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

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by	)	WC Docket No. 17-84
Removing Barriers to Infrastructure Investment	)	
	)	WT Docket No. 17-79
Accelerating Wireless Broadband Deployment by	)	
Removing Barriers to Infrastructure Investment	)	

Petition for Reconsideration of the City of New York,
Regarding Sections III. G. and IV. of the Third Report and Order and Declaratory Ruling

TABLE OF CONTENTS

Page

A. EXECUTIVE SUMMARY

The City of New York ("the City") submits this Petition for Reconsideration Regarding Sections III. G. and IV. of the Third Report and Order and Declaratory Ruling[1] ("this Petition") issued in the above-captioned dockets. The Ruling improperly fails to distinguish among three types of local government decision-making regarding telecommunications service facilities deployment, each of which is subject to a substantially different factual and legal analysis under provisions of the 1996 Telecommunications Act[2]:

(1) zoning/land use regulation of the placement of wireless facilities on private property,

(2) placement of wireline facilities (primarily, today, fiber optic cables and its associated equipment) in the streets (underground, or strung and mounted on utility poles), and

(3) placement of wireless facilities (transmitters, receivers, transceivers, and supporting equipment) above ground in public rights-of-way[3].

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[1] FCC 18-111, adopted August 2, 2018, released August 3, 2018 (hereinafter, "FCC 18-111"). The Declaratory Ruling portion of FCC 18-111 is hereinafter referred to as "the Ruling". Section III.G. of FCC 18-111 is referred to as "the Restoration Statement". The paragraph and footnote citations to the Ruling and the Restoration Statement in this Petition are references to the paragraph and footnote numbering in FCC 18-111.

[2] Telecommunications Act of 1996, Pub. Law. No. 104-104, 110 Stat. 56 (1996) ("the TCA").

[3] Hereinafter, this Petition will use the word "streets" to refer to public rights-of-way owned and/or managed by local or state government authorities. Most such public rights-of-way in the United States are public streets and roads, roadways (including within those terms both street beds and sidewalks or other associated pedestrian passageways), etc. Thus, the term "streets" can serve as a synecdoche for defined--term purposes. In contrast to the technical term "rights-of-way", the colloquial term "streets" more effectively connotes the real-world substance at stake in this discussion.

These three types of local decision-making are hereinafter referred to respectively as Types 1, 2 and 3.

Almost all the so-called "moratoria" the Ruling identifies as purportedly evidencing a basis for preemption involve Type 3 decisions. The Ruling cites only a very few claimed examples of ostensible "moratoria" involving Type 1 or 2 decisions, examples which on their own (even assuming the accuracy of the claims presented) would not justify a determination of the scope of the Ruling.[4] As the Ruling's conclusions with respect to Type 3 decisions are beyond the Commission's statutory authority, the Ruling's inappropriate commingling of the three types reflects an effort to import inapplicable statutory and legal analyses to inappropriately support Type 3 decisions.[5] The Ruling also inappropriately relies on 47 USC Section 253(a) ("253(a)") as its primary basis for concluding that so-called "moratoria" are subject to federal, and specifically Commission-determined, preemption. This Petition will first discuss why (assuming *arguendo* that 253(a) preemption is applicable to Types 1 and 3 decisions despite 47 USC Section 332(c)(7)(A) ("332(c)(7)(A)")), 253(a) fails to support preemption of the so-called "moratoria" the Ruling describes. Then this Petition will turn to 332(c)(7)(A). Lastly, this Petition will describe why Section III. G. of FCC 18-111 should also be reconsidered.

B. DISCUSSION

[4] Footnote 606 to Paragraph 166 of the Ruling itself demonstrates why it is unnecessary for the Commission to include Type 1 local government activity within this Ruling. The Commission's previous rulings cited in that footnote cover the issues likely to arise under this Ruling with respect to Type 1 activity, i.e., local government zoning and land use decisions regarding wireless facilities placement on private property.

1. 253(a): "Service" vs. "Deployment"

Paragraph 140, opening the Ruling, immediately relies on an error that recurs throughout. The paragraph repeatedly references ostensible moratoria on "deployment". But 253(a) bars prohibitions[6] on "service", not "deployment". Deployments of facilities or equipment are means to achieving provision of a service, they are not themselves services. A bar, even a complete bar, to a deployment or method or type of deployment does not prohibit provision of a service if there are achievable alternative deployment methods that would allow the service to be provided. This distinction is crucial in the context of contrasting Type 1 and Type 3 (wireless) decision-making to Type 2 (wireline).

Paragraph 140 summarizes the Ruling's conclusion that moratoria on "deployments" violate Section 253(a), disregarding the difference between deployment methods and provision of service. Though Paragraph 140 includes a passing reference to 253(a)'s requirement that preemption be based on a "service" prohibition, it denudes the word of the substance required to support preemption: "…some states and localities have adopted moratoria on the deployment of telecommunications services ***or*** [emphasis added] telecommunications facilities, including explicit refusals to authorize deployment and dilatory tactics that amount to *de facto* refusals to allow deployment." By referring to "services" ***or*** "facilities", the Ruling strips "service" of its necessary import, as if 253(a) provides for preemption of prohibitions on service or, alternatively,

[6] To avoid the need for repeated restatements of the full phrases "prohibition or effective prohibition" and "prohibit or effectively prohibit", this Petition will use the words "prohibition" and "prohibit", when referring to 253(a)'s language, to include, respectively, "or effective prohibition" and "or effectively prohibit".

mere prohibitions on deployment of certain facilities. The Ruling thus tries to manipulate a statutory prerequisite to preemption into a mere optional but unnecessary condition for preemption, a result that would be contrary to 253(a)'s clear language.

Paragraph 140 closes by dropping all reference to "service", referencing only "deployment". This rhetorical stripping of the prohibition on service prerequisite masks a fatal flaw in the Ruling's logic, because industry complaints, on which the Ruling relies, almost entirely cite equipment deployment matters but fail to document the requisite prohibitions on service as such prohibitions have been defined by the courts and the Commission.

The Ruling futilely tries to fill this gap, between a prohibition on a "telecommunications service" and a prohibition on particular equipment deployments, with two sentences stuck amidst footnote 595 at Paragraph 164. There the Ruling proclaims, without support, that a 253(a) prohibition of a "telecommunications service" includes the prohibition of a deployment of equipment that would enable a service provider to add (to a telecommunications service that is or can be provided):

> "abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities"

But Section 253(a) does not refer to "robustness", "densification" or to "performance characteristics" a telecommunications service provider "wishes to employ". This attempted

expansion of the scope of a 253(a) prohibition goes far beyond the statutory authority.[7] Section 253(a) refers to prohibitions on the provision of a "telecommunications service", defined at 47 USC Section 153(53) as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Unless an entity's ability to provide telecommunications for a fee directly to the public is being prohibited, 253(a) has no preemptive effect; the deployment of particular facilities through which such telecommunications are provided is irrelevant.

[7] The standard the federal courts have widely applied to the issue of when provision of wireless telecommunications services is "prohibited" is the "significant gap" standard, as described, for example, in *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 731 (9th Cir., 2005):

> Several circuits have held that, even in the absence of a 'general ban' on wireless services, a locality can run afoul of the TCA's 'effective prohibition' clause if it prevents a wireless provider from closing a "significant gap" in service coverage. This inquiry generally involves a two-pronged analysis requiring (1) the showing of a "significant gap" in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations….

And further on in the same opinion, at 400 F.3d 715, 734:

> …While we recognize that the TCA does not guarantee wireless service providers coverage free of small 'dead spots', the existing case law amply demonstrates that 'significant gap' determinations are extremely fact-specific inquiries that defy any bright-line legal rule.

This standard is drawn from cases applying Section 332(c)(7)(B)(II), but the Commission itself has acknowledged in its Notice of Inquiry in this Docket (*Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, Adopted April 20, 2017, Released April 21, 2017, ("*Wireless Notice*")) that the same standard applies to both: "These sections thus appear to impose the same substantive obligations on State and local governments, though the remedies provided under each are different." *Wireless Notice* at paragraph 89.

Footnote 594 of the Ruling makes a similarly fruitless effort to extend the scope of 253(a) preemption by ostensibly finding that "a prohibition or effective prohibition could occur… by prohibiting or effectively prohibiting the introduction of …significant improvements to existing services by an incumbent provider". While potential improvements to a telecommunications service being offered may be desirable, the inability to offer such improvement has not yet been made a basis for preemption by Congress in 253(a). If the Commission believes such preemption would be good policy, it may seek statutory changes, but not arrogate to itself authority that lies with Congress.

2. 253(a): Telecommunications Service vs. Information Service

The Ruling's failed effort to identify grounds for its 253(a) preemption findings is further crippled by the Commission's recent reclassification of broadband internet access service ("IAS") as an information service rather than a "telecommunications service" covered by 253(a). The Ruling makes no effort to show that the offering (much less the "robustness", "densification" or "performance characteristics") of an "information service" is a necessary condition to the provision of what remains of "telecommunications service" post-reclassification.

To the extent a local government's zoning and land use decision-making procedures, and substantive requirements, with respect to *private* property in a community (a Type 1 decision) is consistent with the legal availability of potential wireless facilities sites to enable providers to offer adequate provision of "telecommunications service" in the community, the unavailability of street sites (Type 3) cannot be the subject of 253(a) preemption because the provision of such

service is not being prohibited. Regardless of whether street locations sought by a provider are to be used, or could be used, to

(i) provide an information service, or

(ii) provide both an information service and a telecommunications service, or

(iii) deploy equipment capable of providing an information service or a telecommunications service, or both,

such matters are irrelevant to the necessary inquiry under Section 253(a). The necessary inquiry in the case of deployment siting requests is whether there remain alternative locations that could lawfully be used by the applicant to provide an identified *telecommunications* service. In the case of a Type 3 request (for above ground wireless installations in the streets), a decision to deny some or all such deployments cannot constitute a 253(a) prohibition unless (x) lawfully permitted private property siting is so restrictive under applicable land use regulation in the community that it would not allow such telecommunications service provision without significant gaps in coverage, *and* (y) such street sites are needed for, and will in fact be used for, such telecommunications service provision. The effect of the Commission's reclassification of IAS service is that such service can no longer be such cited as a proposed telecommunications service in such an attempt to show a prohibition. Industry complaints and Commission concerns relating to IAS service are thus unusable to support the Ruling's conclusions.

The Ruling's Paragraph 167 says: "We also disagree with assertions that the change in regulatory classification of broadband Internet access service in the *Restoring Internet Freedom Order* affects the validity of this Declaratory Ruling." However, the Ruling fails to support this

"disagreement", announcing only a *non sequitur*: "Consistent with prior Commission decisions, we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis." But the reclassification of IAS makes the Ruling problematic not because the Commission lacks "authority" under other provisions of law over particular infrastructure items, but because 253(a) only bars decisions that prohibit provision of telecommunications service.

Wireless "telecommunications service", as the Commission now defines it, can be successfully provided across most of the U.S. today without the use of additional above-ground wireless equipment deployed in the streets[8]. The reclassification of IAS service means the inability to provide that service cannot support a 253(a) preemption. As such, the reclassification renders any justifications for the Ruling based on a claimed inability to provide IAS service (even if proven) unavailing.

In citing the unambiguous limits on preemption embedded in the statutory scheme, this Petition is not challenging the desirability of local governments working cooperatively with providers to achieve siting policies that authorize wireless installations on the streets that enhance robust and competitive IAS service (and/or telecommunications service) in ways that meet the needs of the community. The City, and many other jurisdictions, have done just that and continue doing so. This Petition merely points out what the Ruling fails to confront: that as a legal matter whether

[8] See, e.g. coverage maps widely available in marketing materials of Verizon, AT&T, T-Mobile and Sprint.

local street siting is needed for, or the extent to which it will be used for, IAS or other information services cannot be evidence for 253(a) preemption.[9]

3. 253(a) and (d): Lack of Commission Authority.

Paragraph 141 of the Ruling seeks to arrogate to the Commission, contrary to clear Congressional intent and twenty years of Commission practice, the authority to preempt local government decisions regarding use of the streets. Such authority has long been recognized as reserved by Congress for the courts, not the Commission. The legislative history of Section 253 is unambiguous and has been noted at length in comments previously submitted to the Commission (see below). The Ruling's Paragraph 141 includes a footnote that refers to Paragraphs 163 through 165 of the Ruling as its defense of this unsupported arrogation of authority, but this defense fails to rebut the clear and longstanding limit on the Commission's authority:

-Paragraph 163 cites the preemption authority granted to the Commission under 47 USC Section 253(d) ("253(d)"), but avoids confronting the fundamental Congressional purpose of excluding from 253(d) reference to 47 USC 253(c) ("253(c)").

[9] The Ruling in Paragraph 167 says: "Infrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service, and our ruling today will promote broadband deployment in concert with our actions in the *Restoring Internet Freedom Order*." Such a policy goal is not a lawful basis for the Ruling's "disagreement with assertions" that reclassification affects the validity of the Ruling. To the extent the Ruling relies on supposed effects of so-called "moratoria" on IAS service, the Ruling must be reconsidered and such reliance excluded.

-Paragraph 164 refers to a Supreme Court opinion that did not involve issues of the scope of Commission authority under 253(a).

-Paragraph 165 cites cases regarding the forms of jurisdiction courts have taken over Section 253 preemption, and claims that precedent does not "prevent us from declaring that a category of state or local laws is inconsistent with section 253(a) because it prohibits or has the effect of prohibiting service". To the contrary, see e.g., *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1177 (11th Cir. 2001) and the Congressional legislative history cited there, and the discussion of this issue in, for example, *Comments of the National Association Of Telecommunications Officers And Advisors*, In the Matter of Level 3 Communications, LLC Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253 , Docket No. WC 09-153).[10]

4. 253 (b) and (c): Safe Harbors from Preemption

In its Paragraphs 153 through 160, the Ruling claims that the safe harbor from preemption provisions in subsections (b) and (c) of Section 253 must generally fail to protect from preemption the so-called "moratoria" that the Ruling concludes are generally preempted. Again, however, the failure of the Ruling to distinguish among the types of local decision-making it seeks to cover

[10] The Ruling also cites its *Classic Telephone* decision (see citation at footnote 520, Paragraph 141 of the Ruling) for the Commission's supposed authority to preempt local government decisions that implicate street issues, i.e., in a local "franchise" context. But *Classic Telephone*, a "Type 2" (i.e., wireline) case, relied on a factual determination that the local governments in question were merely seeking to preserve pre-1996 Telecommunications Act decisions to limit telephone service to a single monopoly provider. *Classic Telephone* is irrelevant to local government decisions today regarding whether and to what extent to allow wireless equipment above ground on local streets.

conceals the degree to which deployment of above-ground wireless facilities in public streets raises issues of state and local government authority under 253(b) and (c) which cannot simply be carried over from past consideration of the issues previously identified in the cases involving wireline deployment underground or mounted on existing utility poles.

Proposed installation of wireless facilities above-ground on public streets raises management of rights-of-way concerns that do not generally arise in other types of local decision-making.[11] Visual and aesthetic concerns arising in zoning/land use regulatory decisions regarding proposed wireless installations on private property implicate the portion of the community within visual range of the proposed installations. But proposed installations on streets would occupy space used by everyone, affecting the entire community. Zoning issues are often characterized as issues about what goes "In My Back Yard"; issues relating to above-ground street installations are instead about what goes "In ***Everybody's Front*** Yard".

And it is not merely visual and aesthetic impact that must be evaluated by any community exercising its management of right-of-way authority when above-ground streets installations are being considered, because such locations for such installations are a limited resource. Only so many above-ground installations can safely and effectively be accommodated on streets with many competing or potentially competing uses for above-ground installation locations, including those serving public safety, emergency response, signage, environmental testing, energy and water consumption and conservation evaluation, and others. Section 253 cannot be treated (nor

[11] Note that this discussion is assuming solely for the sake of argument that concepts applicable to 253(c) are relevant to proposed wireless facilities installations. As discussed in Section 6. Of this petition, below, preemption of local authority under Section 253 is barred by 332(c)(7)(A).

can 332(c)(7)(B) for that matter) as a trump card that defeats every other one of these potentially competing uses. Balancing these competing demands on the limited resource of above-ground locations in a *core element* of a local government's rights-of-way management task regarding proposed street-based installation of above-ground wireless telecommunications facilities. Past precedent regarding the scope of "management of rights-of-way" authority under Section 253(c) in Type 2 (wireline) circumstances (cited, for example, in Paragraph 160 and footnotes 589 and 590 of the Ruling) is irrelevant to above-ground wireless siting decisions. Indeed, the benefits-and-burdens evaluations required, in light of both visual impact and scarce resource considerations relevant with respect to wireless installations in the streets, demand, in the exercise of management of rights-of-way authority, consideration of some of the same issues that are mentioned in 253(b) in the state regulatory, rather than the street management context. [12] If, *arguendo*, 253(a) preemption is, *contra* 332(c)(7)(A), read to apply to wireless facilities at all, 253(c)'s management of rights-of-way safe harbor must be read to include some of the same concerns as 253(b) in the context of allocating resources in the streets and assessing potential

[12] Thus, for a local government allocating limited above-ground street space among competing uses (for public safety, signage, etc.) important considerations may include the degree to which service will be available to the whole community, under-served communities, etc. Such considerations are a legitimate part of a local government's exercise of its management of rights-of-way authority if they are a reasonable element allocating scarce availability of locations among potential uses and among potential users offering different levels of community benefit. (An alternative way to look at the relationship between 253(b) and 253(c) in the wireless context is that to the extent 253(c) authority is as limited as the Ruling claims, that is because Congress never meant Section 253 preemption to apply to wireless installations at all (see 322(c)(7)(A).)

benefits that would offset the burdens on the streetscape of above-ground wireless installations.[13]

5. 253(c): Competitive Neutrality

At Paragraph 153, the Ruling states: "Further, we find that most moratoria are not competitively neutral—they almost certainly will favor incumbents over new entrants and existing modalities over new technologies." But the first finding is unsupported and, indeed, unsupportable on its face, and the second finding runs directly contrary to the holding of the *Level 3* decision the Ruling cites in its footnote 516. A decision by a local government not to lease street space for wireless facilities deployment that applies to all wireless telecommunications service providers equally is not competitively unfair if all such wireless telecommunications service providers continue to receive competitively neutral treatment from the local government with respect to their use of private property locations capable of serving the community in question. Competitively neutral denial of access to one group of potential locations plus competitively neutral treatment of access to an alternative group of potential locations does not and cannot equal competitively non-neutral treatment.

[13] The fairest way to treat competing providers, as a local government deals with these issues, may often be precisely through the kind of general pause in granting approvals that the Ruling finds disturbing. Where limited above-ground resources are available for wireless telecommunications facilities, it may be more supportive of competitive fairness to organize coordinated "starting gates" for the commencement of organized application procedures, as opposed to a mad dash to be the first to grab up all the best available spots before others get to the government's door. But such coordinated application procedures may require quiet periods where no applications are accepted, while government re-evaluation is conducted regarding what remaining or additional locations can be made available. Under the Ruling, such coordinated pauses seem to run afoul of the ostensible preemption of so-called "moratoria".

6. Section 332(c)(7)(A)'s Limit On Section 253(a) Preemption

Paragraph 142 of the Ruling announces that the phrase "telecommunications service" in 253(a) includes, at least in theory, wireless (in addition to wireline) telecommunications services. But that conclusion is irrelevant to the substance of the Ruling, and its placement seems intended to sidestep, without having to confront, the plain point that 332(c)(7)(A) bars the use of 253(a) as a basis for preemption of local government decisions regarding deployment of wireless facilities: "Except as provided in this paragraph, ***nothing in this chapter*** [emphasis added] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."

Instead of responding to commenter citations of the express statutory bar in 332(c)(7)(A) on 253(a) preemption with respect to wireless facility siting (See, e.g., WT Docket No. 17-79, *Comments of the City of New York* ("*NYC Comments*") at Section II.B.1., pp. 3-5) the Ruling in Paragraph 142 relies in footnote 532 on two irrelevant citations.

The first references *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co*., 534 U.S. 327, 340 (2002), which finds wireless facilities to be covered under the Pole Attachment Act (47 USC Section 224) (the "PAA") but offers no support to the Ruling's apparent assumption that 253(a) preemption of personal wireless facilities siting decisions is not precluded by 332(c)(7).[14] The

[14]A review of the PAA does however add force to the argument that Congress intended local governments to retain unfettered control over their own poles in public streets. The PAA requires *private* utility pole owners to accommodate telecommunications service providers in certain respects, but expressly *excludes* from that mandate publicly-owned poles. But the Ruling appears to assume that 253(a) can be implied to reverse that very clearly stated exclusion. Regarding implied preemption, an intrusion of this kind into an area of core local concern requires especially clear and express authorization from Congress. *See City of Dallas v. FCC*, 165 F.3d 341,

Rulings' second citation in its footnote 532 is also irrelevant. The Ruling points to a paragraph in the 1997 *Fourth Order on Reconsideration* in the *Access Charge Reform* Docket[15] regarding wireless industry access charge requirements, a matter wholly unrelated to "decisions regarding the placement, construction, and modification of personal wireless service facilities" which 332(c)(7)(A) protects from any preemption outside 332(c) itself. This reference in the *Fourth Order* represents no precedent or logic supporting the Ruling's attempt to Section 253(a) to personal wireless service facilities placement decisions despite the clear language of 332(c)(7)(A).[16]

When the Ruling reaches its conclusion on this issue ("We therefore disagree with Smart Communities that section 253 does not apply to wireless facilities. *See* Smart Communities Wireless NPRM Comments at 56-57.") it has merely knocked down a straw man. Nowhere does Smart Communities argue that the phrase "telecommunications service" excludes wireless service. Smart Communities argues, as have others, now and in the past, that the plain language of the Communications Act bars preemption that in any way *limits or affects local authority over*

349 (5th Cir. 1999) (holding that the FCC lacks authority to preempt local rights-of-way requirements without a clear statement from Congress and particularly in light of Section 601(c)(1) of the TCA); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

[15] *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45 et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5486, para. 302 (1997) (the "Fourth Order").

[16] If anything, the cited paragraph of the *Fourth Order* supports the earlier point made by this Petition: that the mere imposition of a condition or even impediment to the provision of a service is not the equivalent of a prohibition of that service that might constitute a violation of Section 253(a).

wireless siting decisions unless pursuant to 332(c) itself. The Commission has acknowledged this argument ("Several commenters argue that by using the sweeping phrase 'no chapter,' Congress made clear that it intended Section 332(c)(7) to override any other provision in the Communications Act that may be in conflict, including Section 253"[17]), it has been raised again in the current docket, yet the Ruling fails to explain why it disagrees – the Ruling must thus be reconsidered.

Even if the Commission were to attempt to achieve the sort of preemption of so-called "moratoria" with respect to above ground wireless installations in the streets by referencing 47 USC 332(c)(7)(B)(i)(II), it would be unavailing for many of the same or similar reasons that 253(a) preemption would (were it not itself made irrelevant by 332(c)(7)(A)) be inapplicable. See for example the discussions in Sections 1. and 2. of Part B. above. While 332(c)(7)(A) references all "decisions" regarding personal wireless facilities siting, 332(c)(7)(B)(i) references only "regulation". As discussed in the *NYC Comments* at page 6, there are two separate types of "decisions" that are relevant with respect to any proposed placement of private facilities above-ground on public streets or any other public property. The public property owner must first make the same decision that any private property owner makes with respect to a proposed installation on such private property – whether the proposed installation is a desirable one from the owner's

[17] See Footnote 203 of the Commission's 2009 "Shot Clock" Ruling (*In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance,* FCC 09-99, 24 FCC Rcd 13994, 14020). The "shot clock" requirements for zoning decisions regarding proposed wireless facilities placements on private property issued in that ruling were adopted pursuant to Section 332, the proposed application of Section 253 was rejected.

point of view given the benefits and burdens associated with the proposed installation. Only if that initial decision is affirmative does a second decision, a "regulatory" decision, come into play, that is, whether the installation meets the generally applicable zoning and laws and regulations applicable in the jurisdiction. Section 332(c)(7)(B)(i) applies only to the second decision, if it arises. The initial decision by the public owner as to whether the terms and conditions, and the benefits to and burdens on, the property owners of leasing such access is not a decision to which Section 332(c)(7)(B)(i) applies.[18]

7. Model Form of Denial.

Attached to this Petition is Attachment A, a proposed model form of a denial of an application for placement of a wireless facility above-ground in the public streets, by a local government in a community that has made a decision to deny such applications pending a careful and complete consideration of all the issues that any land owner or manager would have the right to consider

[18] Consider a private property owner or manager with a range interests to accommodate in its decision responding to a wireless siting application, for example a housing development company with several substantial developments under way across a community. On receiving a request to site several wireless facilities on its properties under development, such a developer might consider not merely routine contractual issues (insurance or indemnifications requirements, etc.) but also broader property management issues: To what alternative uses might the requested sites be put that might add greater value to our properties? To what degree will the visual impact of wireless equipment at these sites reduce property values of our nearby sites? Recognizing that availability of wireless communications enhances the value of our properties, might the proposed installations be provided at some other owner's sites, thus allowing us to enjoy the benefits without the burdens? If we are counting on the proposed service to enhance the value of our properties, what assurances will we get that our potential housing buyers or tenants will actually enjoy such service and our property values thus be enhanced (i.e., what will the service cost, will it be too expensive for our potential buyers or tenants, how ubiquitously will it be provided across our properties, etc.)? All completely appropriate and legitimate decision points for a private property owner to consider in managing its properties.

in choosing whether or not to make its property available for such a purpose, including the monetary or other forms of rental consideration the owners will require, the benefits the owners and users of the property will receive from the presence of the facility, the burdens to which the owners and the users of the property will be subject (including the visual impact, and whether and to what extent the benefits could be enjoyed were the facility on someone else's property such that the countervailing burdens could be simultaneously avoided). Paragraph 168 of the Ruling says "we expect states and localities to comply with federal law by repealing existing moratoria, refusing to enforce moratoria that remain on the books, and declining to adopt new moratoria." Because as discussed in this Petition, the Ruling exceeds the scope of the Commission's authority and invokes claims of federal preemption of local decision-making that exceed the actual scope of such preemption, this Petition has included a model or example of one type of decision that would not be preempted under federal law, despite the Ruling's apparent intention that such a decision would be treated as "preempted" because it would be pursuant to a purported "moratorium". Petitioners contend that states and local governments for the most part need not change their current practices with respect to the matters ostensibly described in the Ruling.

The Ruling claims at Paragraph 167 that "…our ruling today will promote broadband deployment…." Petitioners disagree and offer one example of how the Ruling is likely to be *counterproductive* to broadband deployment: The City is as of the date of this Petition in the midst of a process, pursuant to New York City Charter requirements, intended to result in extension and potential expansion of the use of locations in City streets for wireless communications equipment. The City has been a pioneer and innovator in such uses for many

years. However, the issuance of the Ruling is creating immediate uncertainty and confusion regarding, among other issues, whether service providers will agree to comply, or even having agreed to comply will actually comply, with appropriate terms and conditions the City has placed and expects to continue to place on the occupancy of City-owned or managed property. Among these terms and conditions are and have been substantial periods where new applications for such occupancy are not granted, among other reasons to allow orderly allocation of limited above ground siting locations. Treatment of such periods as "preempted" "moratoria" would displace, without any practical alternative, procedures that have been successfully used for many years for the placement of thousands of installations on City property. The City also understands that other pending local government activities and negotiations around the country that could be moving forward to assist in advancing broadband infrastructure deployment activity are at risk of being thrown off track by this ill-considered, inaccurate and inappropriate Ruling.

8. The Restoration Statement

Paragraphs 137 through 139 of FCC 18-111 also include statements that inaccurately describe the scope of the Commission's preemption authority, and should thus also be reconsidered.

Paragraph 137 of FCC 18-111 says: "We find that sections 253 and 332(c)(7) of the Act provide authority to preempt state or local laws that prohibit or have the effect of prohibiting the rebuilding or restoration of facilities used to provide telecommunications services…." This sentence inaccurately describes the referenced statutory provisions as preempting prohibitions on the treatment of facilities. As noted above in this Petition, the fact that particular facilities have been used to provide telecommunications services does not necessarily mean they are the

only practical method of providing such services. As long as state and local laws and regulations would permit alternative means of providing such services, bars to the use of particular facilities are not subject to preemption.

Paragraph 138 of FCC 18-111 says: "We prefer to exercise our authority to address the application of section 253 to preempt state and local requirements that inhibit network restoration on an expedited adjudicatory case-by-case basis…." This statement inaccurately replaces the concept of "prohibition" with "inhibition. References to 253(a) preemption based on "inhibition" derive from use of the word "inhibit" in a sentence in *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, para. 38 (1997) ("*California Payphone*"), which can and must be understood only in the full context in which that word was used there, and which cannot be treated as if it were synonymous to "prohibition".[19]

[19] From *Comments of the City of New York*, p.4, submitted in WC Docket 17-84:

> Paragraph 108 of the Wireline Notice states that the "Commission has described Section 253(a) as preempting conduct by a locality that materially inhibits or limits the ability of a provider 'to compete in a fair and balanced legal and regulatory environment.'"… The standard the Commission mentions here has been widely cited by courts dealing with 253 issues…but *only* if applied with full attention to *all* its aspects…. A full parsing of the phrase in its entirety, especially in the context in which the Commission originally used it shows that it reflects that a material inhibition of or limitation on provision of a telecommunications service is *not* subject to preemption unless such also rises to the level described in the rest of the standard. Thus, for example, a particular regulation imposed generally on all providers may not, regardless of the burden involved, be subject to preemption under 253(a) under this standard because all providers subject to the regulation would be subject to a fair and balanced regulatory environment. In particular cases, differential application of a specific regulation or legal requirement may

Paragraph 139 of FCC 18-111 approvingly references a "suggestion" of the City of New York, but the Restoration Statement fails to reflect the substantive import of that "suggestion". The comments to which Paragraph 139 is thus referring urged the Commission not to claim preemption authority in disaster recovery and emergency response contexts, pointing out that such claims are only likely to complicate and confuse efforts when clear chains of command and well-practiced procedures are at their most important. The Restoration Statement as issued is the complete opposite of what the City of New York urged in its comments. By invoking contested, and indeed invalid, preemption authority and threatening ad hoc preemption determinations that may result in contradictory and confusing direction to communications service providers and personnel at the worst possible moments, the Restoration Statement is ill-advised, offers no benefits to the public and should be reconsidered.

C. CONCLUSION

In summary, the Ruling and the Restoration Statement inaccurately describe the scope of federal preemption (and the Commission's authority to invoke such preemption) of state and local-decision-making regarding telecommunications facilities and services, as described in this

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> also be shown not to justify preemption under this standard, because other aspects of the legal and regulatory environment as a whole render such differential application consistent with a fair and balanced regulatory environment. The proper application of this standard requires a careful evaluation of the circumstances of each case. The deepest risk of citing the *California Payphone* standard is that it will be improperly whittled down and what remains will be displayed as if it were the whole, by replacing the prohibit or effectively prohibit language of the statute with a less demanding "materially inhibit or limit" standard. Unfortunately, the Wireline Notice does just that….

Petition. The Commission therefore is urged to reconsider the Ruling and the Restoration Statement in each of the respects described above.

Respectfully submitted,

The City of New York

s/_____

By:
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New York, New York 10019

Attachment to Petition for Reconsideration

Model Denial of Application for Installation of Wireless Communications Facilities On Publicly-Owned Property, Including But Limited to Public Street Property.

Decision of [INSERT TOWN NAME] ("the Town"),
as Manager of the Above-Captioned Property on Behalf of its Ownership.

Dear Applicant:

The Town has received your application to install privately-owned wireless communications equipment above ground on publicly-owned property of the Town. The Town, as the designated manager of said property on behalf of its ownership, is currently engaged in evaluating the extent to which, and the terms on which, such installations (to the extent not previously installed pursuant to the Town's lawful authority) would best serve to benefit the owners of the property while minimizing the burdens of such installations on said owners, and it would be premature for your application to be granted prior to the completion of that review. The Town is unaware of facts that would prove that wireless "telecommunications service", as that term is defined in federal law, cannot be provided by the applicant in the Town by means of wireless facilities that could be placed consistent with existing state and local law on properties other than publicly-owned property of the Town. For the reasons described above in writing your application is denied. This denial is being issued within 90 days of the submission of the fully completed Application. You would be welcome to submit a new application for review by the Town upon the completion of the Town's evaluation process described above.

[Authorized Signature]