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August 10, 2018

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch:

On August 9, 2018, Will Johnson, Rudy Reyes, and Tamara Preiss of Verizon met separately with Nick Degani, Senior Counsel to Chairman Pai; Erin McGrath, Legal Advisor to Commissioner O'Rielly; Will Adams, Legal Advisor to Commissioner Carr; and Umair Javed, Legal Advisor to Commissioner Rosenworcel. During those meetings, Mr. Reyes discussed Verizon's small cell and fiber deployment plans to support both 4G LTE densification and 5G services. He described how Verizon works collaboratively with state and local leaders to modernize siting processes and fees to facilitate that deployment, while noting continued need for federal action to ensure that unreasonable processes and fees at the local level do not undermine the goal of ensuring that the U.S. wins the global race for 5G.

Although some states and localities have taken useful steps to establish reasonable processes for addressing siting requests and for ensuring reasonable fees, others unfortunately continue to slow deployment or block it altogether by demanding fees that far exceed costs. Verizon provides the attached analysis to support the Commission's authority to require states and localities to charge cost-based rates for siting applications, to access state or locally-controlled rights-of-way, and to attach to structures within the rights-of-way.

Should you have any questions, please contact the undersigned.

Sincerely,

Attachment

cc: (via e-mail)

Nicholas Degani
Michael Carowitz
Erin McGrath
Will Adams
Umair Javed
Donald Stockdale
Suzanne Tetreault
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The Proper Interpretation of the "Substantial Barrier" Standard Under Section 253(a): A Legal Analysis

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I. INTRODUCTION

This paper elaborates on the proper interpretation of 47 U.S.C. § 253(a), as discussed in Verizon's Comments to the Commission's *Wireless Infrastructure Notice*.[1] There, Verizon explained that the Commission should not permit any state or local legal requirement to act as a "substantial barrier" to the provision of wireless telecommunications service, including new 5G services that will soon be coming to market.[2] This filing further explains that, for purposes of Section 253(a), fees to access state or locally controlled rights-of-way or attach to structures within them impose a "substantial barrier" where they are not cost-based. Excessive rates pose a particular threat to the future availability of 5G services, given the high volume of small cells that must be deployed to enable these services. Although some states and localities have worked productively with industry to establish reasonable siting processes and rates, others continue to slow deployment or block it altogether by demanding rates far in excess of their costs.

Section 253(a) prevents state and local governments from erecting barriers to the provision of service in the market for telecommunications. Because state and local governments control an essential input to providing telecommunications – access to rights-of-way and poles within those rights-of-way – they erect a barrier to providing service when they charge rates designed to produce additional revenues, rather than merely recover their costs. In other analogous contexts, regulators impose cost-based rates to constrain the monopoly power of those entities that control an essential resource. Construing Section 253(a) to preclude rates that exceed a locality's costs for access to public rights-of-way and poles within them is not only consistent with the language of that provision, but also with the structure of Section 253 as a whole.

The paper concludes by proposing a process by which the Commission could limit fees to those that recover reasonable costs and establish presumptively reasonable charges and fees based on fees reflected in state legislation and derived from the federal pole attachment rate formula. By limiting the fees that carriers incur to deploy infrastructure, the Commission will take a critical step in ensuring that American providers can deploy the world's most advanced wireless networks and that American consumers are the first to reap the benefits of cutting edge 5G services.

II. THE COMMISSION HAS AUTHORITY TO REQUIRE COST-BASED RATES UNDER SECTION 253(a).

A. Non-Cost Based Fees Prohibit Wireless Broadband Service.

The record in this proceeding makes clear that exorbitant fees are a substantial barrier to wireless broadband deployment. Some jurisdictions (or their consultants) continue to view access to rights-of-way and municipal poles as opportunities to generate revenues, rather than as

[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017).

[2] *See* Verizon Comments, WT Docket No. 17-79 (Jun. 15, 2017) ("Verizon Infrastructure Comments") at 13-18.

critical inputs for encouraging investment and deployment to bring robust wireless services to their communities.[3] Verizon's comments included examples of right-of-way access fees of $5,000 and five percent of revenues, and pole attachment fees ranging from $1,800 up to $37,000 per year.[4] Many other commenters offered evidence of excessive fees that prevent or limit wireless broadband deployment. AT&T provided examples of unreasonably high right-of-way access, application, administrative, and pole attachment fees that discourage providers from investing in or expanding their networks.[5] CTIA also provided examples of exorbitant access, application, and pole attachment fees.[6] And the Competitive Carrier Association ("CCA") provided examples of right-of-way access, consultant, and pole attachment fees that significantly raise deployment costs, harm consumers and economic growth, and disproportionately burden smaller carriers.[7] Communities throughout the country bear the cost of these excessive fees as providers limit or delay broadband deployment. Capital budgets are finite. When providers are forced to spend more to deploy infrastructure in one locality, there is less money to spend in others. The leverage that some cities have to extract high fees means that other localities will not enjoy next generation wireless broadband services as quickly, if at all.

The record contains a study that illustrates this point by quantifying the impact of excessive fees on wireless broadband deployment.[8] The CMA Strategy Report filed by Corning in this proceeding compares 5G coverage and investment when fees are at low baseline levels and when fees are high.[9] For attachments to municipally owned poles, the baseline fee was derived from fees produced by the Commission's pole attachment formula, which is designed to produce cost-based rates.[10] The baseline fees for applications and right-of-way access were $0, reflecting that a number of jurisdictions do not impose access fees – choosing instead to recover right-of-way management costs through pole attachment fees[11] – and some jurisdictions either do not assess application fees or charge only nominal amounts.[12] Although jurisdictions may use

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[3] Verizon Comments, WT Docket No. 16-421 (Mar. 8, 2017) ("Verizon Small Facility Comments") at 8; *see also* Verizon Infrastructure Comments at 6-7.

[4] Verizon Small Facility Comments at Appendix A.

[5] AT&T Comments, WT Docket No.17-79 (Jun. 15, 2017) at 17-21.

[6] CTIA Comments, WT Docket No. 17-19 (Jun. 15, 2017) at 30.

[7] CCA Comments, WT Docket No. 16-421 (Mar. 8, 2016) at 15-20).

[8] Letter from Tom Navin, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Jan. 25, 2018), attaching *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 1, Model Sensitivities,* CMA Strategy Consulting (Jan. 2018) ("CMA Strategy Report").

[9] The baseline and high fees are all based on fees observed in some jurisdictions. *See id* at 6-9.

[10] *Id.* at 7.

[11] For example, the small facility laws enacted in Delaware and Ohio allow access to rights-of-way for wireless facilities without a separate fee. Ohio Rev. Code Ann. § 4939.0322(C); Del. Code Ann. tit. 17, § 1605.

[12] For example, small facility legislation adopted in Kansas forbids application fees unless such fees are assessed on all attachers to municipal poles. Kan. Stat. Ann. § 66-2019(c)(1). Several

different rate structures, it is reasonable to assume that the rates, in total, are sufficient to recover their costs.[13] The study concludes that an increase from the baseline municipal pole attachment annual fee ($20) to the high fee ($12,000) would reduce 5G coverage by over 28 million premises passed and investment by almost $38 billion. Similarly, a $500 increase in application fees would reduce 5G coverage by almost 8 million premises passed and investment by $11.6 billion. And increasing right-of-way access fees from zero to five percent of gross revenues would reduce coverage by 9.4 million premises passed and investment by $13.6 billion.[14] The study both establishes and quantifies a direct nexus between increases in fees carriers may be required to pay to construct 5G wireless facilities and investment in 5G wireless broadband facilities. Said another way, the CMA Strategy Report confirms that fees that exceed cost will have the effect of prohibiting 5G service for millions of American consumers.

Fortunately, Congress empowered the Commission to address state and local barriers to providing broadband wireless service. Section 253 of the Communications Act prohibits state and local governments from taking actions that "prohibit or have the effect of prohibiting" service.[15] The provision also requires preemption of any requirement determined to prohibit service.[16] As discussed below, the Commission should exercise this authority to bar requirements, including excessive fees, that create a substantial barrier to providing service, and to establish a process for determining when fees violate Section 253.

B. Section 253(a) Prevents State and Local Governments from Erecting "Substantial Barriers" to the Provision of Wireless Service, Including Barriers to Entry.

Congress passed the Telecommunications Act of 1996 to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[17] To prevent state and local governments from impeding its efforts to foster competition, Congress enacted Section 253, entitled "Removal of Barriers to Entry."[18] Section 253(a) implements this general purpose by stating: "No State or local statute or regulation, or

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other state laws limit application fees to $100 per node for the first five nodes in a batch, then $50 per node for other nodes in the batch. *See* Ariz. Rev. Stat. Ann. § 9-593(J); Va. Code Ann. § 15.2-2316.4(B)(2).

[13] The charges and fees set forth in state small facility laws can be presumed to cover the costs incurred by the local governments for processing applications, managing the rights-of-way, and allowing attachments to municipally owned poles.

[14] *Id*.

[15] 47 U.S.C. § 253(a).

[16] 47 U.S.C. § 253(d).

[17] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

[18] 47 U.S.C. § 253.

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."[19]

The Commission interpreted "prohibit or have the effect of prohibiting" service in Section 253(a) in its *California Payphone* order as barring any local government action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[20] It subsequently applied the *California Payphone* standard to preempt state and local regulations that act as barriers to entry to providers. The Commission found, for example, that a universal service fund that offered funding solely to incumbent providers would likely violate Section 253(a) because it would "effectively lower the price of [incumbent]-provided service relative to competitor-provided service," which would "give customers a strong incentive to choose service from [incumbents] rather than competitors."[21] This advantage to incumbents discouraged entry of potential competitors, thereby acting as a barrier to entry. The Commission likewise noted that designation of "an unreasonably large service area could … violate Section 253" because it "could greatly increase the scale of operations required of new entrants."[22] And it found that a Texas state requirement that new entrants use some of their own facilities to provide service was a barrier to entry that violated Section 253(a).[23]

In each of these cases, the Commission did not require that a state or local regulation absolutely bar entry; it was enough that it made entry for a potential competitor considerably more difficult or costly.[24] As stated in Verizon's Wireless Infrastructure Comments, the Commission's orders applying the *California Payphone* standard are best understood as establishing a test that prevents a state or local government from erecting a "substantial barrier" to the provision of wireless service, including substantial barriers to entry for wireless providers.[25] Economic barriers satisfy this test.

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[19] *Id.* § 253(a).

[20] *California Payphone Ass'n Petition for Preemption*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206 at ¶ 31 (1997) ("*California Payphone*").

[21] *In re W. Wireless Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231 at ¶ 8 (2000).

[22] *In re Fed.-State Joint Bd. on Universal Serv.*, Report and Order, 12 FCC Rcd 8776, 8847 at ¶ 129 (1997), *aff'd in part, rev'd in part on other grounds, Tex. Office Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

[23] *In re Pub. Util. Comm'n of Tex.*, Memorandum and Order, 13 FCC Rcd 3460, 3496-97 at ¶¶ 73-75 (1997).

[24] The courts of appeals have similarly determined that "[a] regulation need not erect an absolute barrier to entry in order to be found prohibitive" under Section 253(a); a state or local policy that substantially impedes entry is enough to violate Section 253(a). *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1269 (10th Cir. 2004); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (same).

[25] *See* Verizon Infrastructure Comments, at 13-18.

The Commission has not adopted rules implementing Section 253(a) in general; nor has it provided guidance on how to apply the statute to fees charged by state and local governments for access to public rights-of-way, beyond noting the application of the *California Payphone* standard.[26] In the absence of such guidance, as Verizon explained, courts have not consistently applied this standard to state and local regulation of wireless siting policies and decisions.[27] The "substantial barrier" standard properly applies the longstanding *California Payphone* standard, striking the statute's desired balance between state and local authority and the Act's pro-competitive aims.[28]

C. Because State and Local Governments Control Access to an Essential Resource in the Telecommunications Market, They Erect a Barrier to Entry When They Charge Excessive Rates.

The Commission should interpret the "substantial barrier" standard for Section 253(a) to allow cost-based fees for access to public rights-of-way and structures within them, but to prohibit above-cost fees that generate revenue in excess of state and local governments' actual costs. State and local governments control access to public rights-of-way and many of the structures therein, both of which are necessary for providing telecommunications services. State and local governments are thus providers of an essential input for the provision of telecommunications services. Absent access to municipal poles, lamps, streetlights, streets and sidewalks, and the areas underneath those streets and sidewalks, providers of wireless and wireline services alike would be unable to furnish communications services to their customers. As the Second Circuit recognized, "[w]ithout access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible."[29] In the fifteen years since that decision, it has become equally infeasible to provide wireless service – and particularly 5G service – without access to public rights-of-way and the structures within them.[30]

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[26] *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13371 (WTB 2016) ("*WTB Infrastructure Notice*").

[27] Verizon Infrastructure Comments, at 10-11.

[28] Although the Commission expressly deferred consideration of "what fees may be consistent with section 253(a)" in its recent declaratory ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, at ¶ 149, n. 551 (rel. Aug. 3, 2018), it recognized in that order its broad authority to interpret the statute, *id.* at ¶ 161, which "articulates a reasonably broad limitation" on state and local governments. *Id.* at ¶ 141 (internal quotations and citation omitted).

[29] *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002).

[30] *See* Verizon Small Facility Comments, at 3-5.

When a seller – in this case the locality – controls an essential resource, its pricing decisions may impose a barrier to entry.[31] Fees imposed to maximize revenues for a particular locality (as opposed to recover costs) act as a barrier to entry, because the money that providers devote to producing revenue for state and local authorities cannot be used to deploy the next generation of wireless services to more locations. As the First Circuit noted, right-of-way fees not tied to costs "strain [a provider's] ability to provide telecommunications service."[32] And because each municipality could charge similar fees, the combined effect of revenue-raising right-of-way fees "place[s] a significant burden on" providers in violation of Section 253(a).[33] Revenue-promoting fees "materially inhibit[] or limit[] the ability of a[] competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,"[34] thus acting as a substantial barrier to the provision of service and violating the Commission's longstanding interpretation of Section 253(a).[35]

The Commission's application of Section 253 in a similar scenario supports this interpretation. Where a municipality passed a "most favored nation" provision, requiring franchisees to provide it with any in-kind services they provided to any other locality in the state, the Commission suggested that the arrangement would "imped[e] competition and impos[e] unnecessary delays on new entrants."[36] After explaining why these practices were likely a barrier to entry in violation of Section 253, the Commission stated: "In applying this statutory provision, we must remain mindful of the fundamental purpose of the Act: to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[37] Where a municipality attempts to use its control over rights-of-way to demand excessive payments – whether monetary or in-kind – those payments act as a "substantial barrier" to the provision of service and violate Section 253(a).

Some state and local governments have acknowledged that excessive fees impose a substantial barrier to the provision of service. A number of states enacted infrastructure

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[31] *See, e.g., Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 439 (5th Cir. 2008) ("control of essential or superior resources is a recognized barrier to entry" (internal quotation marks and citation omitted)).

[32] *Puerto Rico Tel. Co.*, 450 F.3d at 19.

[33] *Id.*

[34] *California Payphone*, 12 FCC Rcd at 14206 at ¶ 31.

[35] *See, e.g., Puerto Rico Tel. Co. v. SprintCom, Inc.*, 662 F.3d 74, 79 (1st Cir. 2011) (noting that the Section 253 of the Act was meant to end monopolistic behavior in the telecommunications industry)*; Bell Atl.-Maryland, Inc. v. Prince George's Cnty., Md.*, 49 F. Supp. 2d 805, 817 (D. Md. 1999), *vacated sub nom. Bell Atl. Maryland, Inc. v. Prince George's Cnty., Md.*, 212 F.3d 863 (4th Cir. 2000) (noting that Section 253(a) was meant to check the total control of local governments over public rights-of-way).

[36] *In the Matter of: TCI Cablevision of Oakland Cnty., Inc.*, 12 FCC Rcd 21396, 21441-42 at ¶ 105 (1997).

[37] *Id.* at 21443 at ¶ 110.

legislation because they determined that rate relief was necessary to ensure wireless deployment. In North Carolina, for example, the preamble to the legislation states that "[e]xpeditious processes and reasonable and non-discriminatory rates, fees, and terms … are essential to the construction and maintenance of wireless facilities."[38] When San Jose announced agreements with a number of providers to promote deployment of next generation networks, it explicitly recognized that its previous small cell fee structure ($2,500-$3,500) "is not competitive or fully responsive to market conditions."[39] Indeed, the city observed that those rates resulted in San Jose "being unable to secure the necessary private sector investment in our broadband infrastructure" and that it "had not approved a single small cell permit nor collected any small cell lease revenue largely due to the existing Usage Fee Structure…."[40] It consequently reduced the recurring annual attachment fee to $175 per structure and took other steps to encourage deployment.[41]

Providers' deployment decisions supply further empirical evidence that high fees "effectively prohibit" the provision of service. Verizon recently concluded that it would not deploy additional small cells in Lincoln, NE, at this time because of the $1,995/year attachment rate. In contrast, deployment is proceeding apace in Des Moines, IA, where city officials have worked with Verizon since 2013 to establish a reasonable process and rates for small cell deployment. When Iowa adopted small cell legislation in 2017, Des Moines moved quickly to lower application fees to comply with the new law. Verizon has placed 56 small cells in service in Des Moines, with another 57 projects in the planning stage. Other Iowa cities, however, including Altoona, University Heights, and Iowa City, have been slow to comply, which in turn

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[38] *See, e.g.*, N.C. Sess. Laws 2017-159, Section 1(5) ("Expeditious processes and reasonable and nondiscriminatory rates, fees, and terms … are essential to the construction and maintenance of wireless facilities."); *see also, e.g.*, Tex. Local Gov't Code § 284.001(5) ("expeditious processes and reasonable and nondiscriminatory terms, conditions, and compensation for use of the public right-of-way for network node deployments are essential to state-of-the-art wireless services"); Del. Code Ann. tit. 17, § 1602(6) ("expeditious processes and reasonable and nondiscriminatory rates and terms related to such [small wireless facilities] deployments are essential to the construction and maintenance of wireless facilities"). In other words, these legislatures recognized that unreasonable fees "effectively prohibit" deployment.

[39] *See* City of San Jose, Press Release (June 15, 2018) (http://www.sanjoseca.gov/DocumentCenter/View/78342) ("San Jose June Press Release") (including link to Memorandum on Verizon Small Cell Master Lease Agreement, at 3).

[40] *See* City of San Jose, Press Release (April 23, 2018) (http://www.sanjoseca.gov/documentcenter/view/76522) ("San Jose April Press Release) (including link to Memorandum on AT&T Small Cell Amendments and Agreement, at 4). In its Memorandum, the city also cited the "lack of centralized broadband governance" and the "private sector burden of remediating the City's poles." *Id.* The lack of private sector investment "has resulted in the City ranking in the bottom quartile of peer cities for internet speeds, connection rates, and input/output data processing capacity" and "a deep digital divide has opened…." *Id.* at 2.

[41] *See* San Jose June Press Release (link to Memorandum on Verizon Small Cell Master Lease Agreement at 3).

has slowed Verizon's deployment efforts in other parts of the state. Turning to the Pacific Northwest, Seattle is seeking $1,872/pole/year, with a four percent annual escalator, and Portland wants to charge between $1,200 and $3,500/pole/year and annual right-of-way fees as high as $7,500,[42] resulting in minimal small cell deployment in both cities. Finally, although Verizon has reached 5G deployment agreements with some cities in California, like Los Angeles and Sacramento, prohibitively high fees have blocked deployment elsewhere in the state. Rancho Cordova, not even 15 miles from Sacramento, is demanding $4,300/pole/year, and Fresno wants $1,800 - $2,200/pole/year. In short, excessive fees can and do "have the effect of prohibiting" the provision of service, as wireless carriers routinely take fees into account when deciding whether and where to deploy service.

D. Section 253(c) Supports Application of the Substantial Barrier Standard under Section 253(a) to Require Cost-Based Rates.

Although *any* fee could be said to raise the cost of providing service, Section 253(a) requires the Commission to determine when a fee imposes a "substantial barrier" to the provision of service. This is precisely the sort of "gap-filling" role that the Commission, as the expert agency, is uniquely positioned to fill.[43] Courts have struggled to articulate a practical standard;[44] phrases like "substantial" and "significant" may not lend themselves to consistent application. Fortunately, the statute offers guidance to inform this inquiry. Section 253(c) states that "[n]othing 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."[45] As Verizon explained previously, the Commission has authority to interpret the ambiguous phrase "fair and reasonable compensation." [46]

Compensation means "[r]emuneration…in return for services rendered" or a payment that "makes the injured person whole," [47] which in the context of fees indicates the recoupment of costs as opposed to fees untethered to the service provided. Thus "fair and reasonable compensation" is best read as allowing state and local governments to recover the costs of managing the rights-of-way they control, but not permitting fees that generate additional revenues. This interpretation is consistent with cases where the Commission and other agencies

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[42] The Portland rates apply only to limited city assets; it has imposed a moratorium on attachments to city light poles.

[43] *See Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

[44] *See, e.g., Puerto Rico Tel. Co.*, 450 F.3d at 19 (five percent franchise fee would lead to "a substantial increase in costs" to the carrier, "negatively affect [its] profitability", "place a significant burden on" the carrier, and "strain [its] ability to provide telecommunications services").

[45] 47 U.S.C. § 253(c) (emphasis added).

[46] *See* Verizon Small Facility Comments at 14-18; Verizon Infrastructure Comments at 13-15.

[47] *Compensation*, Black's Law Dictionary (10th ed. 2014).

have found that cost-based rates are reasonable.[48] And it is particularly apt where, as here, the fees are set by a provider that does not face competition, like the municipalities that control access to rights-of-way and structures therein – there is no alternative "right-of-way" provider. Having established that Section 253(c) entitles states and localities to cost-based fees, but no more, for managing rights-of-way, the Commission should adopt a consistent construction of Section 253(a): By requiring cost-based fees for applications, use of rights-of-way, and attachments to municipally-owned poles, the Commission can ensure that those fees do not erect barriers to entry that violate the pro-competitive mandate of Section 253.

E. The Commission Should Adopt Presumptively Reasonable Fee Limits for Small Cells Mounted on State and Local Government Owned Poles.

Because localities erect a "substantial barrier" to the provision of wireless service under Section 253(a) when they impose above-cost fees for access to rights-of-way and structures within them, the Commission should adopt a methodology for determining when a fee is cost-based. The sheer number of states and localities makes it infeasible for the Commission to review the rates set by governments on a case-by-case basis.[49] Instead, to implement the cost-based fees standard required by the "substantial burden" framework, the Commission can examine evidence of existing fees that are either cost-based or are reliable proxies for cost-based fees. It should use these proxy fees to establish presumptively reasonable, cost-based fees for access to rights-of-way and attaching to municipally owned structures. Fees at or below the proxy fees would be presumptively reasonable and lawful under Section 253(a). Any entity wishing to challenge that presumption would bear the burden of proving that fees at or below the presumptively reasonable fees are not cost-based. Fees above the presumptively reasonable limit would be presumed not to be cost-based and thus to prohibit or have the effect of prohibiting service and violate Section 253(a). But a state or local authority could overcome that presumption by exercising its rights under the statute to demonstrate that the fee charged is cost-based and is otherwise reasonable and nondiscriminatory. By adopting proxies for cost-based fees, the Commission can simplify the process of implementing a cost-based rate requirement under Section 253(a) while preserving and protecting state and local rights guaranteed under Section 253(c).

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[48] *See* Verizon Small Facility Comments at 13-14; *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2537 at ¶ 6 (2005), *aff'd, Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (requiring that a local exchange carrier provide access to entrance facilities at cost-based rates where the statute states that rates must be "just, reasonable, and nondiscriminatory"); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) (upholding a Federal Power Commission order setting "just and reasonable" rates as a method of cost recovery); *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276, 291 (1923) (espousing that a utility obliged to provide service to the public ought to be able to recover "the reasonable cost of conducting the business").

[49] *Cf. In re Permian Basin Area Rate Cases*, 390 U.S. 747, 757 (1968) (noting that, in the context of the large number of producers of and transactions involving natural gas, "the administrative burdens placed upon the [Federal Power] Commission by an individual costs-of-service standard were therefore extremely heavy").

The Commission should establish presumptively reasonable amounts for two types of fees commonly charged by local jurisdictions. The first is for annually recurring charges to rent space on municipal poles and recover any other recurring costs attributable to the attachment. The second is for non-recurring charges such as one-time permit application and application review fees. Because state and local governments may choose to recover the costs incurred due to wireless attachments through a variety of different charges and fees, establishing presumptively reasonable fee levels based on generic fee categories preserves flexibility for localities to recover those costs. Also, by establishing presumptively reasonable fees for broad fee categories rather than specific line items (such as pole attachments, application fees, and right-of-way management), the Commission would ensure that parties cannot evade the presumptive limits by creating and charging additional fees outside of this framework.

The Commission should establish a presumptively reasonable recurring fee limit of $100 per node for right-of-way access and attachment to structures with the right-of-way,[50] and non-recurring fees of $500 for up to five nodes in a batch, and $50 for each additional node. These limits are consistent with fees adopted in recent state legislation and the federal pole attachment statute and thus are reasonable proxies for actual costs. They ensure that state and local governments are compensated for costs incurred in reviewing applications, leasing space on government owned poles, and maintaining rights-of-way. And fees below these limits will not prohibit service by preventing deployment or substantially reducing the number of facilities that can be deployed in an area.

These presumptively reasonable fee limits reflect the fees adopted by many state legislatures for small cell deployments. Many state small cell laws cap annual recurring pole attachment fees at $50 per node.[51] Some attachment fees are as low as $20 per node.[52] Three states imposed limits on recurring attachment fees based on the pole attachment rate formula adopted by the Commission pursuant to Section 224 of the Act,[53] while two others limit attachment fees to "direct" and "actual" costs.[54] The federal pole attachment formula is designed to recover the incremental costs of attaching communications facilities to a utility pole.[55]

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[50] As discussed below, some localities impose separate attachment and right-of-way access fees, some combine them into a single recurring charge, and others impose no right-of-way fees at all. Whether separate or combined, the fee limit would be $100 per node/year.

[51] *See* Ariz. Rev. Stat. Ann. § 9-595(C); Ind. Code 8-1-32.3-26 (d)(1); N.C. Gen. Stat. § 160A-400.56(a); 2018 Utah Senate Bill 189, Section 54-21-504 (effective Sept. 1, 2018).

[52] *See, e.g.*, Okla. Stat. tit. 11, § 36-506(E) (effective Nov. 1, 2018).

[53] *See* Colo. Rev. Stat. § 38-5.5-108(1) (Colorado House Bill 1193, Section 12); Iowa Code §§ 8C.7A.3(b)(1) and 8C.7A.4 (2017 Iowa Senate File 431, Section 4); Rhode Island HB 5224, Section 39-32-5(a). The Rhode Island law gives local authorities the choice between the federal pole attachment rate and not more than $150 per node.

[54] *See* Del. Code Ann. tit. 17, § 1613(4)("actual, direct and reasonable costs"); Va. Code Ann. §§ 56-484.31 (B)("cost-based"), (E)("actual costs").

[55] 47 C.F.R. §§ 1.1409(b), (c), (e)(2). We do not yet know the rates that the Delaware and Virginia statutes will yield, but both require rates that reflect "actual" and "direct" costs, so it is

Wireless attachment rates produced by that formula tend to be near or below $50 per node per year.[56] In many states, attachment fees are the only recurring charges because state laws do not permit separate right-of-way fees[57]; other states impose right-of-way fees at or below $50/node/year.[58] In either case, the federal pole attachment rates and the recurring attachment and right-of-way fees in the state small cell laws support a Commission finding that a recurring fee limit of not more than $100 per node per year is presumptively reasonable.

Although Verizon has documented the exorbitant fees some localities seek for attachment to municipal poles,[59] other cities have taken steps to promote wireless investment by adopting more reasonable fees that more accurately reflect costs. The city of Napa, CA, for example, charges $100/year for attachments to street and traffic lights; Anaheim, CA charges just under $100/year for attachments to street lights.[60] Similarly, in Topeka, KS, providers pay an annual attachment rate of $100 for poles and other structures owned or leased by the city. None of these localities imposes a separate right-of-way fee. These examples demonstrate that reasonable rates allow cities both to recover their costs and hasten the time when their citizens enjoy the benefits of the 5G future.[61]

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reasonable to assume that will result in rates in the range of $50/node/year, consistent with the cost-based federal pole attachment formula.

[56] *See* Verizon Small Facility Comments at 9 (reporting that the FCC pole attachment formula "yield[s] an annual rent for wireless attachments in the range of $10 to $20 per pole in many cases"); FCC Broadband Deployment Advisory Comm., Ad-Hoc FCC Comm.,*"Survey of Rates for Pole Attachments and Access to Rights of Way"* at 1 (April 24, 2018) ("BDAC Attachment Rate Study"), https://www.fcc.gov/sites/default/files/ad-hoc-commitee-survey-04242018.pdf, (stating that the median rate for wireless attachments subject to FCC regulation from the data it collected was $29.64, while the mean rate was $82.26).

[57] *See, e.g.,* Del. Code Ann. tit. 17, § 1605; Ohio Rev. Code Ann. § 4939.0322 (C); Va. Code Ann. § 56-484.28(C).

[58] *See, e.g.,* Ariz. Rev. Stat. § 9-592(D)(4) (right-of-way fee capped at $50/small wireless facility/year); Okla. Stat. tit. 11, § 36-506(D) (effective Nov. 1, 2018)(right-of-way fees capped at $20/small cell/year); *see also* Minn. Stat. § 237.163, Subd. 6(b)(1)(fees limited to "actual costs incurred" for right-of-way management).

[59] Verizon Small Facility Comments at Appendix A, 2-3 (listing annual attachment fees from $1,800 to $37,000).

[60] Both of these rates are subject to a 2% annual escalator.

[61] Some municipalities suggest that higher attachment and application fees reflect the higher costs of living and working in those locations, but those claims lack factual support. For example, the Bureau of Labor Statistics reports that in 2017, Anaheim, CA had an average (mean) hourly wage of $27.22 (https://www.bls.gov/regions/west/news-release/occupationalemploymentandwages_santaana.htm), compared with an average (mean) hourly wage of $21.88 in Lincoln, NE (https://www.bls.gov/regions/midwest/news-release/occupationalemploymentandwages_lincoln.htm). Similarly, the Bureau of Economic Analysis provides regional pricing parity data. Looking at the "all items" index (goods and

The proposed non-recurring charge limit is also consistent with the non-recurring application processing and review fees in many state small cell laws. A presumptively reasonable limit of $500 for up to five nodes in a batch, and $50 for each additional node, is identical to the limits on non-recurring application fees adopted in the Iowa small cell law.[62] The proposed limits are also similar to, but potentially more generous than, several other state law provisions, each of which caps application fees at $100 per application for the first five applications in a batch, and $50 for all other applications in the batch.[63] And other state laws cap non-recurring application fees at $100 per node[64] or actual cost.[65] These state small cell law provisions provide ample support for the Commission to adopt a non-recurring charge limit of $500 for up to five nodes in a batch, and $50 for each additional node.

By establishing presumptive state and local fee limits for recurring and non-recurring charges, the Commission can ensure that governments are adequately compensated for the reasonable costs caused by wireless attachments to government owned structures while eliminating the barriers to deployment that result from excessive and non-cost based fees.

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services, including rent), the Lincoln MSA is at 92.5 and the Los Angeles/Anaheim MSA is at 117.7, indicating that what costs $1,0000 in Anaheim would cost only $785 in Lincoln. Yet Lincoln's attachment rate ($1,995) vastly exceeds Anaheim's rate (less than $100). *See* https://www.bea.gov/iTable/iTable.cfm?reqid=70&step=1&isuri=1&acrdn=6#reqid=70&step=27&isuri=1&7022=101&7023=8&7024=non-industry&7025=5&7026=30700&7001=8101&7028=3&7031=5&7083=levels&7029=104&7090=70.

[62] Iowa Code § 8C.7A.3.c.(1) (2017 Iowa Senate File 431, Section 3) ("The total amount of fees for processing or issuing a permit, including any fees charged by third parties, shall not exceed five hundred dollars for an application addressing no more than five small wireless facilities, and an additional fifty dollars for each small wireless facility addressed in an application in excess of five small wireless facilities.").

[63] *See* Ariz. Rev. Stat. § 9-593(J); New Mexico House Bill 38, Section 4.M; Tenn. Code Ann § 13-24-407(a)(1); Va. Code Ann. § 15.2-2316.4 (B)(2). The proposed non-recurring fee limit would result in a higher fee to the government than the provisions in these laws if the application includes fewer than five nodes.

[64] *See* Del. Code Ann. tit. 17, §1605; Ind. Code § 8-1-32.3-26(a)(3)(B); Utah Code Ann. § 54-21-503(3) (effective Sept. 1, 2018).

[65] *See* Minn. Stat. § 237.163, Subd. 6(f); R.I. Gen. Laws § 39-32-3 (2).