element, the First, Second, Third, Seventh, Eighth, Ninth and Tenth circuits require a plaintiff to show a “significant gap” in its service, whereas the Fourth Circuit requires a plaintiff to show “no effective coverage.”¹¹⁶ As to the second element, the Second, Third, Eighth, Ninth and Tenth circuits follow the “least intrusive means” approach and the First, Fourth and Seventh circuits follow the “no reasonable alternatives” approach.¹¹⁷

The salient technical difference between approaches to § 332(c)(7)(B)(i)(II) is how the courts allocate evidentiary burdens between the parties. A least intrusive means analysis involves

¹¹⁴ See, e.g., *Sprint II*, 543 F.3d at 578.

¹¹⁵ See *AT&T Mobility Servs. LLC v. Village of Corrales*, 642 Fed. Appx. 886 (10th Cir. 2016); *T-Mobile Northeast LLC v. Loudoun Cnty. Bd. of Supervisors*, 748 F.3d 185 (4th Cir. 2014); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715 (9th Cir. 2005); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003); *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002); *Sprint Spectrum LP v. Willoth*, 176 F.3d 630 (2nd Cir. 1999); *ATP Pittsburgh Ltd. P’ship v. Penn Twp. Butler Cnty.*, 196 F. 3d 469 (3rd Cir. 1999).

¹¹⁶ Compare *Village of Corrales*, 642 Fed. Appx. at 890; *City of Des Moines*, 465 F.3d at 825; *San Francisco*, 400 F.3d at 725; *VoiceStream*, 342 F.3d at 834; *Town of Pelham*, 313 F.3d at 635; *Willoth*, 176 F.3d at 643; *ATP Pittsburgh Ltd. P’ship*, 196 F. 3d at 480, with *Loudoun Cnty.*, 748 F.3d at 200.

¹¹⁷ Compare *Village of Corrales*, 642 Fed. Appx. at 890; *Des Moines*, 465 F.3d at 825; *San Francisco*, 400 F.3d at 725; *Willoth*, 176 F.3d at 643; *ATP Pittsburgh Ltd. P’ship*, 196 F. 3d at 480, with *Loudoun Cnty.*, 748 F.3d at 200; *VoiceStream*, 342 F.3d at 834; *Town of Pelham*, 313 F.3d at 635.

a burden-shifting framework between applicants and local reviewers, whereas the burden of production always remains with the applicant under a no reasonable alternatives approach.

Under the least intrusive means approach, the burden of production shifts back and forth between the parties as one side establishes a presumption and the other rebuts. At the outset, the applicant must submit evidence that it evaluated alternatives to establish its *prima facie* case. If the local government disputes those alternatives or believes additional alternatives exist, it must say so. The applicant may then reestablish the presumption with a meaningful comparative analysis to show those alternatives are either not technically feasible or not potentially available. Subject to the shot clock timeframes, this process continues until an acceptable site is identified or the parties exhaust the ascertainable alternatives. If more than one alternative is technically feasible and potentially available, the local government may choose among them.

Under the no reasonable alternatives approach, the burden of production remains with the applicant. To satisfy this burden, the plaintiff must show “a lack of reasonable alternative sites from which to provide coverage or that ‘further reasonable efforts to gain approval for alternative facilities would have been fruitless.’”¹¹⁸ That burden becomes “particularly heavy” when the plaintiff already provides service in the area.¹¹⁹ Although this approach still evaluates whether the plaintiff adequately investigated the technical feasibility and potential availability, the burden to produce such evidence exists whether the local government identifies potential alternatives or not.¹²⁰

¹¹⁸ See *Loudoun Cnty.*, 748 F.3d at 200 (quoting *T-Mobile Northeast LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 266 (4th Cir. 2012)).

¹¹⁹ See *Loudoun Cnty.*, 748 F.3d at 198; *Town of Pelham*, 313 F.3d at 629.

¹²⁰ See, e.g., *360° Commc’ns Co. of Charlottesville v. Bd. of Sup’rs of Albemarle Cnty.*, 211 F.3d 79, 88 (4th Cir. 2000) (assuming that plaintiff did not investigate all possible alternatives because the record only contained six potential sites).

Despite their different verbal formulations and evidentiary burdens for the second element, many substantive interpretations—and the manner in which they are applied—are often virtually identical. The following paragraphs describe some important similarities that the Commission should retain in any interpretation for an effective prohibition under § 332(c)(7)(B).

Plaintiffs Must Define Their Technical Objectives. As noted above, all judicial interpretations begin with the same question: what purpose or technical objective does the proposed facility serve? Applicants must be required to disclose the technical service objective that it intends to achieve so that local governments can accurately evaluate whether potential alternatives would be technically feasible. It would make little sense for local planners to look for alternatives all over town if the applicant's only objective is to serve a single busy intersection. If an applicant discloses that its subscribers drop calls in an area that lacks a dominant server, planners would know that a technically feasible solution needs a clear view to that particular location on the cell edge. To find a solution, you must first understand the problem.

Courts Evaluate Alleged Technical Need under the One Provider Rule. Consistent with the 2009 Declaratory Ruling, courts evaluate whether a technical need exists based on the *applicant's* service levels in a given area.¹²¹ Although some commenters complain that the Fourth Circuit has not expressly adopted the one-provider rule,¹²² courts within that jurisdiction

¹²¹ See, e.g., *T-Mobile Cent. LLC v. Charter Twp. of West Bloomfield*, 691 F.3d 794, 807 (6th Cir. 2012) (adopting the one-provider rule); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 49 (1st Cir. 2009) (“In this circuit we consider whether a significant gap in coverage exists within the individual carrier’s network.”); *San Francisco*, 400 F.3d at 733 (“[W]e elect to follow the district court’s lead and formally adopt the First Circuit’s rule that a significant gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant gap in *its own* service coverage.” (emphasis in original)); *VoiceStream*, 342 F.3d at 834; see also *T-Mobile Cent. LLC v. Unified Gov’t of Wyandotte Cnty/Kansas City*, 528 F. Supp. 2d 1128, 1154 (D. Kan. 2007) (adopting the one-provider rule).

¹²² See Andrew J. Erber, Note, *The Effective Prohibition Preemption in Modern Wireless Tower Siting*, 66 FED. COMM. L.J. 357, 365–66 (2014).

consistently evaluate the plaintiff's service without regard to any services provided by others in the same area.¹²³

Whether a Technical Need Exists Depends on a Fact-Intensive and Case-by-Case Review, that Considers Both Service Coverage and Capacity Levels. Not all gaps or deficits in service justify preemption.¹²⁴ Courts uniformly consider the gap's geographic size, uses within the gap area, whether the gap impacts a heavily trafficked commuter corridor, how many potential users the gap might impact and how many dropped connections occurred.¹²⁵ Moreover, courts increasingly agree that both service coverage and capacity levels are appropriate factors to determine whether a technical need exists.¹²⁶

Plaintiffs Cannot Rely on Bald Conclusions that Their Preferred Site is the Best or Only Feasible Solution. Courts require actual, valid reasons why a plaintiff could not comply with the local zoning regulations. Consider examples from the Ninth Circuit's decision in *American Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014), and the Seventh Circuit's decision in *VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818 (7th Cir. 2003). In both cases, the applicants requested approval for tall towers in locations where tall

¹²³ See, e.g., *Loudoun Cnty.*, 748 F.3d at 199; *T-Mobile Northeast LLC v. Howard Cnty. Bd. of Appeals*, 524 Fed. Appx. 9, 15 (4th Cir. 2013); *Fairfax Cnty.*, 672 F.3d at 267–68.

¹²⁴ See *Fairfax Cnty.*, 672 F.3d at 277–78; *City of Cranston*, 586 F.3d at 49; *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 727 (9th Cir. 2009); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006); *San Francisco*, 400 F.3d at 725; *Willoth*, 176 F.3d at 644.

¹²⁵ See, e.g., *Village of Corrales*, 642 Fed. Appx. at 891; *Orange Cnty.-Poughkeepsie Ltd. P'ship v. Town of East Fishkill*, 632 Fed. Appx. 1, 2–3 (2nd Cir. 2015); *Loudoun Cnty.*, 748 F.3d at 199; *West Bloomfield*, 691 F.3d at 807; *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 727 (9th Cir. 2009); *City of Cranston*, 586 F.3d at 49; *Des Moines*, 465 F.3d at 825; *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 n.2 (3rd Cir. 1999).

¹²⁶ See, e.g., *Village of Corrales*, 648 Fed. Appx. at 891 (recognizing capacity as a factor to be considered); *Loudoun Cnty.*, 748 F.3d at 199; *T-Mobile West Corp. v. City of Huntington Beach*, No. CV 10–2835 CAS (Ex), 2012 WL 4867775, *6 (C.D. Cal. Oct. 10, 2012); *T-Mobile West Corp. v. City of Agoura Hills*, No. CV 09-9077 DSF (PJWx), 2010 WL 5313398, *8–*9 (C.D. Cal. Dec. 20, 2010); see also *MetroPCS New York, LLC v. Village of East Hills*, 764 F. Supp. 2d 441, 454–55 (E.D.N.Y. 2011); *T-Mobile Northeast LLC v. City of Lowell*, No. 11-11551-NMG, 2012 U.S. Dist. LEXIS 180210, *10 (D. Mass. Nov. 27 2012); *USCOC of New Hampshire RSA No. 2 v. Town of Dunbarton*, No. Civ.04–CV–304–JD, 2005 WL 906354, *2 (D.N.H. Apr. 20, 2005).

towers would be prohibited, and the applicants refused to consider multiple smaller structures as an alternative.¹²⁷ Both courts upheld denials in each case because the applicants provided only “conclusory statements” that the preferred alternative would not work or were not less intrusive.¹²⁸

3. *If the Commission Finds it Necessary to Endorse One Effective Prohibition under § 332(c)(7), It Should Favor the Ninth Circuit’s Significant Gap/Least Intrusive Means Approach*

To the extent that the Commission feels compelled to endorse one approach over the others, the Commission should favor the least intrusive means approach. As the majority rule among the circuit courts, this test strikes an appropriate balance between the dual policies of the Communications Act, provides greater certainty, better enables judicial review and incentivizes the parties to actively engage in the alternatives evaluation process.

First, the least intrusive means approach balances the national interest in infrastructure deployment with the local interest in land use regulation. Local governments cannot flatly refuse to permit facilities necessary to address a significant gap, and the applicant cannot deploy whatever and wherever it chooses. The parties must work together to find a solution that respects both legitimate interests.

Second, this approach offers a settled rule that clearly establishes who must do what and when. Both applicants and local governments know with greater certainty how a judge might rule on the merits if a dispute arises, which may help avoid needless litigation.

Third, the burden-shifting framework naturally creates a more robust record for expedited judicial review. Each step in the process—whether the *prima facie* case, a rebuttal with additional alternatives or a surrebuttal with a meaningful comparative analysis on feasibility or

¹²⁷ See *VoiceStream*, 342 F.3d at 836.

¹²⁸ See *id.*

availability—requires documentation. Courts can more easily trace the events and evaluate whether a particular party satisfied its evidentiary burden.

Lastly, the presumptions create incentives for the parties to actively engage in the alternatives evaluation process. Applicants are encouraged to evaluate alternatives before they even submit their proposal. Local government staff cannot sit on the sidelines if they believe better alternatives exist, and applicants cannot stonewall suggested alternatives. Anyone who refuses to engage in the process almost inevitably loses when they complain about the outcome.

4. *The Commission Should Clarify that § 253(c) Preserves State and Local Zoning Regulations*

The Commission requested comment on whether it should provide further guidance on the *California Payphone* standard for an effective prohibition, and the proper role for aesthetic regulations.¹²⁹ Consistent with the Commission’s statement in the *Wireless NPRM/NOI* that “aesthetic considerations [are] not inherently improper,”¹³⁰ the Commission’s earliest gloss on local rights-of-way management regulations in *Classic Telephone* recognized that localities may continue to enforce zoning regulations. As the Commission stated:

The legislative history sheds light on permissible management functions under section 253(c). During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that . . . (4) “enforce local zoning regulations;”¹³¹

Accordingly, the Commission should take this opportunity to harmonize its decisions in *California Payphone* with *Classic Telephone* and clarify that § 253(c) also preserves state and local zoning regulations.

¹²⁹ See *Wireless NPRM/NOI* at ¶¶ 86, 88.

¹³⁰ See *id.* at ¶ 88.

¹³¹ *In the Matter of Classic Telephone, Inc.*, CCB Pol 96-10, *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, 13103, ¶ 39 (Oct. 1, 1996) (quoting 141 CONG. REC. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)) (emphasis added).

C. Provisions in the Communications Act Refer Exclusively to Regulatory Acts or Requirements by State and Local Governments

Sections 253 and 332(c)(7) both recognize the distinction between regulatory and proprietary government functions.¹³² The Commission should find that Congress intended the words “statutes,” “regulations,” “legal requirements” and “decisions” refer only to regulatory behavior because proprietary acts fall outside the federal government’s preemptive scope.

1. *State and Local Governments Increasingly Both Perform Proprietary and Regulatory Functions in Connection with Wireless Facilities*

Many municipalities in Arizona, California and Oregon have carried on ordinary landlord-tenant relationships with wireless carriers and infrastructure companies for decades. Indeed, community centers, parks and fire stations commonly lease space to macrocells because these locations are often exempt from zoning regulations and situated near restrictive residential areas.

The fact that a wireless tenant may lease municipal property does not negate the separate regulatory relationship between the parties. Facilities on municipal property must still obtain all necessary permits and approvals, and pay all required regulatory fees. Municipalities in their regulatory capacities cannot afford special treatment to particular entities or facilities merely because they happen to be on municipal property.

Despite the long-settled distinction between proprietary and regulatory functions in the macrocell context, the wireless industry appears reluctant to recognize is that state and local governments have property rights in the places and structures where small cells are commonly

¹³² See, e.g., *City of Portland*, 385 F.3d at 1240 (recognizing that Section 253(a) preempts only “regulatory schemes”); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) (finding that Section 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”).

located—streets, sidewalks, light poles, traffic signals, bus shelters and other similar improvements in the public rights-of-way.¹³³ State and local governments have an increasingly proprietary role (in addition to their regulatory role) in the deployment process as installations largely move from largely private property to spaces and structures owned by the state or local governments.

Different small cell proposals can implicate different property interests. A proposed installation in the public rights-of-way may implicate the local government's *real property* interest in the land that comprises the public rights-of-way, its *personal property* interest in the government-owned improvements placed within the public rights-of-way or, in some cases, both. For example, if a wireless provider seeks to attach an antenna to a private (investor-owned) electric company's distribution pole, the local government may have a real property interest in generalized access to the streets for a commercial purpose, but would not likely have a personal property interest in that specific pole. On the other hand, the local government might have both a real property interest and a personal property interest if the proposal involved a city-owned streetlight in the public right-of-way.

Whether and to what extent local government may have a proprietary interest in the public rights-of-way also differs based on state law. Some states, such as Arizona and Oregon, grant municipalities the right to receive compensation from telecommunication service providers that use the municipality's real property, subject to certain limits.¹³⁴ Local governments may also

¹³³ See *City of Huntington Beach*, 738 F.3d at 194; *City of Rome v. Verizon Commc'ns Inc.*, 362 F.3d 168, 174 (2nd Cir. 2004) ("The text and legislative history of Section 253 of the Telecommunications Act indicate that Congress intended to retain a sphere in which states and localities could negotiate and make agreements with telecommunications companies without being automatically subject to federal jurisdiction.").

¹³⁴ See, e.g., ARIZ. REV. STAT. ANN. § 9-583(C) (authorizing an annual fee for undergrounded conduit on a linear-foot basis); OR. REV. STAT. § 221.515 (authorizing municipalities to collect up to a seven percent gross-revenues privilege tax); see also N.M. STAT. ANN. § 62-1-3 (authorizing counties and municipalities to grant franchises, but limiting county franchise fees to "reasonable and actual costs" to grant and administer the franchise).

be permitted to charge a separate fee for installations on their streetlights and other government-owned structures. Other states, like California, grant so-called “state-wide franchises” that prohibit local franchise fees for access to the real property in the public rights-of-way, but do not prohibit private proprietary agreements with telecommunications providers for attachments to municipally-owned structures within the public rights-of-way.¹³⁵

Failure to appreciate these nuances in how municipalities exercise their proprietary functions in the public rights-of-way can explain why firms like Mobilitie perceive costs and decisions timelines as unreasonable compared to their past experiences in a pre-small cell world.¹³⁶ However, at bottom, the same familiar distinction from the macrocell context applies in the small cell context: municipalities enter into proprietary agreements to grant access to their property, and separately perform the ordinary regulatory functions that would be required for to permit the facilities no matter who owned the underlying property.

2. *State and Local Property Rights are Protected under the Constitution, and the Commission Cannot Rewrite the Market Participant Exception to Adjust the Line between Proprietary and Regulatory*

The Commission requested comment on how it should draw the distinction between proprietary and regulatory functions when wireless facilities use municipal property.¹³⁷ The simple answer to this question is that the Commission cannot rewrite the Constitutional protections that insulate state and local proprietary functions from federal preemption.¹³⁸

¹³⁵ See, e.g., CAL. PUB. UTILS. CODE § 7901; *Williams Commc’ns, Inc. v. Riverside*, 8 Cal. Rptr. 3d 96, 107–08 (Cal. Ct. App. 2003) (construing § 7901 as “a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration”).

¹³⁶ See Iain Gillott, *Sprint’s New Plan: Network Suicide*, LINKEDIN (Jan. 25, 2016), <https://www.linkedin.com/pulse/sprints-new-plan-network-suicide-iain-gillott> (describing abandoned past attempts to site wireless facilities in the rights-of-way for various reasons related to property ownership).

¹³⁷ See *Wireless NPRM/NOI* at ¶ 90.

¹³⁸ See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226–27 (1993).

The Supreme Court holds that a state or local government crosses the line between proprietary and regulatory functions when it either does not actually participate in the affected market or when the challenged action is tantamount to regulation or policymaking.¹³⁹ A local government that leases space on a streetlight or rooftop to a wireless carrier participates in the wireless infrastructure market just as much as Crown Castle, American Tower or any other infrastructure provider. Moreover, a local government that charged less than market rates for such access would appear less like other private actors and more like a regulator seeking to achieve some policy objective.¹⁴⁰

Accordingly, arms-length agreements on market rates, terms and conditions for access to government-owned property, including property in the public rights-of-way, are proprietary in nature. The Commission cannot rewrite the market participant exception to expand its preemptive authority.

3. *“Statutes, Regulations and Legal Requirements” under § 253(a) Are Not Coextensive with “Decisions” under § 332(c)(7)*

The Commission requested comment on whether it could equate “legal requirements” and “decisions” as each is used in § 253 and § 332(c)(7). “[L]egal requirements” under § 253 are not coextensive with “decisions” under § 332(c)(7) because Congress employed a “different term [that] denotes a different idea.”¹⁴¹ As used in the Telecommunications Act, the terms “legal

¹³⁹ See *id.* at 229 (“[A] State may act without offending the pre-emption principles . . . when it acts as a proprietor and its acts therefore are not ‘tantamount to regulation’ or policymaking.”); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (“The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.”).

¹⁴⁰ *Cf. Bldg. & Constr. Trades Council*, 507 U.S. at 229 (noting that private actors without a profit motive can be said to affect the marketplace in a regulatory fashion).

¹⁴¹ See ANTONIN SCALIA & BRYAN A. GARNER, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (1st ed. 2012); see also *See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997)) (“Statutes must be interpreted, if possible, to give each word some operative effect.”).

requirements” refer to legislative-type acts whereas “decision” refers to judicial-type act.¹⁴²

Although both “decision” and “regulation” may be susceptible to multiple definitions, their true meaning can be discerned by reading them “in context and with a view to their place in the overall statutory scheme.”¹⁴³

The word “decision” means a “determination arrived at after consideration.”¹⁴⁴ In the zoning context, a decision refers to the “exercise [of] an adjudicative function that involves applying land use rules to individual property owners.”¹⁴⁵ Section 332(c)(7)(B)(iii) provides that “[a]ny *decision* by a State or local government or instrumentality thereof *to deny a request to place, construct, or modify personal wireless service facilities* shall be in writing and supported by substantial evidence contained in a written record.”¹⁴⁶ After a dispute arises from that decision, “[t]he court shall hear and *decide* such action on an expedited basis.”¹⁴⁷ The same word, used in the same statute, refers to a result reached after deliberation.

The word “regulation” means “an authoritative rule.”¹⁴⁸ In the zoning context, this refers to legislative “plans and zoning maps that affect the classification and use of property

¹⁴² See *City of Huntington Beach*, 738 F.3d at 194 (“In addressing land use *regulations* and *decisions* related to the installation of wireless communication facilities, the TCA closely tracks the typical division of land use decision making.” (emphasis added)); cf. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (contrasting “[t]he sort of land use regulations” that “involved essentially legislative determinations classifying entire areas of the city,” with a city’s “adjudicative decision to condition petitioner’s application for a building permit on an individual parcel”).

¹⁴³ See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. The Communications Act does not explicitly define these terms, and so their ordinary meaning controls. See *Clark v. Rameker*, 134 S.Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). Although these terms also appear in the Communications Act, the Supreme Court rejected the notion that how Congress used these terms in 1934 would shed any persuasive light on how Congress used them decades later in 1996. See *City of Roswell*, 135 S.Ct. at 817 n.5.

¹⁴⁴ *Definition of Decision*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/decision> (last visited June 15, 2017); see also BLACK’S, *supra* note 27 at 182 (defining “decision” as “[a] judicial determination after consideration of the facts and the law”).

¹⁴⁵ See *City of Huntington Beach*, 738 F.3d at 194.

¹⁴⁶ See 47 U.S.C. § 332(c)(7)(B)(iii) (emphasis added).

¹⁴⁷ See *id.* § 332(c)(7)(B)(v) (emphasis added).

¹⁴⁸ *Definition of Regulation*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/regulation> (last visited June 15, 2017); see also BLACK’S, *supra* note 27 at 182 (defining “regulation” as “[t]he act or process of controlling by rule or restriction”).

generally.”¹⁴⁹ As used in § 253(b), the word “requirement” refers to legal rules other than statutes or regulations.¹⁵⁰ The term “legal requirement” does not appear anywhere in § 332. The most closely analogous usage in that section appears in § 332(c)(3)(A) and refers to “requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.”¹⁵¹ Accordingly, Congress uses the phrase “legal requirements” as a catch-all for laws other than statutes or regulations.

4. The Term “Legal Requirements” in § 253 Does Not Encompass All Public-Private Agreements

The Commission requested comment on whether “legal requirements” properly spans the divide between proprietary and regulatory capacities. Although we acknowledge that the line between proprietary and regulatory capacities must be drawn on a case-by-case basis, we strongly recommend to the Commission that it revisit its decision in *Minnesota Preemption Order* because not all public-private agreements are “legal requirements.”

The term “legal requirements” must be construed in context with the words “statute” and “regulation” that appear in the same list.¹⁵² Although legal requirements may be susceptible to broad interpretations, general items must be read with reference to more specific items in the same list.¹⁵³ Given that statutes and regulations flow from police powers, a “legal requirement” subject to § 253 must likewise refer to some obligation imposed on the service provider through the state or local government’s regulatory authority.¹⁵⁴

¹⁴⁹ See *City of Huntington Beach*, 738 F.3d at 194.

¹⁵⁰ See 47 U.S.C. § 253(b); see also *id.* § 254 (using the word “requirements” in reference to legal standards).

¹⁵¹ See *id.* § 332(c)(3)(A).

¹⁵² See *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

¹⁵³ See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980).

¹⁵⁴ Other usage within § 253 confirms this conclusion. Section 253(b) preserves state authority to “impose . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the

Although we respectfully disagree with the Commission’s overbroad interpretation in the *Minnesota Preemption Order* that “legal requirement” reaches proprietary agreements, the Commission may have reached the correct result for the wrong reason. That case involved an agreement with a single service provider for exclusive access to the entire state highway system, which can hardly be characterized as a “narrow scope” intended to “address a specific proprietary problem” rather than “encourage a general policy”¹⁵⁵ Accordingly, an analysis under § 253 may have been appropriate because the agreement was a regulatory act, but not merely because the matter involved a public-private agreement.

Similarly, the Commission should recognize that the process and standards a state or local government uses to enter into proprietary agreements may superficially appear to be “regulatory” in nature. As the Ninth Circuit recognized in *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013), formalities required by municipal corporations prior to contract execution fall “outside the City’s framework for land use decision making because it does not implicate the regulatory and administrative structure established by the City’s general plans and zoning and subdivision code.”¹⁵⁶ Municipal corporations must follow its formalities, just as any other corporation must adhere to its bylaws for any major decision or disposition. The Commission should not consider these decisions or dispositions to

continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253(b) (emphasis added); see *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. 2007) (“It is clear that states have authority under the Telecommunications Act to adopt their own universal service standards and create funding mechanisms sufficient to support those standards, as long as the standards are not inconsistent with the FCC’s rules, and as long as the state program does not burden the federal program.”).

¹⁵⁵ See *In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in the State Freeway Rights-of-Way*, CC Docket No. 98-1, *Memorandum Opinion and Order*, 14 FCC Rcd. 21697, 21708–21716, ¶¶ 20–36 (Dec. 23, 1999) [hereinafter “*In re Minnesota Preemption*”]; accord *In the Matter of Amigo.net*, CC Docket No. 00-220, *Memorandum Opinion and Order*, 17 FCC Rcd. 10964, 10967, ¶ 8 (June 13, 2002) (finding that the agreement in the *Minnesota Preemption Order* “would violate section 253(a) because it gave to one party exclusive physical access to the only feasible and cost-effective rights-of-way, and therefore potentially deprived other parties, specifically facilities-based competitors, of the ability to provide telecommunications services.”).

¹⁵⁶ See *City of Huntington Beach*, 738 F.3d at 200–01.

be “legal requirements” under the *Minnesota Preemption Order* approach merely because the formalities resemble legislative or adjudicative procedures.

D. “Functionally Equivalent Services” for Unreasonable Discrimination Purposes under § 332(c)(7)(B)(i)(I) Means Wireless Services in Competition with One Another

The Commission need not adopt any hyper-technical definition for “functionally equivalent services.” The Conference Report specifies that the phrase “functionally equivalent services . . . refer[s] only to *personal wireless services* as defined in [§ 332(c)(7)] that directly compete against one another.” *See* H. CONF. REP. 104-458 at 207–08.

Wireless and wireline facilities are not functional equivalents.¹⁵⁷ Although wireless and wireline connections can technically deliver the same content to the end user, the consumer does not regard them as substitute goods. Wireless reception may be a consideration in an office manager’s decision to rent commercial space, but access to fiber optic connections matter far more.

Moreover, wireless and wireline facilities cannot be subject to the same regulations because their equipment has different characteristics. Whereas wireless antennas generally cannot be placed underground, virtually all wireline facilities can be. To subject these two different technologies to the same regulations threatens to undermine substantial investment in underground utility districts. If wireless facilities physically cannot be placed underground, and wireline facilities are entitled to equal regulatory treatment, then neither can be placed underground. This is not consistent with Congress’ intent that § 253(c) respect local zoning and undergrounding ordinances.

¹⁵⁷ *See Mills*, 65 F. Supp. 2d at 157 (rejecting “Sprint’s argument that landline services are ‘functionally equivalent’ to the wireless services provided by Sprint and reject[ing] Sprint’s claim of discrimination on the grounds that it is barred from competing with conventional landline telephone services”).

Lastly, not all “wireless” services are functional equivalents.¹⁵⁸ The Ninth Circuit rejected American Tower’s argument that San Diego’s permit requirements unreasonably discriminated against commercial wireless facilities because the city exempted similar-looking towers for governmental use. The court reasoned that the facilities were not functionally equivalent because “[i]n contrast to [American Tower]’s telecommunication operations, which are entirely commercial, the City’s telecommunication operations are primarily public in nature.”¹⁵⁹ The Commission should respect the distinction and not burden public safety radio facilities with the same regulatory treatment as commercial radio facilities.

V. CONCLUSION

Local Governments applauds the Commission’s desire to promote expanded and advanced wireless broadband services, but has serious concerns about the Commission’s proposed rules. Limitations on local authority have encouraged applicants to “game” the shot clock and discouraged collaborative efforts to permit facilities that meet the carriers’ needs and respect local community values. Further limitations, like a deemed granted remedy and over-granulized shot clocks, would only exacerbate conflicts that impede deployment. The Commission should not adopt the proposed rules in the *Wireless NPRM*.


In addition, proposals to harmonize interpretations under §§ 332(c)(7) and 253 would conflict with Congress’ clear intent to treat wireless and wireline services differently, and the Commission’s precedents that classify wireless broadband as an information service not subject to § 253. Although these statutes contain some similar provisions, the Commission should ultimately conclude that different interpretations are warranted because §§ 332(c)(7) and 253 govern two different services provided through technologically different facilities.

¹⁵⁸ See *In re Cell Tower Litigation*, 807 F. Supp. 2d at 936–37.

¹⁵⁹ See *Am. Tower Corp.*, 763 F.3d at 1055–1056.

Respectfully submitted,

Dated: June 15, 2017



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EXHIBIT 1

**Joint Comments of Arizona Cities and Towns, League of California Cities,
California State Association of Counties, New Mexico Municipal League, League of
Oregon Cities & Scan NATOA, Inc. Filed in WT Docket No. 16-421**

[appears behind this cover]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

IN THE MATTER OF

Streamlining Deployment of Small Cell
Infrastructure by Improving Wireless Facilities
Siting Practices

Mobilitie, LLC Petition for Declaratory Ruling

WT Docket No. 16-421

**JOINT COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS,
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE
ASSOCIATION OF COUNTIES, NEW MEXICO MUNICIPAL LEAGUE,
LEAGUE OF OREGON CITIES & SCAN NATOA, INC.**

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STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns, League of California Cities, California State Association of Counties (“CSAC”), New Mexico Municipal League (“NMML”), League of Oregon Cities, and SCAN NATOA, Inc. (“SCAN”) (collectively, “Local Governments”) offers these comments in response to the Public Notice dated December 22, 2016, which sought comment on small cell siting practices and a Petition for Declaratory Ruling filed by Mobilitie, LLC.¹

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

CSAC is a non-profit corporation whose membership consists of all of California’s 58 counties. The mission of CSAC is to represent county government before the California Legislature, U.S. Congress, state and federal agencies and other entities, while educating the public about the value and need for county programs and services.

The NMML is a non-profit, nonpartisan corporation whose members are the incorporated municipalities of the State of New Mexico. All 106 New Mexico incorporated municipalities are

¹ See *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (Dec. 22, 2016) [hereinafter “Public Notice”].

members of the New Mexico Municipal League. Its largest member has 10,000 times the population of its smallest, yet each member city casts one delegate vote in setting policy and electing officers. NMML staff and officers frequently appear before state agencies and legislative committees to testify on rules, regulations, and proposed legislation affecting municipalities in New Mexico.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

SCAN has a history spanning over 20 years representing the interests of over 300 members primarily consisting of local government telecommunications officers and advisors located in California and Nevada. Accordingly, SCAN's members have a keen interest and stake in this proceeding and its outcome.

I. INTRODUCTION

The Wireless Telecommunications Bureau (the “Bureau”) should refrain from pursuing additional or more restrictive rules in this proceeding arising from Mobilitie’s petition.² Instead, the Bureau should consider certain simplified reforms that will actually accelerate mobile broadband deployment, such as (1) starting the shot clock upon the tendering of a complete application; (2) dispensing with the 10-day resubmittal period; and (3) removing the limitations on subsequent incomplete notices.

Additionally, the Bureau should decline to interpret the provisions in 47 U.S.C. § 253 as proposed in the Petition and suggested in the Public Notice. Local Governments recommend that the Bureau take steps to encourage and facilitate more collaborative approaches to achieving robust small cell deployment, such as issuing a notice of inquiry and/or establishing joint task force to further consider the issues in this proceeding.

II. RESTRICTIONS PROPOSED IN THE PETITION AND SUGGESTED IN THE PUBLIC NOTICE WOULD HINDER INNOVATIVE AND COLLABORATIVE SOLUTIONS TO SMALL CELL DEPLOYMENTS

Mobilitie’s Petition proposes new limitations on State and local authority over the public rights-of-way and the Bureau’s Public Notice seeks comment on whether new limitations on local authority to review permit applications will accelerate wireless deployment. These proposals appear to be based on the erroneous assumption that carriers are not, at least in part, responsible for delays in their deployment. Without a proper distinction between proprietary and regulatory functions, or how applicant conduct contributes to delays, any new regulations by the

² See *In the Matter of Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, Petition for Declaratory Ruling, WT Docket No. 16-421 (Nov. 15, 2016) [hereinafter “Petition”].

Commission may limit, instead of encourage, innovative and collaborative solutions to small cell deployments in the public right-of-way.

State and local governments have property interests in (a) the public rights-of-way and (b) government-owned poles and other government-owned improvements within the public rights-of-way. This adds a proprietary dimension to the otherwise regulatory relationship between local governments and wireless carriers. Federal limitations on application review periods and compensation generally do not preempt States or local governments in their proprietary roles.³ Mobilitie’s Petition conflates local governments’ proprietary and regulatory functions, and exaggerates Mobilitie’s largely self-perceived and self-inflicted plight.

Additionally, significant delays in small cell deployment have arisen from applicant misrepresentations and misconduct. Even wireless industry members publicly acknowledge that aggressive and deceptive tactics by applicants, in particular those employed by Mobilitie, are among the primary impediments to deployment.⁴

New limitations on local regulatory authority will be unlikely to accelerate wireless facility deployment where (a) such limitations would not apply to decisions by State and local governments acting in their proprietary capacity, which is outside the Commission’s preemptive authority; and/or (b) delays are caused solely or primarily by wireless applicants. Instead, existing regulations already create perverse incentives for applicants to “game” the shot clock to find shortcuts around local regulatory review altogether. To the extent that the Bureau

³ See, e.g., *Qwest v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (“*Portland*”) (recognizing that Section 253(a) preempts only “regulatory schemes”); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) (finding that Section 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”).

⁴ Ernest Worthman, *Mini-cell Towers Shouldn’t Be Passed as Small Cells*, AGL (Aug. 30, 2016), available at: <http://www.aglmediagroup.com/mini-cell-towers-shouldnt-be-passed-as-small-cells/>.

recommends revisiting the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*, it should seek to eliminate incentives to flaunt legitimate local review.

A. Mobilitie’s Petition and the Bureau’s Public Notice Fail to Account for Distinctions between Regulatory and Proprietary Functions and Interests

Small cells and other right-of-way facilities differ from traditional macro cells in more ways than mere size. One difference that neither Mobilitie’s Petition nor the Bureau’s Public Notice appear to recognize is that State and local governments have property rights in the places and structures where small cells are commonly located – streets, sidewalks, light poles, traffic signals, bus shelters and other similar improvements in the public rights-of-way. As a consequence, State and local governments have an increasingly proprietary role (in addition to their regulatory role) in the deployment process as installations largely move from largely private property to spaces and structures owned by the State or local governments.⁵

Different small cell proposals can implicate different property interests. A proposed installation in the public rights-of-way may implicate the local government’s *real property* interest in the land that comprises the public rights-of-way, its *personal property* interest in the government-owned improvements placed within the public rights-of-way or, in some cases, both. For example, if a wireless provider seeks to attach an antenna to a private (investor-owned) electric company’s distribution pole, the local government may have a real property interest in generalized access to the streets for a commercial purpose, but would not likely have a personal property interest in that specific pole. On the other hand, the local government might have both a real property interest and a personal property interest if the proposal involved a city-owned streetlight in the public right-of-way.

⁵ Although the Bureau’s Public Notice describes federal law as it pertains to State and local government regulatory authority over wireless facilities, it does not contain any reference or acknowledgement that wireless facilities in the public rights-of-way often implicate State and local government proprietary interests. *See* Public Notice at 5–7.

Whether and to what extent local government may have a proprietary interest in the public rights-of-way also differs based on state law. Some states, such as Arizona, New Mexico and Oregon, grant municipalities the right to receive compensation from telecommunication service providers that use the municipality's real property, subject to certain limits.⁶ Local governments may also be permitted to charge a separate fee for installations on their streetlights and other government-owned structures. Other states, like California, grant so-called "state-wide franchises" that prohibit local franchise fees for access to the real property in the public rights-of-way, but do not prohibit private proprietary agreements with telecommunications providers for attachments to municipally-owned structures within the public rights-of-way.⁷

The failure to appreciate these core distinctions between regulatory and proprietary functions can explain why firms like Mobilitie perceive costs and decisions timelines as unreasonable compared to their past experiences in a pre-small cell world.⁸ The Bureau should recognize that the "barriers" alleged in Mobilitie's Petition stem from (a) Mobilitie's failure to recognize State and local property rights in the public rights-of-way; (b) the distinction between local regulatory functions and proprietary ones; and/or (c) the legislative framework that differs on a state-by-state basis.

⁶ See, e.g., ARIZ. REV. STAT. ANN. § 9-583(C) (authorizing an annual fee for undergrounded conduit on a linear-foot basis); N.M. STAT. ANN. § 62-1-3 (authorizing counties and municipalities to grant franchises, but limiting county franchise fees to "reasonable and actual costs" to grant and administer the franchise); OR. REV. STAT. § 221.515 (authorizing municipalities to collect up to a seven percent gross-revenues privilege tax).

⁷ See, e.g., CAL. PUB. UTILS. CODE § 7901; *Williams Commc'ns, Inc. v. Riverside*, 8 Cal. Rptr. 3d 96, 107-08 (Cal. Ct. App. 2003) (construing § 7901 as "a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration").

⁸ See Iain Gillott, *Sprint's New Plan: Network Suicide*, LINKEDIN (Jan. 25, 2016), available at: <https://www.linkedin.com/pulse/sprints-new-plan-network-suicide-iain-gillott> (describing abandoned past attempts to site wireless facilities in the rights-of-way for various reasons related to property ownership).

1. Mobilitie’s Petition Conflates Regulatory and Proprietary Fees in an Attempt to Invent an Economic Barrier for the Commission to Remove

The Bureau requested comment on Mobilitie’s claim that it faces multiple, upfront and recurring fees.⁹ Mobilitie improperly frames these costs as purely regulatory fees, and misstates the distinction between *proprietary* fees required to receive value for access to public/government property for its private/commercial use, and *regulatory* fees generally charged to recover the reasonable processing costs the government incurs to review and issue the permit to access the public rights-of-way.

With the proper distinction between proprietary rents and regulatory fees in mind, Mobilitie’s attempt to inflate regulatory fees becomes obvious:

Application Fees. Mobilitie mischaracterizes inducements to negotiate and enter a license agreement to use government property with an application fee charged to review a proposed project and issue a permit to use the public rights-of-way. Although Mobilitie alleges that “a California city requested an \$8,000 ‘administration fee,’ but [did not] explain how it calculated that fee,” the City of Antioch, California, requested a fee in that amount as a one-time sum to offset its costs to negotiate a master license agreement for installations on municipal streetlights, and also provided Mobilitie with invoice summaries from its legal counsel to “explain how it calculated that fee.”¹⁰ Under that agreement, the administration fee would not be required for each pole and was totally unrelated to any regulatory application fee. Moreover, the city intended the master license agreement to reduce overall regulatory burdens and accelerate small cell deployment by establishing a pre-approved site design for typical streetlights within that jurisdiction.

⁹ See Public Notice at 13.

¹⁰ Petition at 16.

Mobilitie also fails to recognize that whatever rights it may have to access or use the public rights-of-way do not also grant it rights to use third parties' personal property within the public rights-of-way. Local governments often own poles, streetlights, traffic signals, ducts, conduit and other chattel that may, in the owner's discretion (*i.e.*, not in their role as a right-of-way regulator), be leased or licensed to telecommunication providers for compensation negotiated at arms-length. On the other hand, the permit fees due for any project in the public rights-of-way are separate, but often still limited to cost.¹¹

Per-Pole Fees. Mobilitie complains that “every locality is seeking a separate [per-pole] fee for each and every facility Mobilitie constructs,” that “[t]hese fees do not serve to compensate the city for processing Mobilitie’s applications” and that these fees “materially impair” its business model.¹² Even taking Mobilitie’s statements about per-pole fees at face value, most – if not all – these fees are rents charged in the government’s proprietary capacity and not subject to, controlled or limited by § 253.¹³

Mobilitie’s assertions are incorrect because many local governments like those within California are prohibited by state law from charging state-certified telephone corporations (like Mobilitie) for access to the public rights-of-way.¹⁴ While cities in California may charge telephone corporations a fee for access to poles owned by the government in its proprietary capacity, those cities do not (and cannot) charge a per-pole fee for attachments to third-party poles or new poles owned by the applicant. California cities could not force Mobilitie to use

¹¹ See, e.g., ARIZ. REV. STAT. ANN. § 9-583(C); CAL. GOV’T CODE § 50030; N.M. STAT. ANN. § 62-1-3.

¹² See Petition at 16.

¹³ See, e.g., *Portland*, 385 F.3d at 1240.

¹⁴ See CAL. PUB. UTILS. CODE § 7901; *T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248, 260 (Cal. Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001) (“[C]ities may not charge franchise fees to telephone corporations for the privilege of installing telephone lines in the public right-of-way.”).

government-owned poles – and thereby require a per-pole fee – because state law also prohibits local mandates to site all wireless facilities on property “owned by particular parties within the jurisdiction.”¹⁵

Additionally, Mobilitie’s assumption that fees charged for attachments to municipally-owned poles should be related to cost recoupment ignores the regulatory/proprietary distinction. While a “\$10,800 annual per-pole fee” may exceed the additional costs imposed on the government in its regulatory capacity to permit and monitor the installation, such fees are proprietary fees that compensate local government for allowing the use of its property.¹⁶ Indeed, if a local government did not charge a fee or receive some other value for the attachment or installation, that action (or inaction) could violate prohibitions on donations to corporations by government entities, found in some State constitutions.¹⁷

Lastly, market rates for access to municipal property for a commercial purpose does not “materially impair” the ability of entities to provide telecommunication services because service providers have other options within the public rights-of-way. For example, the Pole Attachment Act already enables firms like Mobilitie to attach their facilities to utility poles at cost-based rates.¹⁸ In jurisdictions like California, state law prevents local governments from assessing charges that “exceed the reasonable costs” incurred by the government to issue a permit to construct their own poles.¹⁹ These same options are open to all other providers. To the extent that Mobilitie’s business model gambled on rent-free access to use state or local government-owned

¹⁵ CAL. GOV’T CODE § 65964(c).

¹⁶ See Petition at 16–17.

¹⁷ See, e.g., ARIZ. CONST., art. IX, § 7; CAL. CONST., art. XVI, § 6; N.M. CONST., art. IX, § 14.

¹⁸ See 47 U.S.C. § 224.

¹⁹ See CAL. GOV’T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

property residing in the public rights-of-way, some commentators have opined that the economic “barriers” Mobilitie has encountered are self-inflicted.²⁰

Gross-Revenue Fees. Mobilitie complains that fees based on its gross revenues “directly affect [its] ability to finance projects in those communities” that charge such fees.²¹ With respect to Mobilitie’s claims about Oregon and California cities, these claims lack both evidence and merit. Gross-revenue fees charged by Oregon local governments have survived legal challenges as fair and reasonable compensation.²² The fact that Mobilitie’s competitors, other wireless infrastructure providers, have operated in Oregon for years under the same percentage fees strongly weighs against Mobilitie’s claim that those fees effectively prohibit telecommunications services.²³ Moreover, Mobilitie’s claim about gross-revenue fee assessment in California could not possibly prevent its operations because such fees for access to the public rights-of-way would violate State law.²⁴

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²⁰ See Gillott, *supra* note 8 (describing reasons why Sprint and Mobilitie’s plan to decommission up to 80% of its macro sites and transition equipment to new and existing structures in the public rights-of-way is likely to fail); Dawn Chmielewski and Ina Fried, *Sprint Finalizes Plan to Trim Network Costs by Up to \$1 Billion*, RE/CODE (Jan. 15, 2016, 9:44 AM), available at: <http://www.recode.net/2016/1/15/11588832/sprint-finalizes-plan-to-trim-network-costs-by-up-to-1-billion> (describing Sprint’s business plan to cut expenses by transitioning its facilities from leaseholds on private property to streetlights and other government property where it assumed it will pay significantly less).

²¹ See Petition at 18.

²² See, e.g., *City of Portland v. Elec. Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1072 (D. Or. 2005) (“Certainly, it is reasonable to base compensation on a percentage of revenue generated”); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1257–1259 (D. Or. 2002) (holding “the Cities’ revenue-based fees are ‘fair and reasonable compensation’”), *rev’d on other grounds*, 385 F.3d 1236 (9th Cir. 2004), *aff’d*, *Qwest Corp. v. City of Portland*, No. Civ.01-1005-JE, 2006 WL 2679543 (Sept. 15, 2006).

²³ See *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271–1272 (10th Cir. 2004) (finding that “fair and reasonable” should be evaluated under a totality of the circumstances test); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624–25 (6th Cir. 2000); see also *Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 576–77 (9th Cir. 2008) (*en banc*).

²⁴ See CAL. GOV’T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

2. Allegedly Unreasonable Delays Conflate Regulatory Decisions with Proprietary Decisions

Just as applicants for a macro cell site (or any other project that requires a permit) generally need to prove an ownership interest or other authorization to file an application, local governments generally resolve whether they will allow a wireless facility on their own poles (or the like) in the public rights-of-way as an independent matter, and before the regulatory review (land use and/or encroachment permitting) process can meaningfully begin. The Petition appears to incorrectly assume that State and local governments make their proprietary decisions (to allow access on their own poles) simultaneously and concurrently with their regulatory decisions (to issue a land use permit). If public agencies, acting in their proprietary capacity, reach agreement to allow a carrier's facilities on their support structures, that agreement does not guarantee that a carrier's proposed facilities will comply with local right-of-way or zoning rules.

A trend among local governments to enter into an agreement with carriers on a general process to streamline regulatory review for wireless facilities placed on government-owned structures in the public rights-of-way is gaining momentum. These agreements often contain "pre-approved designs" or "pre-approved configurations" that require little or no discretionary review.²⁵ However, the process to reach an agreement can take several months. Local governments often lack resources and/or staff time to devote to these projects, and potential licensees – especially Mobilite – often display an initial interest, only to disappear for several months (or longer).

To the extent that industry commenters assert there are delays in deployment, the Commission should evaluate whether those perceived delays involved (a) seeking approval to

²⁵ See, e.g., CINCINNATI, OH., CODE, tit. VII, ch. 719 (permitting over-the-counter approvals for small cells that meet design guidelines developed in collaboration with the wireless industry).

mount antenna on, for example, a government-owned street light (*i.e.*, a proprietary decision); or (b) seeking a permit to construct a wireless facility after the owner consented to the attachment (*i.e.*, a regulatory decision). As the Commission properly recognized in the *2014 Infrastructure Order*, the presumptively reasonable times to act under § 332(c)(7) do not affect proprietary decisions.²⁶ Accordingly, the Bureau should find that further “clarifications” to its shot clock rules would not accelerate the deliberative or negotiation processes.

B. Applicants Themselves Often Cause Significant Delays, and Shorter Timeframes Would Likely Encourage Applicants to “Game” the Shot Clock

The Bureau’s Public Notice erroneously presumes that the “‘presumptive timeframes’ established in the *2009 Declaratory Ruling* and the *2014 Infrastructure Order* may be longer than necessary and reasonable to review a small cell” application.²⁷ In fact, delays in the deployment process often arise from applicant misconduct or flaws in the Commission’s rules that encourage such misconduct.

In fact, the same article cited in the Public Notice as authority for the proposition that “it frequently takes two years or more from small cell site acquisition to completion”²⁸ continues, in the very next sentence, to lay significant responsibility on applicants for the delays:

“Many markets face incremental challenges driven by the backlash from the aggressive tactics of Mobilitie,” Walter Piecyk of BTIG wrote in a research note in July. “We previously noted how the planning commission in San Francisco voted in favor of a code amendment to deal with the proliferation of small cells better and insure their ability to force operators to clean-up shoddy work by

²⁶ See *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865, 12964 ¶ 239 (Oct. 17, 2014) (“Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances.”) [hereinafter, “*2014 Infrastructure Order*”].

²⁷ See Public Notice at 11.

²⁸ See *id.* at 7 (quoting Colin Gibbs, *Small Cells: Still Plenty of Potential Despite Big Challenges*, FIERCEWIRELESS (Sept. 1, 2016), available at: <http://www.fiercewireless.com/wireless/small-cells-still-plenty-potential-despite-big-challenges>).

requiring permit renewals after 10 years. We suspect that trend to continue in other towns and cities throughout America.”

. . .

“And to be clear, Mobilitie shouldn’t shoulder all of the blame,” Piecyk continued. “As we continue to peel the onion, we are finding examples where Crown Castle’s siting practices are aggravating local communities as well”²⁹

Although more guarded, carriers share the sentiment that “some companies are being ‘a little too cavalier in some instances and messing up [the industry’s] ability to deploy small cells.’”³⁰ Those approaches cause significant delays that the Commission cannot mitigate by regulating State and local governments.

For example, despite claims from Mobilitie nearly a year ago that it would increase transparency, which included ground-breaking steps such as “us[ing] its *own name* as it works with cities and counties to develop small cell sites,”³¹ the firm continues to approach municipalities under misleading pseudonyms both officious (*e.g.*, “California Utility Pole Authority”) and ambiguous (*e.g.*, “Interstate Transport and Broadband, LLC,” “Broadband Network of New Mexico, LLC,” “OR Fiber Network Company, LLC” and “CA Transmission Network, LLC”).³²

Small cell carriers may misrepresent their legal authority, misrepresent their proposed project, disregard local processes and even construct illegal facilities without permits, including

²⁹ Gibbs, *supra* note 29.

³⁰ See Martha DeGrasse, *Carrier Small Cells Appear Slowly but Surely*, RCRWIRELESS (May 24, 2016), available at: <http://www.rcrwireless.com/20160524/carriers/carrier-small-cells-tag4> (quoting Dave Mayo, SVP, T-Mobile, referring to Mobilitie).

³¹ See Martha DeGrasse, *Mobilitie to Increase Transparency for Jurisdictions*, RCRWIRELESS (May 27, 2016), available at: <http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4> (quoting Christos Karmis, President, Mobilitie, LLC) (emphasis added).

³² See, *e.g.*, Email from Alexander Paul, Interstate Transport and Broadband, LLC for California Transmission Network, LLC, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM); Email from Keith Witcosky, City of Redmond, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 30, 2017, 4:24 PM).

the following (anecdotal) examples since the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*:

Misrepresenting Legal Authority and/or Proposed Facilities. The Commission’s rules prohibit applicants from making false or misleading statements to the Commission.³³ “[I]t is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.”³⁴ Yet, the Commission’s rules neither punish nor prohibit false or misleading statements made to local governments.

Although local laws often prohibit such falsehoods and authorize a denial as a consequence, federal bans on effective prohibitions under both § 253 and § 332(c)(7) may allow an applicant who knowingly lied to a State or local government to obtain an order from a federal court to order the permits to be issued. Without real consequences for misrepresentations in permit applications, the review process is often delayed as local governments sift through applications to separate facts from falsehoods.

The following examples illustrate common misrepresentations about the applicant’s legal authority and/or proposed facilities:

- Mobilitie notoriously operated under various alter egos with governmental-sounding names. Figure 1 contains annotated project plans presented to the City of Thousand Oaks, California, and depicts the type of alter ego name that Mobilitie has used for plans presented to many cities in various other states.

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³³ See 47 C.F.R. § 1.17.

³⁴ *Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000) (citing *Swan Creek Commc’ns, Inc. v. FCC*, 39 F.3d 1217, 1221–1224 (D.C. Cir. 1994) and *Garden State Broad. Ltd. v. FCC*, 996 F.2d 386, 393–94 (D.C. Cir. 1993)).

CALIFORNIA UTILITY POLE AUTHORITY

SITE ID: 9CAB004253

SITE NAME: VR90XS108A

SITE LOCATION:
 CALLE TURQUESA & PASEO ESMERALDA
 THOUSAND OAKS, CA 91320

EXISTING CONCRETE STREET LIGHT

GENERAL NOTES

THE QUALITY OF THE INFORMATION AND DATA PROVIDED FOR THE SITE AS REQUIRED FOR THE PROJECT IS THE RESPONSIBILITY OF THE APPLICANT. THE PROJECT WILL NOT BE SUBJECT TO ANY GUARANTEE, WARRANTY, OR INSURANCE. NO WARRANTY, SERVICE, OR MAINTENANCE, OR TRASH DISPOSAL, IS REQUIRED FOR THE CONSTRUCTION, INSTALLATION, OR REMOVAL OF THE PROJECT.

SITE INFORMATION

APPLICANT: CALIFORNIA UTILITY POLE AUTHORITY
 APPLICANT ADDRESS: 2700 MORE AVENUE, STE. 200, THOUSAND OAKS, CA 91320
 APPLICANT CONTACT: PAUL FISHER
 APPLICANT PHONE: (805) 467-0000
 PUBLIC INFORMATION FREQUENCY: PUBLIC USE
 NEAREST ADDRESS: 2700 MORE AVENUE
 NEAREST SPARE: 2700 MORE AVENUE
 SITE LOCATION: 30° 11' 11" N 119° 14' 34" W (9132041)
 SITE COORDINATE: 119° 14' 34" W (9132041)
 USE TYPE: CONCRETE STREET LIGHT
 DISTANCE/ELEVATION: 4000' NAD83
 COUNTY: VENTURA
 JURISDICTION: CITY OF THOUSAND OAKS

DO NOT SCALE DRAWINGS

DISCLAIMER: THIS DRAWING IS FOR INFORMATION ONLY. IT IS NOT TO BE USED FOR ANY PURPOSES OTHER THAN THE ONE FOR WHICH IT WAS PREPARED. THE APPLICANT IS RESPONSIBLE FOR THE ACCURACY OF THE INFORMATION PROVIDED. THE APPLICANT IS NOT RESPONSIBLE FOR THE ACCURACY OF THE INFORMATION PROVIDED.

LOCATION MAPS

VICINITY MAP

LOCAL MAP

PROJECT DESCRIPTION

MOBILITE PROPOSES TO CONSTRUCT A NEW SMALL CELL SITE WITHIN AN EXISTING RIGHT OF WAY. THE SCOPE WILL CONSIST OF THE FOLLOWING:

- ATTACH NEW EQUIPMENT TO EXISTING 33'-0" CONCRETE STREET LIGHT POLE
- INSTALL ONE (1) METER PEDESTAL
- INSTALL ONE (1) AC DISTRIBUTION PANEL
- INSTALL ONE (1) REMOTE RADIO HEAD
- INSTALL ONE (1) UE RELAY
- INSTALL ONE (1) GPS ANTENNA
- INSTALL ONE (1) OMNI-DIRECTIONAL ANTENNA
- INSTALL ONE (1) NEMA-4X DISCONNECT SWITCH

PROJECT DESCRIPTION

MOBILITE PROPOSES TO CONSTRUCT A NEW SMALL CELL SITE WITHIN AN EXISTING RIGHT OF WAY. THE SCOPE WILL CONSIST OF THE FOLLOWING:

- ATTACH NEW EQUIPMENT TO EXISTING 33'-0" CONCRETE STREET LIGHT POLE
- INSTALL ONE (1) METER PEDESTAL
- INSTALL ONE (1) AC DISTRIBUTION PANEL
- INSTALL ONE (1) REMOTE RADIO HEAD
- INSTALL ONE (1) UE RELAY
- INSTALL ONE (1) GPS ANTENNA
- INSTALL ONE (1) OMNI-DIRECTIONAL ANTENNA
- INSTALL ONE (1) NEMA-4X DISCONNECT SWITCH

CALIFORNIA UTILITY POLE AUTHORITY

SITE ACQUISITION

SASCO
 2700 MORE AVENUE
 THOUSAND OAKS, CA 91320
 (805) 467-0000

AME SERVICES

DRAWN BY: [] END: []
 DATE: 11/12/2015

REV	DATE	DESCRIPTION	BY
1	01/27/2016	REV. CONSTRUCTION	PA

IF A VIOLATION OF ANY OF THE ABOVE PROVISIONS IS OBSERVED, THE APPLICANT SHALL BE RESPONSIBLE FOR THE COSTS OF A VIOLATION. THE APPLICANT SHALL BE RESPONSIBLE FOR THE COSTS OF A VIOLATION.

SITE ID: 9CAB004253
 SITE NAME: VR90XS108A
 CALLE TURQUESA & PASEO ESMERALDA
 THOUSAND OAKS, CA 91320
 EXISTING CONCRETE STREET LIGHT

SHEET TITLE
 TITLE SHEET

SHEET NUMBER
T-1

Figure 1

One plausible reason why a deregulated, private corporation that installs and operates wireless equipment on utility poles would assume a name like the “California Utility Pole Authority” is that may have hoped to convince some actual governmental authorities to grant special benefits or exemptions, or to perceive that only state-level oversight is required, precluding local jurisdiction approvals.

- Numerous entities, which include Mobilitie, Crown Castle, ExteNet and Verizon Wireless, misrepresent that their status as either a “telephone corporation” or “CLEC” under state law entitles them to the same regulatory treatment as electric, water and natural gas corporations.³⁵

³⁵ See, e.g., Letter from Michael van Eckhardt, AT&T, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (objecting to any concealment requirements for new small cells in the public rights-of-way); Letter from Paul Albritton, Counsel for Verizon Wireless, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (contending that state law prohibits any inquiry into the technical reasons why an applicant desires a new small cell in a particular location); Letter from Michael Shonafelt, Counsel for Crown Castle, to Mayor Clyde Roberson *et al.*, City of Monterey, Cal., at 4 (Oct. 17, 2016) (“Crown Castle’s special regulatory status as a CLEC gives rise to a vested right under Public Utilities Code section 7901 to use the ROW . . . [and] . . . Crown Castle contends that a discretionary use permit – like that required by the City in this case – constitutes an unlawful precondition for a CLEC’s entry into the ROW”) (citing *See T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248 (Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001); Letter from Paul Albritton, Counsel for Verizon Wireless, to Chair Daniel Fletcher *et al.*, City of Monterey, Cal., at 1-2 (Sept. 13, 2006) (“[R]ight-of-way wireless facilities should be permitted through an encroachment permit, not a use permit,

- In August 2016, the Minnesota Department of Commerce sent a letter to Mobilitie demanding that “Mobilitie cease from asserting that PUC authority has exempted it from the regulatory requirements of local government units.”³⁶ News stories about similar misrepresentations to cities and counties seem to follow Mobilitie in several other states, as well.³⁷
- In Clayton, California, Mobilitie initially contacted city staff to request information on permitting procedures and a potential right-of-way use agreement.³⁸ After city staff provided Mobilitie with guidelines and instructions for each process, Mobilitie ended contact with city staff.³⁹ Several months later, a representative from CA Transmission Network, LLC (one of Mobilitie’s corporate alter egos) contacted the city engineer and falsely asserted that CA Transmission Network, LLC was a California Public Utilities Commission-regulated public utility.⁴⁰ To date, the California Public Utilities Commission still has not granted CA Transmission Network, LLC’s application for a Certificate of Public Convenience and Necessity (“CPCN”).⁴¹ Mobilitie’s representative further indicated that it would submit construction permit applications for two 120-foot transport poles rather than follow the procedures initially outlined by city staff. When questioned about the proposed locations, staff discovered that the permits that Mobilitie requested from Clayton to deploy a 120-foot transport pole were for a location in an adjacent jurisdiction.⁴²
- Mobilitie’s representatives falsely claimed to city staff in Pleasanton, California, that it received approvals from the City of Thousand Oaks, California, to install unconcealed facilities on streetlights in a residential neighborhood. Mobilitie also provided project

because Verizon Wireless, as a telephone corporation, is authorized to use the right-of-way under California Public Utilities Code § 7901.”); Letter from David Bronston, counsel for Mobilitie, LLC, to Andrew J. Benelli, City of Fresno, Cal., at 1 (Apr. 8, 2016) (“Applicant has been granted a Certificate of Public Convenience and Necessity by the California Public Utilities Commission and is a utility under the laws of the state. As a public utility, Applicant is entitled to access to the public rights of way.”).

³⁶ Letter from Diane Dietz, Minn. Dept. of Commerce, to Chester Bragado, Mobilitie, LLC (Aug. 4, 2016).

³⁷ See, e.g., Alyssa Stahr, *Minnesota Utilities Warn Mobilitie About Misrepresentation*, INSIDETOWERS, available at: <https://insidetowers.com/cell-tower-news-minnesota-utilities-warn-mobilitie-misrepresentation/> (last visited Feb. 27, 2017) (describing controversies in Virginia); *Officials Feel Mobilitie is Disingenuous as Moratoriums Mount Throughout the Nation*, WIRELESSESTIMATOR (Nov. 26, 2016), available at: <http://wirelessestimator.com/articles/2016/officials-feel-mobilitie-is-disingenuous-as-moratoriums-mount-throughout-the-nation/> (describing controversies in Florida, California and Connecticut); J. Sharpe Smith, *Municipalities, Mobilitie have a Meeting of the Minds*, AGL (Oct. 11, 2016), available at: <http://www.aglmediagroup.com/municipalities-mobilitie-have-a-meeting-of-the-minds/> (describing controversies in Connecticut).

³⁸ See, e.g., Email from Savir Punia, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Aug. 31, 2015, 9:48 AM); Email from Mindy Gentry, City of Clayton, Cal., to Savir Punia, Mobilitie, LLC (Sept. 17, 2015, 9:55 AM).

³⁹ See Email from Richard Tang, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Oct. 27, 2016, 5:00 PM).

⁴⁰ See Email from Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM).

⁴¹ See *In the Matter of the Application of CA Transmission Network, LLC*, Docket No. A1608012 (Aug. 19, 2016).

⁴² See Email from Rick Angrisani, City of Clayton, Cal., to Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, LLC (Mar. 21, 2016, 7:30 AM).

plans to Pleasanton city staff for the alleged Thousand Oaks facilities as evidence. When Pleasanton contacted Thousand Oaks, they discovered that Mobilitie had not yet even contacted Thousand Oaks, much less applied for city permits for those facilities. A similar scenario occurred in San Dimas, California, when Mobilitie falsely claimed that other nearby jurisdictions had approved 120-foot poles in the public rights-of-way.

- In La Crosse, Wisconsin, Mobilitie’s representatives presented information about Mobilitie’s facilities that falsely represented their physical size and scale.⁴³ The presentation included the slide shown in Figure 2, below.

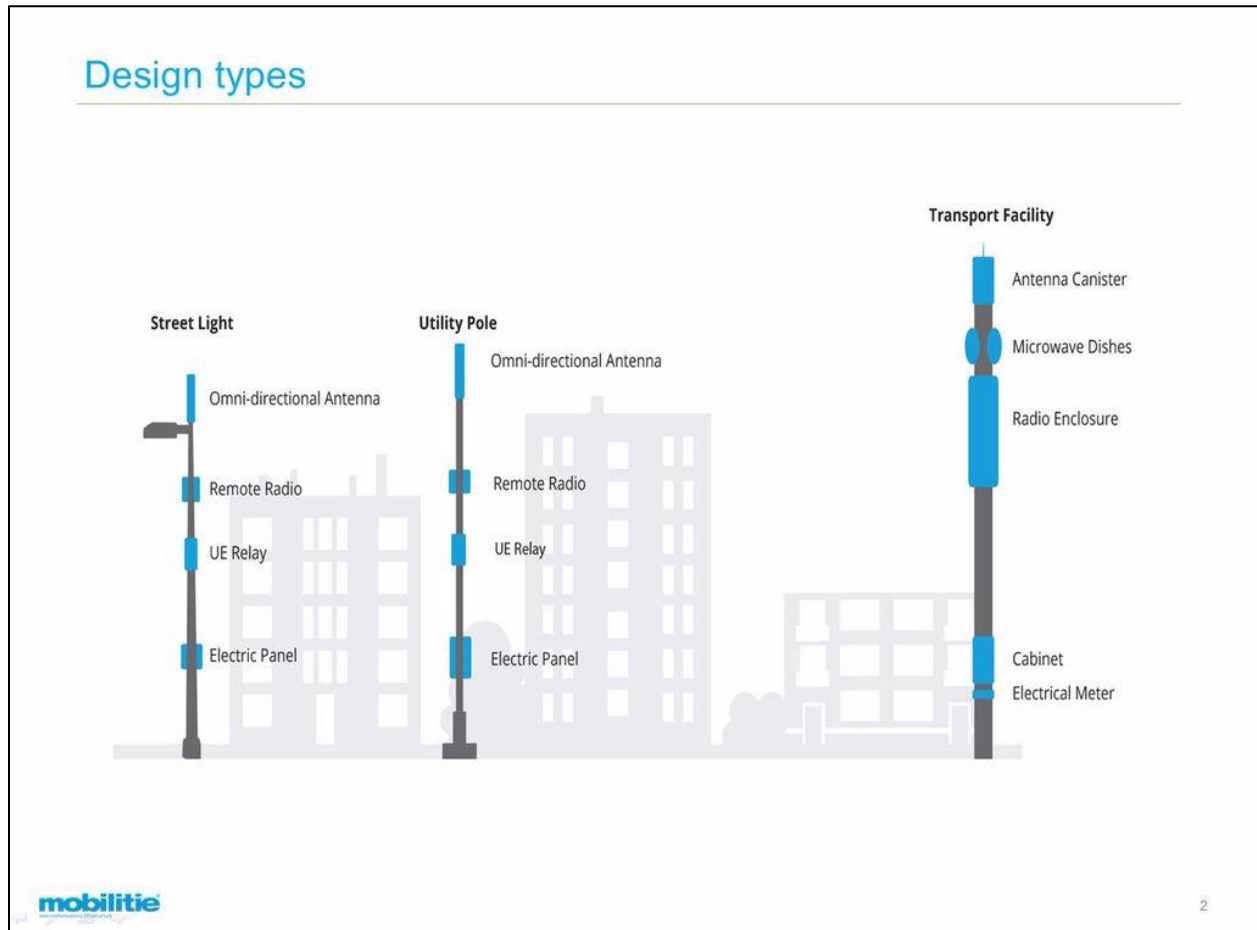


Figure 2: Power Point Slide Presented by Mobilitie to La Crosse, Wisconsin, Public Works Board on Jan. 23, 2017.

Figure 2 suggests that all Mobilitie’s facilities are approximately the same size. However, as illustrated in the scaled graphic in Figure 3, below, the graphic grossly understates the actual differences between Mobilitie’s facilities.

⁴³ See “Mobilitie Presentation” at 10 (Jan. 23, 2017), available at: <http://cityoflacrosse.legistar.com/LegislationDetail.aspx?ID=2930404&GUID=D4B0E9C5-A313-48D1-97B4-EABD788E7E5B&Options=&Search=>.

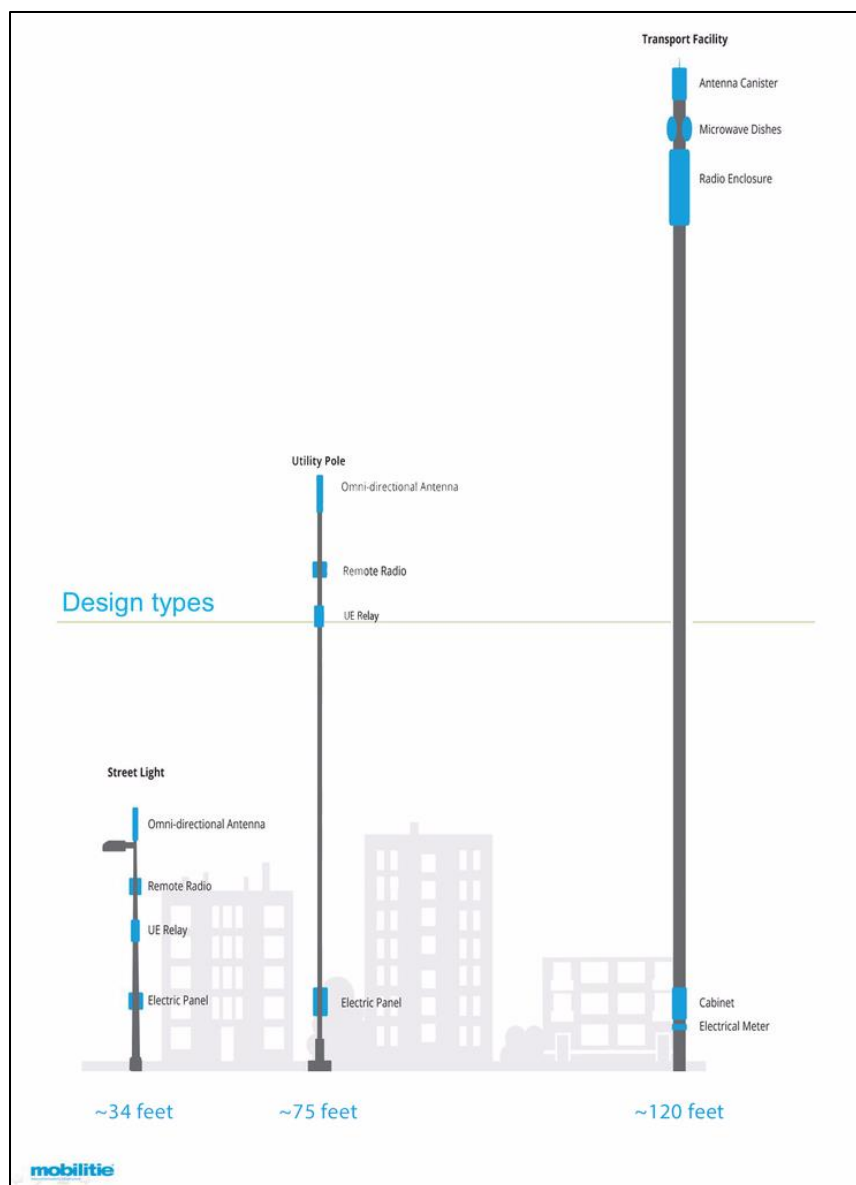


Figure 3: Mobilitie Slide Modified to Show Actual Scale Relative to the Street Light Installation.

Even wireless industry members find this misrepresentation “absurd” because the 120-foot transmission towers “dwarf [the] other options . . .”⁴⁴ Misrepresentations of this magnitude justifiably cause local governments to scrutinize Mobilitie’s applications.

Disregarding Local Process and Gaming the Shot Clock. A pattern has emerged since the Commission adopted the *2014 Infrastructure Order* in which applicants flaunt local

⁴⁴ See *Mobilitie’s DAS Marketing Illustrations are Labeled as “Quite Deceptive”*, WIRELESSESTIMATOR (Feb. 17, 2017), available at: <http://wirelessestimator.com/articles/2017/mobilities-das-marketing-illustrations-are-labeled-as-quite-deceptive/>.

processes and submit woefully inadequate “applications” for multiple sites, often to an incorrect department within the municipality. Ambiguous letters from applicants with multiple preliminary site plans often arrive on Friday afternoons or before a long holiday weekend. These applicant behaviors appear to be geared toward gaming the shot clock—submitting just enough to start the clock and then lying in wait for time to expire as the local officials attempt to make heads or tails from a cover letter with multiple site plans that arrived in the mail.

- The California Street Light Association (“CALSLA”) compiled comments from its constituent California cities and counties documenting, among other things, that Mobilitie has (1) failed to provide accurate project descriptions or equipment specifications upon request by local officials, (2) submitted incomplete applications, (3) terminated communications with local officials after submitting incomplete applications, (4) erroneously claimed exemptions from permitting procedures, local regulations and state environmental compliance laws and (5) complained of high fees without explaining why the fees would be unreasonable.⁴⁵ Their full responses appear in **Exhibit A** to these comments.
- In Albuquerque, New Mexico, Mobilitie approached that city with proposals for small cells on poles without identifying the owner of the poles.⁴⁶ After Mobilitie confirmed that it desired to attach to certain city-owned poles, Mobilitie failed to respond to the city’s requests that Mobilitie enter into lease negotiations to obtain the required property rights for attachments to city-owned poles.⁴⁷
- Mobilitie’s representative hand-delivered to the City of Pleasanton, California, a letter styled as an introduction with 12 plan sets for new facilities attached.⁴⁸ Rather than follow the city’s publicly-stated application process, Mobilitie treated the letter as a single application filed for all 12 sites. The letter was dated and delivered on a Friday. Under California state law, any application for a wireless installation may be deemed-approved if the local government fails to act within the Commission’s presumptively reasonable timeframe for review.⁴⁹ The apparent intent behind the letter was to submit an “application” that would trigger the shot clock but not be seriously reviewed by the local government staff, which would likely result in a deemed-approval. The same scenario played out in several other Northern California cities, including Antioch, Brentwood, Concord,

⁴⁵ See Letter from Jean A. Bonander, CALSLA, to Michael Johnston, Telecom Law Firm PC (Feb. 15, 2017).

⁴⁶ See Email from Kathleen T. Ahghar, City of Albuquerque, N.M., to Kevin Winner, ITB Utility (May 17, 2016, 1:35 PM).

⁴⁷ See Email from Jane L. Yee, City of Albuquerque, N.M., to Brenna Moorhead, Goodwin Procter LLP, counsel for Broadband Network of New Mexico, LLC (Jan. 18, 2017, 2:05 PM).

⁴⁸ See Letter from Richard Tang, Mobilitie, LLC, to Jenny Soo, City of Pleasanton, Cal. (Oct. 14, 2016).

⁴⁹ See CAL. GOV’T CODE § 65964.1.

Richmond, San Pablo, and Pittsburg. Mobilitie's representative also delivered a letter to the City of Fresno, California, which at that time did not require a special permit for installations on unpaved road shoulders, on a Friday.⁵⁰

- In Richmond, California, Mobilitie's representative submitted encroachment applications for 13 new wireless facilities even though the Richmond Municipal Code expressly required a prior authorization from the Community Development Department.⁵¹ A month later, Mobilitie emailed the city project plans for three additional sites but did not submit any additional applications or fees. Two sites were proposed to be located on city-owned streetlights without prior authorization from the city. City staff also discovered that one site was proposed to be located on private property. Although city staff suggested some potential alternative locations on private electric company poles, Mobilitie ultimately withdrew its applications.
- In Brentwood, California, Mobilitie's representative submitted a letter to the city's Public Works Department with project plans, an insurance certificate and a check for \$144, but not an application for a use permit as expressly required by the Brentwood Municipal Code.⁵² Again, Mobilitie tendered the "application" on a Friday. Although the letter described the project plans as "construction drawings," the attached plans stated on each page: "PRELIMINARY NOT FOR CONSTRUCTION."⁵³
- In Goleta, California, Mobilitie's representative emailed that city project plans for six new wireless facilities, but with no application or fees. The email acknowledged that the city requires a "Right-of-Way Access Agreement" (*i.e.*, a standard document required for all entities that carry on operations in the public rights-of-way that sets out maintenance, insurance, safety and other operational requirements, but does not require any fees), but Mobilitie claimed that "our CPCN which can serve in lieu of a City-specific ROW Access/Franchise Agreement."⁵⁴ The email also requested that the city confirm who owns the poles to which Mobilitie wanted to attach their equipment.⁵⁵ This email made clear that Mobilitie did not positively know who owned the pole before it submitted applications for attachments.
- In Richmond, California, ExteNet submitted 31 encroachment permit applications for small cells without first obtaining a use permit from the city, which was required by the

⁵⁰ See Letter from Rebecca Eichinger, Mobilitie, LLC, to Andrew Benelli, City of Fresno, Cal. (Jun. 3, 2016).

⁵¹ See Letter from Richard Tang, Mobilitie, LLC, to City of Richmond, Cal. (Aug. 29, 2016). This letter was dated on a Monday, but Mobilitie's representative hand delivered the applications on a Wednesday (the city closes on Fridays due to State budget shortfalls).

⁵² See Letter from Richard Tang, Mobilitie, LLC, to City of Brentwood, Cal., Public Works Department (Aug. 2, 2016). The letter was received on August 19, 2016, as evidenced by the city's in-take stamp.

⁵³ See *id.*

⁵⁴ See Email from Ben Johnson, Mobilitie, LLC, to Marti Milan, City of Goleta, Cal. (Jan. 31, 2017, 4:13 PM).

⁵⁵ See *id.*

City's recently adopted ordinance that was effective and published before ExteNet submitted its applications.⁵⁶ These applications were received by the city on a Thursday.

- ExteNet submitted 10 applications to Concord, California, for facilities throughout both residential and commercial neighborhoods that it alleged should all be subject to administrative approval, despite local regulations that required public notice with a possible public hearing for highly visible wireless facilities placed in close proximity to residential uses.⁵⁷
- In Gresham, Oregon, Mobilitie submitted a single application for six of its sites without addressing the criteria clearly set out in the local code. Subsequently, a Mobilitie representative acknowledged that the applications were submitted without reviewing the applicable code provisions.⁵⁸
- In Monterey, California, on the day before an appeal to the city council from a permit denial, legal counsel for Crown Castle sent a letter to legal counsel for the city that stated:

. . . in the event the City Council departs from the recommendations of the Staff Report [to grant the appeal and approve the permit] and adopts new conditions or otherwise raises concerns that have the potential for a denial of the Appeal, ***Crown Castle hereby requests a continuance of the hearing.*** Crown Castle makes this request on the record now . . . Please include this letter in the administrative record of the Appeal. Crown Castle's representatives will be on hand at tonight's meeting to answer any questions.⁵⁹

That night, the Monterey city council heard evidence that the proposed site would potentially obstruct view of the historic Cannery Row and decided to schedule a special meeting at the project site to assess first hand whether and to what extent the proposed location might impact historic assets.⁶⁰ A different attorney for Crown Castle stood up and objected to the continuance. When the mayor asked whether the attorney knew that its client already requested a continuance for exactly this purpose, the attorney said he did, but that he withdrew consent to the continuance because he claimed that shot clock had expired and wished to pursue a deemed-approved remedy under state law.

⁵⁶ See Letter from Yader Bermudez, City of Richmond, Cal., to Matt Yergovich, ExteNet Sys. (Cal.) LLC (Nov. 15, 2016).

⁵⁷ In this case, ExteNet's representative submitted both the initial applications and his responses to the city's incomplete notices on Mondays. Although the applications were misfiled and incomplete, it does not appear that their representative attempted to intentionally game the shot clock in the same manner as those who routinely submit on Fridays.

⁵⁸ See Email from David R. Ris, City of Gresham, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 23, 2017, 3:56 PM).

⁵⁹ Letter from Michael Shonafelt, counsel for Crown Castle, to Robert May, counsel for City of Monterey, Cal., at 2 (Oct. 4, 2016) (emphasis in original).

⁶⁰ See Monterey City Council, Meeting Minutes at 5 (Oct. 4, 2016), available at: <http://isearchmonterey.org/cache/2/yvx5igkacsotydo441kqyukq/36644402282017091812544.PDF>.

- In early April 2016, Mobilitie submitted four encroachment permit applications to the City of Antioch, California, for installations on city-owned streetlights without any prior authorization from the city to use its streetlights. The applications listed the owner as “N/A.”
- In Sacramento, California, Mobilitie requested to meet with Public Works staff and brought 40 incomplete applications, which included applications for fifteen 120-foot steel poles. When staff informed Mobilitie that it could not accept 40 incomplete applications, Mobilitie’s representative left the packet on the security desk in the lobby in an apparent attempt to be able to later claim that the shot clock had been started.⁶¹
- In Yuma, Arizona, after receiving a letter from the city that outlined how Mobilitie’s initial application failed to satisfy the city’s code for obtaining a city telecommunications license, Mobilitie resubmitted its application with general responses that appeared intended to avert answering the city’s questions. After a second letter from the city, Mobilitie’s third submission continued to provide vague and inadequate responses to the city’s questions on items as basic as what infrastructure Mobilitie intended to install in the city’s right-of-way. When the city sent a third letter to Mobilitie explaining the deficiencies, Mobilitie never responded.

Unpermitted Installations. Until recently, local officials would only occasionally discover unpermitted modifications to existing wireless facilities. Totally unpermitted sites were rare. However, as one author predicted, “[t]he scary proposition may be that, in the interest of time-to-market, [Mobilitie] does not ask for permission, but simply puts up the new poles and then deals with the backlash later.”⁶² This prediction proved to be correct:

- In March 2016, in Baltimore, Maryland, Mobilitie installed a new, “a roughly three-story-tall utility pole” without permits that obstructed access to an ADA sidewalk ramp.⁶³ The city commenced a code enforcement action and fined Mobilitie for the violation.⁶⁴

⁶¹ See Email from Darin Arcolino, City of Sacramento, to Omar Masry, City of San Francisco (July 7, 2016, 12:35 PM).

⁶² See Iain Gillott, *Analyst Angle: Sprint Network Plan Equals ‘Network Suicide’*, RCRWIRELESS (Jan. 25, 2016), available at: <http://www.rcrwireless.com/20160125/opinion/analyst-angle-sprints-network-plan-equals-suicide-2-tag9>.

⁶³ See Ryan Knutson, *Sprint’s Wireless Fix? More Telephone Poles: Wireless Provider’s Innovative Plan to Boost Cell Service Runs into Local Hurdles*, WALL ST. J. (Jun. 7, 2016, 6:03 PM), available at: <https://www.wsj.com/articles/sprints-drive-to-improve-coverage-faces-permit-delays-1465337015>.

⁶⁴ See *One Company Fined for Not Getting a Small Cell Permit, Another for not Permitting Inspectors*, WIRELESSESTIMATOR (Apr. 4, 2016), available at: <http://wirelessestimator.com/articles/2016/one-company-fined-for-not-getting-a-small-cell-permit-another-for-not-permitting-inspectors/>.

- In Denison, Texas, Mobilitie construed a nearly 90-foot tower in the public rights-of-way without prior approval from the city. Mobilitie sent the city a self-styled application letter (similar to what it provides other cities) with project plans marked “PRELIMINARY NOT FOR CONSTRUCTION,” rather than the application form required by the city. The city never issued any permits.
- In Vallejo, California, staff discovered an unpermitted Verizon small cell on a utility pole after Verizon submitted an application for a building permit. When city staff notified Verizon of the unpermitted work, Verizon threatened legal action if the city did not issue a permit within a week.⁶⁵

Wireless carrier tactics like these disrupt and delay the deployment process, and prevent cooperative and collaborative partnerships.⁶⁶ As one industry member and observer put it:

So what makes [Mobilitie’s conduct] so different than what other players do? Not really that much. But the tipping point here is if a municipality feels that a wireless company has misrepresented itself or what it is doing, the relationship between the whole wireless industry and the municipality is soured. If you are the company coming in after a wireless company has upset a municipality, don’t expect a warm reception. We all have a responsibility to treat municipalities with respect and honesty.⁶⁷

C. If the Commission Addresses its Rules, it Should Seek to Eliminate Uncertainties and Counterproductive Incentives

To the extent that the Bureau seeks comment on further “clarifications” to the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*, Local Governments offers the following specific recommendations.

1. The Commission Should Define “Duly Filed” as the Time at Which the Applicant Tenders a *Complete* Application

Counterproductive carrier conduct often occurs in the submittal phase because, under the “clarifications” in the *2014 Infrastructure Order*, “the presumptively reasonable timeframe begins to run when an application is first submitted” – no matter how incomplete the first

⁶⁵ See Email from Teri Killgore, City of Vallejo, Cal., to Michael Johnston, Telecom Law Firm PC (Feb. 7, 2017, 10:40 AM).

⁶⁶ See, e.g., Worthman, *supra* note 4.

⁶⁷ *Id.*

submittal may be.⁶⁸ Despite the Commission’s rule that requires local governments to publish their application requirements in advance, woefully incomplete application submittals have become the rule rather than the exception.⁶⁹ Given that the Commission’s other rules already bar *ex post facto* application requirements, carriers should be expected (and required by the Commission) to tender complete submittals and there should be no excuse for an incomplete application – and certainly no incentive.⁷⁰

At the very least, the Commission should declare that the shot clock does not begin to run when the “submittal” does not even appear on the proper form provided by the jurisdiction. Mobilitie’s conduct appears to seek to start the shot clock no matter how incomplete the application, and its representatives often submit a mere letter that states Mobilitie expects to commence construction in the near future.⁷¹

The Commission has consistently recognized local governments’ right to require an application.⁷² Allowing applicants to trigger the shot clock with an incomplete application, or in some cases no application at all, encourages attempts to deceive local governments and game the shot clock. Accordingly, the Commission should revise its clarification in the *2014 Infrastructure Order* and declare that the presumptively reasonable time for review begins to run when the applicant tenders a *complete* application.

⁶⁸ *2014 Infrastructure Order* at ¶ 258.

⁶⁹ *See id.* at ¶ 260 (“[I]n order to toll the timeframe for review on grounds of incompleteness, a municipality’s request for additional information must specify the code provision, ordinance, application instruction, or otherwise publically-stated [sic] procedures that require the information to be submitted.”).

⁷⁰ *See id.* at ¶¶ 217, 260.

⁷¹ *See generally* Part II.A, *supra*.

⁷² *See 2014 Infrastructure Order* at ¶ 211 (Oct. 24, 2014); *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, WT Docket No. 08-165, 24 FCC Rcd. 13994, 13994 (Nov. 18, 2009) (assuming local authority to require an application) [hereinafter “*2009 Declaratory Ruling*”].

2. The Commission Should Dispense with the “10-Day Resubmittal” Review Period and the Limitations on Subsequent Incomplete Notices Within the First 30 Days

The 10-day resubmittal review period further encourages applicants to tender resubmittals right before weekends, holidays and other government closures.⁷³ And the so-called “one-shot” rule that limits subsequent incomplete notices to items specifically delineated in the first incomplete notice,⁷⁴ encourages applicants to withhold legitimate requests for additional information based on a minor procedural oversight in the first incomplete notice. The Commission should eliminate these rules.

These complex procedural rules do not coincide with the practical realities involved in wireless facility siting reviews. Although the Commission’s rules might seem more reasonable if one person were responsible to review an application, local governments almost always route applications through multiple departments with specialized knowledge over engineering, right-of-way management, land use planning, finance and other disciplines. If one department sends an incomplete notice to the applicant with respect to their narrow review, the applicant can claim that the notice precludes other incomplete notices from the other departments because their concerns would not relate back to the incompleteness cited in the first notice.

The Commission should eliminate the 10-day resubmittal review period and the limitations on subsequent incomplete notices within the first 30 days.

⁷³ In this respect, the 10-day resubmittal review period appears to conflict with at least two Commission rules: (a) The holiday-exception procedural rule for replies due within 10 days or less. *See* 47 C.F.R. § 1.4(h) (providing that where “the filing period for a response is 10 days or less, an additional 3 days (excluding holidays) will be allowed to all parties in the proceeding for filing a response”); and (b) The 15-day review period for “[a]ny amendments to an application for renewal of any instrument of authorization” *See id.* § 73.3578; *see also* § 1.927(h) (providing that amendments to application that “constitute[] a major change shall be treated as a new application” altogether).

⁷⁴ *See 2014 Infrastructure Order* at ¶ 218.

III. THE COMMISSION CANNOT PERMISSIBLY INTERPRET THE PROVISIONS IN § 253 AS PROPOSED IN MOBILITIE’S PETITION

Mobilitie asks the Commission to interpret the safe harbor for “fair and reasonable compensation” for access to the public rights-of-way in § 253(c) as strict cost recoupment, in direct contradiction with Congress’ statutory scheme in the Communications Act and express intent in the Congressional record. The Commission should dismiss Mobilitie’s Petition and decline to interpret § 253(c).

A. “Fair and Reasonable Compensation” Refers to Regulatory Fees, and § 253 Does Not Authorize the Commission to Preempt Compensation Paid to States or Local Governments as Market Participants

“Fair and reasonable compensation” refers to fees charged by State and local governments in their regulatory – not proprietary – capacities as consideration for access to the public rights-of-way.⁷⁵ Federal preemption prohibits State and local governments “from *regulating* within a protected zone” but does not prohibit proprietary activities within such preempted fields.⁷⁶ As the Supreme Court stated:

[a] State does not regulate . . . simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption . . . because pre-emption doctrines apply only to state *regulation*.⁷⁷

The same principle applies to preemption under the Communications Act.⁷⁸ Whatever the Commission’s authority may be to interpret the term “fair and reasonable consideration” with respect to regulatory fees, the Commission simply lacks the authority to preempt State or local governments in their proprietary capacity as a market participant. Accordingly, the Commission

⁷⁵ See *Portland*, 385 F.3d at 1240.

⁷⁶ See *Bldg. and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226–27 (1993) (emphasis added).

⁷⁷ *Id.* (emphasis in original).

⁷⁸ See, e.g., *Portland*, 385 F.3d at 1240 (recognizing that Section 253(a) preempts only “regulatory schemes”); *Mills*, 283 F.3d at 421 (finding that Section 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”).

should reject Mobilitie’s plea to have the Commission regulate State or local governments, where states and local governments enter into arm’s-length agreements as market participants with the wireless industry.

B. “Fair and Reasonable Compensation” Does Not Mean Compensation Based on Cost Recoupment Alone

Mobilitie’s proposal to limit compensation for commercial telecommunications uses the public rights-of-way conflicts with existing statutes on rate regulation and Congressional intent to preserve local authority to charge rates based on gross revenues. The Commission should reject Mobilitie’s proposal.

1. “Fair and Reasonable” Compensation Means Something More than “Just and Reasonable” Compensation

A crucial flaw in Mobilitie’s proposal to interpret “fair and reasonable” as cost recoupment is that Congress uses the phrase “just and reasonable” in the Communications Act when it intends to describe a cost-based compensation scheme.⁷⁹ “[F]air and reasonable” under § 253(c) cannot mean the same as “just and reasonable” under § 224 or § 251 because different words in the same act have different meanings.⁸⁰ Thus, contrary to Mobilitie’s claim that the dictionary definition for “compensation” compels the Commission to define this term as “cost,”⁸¹ the plain language in Congress’ statutory scheme clearly shows that “fair and reasonable” means something *other than* cost.

Moreover, “fair and reasonable compensation” must mean something *greater than* cost given that Congress did not intend the “fair and reasonable” standard to subsidize for-profit

⁷⁹ See, e.g., 47 U.S.C. § 224(d)(1) (establishing a cost-based formula for pole attachment rates); 47 U.S.C. § 251(d)(1)(A)(i) (defining “just and reasonable” rates for interconnection as “based on the cost”).

⁸⁰ See *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”).

⁸¹ See Petition at 24.

telecommunications providers at the States' or local governments' expense.⁸² Despite Mobilitie's argument that Congress chose the word "compensation" over "payments,"⁸³ at least one federal court has held that:

Congress chose the term compensation, rather than cost, to further its intent that local municipalities be permitted to recoup revenue in exchange for a telecommunications provider's use of the public streets.⁸⁴

Especially where municipalities act in their proprietary (not regulatory) capacity to lease or license space on their own traffic signals, light poles or the like, their "fair and reasonable" compensation is defined by market value. The Commission should reject Mobilitie's proposal to limit "fair and reasonable compensation" to mere a cost-based fee. To hold otherwise could amount to a regulatory taking, in violation of the Fifth Amendment.⁸⁵

2. State and Local Governments May Impose Fees Based on Gross Revenues

In 1996, Congress considered and overwhelmingly rejected (by a 4-to-1 margin) an alternative to the "fair and reasonable compensation" approach that would have required State and local governments to charge all telecommunications service providers the same fees.⁸⁶ "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."⁸⁷ One district court has found that neither § 253(c) (as passed by Congress), Congressional history, nor case law limits a city from charging more than their "cost of

⁸² See 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).

⁸³ See Petition at 24.

⁸⁴ See *Elec. Lightwave*, 452 F. Supp. 2d at 1072.

⁸⁵ See *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (noting that "it is most reasonable to construe the reference to 'private property' in the Takings Clause . . . as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.").

⁸⁶ See 141 CONG. REC. H 8427 (Aug. 4, 1995).

⁸⁷ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987).

maintaining the rights of way. Nor does it require absolute parity among providers and utilities in setting compensation levels. Rather, those restrictions are an overlay put forth by telecommunications providers . . . and it is not the law in any circuit.”⁸⁸

When Congress was considering 1996 Telecommunications Act, a proposal then styled as § 243(e) stated in full:

PARITY OF FRANCHISE AND OTHER CHARGES.—Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services *that distinguishes between or among providers of telecommunications services*, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit, or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.⁸⁹

In response to concerns that this “parity” requirement would unfairly prevent different fees for different uses that imparted different impacts on the rights-of-way and the public’s use, a bipartisan amendment offered by Congressmen Barton and Stupak proposed to completely delete Section 243 and replace it with language substantially similar to the current law.⁹⁰ Congressman Stupak stressed that, under the proposed § 243(e), “local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets.”⁹¹ Given that many incumbents paid little or no actual compensation under sometimes-ancient franchises, the parity requirement would effectively subsidize new entrants

⁸⁸ *Elec. Lightwave*, 452 F. Supp. 2d at 1074–1075.

⁸⁹ 141 CONG. REC. H 8427 (Aug. 4, 1995) (emphasis added).

⁹⁰ See 141 CONG. REC. H 8460–8461 (Aug. 4, 1995). See also Fredrick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism and the Public Right-of-Way*, 26 SEATTLE UNIV. L. REV. 475, 521–23 (2003) (discussing at length the legislative history behind the Stupak Amendment).

⁹¹ 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).

who would be permitted to use public property at the public's expense.⁹² Congressman Barton stated that "[t]he Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way."⁹³

The House overwhelmingly adopted the Stupak-Barton amendment and rejected the parity requirement.⁹⁴ The amendment confirms that the House (a) intended local governments to determine compensation for access to the rights-of-way and that charges might differ among various users; and (b) rejected in 1996 a proposal similar to Mobilitie's petition in 2017.

Mobilitie's proposed cost-based "compensation" scheme with exemptions from gross-revenue fees seeks to resurrect the "parity" requirement Congress discarded in the Stupak-Barton amendment. Such a construction would be struck down because "it appears from the statute or its legislative history that the [definition] is not one that Congress would have sanctioned."⁹⁵

Although Mobilitie attempts to shoehorn statements by Senator Diane Feinstein that describe rights-of-way management functions into limitations on compensation,⁹⁶ Senator Feinstein's statements concerned the Commission's preemptive scope under § 253(d) rather than the permissible "compensation" protected under § 253(c).⁹⁷ Senator Feinstein's proposed amendment to limit the Commission's preemptive powers cannot be understood as tacitly endorsing limitations on compensation for access to the public rights-of-way.

⁹² See *id.* at H 8460 (statement of Rep. Stupak). As an example, Congressman Stupak submitted evidence that cities collectively spent more than \$100 billion on right-of-way maintenance in 1994, but collected only \$3 billion in fees from all rights-of-way users, including gas, water, electric and telecommunications companies. See *id.* (statement of Rep. Stupak).

⁹³ *Id.* at H 8460 (statement of Rep. Barton).

⁹⁴ See *id.* at H 8477 (10 representatives did not vote).

⁹⁵ See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).

⁹⁶ See Petition at 25.

⁹⁷ 141 CONG. REC. S 8305–8306 (Aug. 4, 1995).

The Congressional record clearly shows that Congress considered gross-revenue fees to be permissible. Several federal courts agree that § 253(c) does not prohibit compensation based on gross revenues.⁹⁸ The Commission should, too.

IV. THE COMMISSION SHOULD CONSIDER ALTERNATIVES TO RESOLVE THE ISSUES RAISED BY MOBILITIE, BASED ON THE COMMISSION’S OWN PAST PRACTICE

Mobilitie’s Petition lacks merit and should be dismissed. However, to the extent that the Bureau desires to address any issues raised in Mobilitie’s Petition or the Public Notice, the Bureau should follow the recommendations set forth in the National Broadband Plan and the example set by Chairman Pai in creating the Broadband Deployment Advisory Committee and engage with federal, state, local, tribal and industry stakeholders in a meaningful factual investigation.

Whether the Commission has the legal authority to adopt substantive, legislative-type rules through a declaratory ruling does not guarantee the rules adopted will achieve their intended purpose. For the reasons discussed below, a collaborative, fact-based and consensus-driven approach is needed to accelerate wireless broadband.

⁹⁸ See *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543 (D.P.R. 2003) (holding that “Section 253(c) of the Telecom Act does not explicitly forbid revenue-based fees” and approving of an “approach which does permit a municipality to obtain a reasonable ‘rent’ for [a carrier’s] use of [the municipality’s] property”); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257 (concluding that Ninth Circuit precedent “does not stand for the proposition that § 253(a) categorically bars all revenue-based right-of-way fees”). Also, contrary to Mobilitie’s assertion of a circuit split on “fair and reasonable compensation,” see Petition at 26–28, the courts agree that a fee’s relationship to cost can be an important – but not dispositive – factor. See *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (finding that a franchise fee need not be limited to cost but should have some relationship to it); *Santa Fe*, 380 F.3d at 1271–1272 (finding that “fair and reasonable” should be evaluated under a totality of the circumstances test, including costs); *Dearborn*, 206 F.3d at 624–25 (same); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257.

A. The Commission Should Issue a Notice of Inquiry Rather than Continue to Promulgate Legislative Rules Though Adjudicatory Proceedings

Mobilitie’s Petition seeks a declaratory ruling to interpret provisions in § 253(c), and the Public Notice sought comment on “whether the Commission should issue a declaratory ruling to further clarify” the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*.⁹⁹ The Bureau’s Public Notice appears self-convinced that the best course lies in adjudication rather than rulemaking.¹⁰⁰ Local Governments disagree.

Although the Commission may exercise discretion as to whether to proceed by adjudication or rulemaking, that discretion is not unlimited.¹⁰¹ New rules and changes to existing ones could amount to substantive, legislative-type rules that may call for compliance with the notice-and-comment requirements in the Administrative Procedures Act. The Commission should explore the issues raised in the Public Notice through a Notice of Inquiry (“NOI”), which could be followed by a Notice of Proposed Rulemaking (“NPRM”).

As a practical matter, the Commission lacks a complete and relevant record on the issues raised in the Public Notice. Although the Public Notice appears to suggest that the record from prior proceedings is sufficient, this would mean reliance on stale comments and anecdotes about problems the Commission already addressed in connection with different technologies.¹⁰² Moreover, the Public Notice lacks sufficiently specific propositions to put the public on notice about potential new or changed rules.¹⁰³

⁹⁹ See Public Notice at 10.

¹⁰⁰ See Public Notice at 6–7.

¹⁰¹ See *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947); see also *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976). The Administrative Procedure Act requires that the Commission publish its proposed rule in the Federal Register, give interested persons an opportunity to participate in the proceedings, consider relevant matters presented, state the basis and purpose for the rule and then publish any substantive rule in the Federal Register at least 30 days prior to the effective date. See 5 U.S.C. §§ 553(b)-(d); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

¹⁰² See Public Notice at 8–9.

¹⁰³ See *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 168–71 (D.C. Cir. 2013).

To the extent that the Commission desires to investigate ways to improve small cell deployment practices, the Commission should engage with stakeholders to develop an NPRM based on a robust record.

B. The Commission Should Follow its Staff’s Prior Recommendation and Form a “Joint Task Force” to Consider Best Practices for Deployments in the Public Rights-of-Way

State and local government should play a key role in the development of proposed improvements to the small cell deployment process. In the National Broadband Plan issued in 2012, Commission staff recommended that the Commission “should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way.”¹⁰⁴ More recently, in January 2017, Chairman Pai announced that he would form a similar task force, the Broadband Deployment Advisory Committee (“BDAC”), to develop an administrative record and recommend best practices to accelerate wireless deployments.¹⁰⁵ The Commission should follow its own recommendation and approach these issues raised in the Public Notice through a joint task force.

The Commission should also note that issuing new or amended regulations at this time would be detrimental to any joint task force or advisory board, especially given that Chairman Pai intends his BDAC to “draft for the Commission’s consideration a model code for broadband deployment.”¹⁰⁶ Such a task force may not be able to engage in a robust review and discussion if it were formed after the Commission adopts new or amended regulations.

¹⁰⁴ See FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 131 (2012) *available at*: <https://www.fcc.gov/general/national-broadband-plan>.

¹⁰⁵ See Chairman Ajit Pai, *Formation of the Broadband Deployment Advisory Committee (BDAC)* (Jan. 31, 2017), *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0131/DOC-343243A1.pdf [hereinafter “BDAC Statement”].

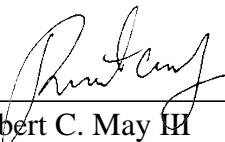
¹⁰⁶ See *BDAC Statement* at 1.


V. CONCLUSION

For the foregoing reasons, the Bureau should (1) refrain from additional or more restrictive rules that may exacerbate shot-clock gaming by the wireless industry and (2) consider simplified reforms to the initial application completeness review as described in Part II.C to these comments. Alternatively, the Bureau should consider more collaborative approaches to small cell deployment, such as a notice of inquiry and/or a joint task force.

Respectfully submitted,

Dated: March 8, 2017


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City of Pasadena

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EXHIBIT A

Additional Comments by the California Street Light Association

(appears behind this cover)

EXHIBIT A



February 15, 2017

TO: Michael Johnston, Legal Counsel, League of California Cities

FROM: Jean A Bonander, Executive Director, California Street Light Association (CALSLA)

SUBJECT: ROW Fee Petition (FCC WT Docket No. 16-421) re: Mobilitie

Thank you for the opportunity to comment on issues surrounding Mobilitie's attempts to use the public right of way to deploy small cell installations. Per your email, there are three categories of interest. The cities, counties and vendors who have commented at CALSLA about these issues are generally indicating the following concerns.

Unpermitted Work

CALSLA jurisdictions have so far not indicated that Mobilitie has tried to install small cell devices, poles or other infrastructure without permits.

Description of Equipment

CALSLA jurisdictions have indicated that Mobilitie representatives who have scheduled meetings with local government officials have not generally been able to provide the jurisdiction with accurately described or rendered equipment or specifications. In situations where drawings have been provided, e.g., the City of San José, the amount of additional equipment on the pole infrastructure for one carrier is substantial. Please see the attached drawing for clarification.

Misinformation

Several CALSLA jurisdictions have indicated that Mobilitie representatives have made the following kinds of statements about interactions with local governments:

- Mobilitie representatives schedule an initial meeting or inquire about applications and fees, then fail to follow up with a completed application.

EXHIBIT A

- Mobilitie representatives claim to have filed a completed application, and when the jurisdiction questions the allegation and asks for more information, Mobilitie representatives claim that the local government is delaying processing.
- Mobilitie representatives file an application, then fail to complete the process without comment to the local jurisdiction.
- Mobilitie representatives claim that no permit or application is required, that they are exempt from local regulations and on occasion, exempt from CEQA.
- Mobilitie representatives have claimed that fees for processing an application are too high, with no further explanation.

Other Issues

The CALSLA Executive Committee, comprised of city and county representatives from around the state, would also like to suggest that the issues listed below are of concern and need additional attention by policy makers at the League of California Cities and the California State Association of Counties.

- Net Neutrality. In this instance, net neutrality means that the various competing private sector telecommunications companies need to come up with a common standard for attachment equipment so that multiple devices can be hosted at one facility location, like a street light pole or a wall-pak mount on a building.
- Migration Regulation. If new right of way infrastructure is required, e.g., an additional pole in the right of way, the telecommunications company shall agree to migrate its attachment device to a common/shared facility as soon as technically possible, and that any decommissioning costs are borne by the telecommunications company.
- Equal Access. Telecommunications companies should expect to be required to place their attachment devices throughout communities, making certain that all members of the community have equivalent access to the services that will be delivered by the company.
- Design Consideration and Quality of Life. If new right of way infrastructure, e.g., an additional pole must be installed in the public right of way, the jurisdiction's design guidelines, right of way access requirements and accessibility requirements must be maintained.
- Aesthetic and Reasonable Use of the Public Right of Way. Most right of way legislation was created in the early 1900's and, as use of the right of way has become more valuable to both communities and private sector vendors, it is important to preserve this asset for the most important and required services and facilities.
- Common Processing Requirements. To the extent possible, local jurisdictions, under the auspices of the League of California Cities and the California State Association of Counties, should quickly develop common application policies, fee schedules, review

EXHIBIT A

guidelines and permitting procedures for small cell attachments to preempt Federal or State authorities from imposing inappropriate standards on local communities.

- Performance Bonds. Any telecommunications company wanting to add devices to the public right of way and/or local government infrastructure facilities shall post a performance bond for clean-up, decommissioning and/or for removal should the telecommunications company file for bankruptcy or otherwise abandon its assets.
- Coordination of Services. As is required of almost all vendors and interjurisdictional participants in projects, the telecommunications companies will coordinate their efforts with local jurisdictions on timing of construction, joint trenching and joint street openings/repairs to achieve economies of scale, minimize disruption to the public, and to expedite comprehensive project management.
- Understanding of Impacts – Utility Owned Facilities (LS-1) and Customer Owned Facilities (LS-2). The issues of which entity permits, conducts environmental or design review, coordinates the construction/installation, receives revenue or fees, incurs expenses and the handling of decommissioning needs to be clarified between the investor owned utility (IOU) infrastructure and the customer owned (cities, counties, special districts) infrastructure.

I hope you find this information helpful. If CALSLA can be of additional assistance, please contact me.

Attachment: City of San José Drawings/Mobilitie

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PROJECT NO: 9CAB013787
DRAWN BY: AH
CHECKED BY: JM

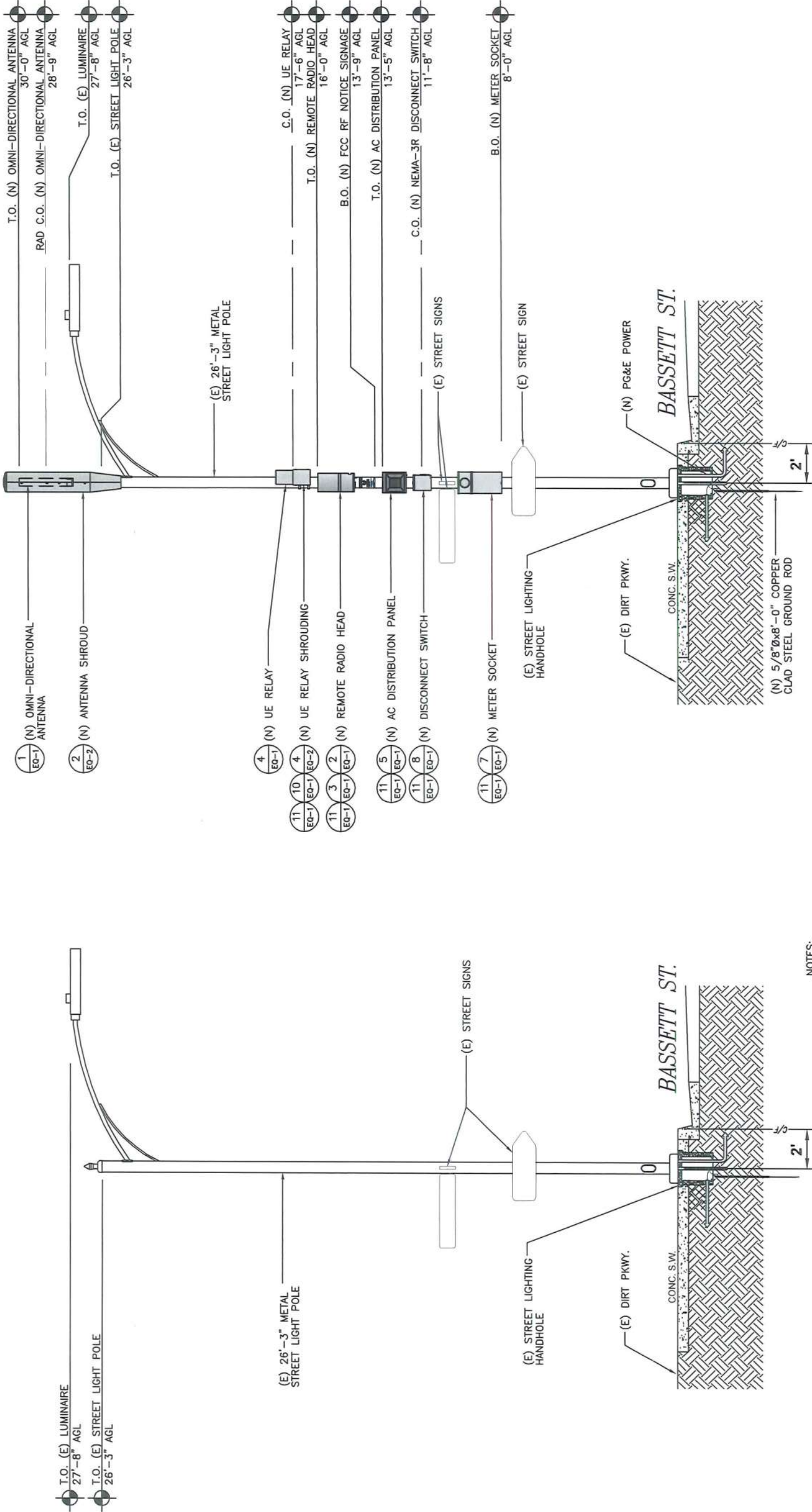
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IT IS A VIOLATION OF THE LAW FOR ANY PERSON WHOSE NAME IS LISTED HEREIN TO ACT OR TO BE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-1




NOTES:


- ALL HARDWARE SHALL BE STAINLESS STEEL.
- ALL CABLES SHALL BE SECURED TO POLE EVERY 36" OR LESS.
- LIGHTNING RODS SHALL BE INCLUDED AS REQUIRED.
- STRUCTURAL BACKFILL TO BE COMPACTED IN 6" MAXIMUM LAYERS TO 95% OF CONTENT IN ACCORDANCE WITH ASTM D698. ADDITIONALLY, STRUCTURAL BACKFILL MUST HAVE A MINIMUM COMPACTED UNIT WEIGHT OF 100 POUNDS PER CUBIC FOOT (16kN/m³)

(E) POLE ELEVATIONS

SCALE: 1" = 5'



intelligent infrastructure



cgs cable engineering services

PRESCOTT COMMUNICATIONS INC.
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CHECKED BY: JM

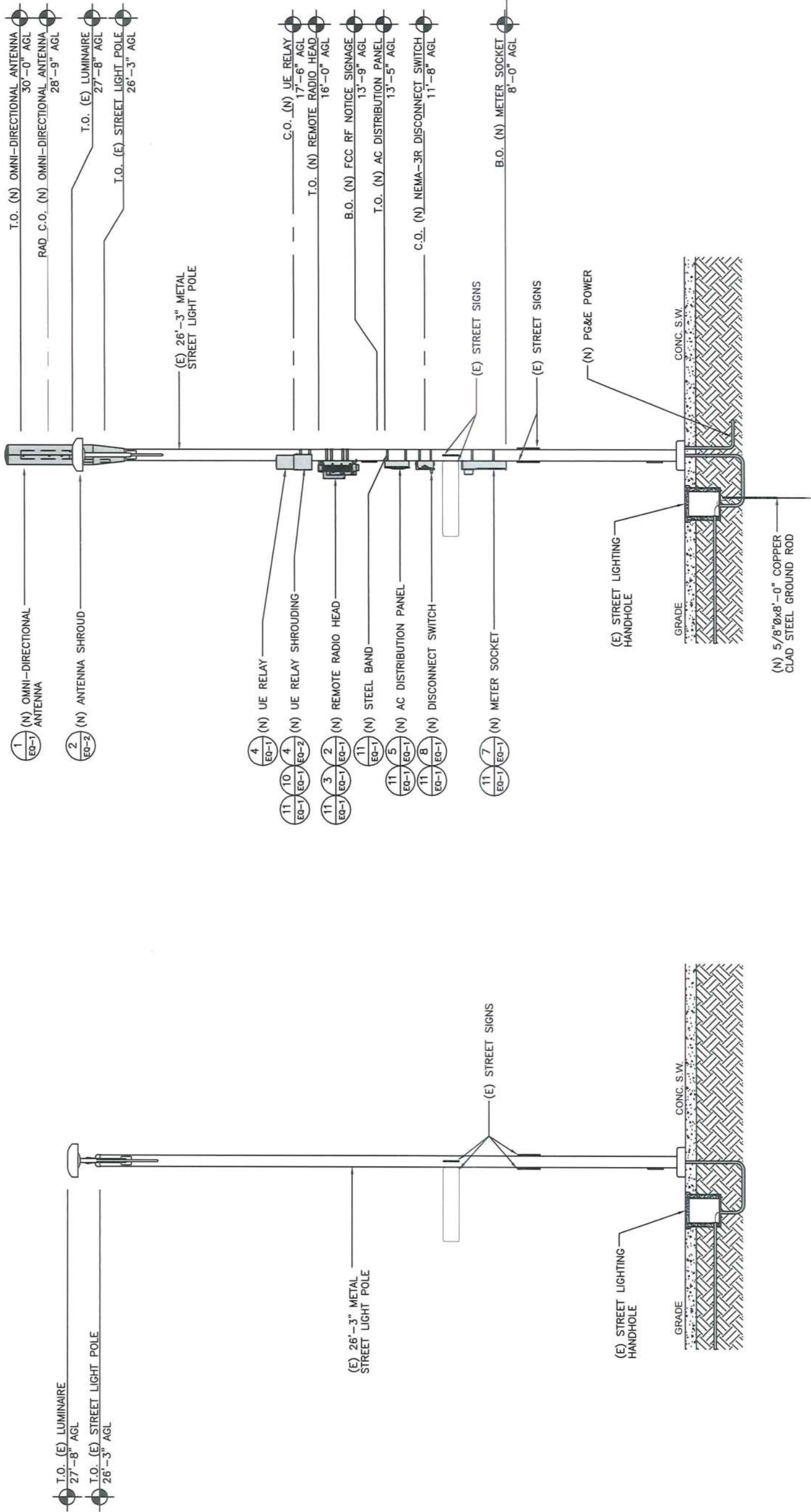
0	01/16/17	90% CONSTRUCTION

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-2



EXISTING FRONT VIEW

NEW FRONT VIEW

- NOTES:
1. ALL HARDWARE SHALL BE STAINLESS STEEL.
 2. ALL CABLES SHALL BE SECURED TO POLE EVERY 36" OR LESS.
 3. LIGHTNING RODS SHALL BE INCLUDED AS REQUIRED.
 4. STRUCTURAL BACKFILL TO BE COMPACTED IN 6" MAXIMUM LAYERS TO 95% OF CONTENT IN ACCORDANCE WITH ASTM D698. ADDITIONALLY, STRUCTURAL BACKFILL MUST HAVE A MINIMUM COMPACTED UNIT WEIGHT OF 100 POUNDS PER CUBIC FOOT (16kN/m³)

EXHIBIT 2

**Joint Reply Comments of Arizona Cities and Towns, League of California Cities,
California State Association of Counties, New Mexico Municipal League, League of
Oregon Cities & Scan NATOA, Inc. Filed in WT Docket No. 16-421**

[appears behind this cover]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

IN THE MATTER OF

Streamlining Deployment of Small Cell
Infrastructure by Improving Wireless Facilities
Siting Practices

Mobilitie, LLC Petition for Declaratory Ruling

WT Docket No. 16-421

**JOINT REPLY COMMENTS OF LEAGUE OF ARIZONA CITIES AND
TOWNS, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE
ASSOCIATION OF COUNTIES, NEW MEXICO MUNICIPAL LEAGUE,
LEAGUE OF OREGON CITIES & SCAN NATOA, INC.**

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Filed: April 7, 2017

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I. THE BUREAU HAS NOT BEEN PRESENTED WITH A MEANINGFUL LEGAL REASON TO CONSIDER THE MEASURES PROPOSED BY MOBILITIE

The industry comments did not provide the Bureau with any meaningful reason to interpret the provisions of § 253 in the manner proposed by Mobilitie. Additionally, the industry comments did not provide any legal authority that would allow the Commission to preempt States and local governments when they act within their proprietary capacity as owners of property in the public right-of-way. In other words, the Commission cannot impose cost-based rates for wireless facilities where States and local governments own an existing street light pole, utility pole or traffic signal pole.¹

II. THE INDUSTRY’S INTENTIONALLY OBFUSCATED FACTUAL RECORD PRESENTS YET ANOTHER REASON FOR THE BUREAU TO DECLINE TO IMPLEMENT NEW OR MORE RESTRICTIVE REGULATIONS

Just as the industry failed to provide the Bureau with a cogent legal basis for its desired outcome, their comments lacked any compelling or verifiable factual basis. Industry comments overflow with unsupported anecdotes and self-serving stories, without identifying jurisdictions by name. Where the industry identified jurisdictions by name, the allegations were often misleading or incorrect.

Despite the Bureau’s direction that it would discount anecdotal evidence, wireless industry commenters generally provided *more* anecdotes than ever before. The record offered by industry stakeholders is replete with unidentified jurisdictions.²

¹ Some industry comments appear to (erroneously) suggest that the Commission may adopt virtually any rule or interpretation it pleases because State and local governments derive their authority to regulate wireless facilities solely from the Communications Act. This is simply not true. Local governments derive their authority from their inherent police powers. *See City of Dallas v. FCC*, 118 F.3d 393, 397–98 (5th Cir. 1997). T-Mobile even attempts to (incorrectly) explain why Congress’ specific limitations on federal preemption in Section 601, 110 Stat. at 143–44, do not actually limit the Commission’s authority. *See Comments of T-Mobile USA, Inc.*, Comment, WT Docket No. 16-421 at 13 n.28 (Mar. 8, 2017) [hereinafter “T-Mobile Comments”].

² *See, e.g., Comments of AT&T*, Comment, WT Docket No. 16-421 (Mar. 8, 2017) (naming no municipalities, but alleging a nationwide problem) [hereinafter “AT&T Comments”]; *Comments of Mobilitie, LLC*, Comment, WT

Although AT&T states in a footnote that it intentionally declined to name names in order preserve its relationships with municipalities,³ the industry’s obfuscation appears to be intended to establish a self-serving record to create a problem that does not exist. The Bureau should discount, if not totally reject, the unsupported anecdotal evidence in the wireless industry’s comments.⁴

One reason why the industry comments appear so thin on concrete facts may be that their anecdotes cannot withstand scrutiny. In the few instances described below where the wireless industry comments actually identified allegedly “bad actors,” the actual facts show that the industry’s characterizations are misleading at best.

A. Fees

Industry comments generally lament the lease and license fees they must pay for access to property and/or structures they do not own. While comments by AT&T, Sprint, T-Mobile and Verizon variously assail unnamed jurisdictions from Arizona, California and Oregon, only one industry commenter provides a concrete—but factually inaccurate—example to support its claims.

Crown Castle erroneously claims that the City of Carlsbad, California, made it “impractical” to continue its operations. As Carlsbad’s reply comments show, the city has

Docket No. 16-421 at 10–13, 15–16 (Mar. 8, 2017) (offering various vague anecdotes about unnamed municipalities) [hereinafter “Mobilitie Comments”]; *Comments of Sprint Corp.*, Comment, WT Docket No. 16-421 (Mar. 8, 2017) (naming no municipalities, but alleging a nationwide problem) [hereinafter “Sprint Comments”]; *T-Mobile Comments* at 2 (naming only San Francisco, but alleging a nationwide problem); *Comments of Verizon*, Comment, WT Docket No. 16-421 at 7 n.17, Appendix A (Mar. 8, 2017) (offering six pages of anecdotes about unnamed municipalities and utilities) [hereinafter “Verizon Comments”]; *Comments of Wireless Infrastructure Association*, Comment, WT Docket No. 16-421 at 12–13 (Mar. 8, 2017) (offering various vague anecdotes about unnamed municipalities) [hereinafter “WIA Comments”].

³ *AT&T Comments* at 17 n.18 (“AT&T works closely with state and local governments on a multitude of issues. In the interest of maintaining those relationships, AT&T provides general references only.”).

⁴ *Cf. Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992) (J. Posner) (citing *Morales v. Yeutter*, 952 F.2d 954, 958 (7th Cir.1991)) (“The nature of the record compiled in a notice-and-comment rulemaking proceeding—voluminous, largely self-serving commentary uncabined by any principles of reliability, let alone by the rules of evidence . . .”).

already extended Crown Castle’s currently-expired agreement on the same terms and conditions to allow for the use of city-owned poles for more than eight months while the parties work collaboratively to develop a comprehensive program for wireless facility access to municipally-owned infrastructure.⁵

B. Moratoria

The Competitive Carriers Association (“CCA”) and the Wireless Infrastructure Association (“WIA”) erroneously assert that Fresno County, California, among other communities, adopted moratoria that resulted in “wasted time and resources.”⁶ Contrary to the industry comments that municipalities “regularly use moratoria as an indefinite stall tactic,”⁷ Fresno County lawfully adopted a 45-day moratorium on new facilities in unincorporated areas so it could assess how other communities permit facilities in the public rights-of-way and adopt its own procedures.⁸ Fresno County had no process in place to permit right-of-way facilities, let alone the “120 feet tall, 4-feet in diameter” towers proposed by Mobilitie.⁹ Rather than indefinitely stall deployment, the short-term moratorium was intended to allow the county to develop a system to review and approve these facilities in a manner that would ensure that such massive and numerous facilities would not threaten pedestrians, motorists and other users in the

⁵ See *Reply Comments of the City of Carlsbad, Cal.*, Reply Comment, WT Docket No. 16-421 at 3–4 (Apr. 7, 2017).

⁶ See *Comments of Competitive Carriers Association*, Comment, WT Docket No. 16-421 at 32 (Mar. 8, 2017) [hereinafter “CCA Comments”]; see also *WIA Comments* at 15 n.18. How or why CCA’s members would “waste resources” under a moratoria in a state like California is unclear because the shot clock runs through the moratoria and state law deems the application approved when the Commission’s timeframe for review expires. See *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 29 FCC Rcd. 12865 at ¶ 219 (Oct. 17, 2014) [hereinafter “2014 Infrastructure Order”]; CAL. GOV’T CODE § 65964.1.

⁷ See *CCA Comments* at 32–33.

⁸ See Cnty. of Fresno Ordinance No. 16-016 at 2:12–22 (Nov. 15, 2016) [hereinafter “Fresno Ordinance”].

⁹ See *id.* at 2:21; see also Marc Benjamin, *Fresno County Adopts Moratorium on Cellphone Towers*, TECHWIRE.NET (Nov. 21, 2016) (“‘The utility poles that go in the public right-of-way are generally designed to have some give or break away,’ said Bernard Jimenez, deputy Fresno County planning director. ‘If you have a 120-foot steel tower with a 4-foot diameter and cement foundation, that’s not going to have a lot of give.’”).

public rights-of-way.¹⁰ The 45-day moratorium expired on its own terms on December 30, 2016 – nearly 100 days ago and more than two months before CCA and WIA provided their opening comments to the Bureau.

C. Amortization

Crown Castle alleges that California cities such as Vista and Palos Verdes Estates intend to adopt “ordinances (virtually identical to ordinances adopted in Irvine, Santa Monica and San Diego)” that use amortization provisions to effectively prohibit new eligible facilities requests or negate the Commission’s rules.¹¹ This assertion is incorrect because (1) municipalities may, consistent with the Commission’s rules, amortize legal nonconforming structures; and (2) the draft amortization provisions in these communities would not bar approval for any eligible facilities request or, for that matter, any new siting requests.

The Commission’s rules on eligible facilities requests preempt legal nonconforming status as basis for denial – but do not preempt all legal nonconforming regulations.¹² For example, municipalities in California may amortize nonconforming uses, i.e., “provide for the eventual termination of nonconforming uses if [they] provide[] a reasonable amortization period commensurate with the investment involved.”¹³

Both the Vista and Palos Verdes Estates draft ordinances respect the preemptive authority of an eligible facilities request under Section 6409(a) – such that the amortization provisions cannot be applied to prevent eligible facilities requests, and would expressly require local

¹⁰ See Fresno Ordinance at 3:3–11, 3:23–4:3.

¹¹ See *Comments of Crown Castle International Corp.*, Comment, WT Docket No. 16-421 at 20 (Mar. 8, 2017).

¹² See *2014 Infrastructure Order*, 29 FCC Rcd. at ¶ 201; see also *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (restating the presumption against preemption applies in areas traditionally regulated by States or localities, such as development and construction); *Hillsborough Cnty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985) (restating federal preemption principles applied to local ordinances).

¹³ See *Metromedia, Inc. v. City of San Diego*, 640 P.2d 407, 427 (Cal. 1980) (en banc), *vacated on other grounds* 453 U.S. 490, 513–16 (1981).

officials to approve eligible facilities requests associated with legal nonconforming facilities. However, the draft ordinances both provide at least a minimum 10-year amortization period based on the applicant's own disclosures about project valuation, both contain exceptions to the amortization for extreme financial hardship.¹⁴

III. NEW OR MORE RESTRICTIVE PROCEDURAL RULES REQUESTED BY THE INDUSTRY WOULD EXACERBATE SHOT CLOCK “GAMING” PROBLEMS

Various industry comments claim that new and more restrictive shot clock regulations are needed, but they fail to appreciate the root cause of their problems.¹⁵ As explained in Local Governments' opening comments, the Commission's complex procedural rules, short timeframes and deemed-granted penalties invite “gaming” of the shot clock by some industry members.¹⁶ New or more restrictive rules would only further encourage this behavior.

As an example, Sprint requests that the Commission declare that the shot clock can begin to run when the applicant submits “basic information about the proposed site” when the local government adopts a moratorium.¹⁷ This proposed rule would essentially approve of the gaming tactics employed by Mobilitie – Sprint's vendor.

The Bureau should decline to adopt any new or more restrictive procedural rules. Rather, the Bureau should simplify its existing rules to remove incentives to “game” the shot clock.

¹⁴ See Vista, Cal., Draft Ordinance for New and Substantially Changed Wireless Communication Facilities § 18.92.100, *available at*: <http://www.cityofvista.com/home/showdocument?id=10326> (last visited on Apr. 3, 2017) (emphasis added); Palos Verdes Estates, Cal., Draft Ordinance for Wireless Communication Facilities § 18.55.047, *available at*: <http://www.pvestates.org/home/showdocument?id=3174> (last visited on Apr. 3, 2017).

¹⁵ See, e.g., *AT&T Comments* at 4–5; *T-Mobile Comments* at 3–4.

¹⁶ See *Joint Comments of League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities & SCAN NATOA, Inc.*, WT Docket No. 16-421 at 21–24 (Mar. 8, 2017).

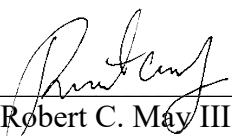
¹⁷ See *Sprint Comments* at 20.

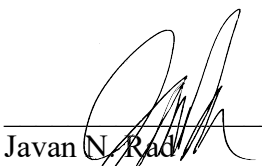
IV. CONCLUSION

For the foregoing reasons in these reply comments, and for the reasons set forth in Local Governments' opening comments, the Bureau should (1) refrain from additional or more restrictive rules that may exacerbate shot-clock gaming by the wireless industry and (2) consider simplified reforms to the initial application completeness review. Alternatively, the Bureau should consider more collaborative approaches to small cell deployment, such as a notice of inquiry and/or a joint task force.¹⁸

Respectfully submitted,

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¹⁸ Subsequent to the opening comments in this proceeding, the Commission agendized a contemplated notice of inquiry on these issues. As of the time of this filing, the agenda for the April 20, 2017 Open Commission Meeting contains an agenda item on Wireless Infrastructure Deployment, with an FCC Fact Sheet dated March 30, 2017, describing a proposed notice of inquiry that “asks for comment on how Sections 253 and 332(c)(7) of the Communications Act apply to wireless facilities, including how the Commission could update our policies under these provisions.”