

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Accelerating Wireless Broadband Deployment  
by Removing Barriers to Infrastructure  
Deployment

WT Docket No. 17-79

In the Matter of

Accelerating Wireline Broadband Deployment  
by Removing Barriers to Infrastructure  
Deployment

WC Docket No. 17-84

**COMBINED REPLY COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO**

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

The City and County of San Francisco (“San Francisco” or “City”) submits these combined reply comments in these proceedings in which the Federal Communications Commission (“Commission” or “FCC”) is exploring actions the Commission could take to remove regulatory barriers to investment in wireless<sup>1</sup> and wireline<sup>2</sup> broadband infrastructure at the federal, state, and local level.<sup>3</sup> San Francisco, like many local governments, supports efforts to deploy the infrastructure necessary to make sure San Francisco’s businesses, residents, and visitors have access to the most advanced broadband networks available—whether those networks are wireless or wireline. San Francisco understands that high-speed internet access fuels business growth and makes our neighborhoods and communities better.

The telecommunications carriers and industry associations filing comments in the *Wireless NPRM/NOI* (“Carrier Commenters”) ask the Commission to address a host of issues related to local government regulation that they contend will stymie their deployment of critical 5G technology. Among other things, the Carrier Commenters have asked the Commission to: (i) define a small cell facility to include equipment that would be anything but small;<sup>4</sup> (ii) deem applications for small cell facilities granted when local governments do not make final determinations within 60 days; (iii) broadly construe the scope of preemption under 47 U.S.C sections 253(a) and 332(c)(7) by “harmonizing” the construction of those statutes;

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

<sup>2</sup> *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 2017 WL 1426086 (2017) (“*Wireline NPRM/NOI*”).

<sup>3</sup> For the most part, San Francisco’s comments apply to the *Wireless NPRM/NOI*. Only Sections V and VI, addressing 47 U.S.C. § 253, concern both the *Wireless NPRM/NOI* and *Wireline NPRM/NOI*.

<sup>4</sup> While San Francisco will use the term “small cells” here, it is worth noting that the use of this term to describe the size of the antennas or other equipment is a misnomer. The term actually describes the size of the area served by the facility. See Comments of Smart Communities and Special Districts Coalition in WT Docket No. 17-79 (“Smart Communities Comments”) at 44 (the “term ‘small cell’ is typically used to describe an installation that serves a small area – not to distinguish between facilities that are ‘small v. those that are large’”).

(iv) limit the scope of section 253(c)'s safe harbor and section 332(c)(7)'s intent to preserve local zoning authority, particularly when it comes to addressing aesthetic concerns; (v) require local governments to allow the installation of small cell facilities on streetlight and other poles; and (vi) regulate the fees local governments can charge wireless carriers for use of their streetlight and other poles.

San Francisco supports the Commission's efforts to expedite the deployment of wireless broadband facilities and has expended substantial resources to develop permitting and licensing schemes that do not impede development of new technologies and services. Nonetheless, as Congress allowed, local governments must continue to play a role in regulating that deployment. The Commission should ensure that local governments can continue to both address local concerns in the siting process and protect the public health, safety, and welfare. Furthermore, the Commission cannot regulate either access to government-owned infrastructure to install and maintain small cell facilities, or the fees local governments charge for use of their infrastructure for this purpose. The Commission has no authority under the Communications Act to direct local governments to allow the telecommunications industry to use their property to install and maintain telecommunications facilities.

## **II. COMPLAINTS THAT SAN FRANCISCO'S PERMITTING REQUIREMENTS FOR SMALL CELL FACILITIES ARE DISCRIMINATORY ARE UNSUPPORTED**

The Wireless Infrastructure Association ("WIA"), T-Mobile, and Crown Castle all complain that San Francisco discriminates against small cell facilities, because San Francisco requires telecommunications providers installing wireless facilities on utility poles to obtain discretionary permits, but does not require similar permits from wireline telecommunications providers, the cable operator, or the electric utility.<sup>5</sup> T-Mobile, Crown Castle, and ExteNet filed

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<sup>5</sup> See Comments of the WIA in WT Docket No. 17-79 and WC Docket No. 17-84 ("WIA Comments") at 58; Comments of T-Mobile USA, Inc. in WT Docket No. 17-79 and WC Docket No. 17-84 ("T-Mobile Comments") at 40, 46; Comments of Crown Castle International Corp. in WT Docket No. 17-79 ("Crown Castle Comments") at 14.

a lawsuit in state court challenging San Francisco’s permitting requirement for wireless facilities in the public right-of-way under two state laws, one of which required that San Francisco treat “all entities in an equivalent manner.”<sup>6</sup> Both the trial court and the Court of Appeal ruled for San Francisco on the allegations of unequal treatment.<sup>7</sup> That decision is not final, however, because the California Supreme Court granted review, which is pending.<sup>8</sup>

Although San Francisco prevailed at the trial court, that court made a factual error that is pertinent here. The trial court found that “the pieces of equipment, including antennas, installed on utility poles in the public right-of-way by Plaintiffs are generally similar in size and appearance to the pieces of equipment installed on utility poles in the public rights-of-way by other right-of-way occupants, including but not limited to PG&E, Comcast, and AT&T.”<sup>9</sup> The trial court incorrectly compared a single piece of equipment used by the plaintiffs with a similar piece of equipment used by cable and landline carriers and an electric utility transformer. Those boxes and the transformers are comparable to only one component of plaintiffs’ facilities—the equipment cabinet. In addition to the equipment cabinet, plaintiffs’ wireless facilities typically include one or more antennas, an electric meter and cut-off switch, and sometimes a separate cabinet containing a battery back-up unit.

T-Mobile argues that the San Francisco ordinance, and litigation over the ordinance, has somehow curtailed its “critical wireless buildout.”<sup>10</sup> The evidence at trial, however, was that San Francisco had approved over 95% of the applications submitted by plaintiffs. That approval

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<sup>6</sup> Cal. Pub. Util. Code § 7901.1(b).

<sup>7</sup> As San Francisco shows, nothing in the Communications Act requires local governments to regulate telecommunications carriers in the same manner as cable companies and electric utilities. (See Section VIII, *infra*.)

<sup>8</sup> *T-Mobile West Corp. v. City & Cty. of San Francisco*, 3 Cal.App.5th 334 (2016), *review granted*, 211 Cal.Rptr.3d 259 (Dec. 21, 2016).

<sup>9</sup> *T-Mobile West Corp. v. City & Cty. of San Francisco*, No. CGC-11-510703, at 8 (Super. Ct. S.F. Cty. Nov. 26, 2014) (trial court statement of decision) (available at: [https://imgquery.sftc.org/Sha1\\_newApp/ViewPDF.aspx?PDFName=04705548&DocumentId=04705548&MindsCat=C](https://imgquery.sftc.org/Sha1_newApp/ViewPDF.aspx?PDFName=04705548&DocumentId=04705548&MindsCat=C)).

<sup>10</sup> T-Mobile Comments at 40.

rate has continued after the trial. Since 2007 San Francisco has received more than 1,000 applications to install wireless facilities on existing poles in the public right-of-way. San Francisco has approved approximately 90% of those applications.<sup>11</sup>

### **III. THE COMMISSION SHOULD NOT ENDORSE THE SIZE LIMITS PROPOSED BY THE CARRIER COMMENTERS FOR SMALL CELL FACILITIES**

The WIA would define a small wireless facility on a utility pole to include: (i) one or more antennas each of which would not exceed six cubic feet in volume; and (ii) other associated wireless equipment that would be “cumulatively no more than 28 cubic feet in volume.”<sup>12</sup> In addition, under WIA’s definition the “electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs” are “not included in the calculation of equipment volume.”<sup>13</sup> In other words, there is no limit to the size of this additional equipment.

WIA claims these specifications meet the “volumetric definition” contained in the First Amendment to the Nationwide Programmatic Agreement for Collocation of Wireless Facilities (“Amended Programmatic Agreement”).<sup>14</sup> That claim is wrong. The Amended Programmatic Agreement established the following volumetric requirements for wireless facilities utility and street light poles: (i) each “antenna”<sup>15</sup> must be no more than three cubic feet and “all

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<sup>11</sup> Crown Castle correctly notes that San Francisco recently denied a handful of applications on “aesthetic grounds.” (Crown Castle Comments at 14.) Crown Castle has filed an administrative appeal of those denials. Crown Castle is incorrect, however, that San Francisco has “entered into an exclusive arrangement with one entity to provide wireless service within the City parks.” (*Id.*) To date, San Francisco has no agreement with any carrier that allows the carrier to install wireless facilities in any City parks.

<sup>12</sup> WIA Comments at 1 fn. 2; *see also* Comments of Verizon in WT Docket No. 17-79 and WC Docket No. 17-84 (“Verizon Comments”) at 20, fn. 64.

<sup>13</sup> WIA Comments at 1 fn. 2.

<sup>14</sup> First Amendment to the Nationwide Programmatic Agreement for Collocation of Wireless Facilities. 47 C.F.R. Pt. 1, App. B. The purpose of the Amended Programmatic Agreement was to streamline the review of the effect of the collocation of wireless facilities on historic properties by acting as a “substitute” for review of each collocation under Section 106 of the National Historic Preservation Act. *See* Recitals to Amended Programmatic Agreement.

<sup>15</sup> The Amended Programmatic Agreement includes the following equipment within the definition of the word “antenna” so they would be part of the volumetric limits: “any on-site

antennas” may be up to six cubic feet; and (ii) “all other associated equipment” may not “cumulatively” exceed 21 cubic feet.<sup>16</sup>

By any objective standard, there is nothing “small” about the small cell facilities WIA believes its members should be permitted to install on utility poles with little or no local government review or control. Moreover, the Commission must not lose sight of the fact that under Section 6409(a) of the Spectrum Act local governments would be required to approve requests to increase the size of these permitted facilities.<sup>17</sup> For that reason, the size of an approved small cell could be readily increased without any local government control.

The Commission should not approve a standard that would grant WIA’s members a virtually unfettered right to install large, obtrusive equipment on utility and other poles in the public right-of-way.

#### **IV. THE COMMISSION SHOULD NOT ADOPT ANY CHANGES TO THE SHOT CLOCK THE COMMISSION ADOPTED IN THE 2009 DECLARATORY RULING**

The Carrier Commenters unanimously endorse changes to the shot clock the Commission approved in the *2009 Declaratory Ruling*.<sup>18</sup> In particular, they endorse the Commission’s proposals to add a “deemed granted” remedy to the shot clock (or similar remedies), reduce the shot clock to 60 days for all collocations and 90 days for new wireless facilities, and find that the shot clock applies to applications to install wireless facilities on street light and other poles owned by state and local governments. Based largely on anecdotal evidence of excessive delays, the Carrier Commenters assert that such changes in the

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equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna.” Amended Programmatic Agreement § 1.A. The WIA would exclude this equipment from the volumetric limits.

<sup>16</sup> Amended Programmatic Agreement § VI.A.5.a, b(ii).

<sup>17</sup> Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (codified at 47 U.S.C. § 1455(a)).

<sup>18</sup> See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review, Declaratory Ruling*, 24 FCC Rcd. 13994, 14012, ¶ 45 (2009) (“*2009 Declaratory Ruling*”), *aff’d*, *City of Arlington v. F.C.C.*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

Commission's shot clock are necessary to foster expeditious deployment. For the most part, however, they fail to provide the Commission with a lawful basis for implementing these changes to the shot clock.<sup>19</sup>

In the *2009 Declaratory Ruling*, the Commission expressly rejected the carriers' request to impose a deemed granted remedy, finding that it is inconsistent with the statutory language:

We reject the Petition's proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis." *This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.*<sup>20</sup>

In light of Congress's intent—as the Commission has already explained—the Commission has no authority to add remedies to its shot clock ruling. "If Congress has spoken directly to the issue, that is the end of the matter; the court, as well as the agency, must give effect to Congress's unambiguously expressed intent."<sup>21</sup> None of the Carrier Commenters have provided the Commission with a reasonable basis for the Commission to now find that the statute should be construed differently.

Nor is their reliance on the Commission's construction of section 6409 of the Spectrum Act persuasive. In section 6409, Congress provided that a state or local permitting authority "may not deny, and shall approve, any eligible facilities request for a modification of an existing

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<sup>19</sup> CTIA also urges the Commission to "clarify that its shot clocks apply to municipal poles." (Comments of CTIA in WT Docket No. 17-79 and WC Docket No. 17-84 ("CTIA Comments") at 13.) According to CTIA, that a "municipality owns the pole is irrelevant to the provisions of the [Communications] Act that allow the Commission to target and eliminate barriers to deployment." (CTIA Comments at 14.) As San Francisco will show, local governments are acting in a proprietary capacity when licensing use of their poles and the Commission's authority under the Communications Act is limited to preempting local regulatory authority. See Section VIII, *infra*.

<sup>20</sup> *2009 Declaratory Ruling*, *supra*, 24 FCC Rcd. at 14009, ¶ 39 (footnotes omitted; italics added).

<sup>21</sup> *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Hous. & Urban Dev.*, 567 F.3d 1235, 1240 (10th Cir. 2009), citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–843 (1984).



wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” While this language might have lent itself to a deemed granted remedy, as the Commission found,<sup>22</sup> there is no similar language in section 332(c)(7)(B)(v). Rather than lending support to the Commission adding a deemed granted remedy to section 332(c)(7)(B)(v), section 6409’s language demonstrates that the Commission’s prior determination that no such remedy is appropriate was correct.<sup>23</sup>

The Carrier Commenters also rely on the Commission’s construction of section 6409 to support their argument that the Commission should reduce the shot-clock period for all collocations to 60 days instead of 90 days.<sup>24</sup> The gist of these comments is that the Carrier Commenters argue there is no difference between modifying an existing and previously permitted wireless facility on a utility pole, within the strictures of section 6409, and installing a wireless facility on an existing pole that has never been used for a wireless facility (which the Carrier Commenters consider to be a “collocation”<sup>25</sup>), provided that at the end the facilities meet the definition of a “small cell.” This view is at odds with the statute.

Congress limited section 6409 to an “eligible facilities request for a modification of an existing wireless tower or base station.” In implementing section 6409, the Commission defined the term “existing” to mean a “tower or base station” that “has been reviewed and

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<sup>22</sup> *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd. 12865, 12961–12962, ¶ 226 (2014), *aff’d*, *Montgomery Cty. v. F.C.C.*, 811 F.3d 121 (4th Cir. 2015) (the “2014 Infrastructure Order”).

<sup>23</sup> Despite the suggestions in some of the Carrier Comments, there is no also basis for imposing a “deemed granted” remedy under 47 U.S.C § 253. (See Comments of ExteNet Systems, Inc. in WT Docket No. 17-79 and WC Docket No. 17-84 (“ExteNet Comments”) at 14.) Nothing in the statutory language suggests that a delay in and of itself is prohibition under section 253 (unlike section 332(c)(7)), and this Commission cannot impose such a remedy based solely on the construction of the statute by a single Court of Appeal.

<sup>24</sup> See CTIA Comments at 11-13; Comments of Verizon in WT Docket No. 17-79 and WC Docket No. 17-84 (“Verizon Comments”) at 41-43; ExteNet Comments at 9; and Crown Castle Comments at 48.

<sup>25</sup> San Francisco disagrees with the proposition that any installation of a wireless facility on an existing utility pole is a “collocation.” See Comments of the City and County of San Francisco in Docket No. WT-17-79 (“San Francisco Comments”) at 18-21.

approved under the applicable zoning or siting process.”<sup>26</sup> Modifying a wireless facility on a tower or base station that had been previously approved for such use means that at the very least whatever public process was required for that facility had been completed. Adding a wireless facility to utility pole that does not have an existing wireless facility, and is neither a tower nor a base station, means that there would have been no public process approving a permit for a wireless facility on that pole. For these reasons alone, it is appropriate and necessary to allow more time for review of applications to install new wireless facilities on existing utility poles.

There is also no basis for the Commission to find that installing a small cell facility on a utility pole is an “eligible facilities request” under section 6409. The Commission has defined the term “eligible facilities request” to mean: “Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station . . . .”<sup>27</sup> In order for the citing of a small cell facility to be an eligible facilities request, therefore, the Commission must find that a utility pole is a “tower” or “base station.” The Commission has defined the term “base station” as a “structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network.”<sup>28</sup> The Commission has defined the word “tower” as “[a]ny structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities.”<sup>29</sup>

Under these definitions, a utility pole is neither an existing “base station” nor a “tower.” A utility pole without existing wireless infrastructure does not “enable Commission-licensed or authorized wireless communications,” nor would it have been “built for the sole purpose of supporting” such communications. The Commission simply cannot find that adding wireless

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<sup>26</sup> 47 C.F.R. § 1.40001(b)(5).

<sup>27</sup> 47 C.F.R. § 1.40001(b)(3).

<sup>28</sup> 47 C.F.R. § 1.40001(b)(1).

<sup>29</sup> 47 C.F.R. § 1.40001(b)(9).

facilities to utility pole that has not previously been used for wireless facilities is an “eligible facilities request.”

San Francisco’s concern about such an overly broad and illogical construction of the term eligible facilities request is not merely theoretical. It could affect San Francisco’s review of hundreds of applications for permits to install wireless facilities on utility and City-owned poles. The Carrier Commenters have not provided the Commission with either a legal basis or a compelling reason for the Commission to establish a separate 60-day shot clock for small cells.

**V. THE COMMISSION SHOULD NOT RECONSIDER ITS CONSTRUCTION OF 47 U.S.C. SECTION 253(a)**

San Francisco and other local governments filing opening comments do not see the need for the Commission to issue a declaratory ruling for the purpose of construing 47 U.S.C. § 253(a).<sup>30</sup> The Carrier Commenters, by contrast, ask the Commission to take another look at section 253(a) and adopt a new construction of that section that would preempt virtually any local regulation over construction of small cell facilities in the public right-of-way.<sup>31 32</sup>

These arguments ignore the common-sense approach the Commission has applied to section 253(a) for 20 years. This approach has allowed local governments to appropriately address local concerns while allowing the carriers to embark on an enormous expansion of the facilities the need to provide telecommunications services. As the Commission has held, preemption under section 253(a) requires a finding that a local ordinance “would have to

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<sup>30</sup> See San Francisco Comments at 23-26; Comments of Smart Communities at 58-62.

<sup>31</sup> Most of Carrier Commenters provide no support for their claim that section 253(a) applies to them and their facilities without citing any caselaw supporting that argument. As San Francisco and other commenters have noted, that assumption is incorrect because in the Telecommunications Act of 1996 Congress expressly limited claims related to wireless facility siting to 47 U.S.C. § 332(c)(7). See San Francisco Comments at 22-26; Smart Communities Comments at 56-57; and Joint Comments of League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities in WT Docket No. 17-79 (“League Comments”) at 37-39.

<sup>32</sup> See Comments of AT&T in WT Docket No. 17-79 (“AT&T Comments”) at 3, 16; Verizon Comments at 13; T-Mobile Comments at 34; ExteNet Comments at 23; and CTIA Comments at 24.

actually prohibit or effectively prohibit” the provision of telecommunications services.<sup>33</sup> The mere *possibility* of a prohibition—due to delays, increased costs to compete, less than perfect service quality, or the denial of an application for a single permit for a small cell—would not meet the standard.

Even were the Commission to find that section 253 somehow applies to wireless facilities, it makes no sense to allow wireless carriers with large numbers of facilities serving thousands of customers in a given community to assert a prohibition under section 253(a) simply because they have been denied access to the public right-of-way to install one or more wireless facilities. Verizon and AT&T serve tens of thousands of wireless customers in San Francisco. Verizon has installed wireless facilities at over 500 different locations in San Francisco (many with one antenna), while AT&T has installed multiple antennas at over 200 locations. In addition, unlike landline providers, wireless carriers have been able to provide those services without installing any wireless facilities in the public right-of-way. While advances in technology now allow them to do so, there is no evidence that wireless carriers cannot continue to provide services to their customers without installing antennas in the public right-of-way. They can continue to meet their service needs by installing new facilities on private property. Under such circumstances, allowing wireless carriers to assert a prohibition under section 253(a) would flout the language and intent of the statute.<sup>34</sup>

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<sup>33</sup> *In re California Payphone Ass’n*, 12 F.C.C.R. 14191, 14209, at ¶ 38 (1997); see also *Level 3 Commc’ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007).

<sup>34</sup> For these reasons too, CTIA’s claim that undergrounding requirements are prohibitions on wireless services makes no sense whatsoever. In the last ten years, San Francisco has undergrounded more than 50 miles of San Francisco streets at cost of nearly \$4 million per mile. At this point in time, nearly half of San Francisco’s streets are undergrounded. Wireless carriers seeking to serve those streets can either use City-owned poles or private property to install their antennas. That the City does not permit the installation of new poles on undergrounded streets is not a prohibition or an effective prohibition on the provision of telecommunications services.

ExteNet<sup>35</sup> and the WIA<sup>36</sup> long for the day when the Ninth Circuit used an ellipsis to alter the meaning of section 253(a), even though that approach has been soundly rejected even by the Ninth Circuit. The Ninth Circuit held in *City of Auburn v. Qwest Corp.*: “Section 253(a) preempts ‘regulations that not only ‘prohibit’ outright the ability of any entity to provide telecommunications services, but also those that ‘may . . . have the effect of prohibiting’ the provision of such services.”<sup>37</sup> The Ninth Circuit’s construction of section 253(a) in *City of Auburn* required the district courts to find that section 253(a) preempted on its face local regulations that “‘might possibly’” prohibit the provision of telecommunications services.<sup>38</sup>

That the Carrier Commenters approve of this construction is not surprising, because until the Ninth Circuit *en banc* in *Sprint Telephony PCS, L.P. v. City of San Diego* overruled *City of Auburn* district courts in the Ninth Circuit routinely preempted local ordinances based on facial challenges under section 253(a).<sup>39</sup> There is no reason whatsoever that this Commission should now adopt a construction of section 253(c) that has been rejected by the courts and is contrary to the Commission’s own construction of the statute.

## **VI. THE COMMISSION MUST UPHOLD LOCAL GOVERNMENT AUTHORITY UNDER 47 U.S.C. SECTION 253(c) TO REQUIRE COMPLIANCE WITH LOCAL AESTHETIC STANDARDS**

Many Carrier Commenters seek to limit local authority to require them to comply with local aesthetic standards when installing small cells, particularly in the public right-of-way.<sup>40</sup> CTIA questions the need for aesthetic regulation because “small cells and DAS systems are designed to blend in to the streetscape with minimal if any visual impact.”<sup>41</sup> Verizon flat out asserts that such regulations are completely unnecessary: “Where a small cell meets size limits

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<sup>35</sup> WIA Comments at 35-39.

<sup>36</sup> ExteNet Comments at 24-28.

<sup>37</sup> *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001) (alteration in original), overruled by, *Sprint Telephony PCS, L.P. v. City of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*).

<sup>38</sup> *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008).

<sup>39</sup> See *NextG Networks of Cal., Inc. v. Cty. of Los Angeles*, 522 F.Supp.2d 1240, 1248–1254 (C.D. Cal. 2007) (citing cases).

<sup>40</sup> See ExteNet Comments at 37; T-Mobile Comments at 39-40; and CTIA Comments at 29.

<sup>41</sup> CTIA Comments at 29.

previously adopted by the Commission for small cells and is mounted on an existing structure or a similar replacement structure designed to accommodate small cells, it will never present an aesthetic concern that will justify denial of a siting application.”<sup>42</sup>

In taking this approach, the Carrier Commenters overlook the importance of section 253(c) in addressing any claim that a local requirement prohibits or has the effect of prohibiting the provision of telecommunications services. Section 253(c) provides:

**(c) State and local government authority**

Nothing in this section affects the authority of a *State or local government to manage the public rights-of-way* or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.<sup>43</sup>

It is well settled that section 253(c) provides a “safe harbor” for local regulations that are preempted by section 253(a), provided those local regulations: (i) concern local management of the public rights-of-way; or (ii) “require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis.”<sup>44</sup> As the Eighth Circuit explained:

Subsection (a), a rule of preemption, articulates a reasonably broad limitation on state and local governments’ authority to regulate telecommunications providers. Subsection (c) begins with the phrase “Nothing in this section affects” and then enumerates various protected state and local government acts. Thus, section 253(a) states the general rule and section 253(c) provides the exception—a safe harbor functioning as an affirmative defense—to that rule.<sup>45</sup>

The section 253(c) safe harbor, therefore, can save from preemption local regulations that prohibit or have the effect of prohibiting the provision of telecommunications services. In

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<sup>42</sup> Verizon Comments at 20.

<sup>43</sup> 47 U.S.C. § 253(c) (emphasis added).

<sup>44</sup> *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271–1272 (10th Cir. 2004).

<sup>45</sup> *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 531–532 (8th Cir. 2007) (citations omitted).

this regard, the Commission should not find that the section 253(c) safe harbor is limited to “traditional safety and construction coordination functions.”<sup>46</sup> As one court held:

[T]he City’s interest is limited to protecting the integrity of its historic and cultural resources as well as its parks and open spaces. Whether this interest is grounded in concerns for aesthetics, convenience, property values, tourism, or business development is not the issue. Whatever the underlying concern, the City may assert an interest in protecting its valuable resources and it is permissible to regulate telecommunications on the basis of that interest.<sup>47</sup>

Consistent with that decision, the Commission should find that the safe harbor includes managing the public right-of-way to address aesthetic and other proper municipal concerns. Local governments, and the local citizens they represent, are concerned about how their streetscapes look. Cities and counties spend hundreds of millions of dollars to design and install new streets or make streetscape improvements. Persons who live on or use those streets have a right be heard before wireless carriers are allowed to come onto their streets to install their facilities and existing or new poles.

It is also infeasible for the Commission to impose objective standards that would apply in communities throughout the United States. Aesthetic concerns are inherently subjective, and depend on the location of the proposed facility. A wireless facility that might be permitted on a commercial street in an urban environment, might be inappropriate on a residential street or in a historic district. Rural and suburban communities might impose very different requirements than large cities. In San Francisco’s case, imposing and enforcing aesthetic standards has neither prohibited nor effectively prohibited any carrier from providing telecommunications services. San Francisco has approved approximately 90% of the more than 1,000 applications it has received to install wireless facilities on utility and other poles in the

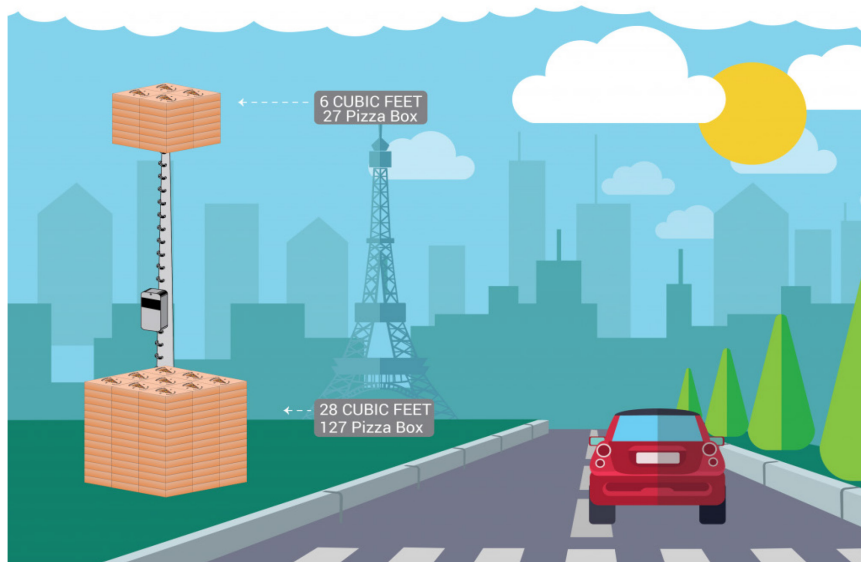
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<sup>46</sup> ExteNet Comments at 34.

<sup>47</sup> *Next Networks I, supra*, 2008 WL 2563213 at \*10; see also *Florida Public Telecommunications Ass’n, Inc. v. City of Miami Beach*, 2001 WL 36406296 at \*13 (S.D. Fla., Aug. 17, 2001), *affirmed in part reversed in part on other grounds*, 321 F.3d 1046 (11th Cir. 2003) (finding that ordinance regulating pay telephones in part for aesthetics “relate to Miami Beach’s ability to manage the public rights-of-way”).

public right-of-way. Those permits were approved efficiently, requiring the payment of only cost-based permit fees. San Francisco only approved those permits after its Planning Department determined that the proposed facilities met the City's applicable compatibility standard.<sup>48</sup>

As San Francisco showed in its comments, wireless facilities can be designed for installation on a utility and other poles to minimize aesthetic impacts.<sup>49</sup> Working with carriers, San Francisco has been able to ensure that is the case—whether the proposed facilities would be installed on utility poles or City-owned street light and transit poles. But Verizon and the other Carrier Commenters are not satisfied with a definition of “small cell” that would meet San Francisco's design standards. They have asked the Commission to define a small cell to include up to six cubic feet of antennas and 28 cubic feet of equipment boxes. Here's what that looks like:<sup>50</sup>



<sup>48</sup> See San Francisco Comments at 3-6. Those standards vary depending on the local of the proposed facility. San Francisco is particularly concerned about streets within historic districts or in scenic corridors.

<sup>49</sup> See San Francisco Comments at 9-13.

<sup>50</sup> Graphic from Steel in the Air (<http://www.steelintheair.com/Blog/2017/04/small-cells-arent-like-a-pizza-box.html/>). Twenty-eight cubic feet is the size of a large refrigerator that would be over six-feet tall and nearly three-feet wide and deep. For example an LG Model No. LFC28768ST 28 cubic-foot refrigerator are 35 3/4 inches wide, 35 3/8 inches deep, and 69 3/4 inches high. (See <http://www.lg.com/us/refrigerators/lg-LFC28768ST-french-3-door-refrigerator>).



Verizon's and CTIA's arguments that small cells could never have an adverse effect on the streetscape are simply untrue. Facilities of that size could have substantial negative impacts on local streetscapes, particularly in crowded urban environments. Left unsaid by the Carrier Commenters is that, due to section 6409 of the Spectrum Act, even a permitted small cell can be modified to exceed the parameters they have proposed. The Carrier Commenters cannot continue the pretense that these so-called "small cells" will truly be unobtrusive when they ask the Commission to define the term "small cell" to include facilities that are anything but small, and then want to insist on their rights under federal law to modify those facilities. As long as small cells on utility poles can include up to 34 cubic feet of antennas and equipment, with no limits at all on certain additional equipment, local government management of the public right-of-way under section 253(c) must continue to include the imposition of aesthetic standards.

**VII. THE COMMISSION SHOULD FOLLOW THE CONSTRUCTION OF 47 U.S.C. SECTION 332(c)(7)(B)(I)(ii) RECOGNIZED BY NUMEROUS FEDERAL COURTS**

As San Francisco showed in its comments, the federal circuit courts have largely agreed on the construction of sections 253 and section 332(c)(7).<sup>51</sup> Consistent with the language of the statutes, the courts have recognized that Congress intended section 253 to ensure that competitive local exchange carriers could compete with the incumbent local exchange carrier in any given market, and Congress intended section 332(c)(7) to enable wireless carriers to deploy the facilities they required to provide service (which at that time were only on private property).<sup>52</sup> San Francisco and other local governments filing comments generally agree that

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<sup>51</sup> See San Francisco Comments at 22-26.

<sup>52</sup> See San Francisco Comments at 22-23. Barriers to entry for wireless carriers were not a concern in 1996, because in 1993 Congress had preempted state and local regulation of "market entry" by wireless carriers. 47 U.S.C. § 332(c)(3); see *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986-987 (7th Cir. 2001).

the Commission should continue to recognize this distinction, despite similarities in the language of section 253(a) and section 332(c)(7)(B)(I)(ii).<sup>53</sup>

The Carrier Commenters take an entirely different approach. They urge the Commission to “harmonize” sections 253 and 332(c)(7)(B) by “applying its current interpretation of Section 253 to both statutory provisions.”<sup>54</sup> In this regard, the Carrier Commenters are uniformly critical of the “significant gap” approach approved by the federal courts when addressing effective prohibition claims under section 332(c)(7)(B)(I)(ii).<sup>55</sup>

The construction of section 332(c)(7)(B)(I)(ii) sought by the Carrier Commenters, if adopted by the Commission, would make it virtually impossible for local governments to enforce their zoning laws with regard to wireless facility siting. That this is not what Congress intended is indicated by section 332(c)(7)’s title, which is “Preservation of local zoning authority.” “Although the title of the Act cannot enlarge or confer powers or control the words of the Act, the title may be helpful in interpreting ambiguities within the context of the Act.”<sup>56</sup> In this case, the title is a strong indicator of Congressional intent. The Commission should not adopt a construction of section 332(c)(7) that would eviscerate that intent by in effect denying state and local governments their expressed right to enforce local zoning laws.

#### **VIII. THE COMMISSION MAY NOT REGULATE THE USE OF AND FEES CHARGED FOR USE OF LOCAL GOVERNMENT-OWNED POLES**

Many communities including San Francisco have entered into agreements allowing carriers to install small cell facilities on street light and other poles in the public right-of-way. These agreements are beneficial to carriers, who get access to infrastructure they need, local governments, who receive needed revenues from the carriers, and local residents, who will be provided with better services. Many carriers willingly entered into agreements with the City

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<sup>53</sup> See San Francisco Comments at 22-26; League Comments at 37-55.

<sup>54</sup> Verizon Comments at 10.

<sup>55</sup> See Verizon Comments at 16; Crown Castle Comments at 55; and AT&T Comments at 13.

<sup>56</sup> *Russ v. Wilkins*, 624 F.2d 914, 922 (9th Cir. 1980).

that included a license fee of \$4,000 per pole annually. In just a few years, they have installed those facilities on hundreds of poles in San Francisco.<sup>57</sup>

Many of the Carrier Commenters suggest that section 253 authorizes the Commission to regulate the use of and fees charged for use of local government-owned poles.<sup>58</sup> Those arguments depend on a finding that states and localities are acting in “regulatory” capacity rather than a “proprietary” one when controlling access to their poles.<sup>59</sup> The Carrier Commenters seem to presume that the Commission has the authority to regulate access to assets local governments construct and maintain at taxpayers’ expense to serve their communities, and to limit the fees local governments can charge for use of those assets. They also claim that a “reasonable” fee for the “placement of small cell equipment on municipal structures” should be “about \$50 annually per structure.”<sup>60</sup>

These arguments, which are largely unsupported by citations to any legal authority, are seriously flawed. Over hundred years ago, the United States Supreme Court recognized that when a local government grants an entity the “exclusive use” of its property it has the right to “exact compensation” in the same manner as any other property owner.<sup>61</sup> As the California Supreme Court has held:

The fee which a city may exact for a franchise to use streets and other public property for the construction and maintenance of telephone lines and equipment is not a tax upon the property of the utility or a license charge for the privilege of operating its business; it is compensation for the privilege of using the streets and other public property within the territory covered by the franchise.<sup>62</sup>

The Communications Act preserves this principal. While sections 253 and 332(c)(7) preempt certain local government actions under their regulatory authority, they do not preempt local governments when acting in their proprietary authority. The Commission cannot

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<sup>57</sup> See San Francisco Comments at 7-8.

<sup>58</sup> See CTIA Comments at 26; and WIA Comments at 48, 59.

<sup>59</sup> See T-Mobile at 48.

<sup>60</sup> AT&T Comments at 21.

<sup>61</sup> *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99 (1893).

<sup>62</sup> *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272, 283 (1955).

dictate the process by which local governments allow private entities to obtain access to their property—whether that property is a building or a street light pole. Nor can the Commission require local governments to accept license fees for use of their infrastructure that would not even allow them recover their costs. Nothing in the Communications Act allows the Commission to in essence confiscate local-government property to benefit private companies and their shareholders.

Most of the Carrier Commenters did not even attempt to explain where the Commission would find such authority, or even address the Second Circuit’s decision in *Sprint Spectrum L.P. v. Mills* or the Commission’s discussion of the decision in the *2014 Infrastructure Order*. In *Sprint Spectrum*, the court found that local government control over its property is beyond the reach of the Telecommunications Act of 1996. The court found that 47 U.S.C. § 332(c)(7)(B)(iv) did not prohibit a school district from enforcing a lease provision imposing more stringent standards on emissions from its tenant’s facilities:

In sum, we conclude that the Telecommunications Act does not preempt *nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity*; that the School District acted in a proprietary capacity, not a regulatory capacity, in entering into the Lease agreement with Sprint . . . .<sup>63</sup>

In the *2014 Infrastructure Order*, the Commission noted its agreement with the *Sprint Spectrum* court when it expressly rejected requests from the industry to regulate the use of local government-owned infrastructure:

As discussed in the record, courts have consistently recognized that in “determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate.” As the Supreme Court has explained, “[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction.” 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

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<sup>63</sup> *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (emphasis added).

Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt “non regulatory decisions of a state or locality acting in its proprietary capacity.”<sup>64</sup>

Likewise, to the extent San Francisco and other local governments allow wireless providers to install small cells on their poles, under terms and conditions agreed to by the parties, this Commission cannot find that section 253(c) somehow preempts those agreements. Local government fees for use of their poles are simply beyond the purview of section 253(c).

Nor can the Commission require local governments to allow wireless carriers to install small cells on their poles. In making such an argument, and attempting to distinguish the *Sprint Spectrum* decision, T-Mobile claims that “[a]ccess to municipal poles . . . is fundamentally different from access to a building or park” because municipal poles “are public property intended to serve as the locations for public services.”<sup>65</sup> That argument finds no support in the caselaw. As the Ninth Circuit Court of Appeals found: “The term ‘proprietary’ is somewhat misleading, for a municipality’s cognizable interests are not confined to protection of its real and personal property. The ‘proprietary interests’ that a municipality may sue to protect are as varied as a municipality’s responsibilities, powers, and assets.”<sup>66</sup> From a legal prospective, the ownership and control of buildings, parks, and poles all fit within the category of the proprietary interests of local governments.

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<sup>64</sup> 2014 *Infrastructure Order*, *supra*, 29 FCC Rcd. at 12964-12965, ¶ 239 (footnotes omitted), citing *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (“recognizing that Section 253(a) preempts only ‘regulatory schemes’”); *Sprint Spectrum*, *supra*, 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’”); see also *Omnipoint Commc’ns v. City of Huntington Beach*, 738 F.3d 192, 200-201 (9th Cir. 2013) (voter initiative limiting city’s ability to lease or sell city-owned property not preempted by 47 U.S.C. § 332(c)(7).)

<sup>65</sup> T-Mobile Comments at 49 (emphasis in original). T-Mobile cites to the court’s decision in *NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004) to support its argument. In that case, however, the court simply found that NextG had “adequately alleged” for purposes of its motion for a preliminary injunction that the city’s “franchising scheme” is “not of a purely proprietary nature.” (*Id.* at \*5.) Both the nature of the city’s “scheme,” and the status of the case, minimize any persuasive value that decision could have on the question of whether a city’s leasing of its poles to telecommunications carriers is a regulatory or proprietary activity.

<sup>66</sup> *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004).

That argument also ignores the substantial differences between wooden utility poles and government-owned metal or concrete streetlight, traffic, or other poles that the carriers claim the Commission should entitle them to use for minimal fees. First, the public services government-owned metal and concrete poles support are not the services offered by for-profit entities like the Carrier Commenters. Those poles support services like street lighting, traffic control, and public transportation. Second, wooden utility poles are designed for the sole purpose of allowing for the installation and maintenance of utility equipment. They are intended to be shared with other utilities and are subject to rate regulation under 47 U.S.C. § 224.<sup>67</sup> By contrast, government-owned metal and concrete poles designed to hold streetlight, traffic signals, etc. are not designed to be shared with utility providers of any kind, let alone to support a small cell facility. Third, wooden utility poles are substantially cheaper than metal and concrete poles used for streetlights and traffic signal lights. Any degradation of the metal and concrete poles due to the installation of small cells would require local governments to incur substantial expenses, which would not be covered by license fees equivalent to utility pole attachment rates.

The Commission should find that nothing in the Communications Act allows the Commission to regulate access to or the fees local governments can charge for use of their poles for the installation and maintenance of small cell facilities.

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<sup>67</sup> CTIA seems to suggest that the Commission can rely on this section to assert jurisdiction over municipally-owned utility poles, at least in states that have not used reverse preemption to regulate utility poles. See CTIA Comments at 40-45. Because California is a reverse preemption state, San Francisco does not intend to address that argument. However, that argument does not in any way provide the Commission with authority over street light and other municipally-owned poles.

## **IX. CONCLUSION**

As discussed in San Francisco's comments and above, San Francisco does not see the need for the Commission to take any action with respect to local government regulation over the installation of wireless or wireline facilities in the public right-of-way.

Dated: July 17, 2017

Respectfully submitted,

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