Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION FOR RECONSIDERATION

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September 4, 2018

EXECUTIVE SUMMARY

The Smart Communities and Special Districts Coalition[1] seeks reconsideration of the Declaratory Ruling issued in the above-captioned proceedings.[2] The Ruling purports to find, generically, that what the Commission defines as "express moratoria" prohibit or effectively prohibit the ability of entities to provide telecommunications services in violation of Section 253(a); that *de facto* moratoria also generally violate Section 253(a); and that neither generally fall within the savings clauses in Sections 253(a)-(b). But, as a review of "moratoria" cited by

[1] Smart Communities are localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia.

Individual members: Ann Arbor, MI; Atlanta, GA; Berlin, MD; Berwyn Heights, MD; Boston, MA; Capitol Heights, MD; Cary, NC; Chesapeake Beach, MD; College Park, MD; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; Laurel, MD; Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Myrtle Beach, SC; New Carrollton, MD; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Perryville, MD; Pocomoke City, MD; Poolesville, MD; Rockville, MD; Rye, NY; Santa Margarita Water District (CA); Sweetwater Authority (CA); Takoma Park, MD; University Park, MD; Valley Center Municipal Water District (CA); Yuma, AZ, Bloomfield Township, MI, and Meridian Township, MI.
Organizations Representing Local Governments: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of more than 75 Michigan communities that focuses on protection of their governance and control over public rights-of-way. The Michigan Townships Association promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Colorado Communications and Utility Alliance ("CCUA") is an organization comprised of 56 cities, towns, counties, school districts and regional councils of government throughout Colorado. Its membership includes communities of all sizes in urban, rural and suburban areas throughout the state. The Kitch Firm represents PROTEC, the Michigan Townships Association, and Bloomfield and Meridian Townships. Kissinger & Fellman represents CCUA. Best Best & Krieger represents the others in the Smart Communities coalition.

[2] *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure*, WC Docket No. 17-84, WT Docket No. 17-79, *Third Report and Order and Declaratory Ruling* (rel. August 3, 2018).

the Commission shows, the Commission seems to have failed to examine the laws or the impacts of the laws it relies on to find prohibitions, had no basis for finding that a prohibition results from those "moratoria"; and had no basis for concluding that the "moratoria" are not within the bounds of the Section 253 savings clauses. Indeed, many of the cited laws do not actually fit within the Commission's own definition of "moratorium." The "freeze and frost" laws the Commission cited as "moratoria" are typical: those laws are not moratoria as defined by the FCC, are not obviously prohibitory, and are directly related to right of way management. They simply prevent very heavy trucks from using certain roads in freeze or frost conditions, when use is well-known to harm the integrity of the roadway.

Unfortunately, the examples are emblematic of broader errors. The Commission fails to properly apply Section 253(a) or 253(b) and (c): its finds "prohibitions" and discriminatory effects where there clearly are none under settled law and precedent, including the Commission's own precedent. It ignores Section 332(c)(7) and improperly applies Section 253 to limit and affect local authority over wireless siting decisions. It uses Section 253(a) to assert control over facilities it cannot control under 47 U.S.C. Section 224, or under constitutional principles (and the Commission's own precedent), which distinguish proprietary and non-proprietary facilities.

The result is an order that is internally inconsistent, arbitrary and capricious in the extreme, and ultimately, unconstitutional.

The Declaratory Ruling was an improper vehicle for actions of this type, creates uncertainty rather than resolving it, and fails to recognize that many moratoria in fact speed deployment, and have pro-competitive, not discriminatory effects. It must be reconsidered.

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The Smart Communities and Special Districts Coalition ("Smart Communities") submits this Petition for Reconsideration, asking the Federal Communications Commission to set aside its August 3rd, 2018 Declaratory Ruling finding that express and de facto moratoria are prohibitions or effective prohibitions within the meaning of 47 U.S.C. Section 253(a) and generally are not protected from preemption by 47 U.S.C. § 253(b) or (c).[3]

I. THE DECLARATORY RULING IS FUNDAMENTALLY FLAWED

The Declaratory Ruling purports to define an express moratorium as "state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities,"[4] but never shows the examples it gives fit this definition (as vague and unclear as it is) of "express moratoria, or shows that "moratoria" (whatever the Commission means by the term) invariably result in prohibitions under Section 253(a).[5] The Commission never examines the examples on which it relies closely enough to conclude that as a general matter, such moratoria are unprotected by Section 253(b) or (c). Its discussion of *de facto* moratoria[6] is subject to the same flaws. As a result, the Declaratory Ruling is internally inconsistent, inconsistent with the plain language of the Communications Act, inconsistent with prior Commission precedent and unconstitutional.

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[3] *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure*, WC Docket No. 17-84, WT Docket No. 17-79, *Third Report and Order and Declaratory Ruling* (rel. August 3, 2018) ("Declaratory Ruling" or "Ruling").

[4] Declaratory Ruling at ¶ 145.

[5] The Commission, without meaningful discussion, simply repeats that moratoria, as defined, even temporary ones, are prohibitory because they halt "the acceptance, processing, or approval of applications or permits for such services or the facilities used to provide such services." *Id.* at ¶ 147. This is nothing more than a restatement of the definition of a moratorium, not an analysis of prohibitory effect, and in itself is a fundamental flaw in the Declaratory Ruling.

[6] The Commission defines *de facto* moratoria as "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium." *Id.* at ¶ 149.

The Ruling is so defective that it is difficult to point out all the flaws in the Commission's analysis, but the Commission's discussion of Michigan's "freeze and frost laws"[7] best illustrates the fundamental problems. There is no citation to the "freeze and frost laws" – just a citation to a Frontier Communications filing that itself does not identify what laws are being referenced. As far as can be determined, the Commission is simply declaring the law "prohibitory" without ever examining it, or even determining whether it falls within its two definition of moratoria.

A review of Michigan's laws suggests that Frontier Communications' filing was likely referring to Michigan Public Act 300 of 1949.[8] In place since 1949, the law seeks to preserve Michigan's roadways by imposing weight restrictions on vehicular traffic during spring months as the uneven freezing and thawing of road surfaces leads to roadway damage if traffic weight is not closely monitored and load limits enforced.[9] To support its conclusion of "prohibition," the Commission would need to find: (a) this general law, in effect for more than half a century, has in fact resulted in service prohibitions (one would expect significant evidence of that fact); (b) telecommunications companies do large amounts of construction in the winter months; (c) they must use roads that are subject to the weight restrictions (as opposed to roads which are not); and (d) must use trucks that exceed proscribed weight limits. The Commission provides no record on any of these points, and essentially finds a prohibition based on speculation.

Nor does the Commission fare better when one tests its conclusion that "moratoria" are not generally saved by Section 253(c) and are unrelated to right of way management. Minnesota also has a frost weight law, in place since 1937, the need for which the State explains

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[7] *Id.* at ¶ 143.
[8] MCL 257.722, as updated and amended periodically including as of September 27, 2018.
[9] A fuller description of the threats the "frost laws" have sought to address since 1949 can be found at http://micountyroads.org/Doing-Business/Seasonal-Weight-restriction. The Michigan State Police have a special enforcement division to ensure compliance. *See* https://www.michigan.gov/msp/0,4643,7-123-72297_59877---,00.html.

this way: "In regions of the United States where pavements are constructed in freeze-thaw environments, spring load restrictions (SLR) are typically used as a preservation strategy. During the spring, pavement layers are generally in a saturated, weakened state due to partial thaw conditions and trapped water."[10] Damage to the integrity of the roadway is five times that at other times; by limiting use, the Minnesota Department of Transportation found that its most recent restrictions saved it an average of $10 million annually in road repairs.[11] The Commission concedes that preserving the physical integrity of the roadway is a legitimate right of way function[12]; but without ever examining publicly available information, concludes that the freeze and frost laws, along with other examples it cites, have little to do with right of way management.[13] Its conclusion is *ipse dixit*, unsupported by substantive analysis. It simply intrudes into areas where it has no experience, and in the case of freeze and frost laws, that are within the jurisdiction of other agencies. Seasonal weight bans have been by affirmatively approved by the Congress and the Department of Transportation, which have granted exceptions to weight limitations to deal with spring load restriction.[14] The Declaratory Ruling illustrates why Congress did not grant the Commission authority to determine whether particular laws fell within or outside the ambit of Section 253(c), and the Commission on reconsideration should abandon its efforts to do so based on unsupported analysis.

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[10] Minnesota Department of Transportation, *Spring Load Restrictions: Technical Fact Sheet*, *available at* http://dotapp7.dot.state.mn.us/research/seasonal_load_limits/thawindex/tfs_slr.asp.
[11] *Id.*
[12] Declaratory Ruling at ¶ 160.
[13] *Id.*
[14] *See e.g.* 23 U.S.C. § 127(a)(1); 23 C.F.R. 657.

II. THE DECLARATORY RULING MISAPPLIES SECTION 253.

A. The FCC Improperly Applies Sections 253 Where Section 332(c)(7)[15] Applies.

In a 2017 filing, Smart Communities explained that "Section 332's plain language makes it clear it is the only provision which applies to *placement* of personal wireless facilities, as does the statute's legislative history."[16] The Declaratory Ruling misstates that point, implying Smart Communities had said that Section 253 could never apply to personal wireless facilities.[17] One can imagine a case where Section 253 would apply[18] – but by the plain language of Section 332(c)(7), Section 253 cannot apply to "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."[19] The substance and process for decision-making, to the extent that it is controlled at all, is controlled through 47 U.S.C. § 332(c)(7)(B). The Declaratory Ruling, however, purports to apply Section 253 to control the process for decision-making. This is a clear error of law, and unnecessary to boot.[20]

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[15] 47 U.S.C. § 332(c)(7).

[16] Comments of Smart Communities and Special Districts Coalition, WT Docket No. 17-79, at 56 (Jun. 16, 2017) ("Smart Communities Wireless Comments") (emphasis added).

[17] Declaratory Ruling at ¶ 142, fn. 523.

[18] A state law that required wireless providers to obtain approval for rates charged might be an example of a requirement that had nothing to do with facilities placement, and therefore subject to a Section 253 analysis.

[19] 47 U.S.C. § 332(c)(7) (emphasis added).

[20] A moratorium may be appropriate, and entirely lawful, to conform to requirements of state law, and to prevent rights from vesting inappropriately. But moratoria do not delay wireless deployment under the Commission's current rules. The Commission has adopted shot clocks for action on applications for wireless facilities, and the Declaratory Ruling states that those shot clocks run without regard to the existence of a local or state moratoria for wireless facilities. Hence, moratoria cannot unreasonably delay, much less "prohibit or effectively prohibit" the provision of personal wireless services within the meaning of federal law. Wireless service providers may well agree to work with local authorities to develop uniform design standards and regulations, and to that end may agree to wait to deploy until all interested in deploying can move forward under the same rules, rather than on a more *ad hoc* basis. That cooperative approach is designed to speed deployment long term (as the Commission's BDAC process

B. The Declaratory Ruling Misapplies Section 253(a).

Congress enacted the Telecommunications Act of 1996 (TCA)[21] to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies."[22] Consistent with the effort to rely on competition, rather than regulation, to develop telecommunications markets, Section 253 focused on ending "the States' longstanding practice of granting and maintaining local exchange monopolies."[23] Congress therefore provided that no local and state laws and legal requirements could "prohibit or have the effect of prohibiting" the "ability of any entity" to provide telecommunications services unless the requirement fell within one of two safe harbors.[24] The purpose of the provision – to rely on competition rather than regulation – as well as its language, indicates that Section 253 was not designed to subsidize new entry, or to insulate providers of facilities or services from ordinary business requirements. Section 253 protects those "capable of providing such services without the State's direct assistance," and hence does not command that States or localities give special rights or benefits to incumbents or new entrants,[25] or excuse telecommunications companies from requirements that may simply impede, delay or inconvenience. As the Ninth Circuit concluded, based on the unambiguous language of the statute, "a plaintiff 'must show actual or effective prohibition, rather than the mere possibility of prohibition.'"[26]

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implicitly recognizes), is not prohibited by Section 332 (and is in fact encouraged under the Commission's rules); but would appear a de facto moratorium as the Commission now defines it.

[21] 110 Stat. 56.

[22] *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005).

[23] *AT&T Corp v. Iowa Utils Board*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part and dissenting in part).

[24] 47 U.S.C. § 253(a)-(c).

[25] *Nixon v. Missouri Mun. League*, 541 U.S. 125, 145 (2004).

[26] *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 577–78 (9th Cir. 2008), citing *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir.2007), and noting

The Supreme Court's analysis of Section 251's interconnection requirements is instructive. Section 251 provides that the Commission can order access to network elements where denial of access will "impair" the ability of a telecommunications company to provide services. The Court concluded that the Commission had improperly read "impair" to reach mere impediments on the ability to provide service, noting that not every "'increased cost or decreased service quality' … establish… an 'impair[ment]' of the ability to 'provide … services.'"[27] And if imposing a cost or other obligation does not rise to the level of impairment, such requirements could never meet the higher bar of express or effective prohibition.

Likewise, because it is preemptive, and not prescriptive, Section 253 does not require states or localities to take affirmative actions to promote deployment – including by providing access to proprietary property. As the Commission has very recently affirmed, neither Section 253 or Section 332 apply to the "non-regulatory decisions of a state or locality acting in its proprietary capacity."[28] That affirmation is compelled by a long line of cases recognizing that the Communications Act "does not preempt non-regulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[29] These basic points are not disputed or distinguished in the Declaratory Ruling. Instead. without discussion, the Declaratory Ruling applies Section 253 in a manner fundamentally inconsistent with the statute and precedent.

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that the Commission's own cases were consistent with the unambiguous language of the statute, citing *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation "would have to actually prohibit or effectively prohibit" the provision of services).

[27] *AT&T*, 525 U.S. at 392.

[28] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, WT Docket No. 13-238, Report and Order, 29 FCC Rcd. 12865 (2014) at ¶ 239.

[29] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 225 (1993) (pre-emption doctrines apply only to state regulation).

First, the Commission applies a definition of Section 253 that is not consistent with the cases it relies upon, or its own precedent. The Commission suggests a requirement "that may" effectively prohibit entry violates Section 253.[30] Yet, the *Level 3* case, relied upon by the Commission, noted that "inserting the word 'that' before 'may'" lead to "the most precise meaning of 253(a) [being] distorted." In fact, the Commission's discussion of "prohibitions" and "moratoria" rests almost entirely on speculation as to impacts drawn without any regard to the scope, purpose, or nature of "requirements" that fall within the bounds of moratoria.

Second, having started off on the wrong foot, the Commission continues to misstep, arguing that conduct is prohibitory if it "discourages" providers, or "limit[s] the provision of service" or even simply "impede[s] the deployment of telecommunications infrastructure."[31] It expands the scope of Section 253 protections to treat as a prohibition or effective prohibition a requirement that impedes "significant improvements to existing services by an incumbent provider."[32] The plain language meaning of "prohibit," however, is "to forbid by authority" or "to prevent from doing something" – nowhere in the statute, nor in the cases interpreting Section 253, is there any indication that mere discouragement, impediment, or limitation are prohibitive.

Having started with an overly broad definition of what it means to "prohibit," the Commission essentially finds that telecommunications providers must be accorded special treatment and exempted from general laws and safety codes that may somehow delay deployment under some circumstances – the freeze and frost laws being an example. Because the Commission's Declaratory Ruling provides no analysis that would allow one to distinguish

[30] *See* Declaratory Ruling at fn. 556 ("We note that Congress used the broad language of 253(a) to invalidate all state or local requirements *that* 'may prohibit or have the effect of prohibiting' service.) (emphasis added.)
[31] *Id.* at ¶ 147.
[32] *Id.* at ¶ 162, fn. 594.

between what is and what is not within the ambit of Section 253, one might argue any number of laws, including: speed regulations, truck registration or periodic inspections, that delay providers are therefore prohibitions. This is not surprising as the Commission does not conduct an analysis that would permit it to conclude that the examples it cites as moratoria are prohibitory.

Third, as a further misstep, the Commission includes as moratoria – and thus as potential prohibitions – delays which are wholly the result of acts or omissions of the permit applicant. Thus, the Declaratory Ruling lists the refusal to process a permit submitted without a required fee as a practice that could constitute a banned moratorium.[33] It is hard to see how requiring payment of fees before an application is processed is a prohibition (or how a state could be compelled to process applications without payment). As importantly, the finding directly conflicts with the Commission's own precedent. In *Classic Telephone*, the Commission noted that Sections 253(b) and (c) "preserve the authority of States and localities to deny a franchise application until such time [as] the applicant complies with these permitted legal requirements."[34] No one has suggested fees are unlawful.[35]

Fourth, the Commission applies Section 253 to actions that it previously determined Section 253 does not apply – namely, decisions by local governments in their proprietary capacity. The Commission identifies as a "*de facto*" moratorium delays in response to applications for municipal pole attachments, even though (a) the Commission is forbidden from regulating pole attachments to municipal poles by the express provisions of 47 U.S.C. § 224; and

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[33] *Id.* at ¶ 143

[34] *In the Matter of Classic Telephone*, Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd. 13082, 13097 (1996) ("Classic Telephone"). Smart Communities and other commenters have also documented for the record that most wireless facility permit denials, or delays in processing, are frequently the direct result of incomplete, incorrect, or otherwise noncompliant provider applications. Does the Commission intend that a refusal to issue a permit without a completed application is a de facto moratorium that violates Section 253?

[35] *See* Declaratory Ruling at ¶ 143.

(b) control of municipally owned poles is a proprietary function not subject to Section 253.[36]

In sum, the Commission's discussion of moratoria provides no meaningful guidance as to what is and is not within the ambit of the order. The Declaratory Ruling goes far beyond Section 253(a)'s mission of preventing states and localities from maintaining barriers to competitive entry, it reads Section 253(a) to have a preemptive and prescriptive force that cannot imaginably be consistent with Congressional intent.[37]

C. The Declaratory Ruling Misapplies the Section 253 Savings Clauses.

As suggested above, not only does the Commission find that general laws, which may delay entry, like the freeze and frost laws, are prohibitory, the Commission also finds, without reasoned analysis, that such laws generally are not protected by Section 253(b) and (c).

The Commission misreads Section 253(b) to suggest that numerous laws that impose costs on telecommunications companies, ranging from state minimum wage laws to workplace safety regulations could be declared barred under the Ruling's reading of the statute, unless a state could demonstrate that the law in question was somehow "necessary" – meaning "essential" under Section 253(b).[38] Even assuming that Section 253 reached general laws, there is no indication in the statute, nor in the legislative history, that Congress intended states and localities to suspend their exercise of police powers when it came to telecommunications providers, except where "essential." The legislative history actually indicates that the "necessity" clause is meant to distinguish between those requirements which are simply a ruse to protect incumbents by effectively preventing competitors from entering the market, and those which are not; it was not

[36] Regulating the timing or any other aspect of the response to an application to attach to a municipally-owned structure requires the Commission to go beyond preemption and to prescribe timing, terms and conditions under which access must be granted. But Section 253 cannot be read as a grant of prescriptive authority, and nothing else in the Communications Act grants that authority.

[37] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

[38] 47 U.S.C. § 253(b).

intended to grant the Commission broad authority to assess the exercise of police powers.[39]

The Commission's interpretation of Section 253(c) is likewise defective. Section 253(c) protects "the authority of a State or local government to manage the public rights-of-way" without limitation. It does not, for example, confine rights-of-way management to only what the Commission deems "necessary."[40] The Commission does not have the authority to dictate which practices are and are not permissible; as long as a practice is within the scope of right-of-way management, it is protected. The Ruling fails to recognize this, going so far as to argue that while localities are allowed to adopt policies governing the rights-of-way, "planning purposes or government study" are not permissible preconditions. Under the Ruling, in other words, localities may manage the rights of way, but remarkably they may not take the time to plan out how to do so if that would be inconvenient for any service provider.

In reaching this conclusion, the Ruling relies on a misstatement both of Commission precedent, and of the legislative history on which that precedent relies. For example, the Ruling omits from its recital of permissible rights-of-way management practices, the right to "enforce local zoning regulations," to "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts," to "require a company to place its facilities underground rather than overhead, consistent with the requirements imposed on other utility companies," and to "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation."[41] Many of the examples of alleged moratoria the Commission cites fall

[39] 1996 S. Conf. Rpt. 104-230 at 126-127 (1996). Hence, necessity should be given its ordinary meaning particularly when addressing ordinary exercises of the police power, like freeze and frost laws (and like emergency response laws, discussed below).
[40] *Compare* 47 U.S.C. § 253(c) *with* 47 U.S.C. § 253(b).
[41] *Classic Telephone*, 11 FCC Rcd. at 13103.

directly within these examples. As noted, requiring payment of fees before issuing permits, for example, is cited as an example of a moratorium, and according to the Commission, not generally part of right of way management.[42] Frost and freeze laws, as noted above, are created to prevent hazardous road conditions and minimize long-term damage to the rights of way.[43]

Furthermore, the Ruling erroneously relies on an overturned and vacated 9th Circuit decision (*Auburn*) as sole substantiation for a list of practices it deems outside the scope of permissible rights-of-way management.[44] This reliance on the *Auburn* case leaves Ruling's assertions about rights-of-way management unsupported by any source with precedential value.

To suggest, as the Commission does, that planning has nothing to do with right of way management, and that delays attendant on examining a problem have nothing to do with right of way management simply defies common sense and practice. Indeed, as described in detail in the underlying record,[45] local government permitting processes are complex and serve a variety of functions, all clearly protected by the right-of-way management savings clause in Section 253(c).

Orderly processing of applications by local governments requires payment of fees, compliance with local codes, ordinances, and other requirements, as well as submission of completed applications. Management of the rights of way involves more than purely ministerial functions.[46] Planning is an essential element of rights-of-way management, as is development and revision of zoning and land use laws, inspections of existing infrastructure, considerations of impact on local government budgets, and numerous other considerations addressed in great detail

[42] Declaratory Ruling at ¶ 143.
[43] *Id.*
[44] *See id.* at fn. 589.
[45] *See generally* Letter from Gerard Lavery Lederer, WT Docket No. 17-79, WC Docket No. 17-84 (Jul. 16, 2018).
[46] *Id.* at 17-18.

in the underlying record.[47] Seasonal restrictions on construction, such as during peak tourist seasons at popular destinations help mitigate traffic congestion during peak periods.[48] And all of these policies, and others, are adopted pursuant to administrative processes often mandated by state and local law. None of these things actually prohibit deployment – at most they delay it, and the Ruling, although internally inconsistent, expressly notes that a delay is not inherently prohibitory.[49] And they also all easily fit within the definition of right of way management as defined by the courts, by the Commission, and as detailed in the legislative history. This Declaratory Ruling thus rests on a redefinition of what it means to manage the rights of way and is, furthermore, proffered without explanation or rationale – it is merely stated as though it were fact. The omission of any rationale for these changes, or articulation of Commission authority to redraw the lines here, is fatal to the Ruling.

III. THE DECLARATORY RULING'S EXAMPLES OF MORATORIA SHOW THAT ITS DEFINITION OF "MORATORIUM" IS MEANINGLESS.

While the Ruling states that it does not "reach specific conclusions on the numerous examples" discussed in the record and cited in the Ruling, at other points it simply declares them to be prohibitory without further analysis.[50] The examples of "moratoria" bear so little connection to the Commission's definitions of the term, and so little connection to the statutory "prohibition" and savings clause provisions as to emphasize that the Commission's definition is

[47] *Id.* at 3-4, fn. 13-14.
[48] *See* Letter from Gerard Lavery Lederer, WT Docket No. 17-79, WC Docket No. 17-84 (Aug. 1, 2018) ("Myrtle Beach Ex Parte") (describing state highway agency restrictions on construction on roadways during peak travel seasons as part of "traffic management plans" designed to further the longstanding principle of rights of way management, namely that use of rights of way be carefully managed so as not to "incommode the public").
[49] Declaratory Ruling at ¶ 150.
[50] *Id.* at ¶ 150.

meaningless, and its conclusions regarding prohibition unsupportable.[51]

The pervasive flaws are demonstrated where the Declaratory Ruling refers to express moratoria as facially inconsistent with Section 253(a), then immediately proceeds to describe such actions as "imped[ing] the deployment of broadband services."[52] Impeding, as we have shown, is not the standard; but more importantly, broadband is not a telecommunications service subject to Section 253. Even if one assumes that delays "prohibit" broadband, that delay cannot justify finding the underlying regulation a violation of Section 253.

A. Requirements that Providers Obtain and Document Access to Property are Not Prohibitive

Section 253 does not create a right to specific property, yet the Declaratory Ruling cites decisions not to grant permits for access to rights-of-way,[53] bridges,[54] and highways[55] as examples of prohibitive moratoria. There is no explanation in the Declaratory Ruling as to how requiring consent to use public property prior to issuance of permits constitutes a prohibition, or why such requirements are "moratoria" in any sense of the word. The Commission's bridge examples are illustrative: while a moratorium is defined, *inter alia*, as the suspension of

[51] Many of the examples given to illustrate moratoria relate to denials of applications for placement of wireless facilities, matters clearly subject to Section 332(c)(7). Those examples do not support the Commission's conclusions with respect to Section 253.
[52] Declaratory Ruling at ¶ 147.
[53] *Id.* at fn. 533.
[54] A similar flaw underlies the discussion of bridges at fn. 542. There, the commenter simply states it was denied access to a bridge even though there was spare conduit, but admits it had an alternative way to provide service (albeit a more expensive one). Section 253 does not require localities to guarantee the cheapest path for construction. And, as suggested above, calling mere denial a "moratorium" renders the term meaningless. Bridges may be built and managed under arrangements that make them much more like privately managed toll roads than traditional rights-of-way. And of course, structurally, bridge safety may involve far different considerations than ordinary roads. When the Commission assumes, for example, that it is prohibitory not to grant access to an empty conduit, it assumes (a) it would be safe to do so; (b) that the public authority has the right to do so; and (c) that it can be done consistent with other work, planned or ongoing on the structure. The notion that requiring permission is prohibitory, or that refusing permission is unrelated to the management of the structure involves unsupported leaps.
[55] *Id.* at fn. 542.

processing a permit, at n. 529, the Commission cites as an example of a moratorium a case where the permit was processed, but denied. The Commission does not consider whether denial of the application was justified for other reasons, which may range from safety; timing (related to other work on the bridge, including replacement of existing infrastructure); to competing demand for the same facility; to a failure to agree to terms and conditions on use of the bridge. Finding that denial itself is a moratorium renders the definition of moratorium meaningless.

Even where the protested actions allegedly involve refusals to process, the Commission's examples show that the Ruling is arbitrary and not grounded in the statute. The Commission cites local responses to requests from Mobilitie as examples of "refusals to process." There is quite an extensive record in this and in related proceedings as to the requests submitted by Mobilitie, showing, among other things, that the company repeatedly submitted incomplete and inaccurate applications, refused to seek permits and approvals required by law, and that proposed installations that literally blocked sidewalks and precluded compliance with the ADA.[56] In effect, the Commission is declaring it a moratorium to refuse to process incomplete or clearly defective applications. It is hard to understand why refusals to process defective applications are moratoria, or why that refusal violates Section 253(a) when there is a clear remedy – the applicant can submit a complete application.

B. Emergencies/Disasters

The Declaratory Ruling offers as another example of prohibitions, the practices of local governments during times of emergency which might delay providers from receiving permits to

[56] As one example of the well-documents problems with Mobilitie applications, see Comments of Montgomery County, Maryland, *In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling,* WT Docket No. 16-421, at pp. 12-20 ("A 10 Month Odyssey And Counting: Mobilitie Has Not Put Forth A Reasonable Effort To Use The County's Telecommunications Siting Process").

deploy communications services. In times of crisis, local and state governments exercise their police powers for a broad array of purposes, as local governments are consistently best-positioned to take the lead in disaster response and recovery. These tasks often require allocating permitting staff away from their ordinary duties, sharing staff with other communities to lend a hand, or moving personnel throughout cities and states to maximize government capacity for response. Yet the Commission imposes restrictions on local disaster response through the Declaratory Ruling, in effect insisting that states and localities must, at all costs, keep granting permits lest they violate federal law. The Commission offers no source of authority for its implication that permitting may be suspended only in an emergency and under narrow conditions dictated by the Commission, including that, in time of crisis, localities must expend resources affirmatively notifying providers that communications applications are not being processed or approved.[57] The geographic restrictions furthermore demonstrate a clear lack of understanding of disaster response practices. When one part of a state is affected by a crisis, the entirety of that state's government focuses, as much as possible, on addressing that disaster. That may mean, for example, that fewer staff are available to process permit applications. Responding to a disaster by reallocating resources is not in any way a prohibition on service – it is merely the kind of temporary inconvenience commonly encountered when unexpected crises arise. The Commission cannot intend that the processing of wireless applications across a whole community take precedence over mobilizing every possible resource to combat a disaster, yet that is precisely what the Declaratory Ruling does by, in effect, placing limitations on the discretion of state and local agencies to reassign staff away from permitting functions in times of crisis. This is far outside the scope of authority granted by a statute originally adopted to preempt

[57] Declaratory Ruling at ¶ 157.

state and local regulatory barriers that granted local telephone monopolies.[58] Moreover, it is hard to imagine how the Commission concluded a prohibition results from delays attendant on emergencies. One would have to assume: (a) the provider has adequate and available construction personnel available to perform the work (in emergencies, providers often must divert resources to restore service in affected areas, or remove hazards); (b) the emergency has no collateral effects on supply chains; and (c) the delay attendant on an emergency will be significant enough to actually prevent the project from moving forward; and (d) there will be a telecommunications service affected thereby. No such record information is discussed, much less why the action is not protected under Section 253(b) or (c).

C. Seasonal and Temporary Work Restrictions

Without explaining why, the Commission identifies as an example of prohibitions seasonal restrictions on work in the rights-of-way, designed to prevent work in the rights-of-way at times when congestion would make the work hazardous and interfere with other users of the rights of way. To be sure, the Commission emphasizes that it is not deciding whether particular communities have violated the law,[59] but the broader question, unexplained, is why such restrictions are prohibitory *and* unrelated to management of the right-of-way. As to the former, for example, the Commission would have to find at a minimum that telecommunications providers cannot plan work to avoid delays; and would need to find that delays are of such significance as to amount to a prohibition. There is, if course, no support cited for such conclusions, and they are insupportable.

In addition to attacking the Michigan frost and freeze regulations discussed above, the Ruling is so broad it will have the effect of preempting the kinds of regulations that many states

[58] *See* Comments of Smart Communities and Special Districts Coalition, WC Docket No. 17-84, at 8-9 (Jun. 16, 2017) ("Smart Communities Wireline Comments").
[59] Declaratory Ruling at fn. 558.

have adopted to facilitate the location of utilities in state rights-of-way while protecting the public interest in the safe and efficient movement of traffic. For example, Colorado's Department of Transportation (CDOT) manages access to state roads by utilities under the State Highway Utility Accommodation Code.[60] The purpose of the Code is to "establish a uniform and consistent statewide process for accommodating utilities within SH ROW by means of reasonable regulations to ensure that such accommodations do not adversely affect the highway or traffic safety, or otherwise impair the operation, aesthetic quality or maintenance of the transportation facility, or conflict with applicable law."[61]

A "utility," which would include entities seeking to deploy wireline or wireless broadband infrastructure, is limited in the time, place and manner in which it has access to state rights-of-way, often at the discretion of CDOT. For example, a utility "shall not work at night or on Saturdays, Sundays, or holidays, except as approved by the Department. The Department may specify and/or restrict the utility's access to construct or service utility facilities during peak traffic flow or due to adverse weather, insufficient visibility, or other conditions not conducive to safe and efficient traffic operations."[62] Work cannot begin before a traffic control plan is approved by CDOT, trenches and excavations are limited to certain circumstances only, deployment of facilities are restricted when they impact drainage ways and watercourses, and deployment cannot occur until specific steps are taken to address erosion and sediment control, and protect storm water quality in accordance with Federal, State and local jurisdiction codes and standards.[63]

[60] *See* 2 CCR 601-18, *et seq.*
[61] 2 CCR 601-18, Section 1.1.2.
[62] 2 CCR 601-18, Section 3.4.1.2.
[63] *Id.* at §§ 3.4.2, 3.4.5, 3.4.7, 3.4.8.4.

None of these regulations are a prohibition or an effective prohibition to the deployment of telecommunications infrastructure. And while they serve to protect public health and safety by ensuring that the state transportation experts get to make the call on how their roads are impacted, the regulations can certainly be read to "impede" deployment. Under the unwarranted, overreaching language of the Ruling, these critically important public safety regulations now take a back seat to unimpeded deployment activities of the telecommunications industry.

D. Dig Once Policies

The Commission acknowledges that "Dig Once" policies are related to right of way management, but suggest that the policies are not valid unless they leave open alternative means of deployment.[64] Even assuming "Dig Once" policies are prohibitory (and again, there is no reasoning that would adequately support that conclusion), once it is determined that a restriction falls within the safe harbor, it cannot be preempted, even if prohibitory.[65] The Commission is given no authority to condition the exercise of that right to manage the rights-of-way.

E. Discrimination.

The Commission suggests that moratoria are inherently prohibitory, and inherently not competitively neutral because they necessarily favor the incumbent.[66] That is presumably because the incumbent by definition has facilities in place, while a new entrant does not. The conclusion also assumes without support that the incumbent did not face similar restrictions when it installed its facilities (freeze and frost laws have been in place for decades). Second, it assumes that Section 253 prevents localities from drawing distinctions between facilities in place and new facilities. The First Circuit rejected just such a contention in a case the Commission does not discuss or distinguish:

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[64] Declaratory Ruling at ¶ 152.
[65] 47 U.S.C. § 253(c).
[66] Declaratory Ruling at ¶ 155.

> "Constructing new conduit requires digging up the City's streets and attendant disruption. Putting new cable in existing conduit or converting existing cable to new uses does not require digging up streets or disruption. Thus, it is not discrimination for the City to have different policies for the construction of conduit that is new and for the conversion of the uses to which existing conduit can be put."[67]

The Commission's conclusions as to the discriminatory impact of "moratoria" rests on faulty factual and legal assumptions.

F. *De Facto* Moratoria

The Ruling's internal inconsistencies are particularly notable in the discussion of *de facto* moratoria. As noted above, in the span of five paragraphs, the Ruling holds that any local policy which expressly *delays* deployment by even one day is prohibited by Section 253(a), but that "state and local actions which simply entail some delay in deployment" are not *de facto* moratoria.[68] A local action that delays deployment by some undefined period of time, so long as it is not "indefinite or unreasonabl[e]," then, appears to be permissible, but only if it is not expressly communicated as such? And the discussion of *de facto* moratoria then goes on to reverse course, arguing that a situation where "applicants cannot reasonably foresee when approval will be granted" constitutes a moratorium in violation of Section 253.[69]

G. There is Little Evidence That Even Actual Moratoria Are Prohibitory

As suggested above, many of the examples of moratoria do not involve anything like a moratorium as the Commission defines the term, instead addressing restrictions on the time, place and manner in which permits granted may be exercised. Others simply involve denial of permits, and while the Commission's examples suggest that denial is a moratorium, such a

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[67] *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of City of Boston*, 184 F.3d 88, 103–06 (1st Cir. 1999).
[68] *Id.* at ¶ 150.
[69] *Id.* at ¶ 151. Of course, applicants are not entitled to a grant of an application by a time certain; an application may be denied for reasons related to management of the rights of way, as the Commission itself recognizes in its discussion of "dig once" policies.

definition cannot be squared with the plain language of the law, or court or Commission precedent. Taken as a whole, there is actually very little evidence that actual on wireline facilities – that is, a refusal to accept any applications for any permits anywhere in a community – are either widespread, or that they in fact result in prohibitions.

Moratoria have long been recognized by the courts as valid land use tools to address a wide variety of issues. In the context of telecommunications facilities siting, moratoria have been used to *promote* more efficient permitting. For example, the Colorado General Assembly passed new small cell siting legislation in the spring of 2017. The City of Fort Collins is a university community of approximately 165,000 residents in northern Colorado. The City recognized the need to update its code provisions to address siting and permitting of this new type of infrastructure in order to treat all applicants comparably and to address applications both comprehensively and as efficiently as possible. It adopted a moratorium on permit applications in mid-September 2017 with an expiration date of December 31 or whenever new code provisions were adopted. Fort Collins then developed new code provisions. It consulted with other communities and examined their regulations, and it sought input from the wireless industry, including AT&T and Verizon. When the new code provisions were adopted and the moratorium ended on December 5, 2017, industry representatives testified at City Council, acknowledged that while they did not obtain everything they wanted in the code, it was a positive process where compromises were made, and they expressed their appreciation to the City for the opportunity to have input in developing the City's regulatory framework for small cell siting. Fort Collins now has an efficient, effective regulatory structure for reviewing and approving applications for small cell network facilities. This moratorium resulted in a faster, more efficient process to promote broadband deployment and cannot, under any reasonable

interpretation, be considered an effective prohibition under Section 253. The Commission's general conclusion to the contrary is unsupported.

IV. THE DECLARATORY RULING IS NOT A PROPER VEHICLE FOR ACTION

A. The Declaratory Ruling Bears all The Hallmarks of a Rulemaking.

While the Commission labels its decision a declaratory ruling, it involves no specific, cognizable controversy; no specific statutory term is interpreted. This appears to be far more like the Commission's wireless shot clocks, which the Fifth Circuit concluded should have been the subject of a rulemaking.[70] In that case, the Court concluded the failure to proceed by rulemaking was not prejudicial. Here, it is prejudicial, *inter alia*, because the Commission never analyzed the impact of its ruling on small entities, as would have been otherwise required, and the treatment of emergencies and freeze and frost laws suggest those costs are in the millions, and perhaps billions of dollars.

B. The Ruling Impermissibly Avoids the Procedures Specified in Section 253(d).

Section 253(d) "directs the Commission to preempt the enforcement of particular State or local statutes, regulations, or legal requirements 'to the extent necessary to correct such violation or inconsistency'"[71] and also "to preempt such particular requirements 'after notice and an opportunity for public comment.'"[72] The Ruling seeks to avoid Section 253(d) procedures by claiming instead that it is merely interpreting the statutory terms. This is not a case, however, where the Commission is interpreting statutory terms (except incidentally). Rather, it purports to be moving from specific examples in a record to a conclusion that those examples, and others

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[70] *City of Arlington, Tex. v. F.C.C.*, 668 F.3d 229, 241–42 (5th Cir. 2012), aff'd, 569 U.S. 290, (2013).

[71] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, WC Docket No. 17-84, at ¶ 110 (rel. Apr. 21, 2017) ("Wireline NPRM/NOI").

[72] *Id.*

like them, are prohibitory, and generally not protected by the Act's savings clauses. The clear purpose is to require alteration of those laws.[73]

In the *Cal. Payphone Ass'n* decision, the Commission explicitly rejected an argument that Section 253 preempts on a *per se* basis:

> We cannot agree that the City's exercise of its contracting authority as a location provider constitutes, *per se*, a situation proscribed by section 253(a). The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment…In other words, the City's contracting conduct would have to *actually prohibit or effectively prohibit* the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City's contracting conduct has caused such results.[74]

In *TCI Cablevision of Oakland County, Inc, t*he Commission emphasized that those seeking preemption must:

> demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties…must supply us with *credible and probative evidence* that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[75]

The Commission argues here that it would be "inefficient" for Section 253(a)'s preemptive effect to be available only through the Section 253(d) process and that "otherwise, the Commission would only have authority to act retrospectively to target individual laws."[76] In doing so, it departs from precedent, and eludes the requirement that case-by-case determination is *precisely* what Congress enacted. Whether it is more or less efficient is immaterial. Even if one assumes

[73] Declaratory Ruling at ¶ 168 ("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.")
[74] *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14191, 14209 (Jul. 17, 1997) (emphasis added).
[75] *In the Matter of TCI Cablevision of Oakland County, Inc.*, FCC 97-331, 12 FCC Rcd. 21396, 21440 (Sep. 19, 1997) (emphasis added).
[76] Declaratory Ruling at ¶ 166.

that Section 253 permits use of traditional rulemaking and declaratory actions in some instances, it renders Section 253(d) a nullity, and is inconsistent with court and Commission interpretation of Section 253 to declare that certain activities are prohibitions without actual showings of prohibition.[77]

V. THE DECLARATORY RULING IS UNCONSTITUTIONAL

As noted above, the Commission identifies a "moratoria" as delays in responding to grant access to municipal property as well as the denial of access to proprietary property. It further suggests that the differential treatment of existing and new facilities is impermissible, essentially requiring states and localities to affirmatively create a level playing field. As the First Circuit noted, such a prescriptive reading raises significant constitutional issues:

> Finally, we note that an affirmative obligation reading of the term "competitively neutral" would raise significant constitutional issues regarding Congress's ability to commandeer local regulatory bodies for federal purposes. See *Printz v. United States*, 521 U.S. 898, 934, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) …[78]

By seeking to define and prescribe specific rights-of-way management practices as impermissible (despite, as shown above, a lack of authority to do so) and by attempting to compel local governments to provide access to public rights-of-way on federally-prescribed terms, the Ruling unconstitutionally commandeers the local administration of public property in service of a federal regulatory program. The Supreme Court has spoken directly to the question of commandeering and the 10th Amendment this year.[79] Writing for the majority, Justice Alito noted that "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States."[80] Furthermore, it makes no difference whether a

[77] Moreover, it requires the Commission to resolve issues that Section 253(d) left to the courts – the question of whether a particular action falls within Section 253(c) safe harbors.
[78] *Cablevision of Boston, Inc.*, 184 F.3d at 105.
[79] *See Murphy v. National Collegiate Athletic Assn.*, 584 U.S. __ (May 14, 2018).
[80] *Id*., slip op. at 15.

law "commanded 'affirmative' action" or imposed a prohibition.[81] "The basic principle – that Congress cannot issue direct orders to state legislatures – applies in either direction."[82] These concerns were raised in the record, but not addressed by the Ruling.[83]

The preemption of local discretion regarding how to manage property also raises concerns under the Guarantee Clause.[84] The Guarantee Clause precludes the federal government from interfering with a State's distribution of power among the various levels of government.[85] Where a State has decided to allow local governments to obtain certain fees, the Commission may not undermine the State's decision by leaving the local government without a means to recover that compensation. While the federal government may use its Commerce Clause authority to limit certain actions of State and local officers, it may not—consistent with the unqualified *guarantee* to the people of the States of "a Republican Form of Government"—curtail the fundamental powers or property rights of local governments as such. Nevertheless, the Ruling takes just such an action by directing localities, where applicable, to "refus[e] to enforce moratoria still on the books" even if so directed by state law.[86]

C. To the Extent It Requires Leasing of Proprietary Property, the Declaratory Ruling Violates the Constitution

The Ruling, read literally, also violates the Commerce Clause, due process and constitute a taking under the Fifth Amendment. In this case, the Commission suggests that it may compel leasing of public property (since the refusal to approve an application promptly appears to amount to a moratorium, *see supra*). But the Commission's authority derives from the

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[81] *Murphy*, 584 U.S. __, slip op. at 19.
[82] *Id.*
[83] Ex Parte Letter from Gerard Lavery Lederer, WT Docket No. 17-79, WC Docket No. 17-84 (Jun. 4, 2018).
[84] U.S. Const., Art. IV, § 4.
[85] *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty").
[86] Declaratory Ruling at ¶ 168.

Commerce Clause, and that Clause does not compel localities to dedicate their property to interstate commerce, much less do so on what amounts to a common carrier basis.[87] Likewise, requiring access to proprietary property constitutes a taking, and to suggest simultaneously that Section 253 both requires leasing, and requires action on an application even if an applicant refuses to pay required fees is a taking.

CONCLUSION

For the foregoing reasons, Smart Communities request the Commission immediately suspend the effect of, and expeditiously reconsider the Declaratory Ruling.

Respectfully Submitted,

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September 4, 2018

[87] *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 590 (1926).