Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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Pursuant to Section 1.429(f) of the Commission's Rules, CTIA[1] hereby opposes the petitions for reconsideration of the August 3, 2018 Declaratory Ruling in these proceedings ("Ruling"), which held that state and local moratoria on the deployment of telecommunications services or facilities violate Section 253(a) of the Communications Act ("Act").[2]

I. INTRODUCTION AND SUMMARY.

The Commission's interpretation of Section 253(a) to prohibit moratoria is squarely within its statutory authority, fulfills the objectives of that provision and the Act, and is lawfully

[1] CTIA® (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st- century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, DC.

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, FCC 18-111 (rel. Aug. 3, 2018) ("Ruling"). Three petitions were filed against the Ruling on September 4, 2018, by the Smart Communities and Special Districts Coalition ("Smart Communities Pet."), the City of New York ("City of New York Pet."), and the County Road Association of Michigan ("Road Association Pet."). CTIA's Opposition does not address a separate petition for reconsideration filed against the Third Report and Order, which modified the Commission's pole attachment rules implementing Section 224 of the Act.

grounded on a substantial factual record showing that moratoria prohibit or effectively prohibit the deployment of new services to the detriment of the public. As the Commission rightly concluded, moratoria "strike at the heart of the ban on barriers to entry that Congress enacted in that provision."[3] The Commission interpreted Section 253 to prohibit express as well as *de facto* moratoria because it found that both do precisely what the statute bars: they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[4] The Ruling was well within its authority as the expert agency charged with interpreting and applying the Act. While Petitioners object to the Ruling, they fail to demonstrate that the Commission exceeded its interpretive authority.

Petitioners instead misstate and mischaracterize the Ruling in order to attack it. Their straw man arguments assert, for example, that the Ruling preempts specific state or local laws, prevents localities from managing deployment, exempts wireless facilities from health and safety codes, precludes local management of rights-of-way or regulations governing excavation periods, prohibits local government planning or studies, and requires localities to grant incomplete applications. The Ruling takes none of these actions. These inaccurate arguments should be summarily rejected.

Petitioners' remaining arguments raise meritless challenges to the Commission's clear authority to interpret Section 253. They wrongly assert, for example, that Section 253(d) precludes the Commission from issuing a declaratory ruling, but that provision nowhere restricts the Commission from interpreting Section 253(a). Their claim that the Commission was obligated to proceed by rulemaking likewise ignores settled authority that the Commission may

[3] Ruling ¶ 140.

[4] 47 U.S.C. § 253(a); *see also* Ruling ¶ 4.

clarify statutory provisions through declaratory rulings. Additionally, the Commission correctly rejected Petitioners' arguments that Section 253(a) can only apply where there is a physical gap in coverage, that Sections 253(b) and (c) authorize moratoria (despite the clear language to the contrary in Section 253(a)), and that the Ruling is unlawful because some services are classified as information services. Moreover, the Petitioners' claims that Sections 332 and 224 of the Act prohibit the Commission from addressing moratoria under Section 253(a) misread those provisions and ignore Commission and court decisions that properly give effect to each one. Finally, Petitioners' cursory constitutional arguments lack any merit because they are based on an overstatement of the Ruling, which neither constitutes a "taking" of private property in violation of the Fifth Amendment nor compels states to take particular actions in violation of the Tenth Amendment.

In short, because the petitions present no valid grounds for reconsidering the Ruling, the Commission should deny them. Moratoria are unquestionably harmful because they prohibit or effectively prohibit the deployment of facilities needed to meet the public's increasing reliance on broadband and other advanced communications services. They obstruct the goals of the Act and the cardinal objective of the Commission in these proceedings – to promote the rapid deployment of services to benefit the public. The Commission's measured decision to declare that governmental action (or inaction) that prohibits or effectively prohibits those services violates Section 253(a) was fully justified on the law and the record.

II. THE COMMISSION LAWFULLY INTERPRETED SECTION 253 TO PROHIBIT EXPRESS AND *DE FACTO* MORATORIA.

The Commission's authority to interpret provisions of the Act is unquestionable. Courts have regularly upheld this authority, which enables the Commission to apply the expertise and experience it has gained in overseeing communications services to give practical effect and

meaning to what is often ambiguous or general statutory language.[5] Federal agencies such as the Commission "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" and are thus entitled to interpret federal law to preclude such outcomes.[6]

In the Ruling, the Commission interpreted Section 253(a) of the Act, which provides that "no state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or interstate telecommunications service." The Commission's authority to interpret Section 253(a) is well established. The Commission exercised that authority in its 1997 *California Payphone* decision – which the Commission recently reaffirmed.[7] *California Payphone* is – and has been – binding federal law, and has been repeatedly cited and applied by several courts of appeals.[8]

The Commission grounded the Ruling on a record establishing that local moratoria do precisely what Section 253(a) prohibits, by blocking the governmental approvals that service providers need to obtain to serve businesses and consumers. The Commission correctly found

[5] *See, e.g.*, *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1036-37 (8th Cir. 1978); *North County Communs. Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1155 (9th Cir. 2010).

[6] *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (citations omitted).

[7] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133, ¶ 35 (rel. Sept. 27, 2018) ("Local Siting Order") (citing *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 (1997) ("*California Payphone*")).

[8] *See, e.g.*, *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *TCG N.Y., Inc. v. City of New York. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

this is precisely the type of government-imposed impediment to service that Congress intended to prevent.

Indeed, there can be no more ironclad barriers to wireless deployment than ordinances that expressly ban approval of new wireless facilities, or local practices that have the same effect. Whether express or *de facto*, moratoria run flatly counter to the national objectives undergirding the Act – to promote new, expanded, and improved communications services. The record demonstrated that laws imposing moratoria, as well as local policies and practices that are effectively refusals to act on applications to provide service, undermine the national priority to speed the deployment of 5G and other advanced services to all Americans.[9]

Petitioners fail to show that the Commission exceeded its clear authority to interpret Section 253(a) to bar moratoria, or that it adopted an unreasonable interpretation of that provision.[10] Smart Communities cites to a few court decisions that adopted a narrower interpretation by holding that Section 253(a) requires a showing of an actual prohibition.[11] But this argument neither demonstrates why the Commission's interpretation is unlawful, nor justifies such an "unduly narrow reading of the statute and an outdated view of the marketplace."[12] It ignores the Commission's authority as the expert agency to interpret

[9] Ruling ¶ 147 ("As the record demonstrates, express moratoria limit the provision of service, harm completion, and impose significant costs that impede the deployment of telecommunications infrastructure and thereby exacerbate the digital divide.") (citation omitted).

[10] Under settled law, the Commission's reasonable interpretation of the Act must be affirmed. *See, e.g.*, *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Nat'l Cable & Television Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[11] Smart Communities Pet. at 5-8.

[12] Local Siting Order ¶ 40 (citation omitted).

provisions of the Act,[13] as well as the fact that the Commission's interpretation in *California Payphone* governs notwithstanding its misapplication by some courts.[14]

III. THE COMMISSION SHOULD REJECT PETITIONERS' MANY ARGUMENTS THAT MISSTATE OR MISCHARACTERIZE THE RULING.

The petitions rely on flawed arguments that overstate and mischaracterize what the Commission actually held. They therefore fail to supply any basis for the Commission to reconsider its correct holding that moratoria violation Section 253(a). In fact, moratoria do precisely what that provision declares to be illegal: they prohibit or effectively prohibit service.

A. The Ruling Does Not Preempt Localities from Managing Where Facilities are Deployed.

The City of New York wrongly asserts that the Commission "seeks to arrogate" to itself "local government decisions regarding use of the streets," "management of rights-of-way concerns," decisions regarding how many facilities "can safely and effectively be accommodated on streets," and allocation of "scarce availability of locations among potential use[rs]."[15] But the Commission does not preempt such decisions; to the contrary, it expressly preserves localities' authority to make them.[16] What it does prohibit is localities' abject refusal to allow use of the public streets at all.

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[13] *See* Ruling ¶¶ 161-168 (citing statutory authority and Supreme Court precedent).

[14] *E.g.*, *Brand X*, 545 U.S. at 983-86 (finding that the Commission's interpretation of ambiguous statutory provision overrides earlier court decisions interpreting the same provision). And, as the Commission subsequently noted, it can exercise its authority to interpret the Act to restore uniformity by issuing definitive interpretations of ambiguous statutory terms. *See* Local Siting Order ¶ 100.

[15] City of New York Pet. at 10-13.

[16] Ruling ¶ 160 (recognizing that "local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage gas, water, cable . . . and telephone facilities that crisscross the streets and public rights-of-way") (internal quotations omitted) (citation omitted).

B. The Ruling Does Not Preempt Specific State or Local Laws.

Smart Communities incorrectly asserts that the Ruling improperly preempts specific laws, and claims that some of those purportedly preempted laws do not truly prohibit service.[17] Similarly, the Road Association claims that the Commission should not have preempted Michigan's seasonal weight restrictions for the use of state highways.[18] But in fact, the Ruling does not preempt or make any findings as to the legality of any individual laws. As the Commission clearly stated, "[W]e interpret section 253(a) and do not specifically preempt any state or local law."[19]

The Commission also made this clear in response to challenges to specific laws. For example, Smart Communities asserts that the Commission wrongly preempted restrictions on the use of excess conduit that were imposed in South Carolina for traffic management.[20] However, the Commission noted that parties disputed the prohibitive effect of these restrictions and stated, "[W]e do not decide their validity here."[21] Indeed, it noted that some of the examples commenters submitted as moratoria were "inapt where the limitations do not foreclose deployments and carriers' ability to build the facilities they need to provide service."[22] And it emphasized that parties seeking to invalidate a certain law may bring a separate action seeking to preempt it.[23]

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[17] Smart Communities Pet. at 1-4, 16-18.

[18] Road Association Pet. at 5-7.

[19] Ruling ¶ 164.

[20] Smart Communities Pet. at 12.

[21] Ruling ¶ 150 n.558.

[22] *Id*. ¶ 152.

[23] *Id*. ¶ 163 ("There is no dispute that section 253(d) provides an express mechanism for the Commission to preempt specific state or local legal requirements.") (citation omitted).

In any event, Smart Communities' attempt to defend certain restrictions ignores the numerous record examples of the effect of both ordinances and local practices in prohibiting or effectively prohibiting services or facilities. Providers identified ordinances that explicitly prohibited approvals of wireless facilities applications for many months or years,[24] and local policies and practices that similarly had the practical effect of prohibiting action.[25] As the Commission correctly concluded, "The record demonstrates that moratoria are numerous, geographically diverse, and occur at both the state and local level, showing that this issue affects the deployment of telecommunications services in many cases across the nation."[26]

C. The Ruling Does Not Exempt Facility Deployment from Health and Safety Codes.

Smart Communities incorrectly claims that the Commission "essentially finds that telecommunications providers must be accorded special treatment and exempted from general laws and safety codes."[27] The Commission made no such explicit or implicit finding. To the contrary, it recognized that more limited requirements may be necessary "to protect the public safety," and that localities had the right to "perform a range of vital tasks" such as preserving the streets and controlling traffic. But it validly found that moratoria were "too broad and far-ranging" to meet such limited public safety objectives.[28] Its decision is well supported by record evidence of flat prohibitions on any new wireless deployments.

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[24] *Id*. ¶ 145; *id*. nn.528-529.

[25] *Id*. ¶ 150; *id*. nn.554 & 559 (citing Indiana jurisdiction that had refused to act on wireless applications for three years, and Illinois and Massachusetts jurisdictions that suspended wireless application processing indefinitely).

[26] *Id*. ¶ 143.

[27] Smart Communities Pet. at 7.

[28] Ruling ¶ 158, ¶ 160.

D. The Ruling Does Not Prohibit Local Planning or Studies.

Smart Communities mischaracterizes the Commission's discussion of Section 253(c) as barring localities from "planning purposes or government study."[29] This is yet another red herring; the Ruling only bars moratoria. Localities can engage in planning or study, but they cannot under Section 253(a) prohibit or effectively prohibit service, and nothing in Section 253(c) changes that clear prohibition. Moreover, if Section 253(c) were to allow "planning" or "study" to justify moratoria, it would effectively nullify Section 253(a).

E. The Ruling Does Not Require Localities to Grant Incomplete Applications.

Smart Communities incorrectly asserts that "the Commission is declaring it a moratorium to refuse to process incomplete or clearly defective applications."[30] In fact, just the opposite is true. The Commission's past and recent decisions adopting and applying the shot clocks expressly recognize that localities are not obligated to grant incomplete or defective applications.[31] Smart Communities wrongly asserts that the Commission found a situation "where the permit was processed, but denied" to be a moratorium, but the footnote it cites says no such thing.[32]

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[29] Smart Communities Pet. at 10.

[30] *Id*. at 14.

[31] *See, e.g.*, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, Report and Order, 29 FCC Rcd 12865, 12970-71 ¶¶ 257-262 (2014). In addition, the Commission recently adopted a new rule allowing a locality to restart the shot clocks that apply to small wireless facilities to Day Zero if it determines the application is materially incomplete. Local Siting Order ¶ 143.

[32] Ruling ¶ 143 n.529.

F. The Ruling Does Not Require Localities to Act on Applications During Disaster Situations.

Smart Communities incorrectly claims that "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."[33] To the contrary, the Ruling expressly *allows* temporary moratoria during such emergency events, merely requiring them to be competitively neutral (as Section 253 requires), necessary, and tied in length and geographic scope to the disaster.[34]

IV. THE COMMISSION CORRECTLY INTERPRETED AND APPLIED SECTION 253 AND SHOULD REJECT PETITIONERS' REQUESTS TO NARROW THE SCOPE AND EFFECTIVENESS OF THAT PROVISION.

Petitioners' procedural and substantive challenges to the Commission's interpretation and application of Section 253 are similarly meritless. The Commission reasonably interpreted that provision to prohibit both express and *de facto* moratoria.

A. Section 253(d) Does Not Prohibit the Commission from Interpreting Section 253(a).

Smart Communities incorrectly asserts that the remedy Section 253(d) affords for parties to seek preemption of a state or local requirement precludes the Commission from interpreting Section 253(a).[35] As explained above, the Ruling does not preempt any specific laws, but instead merely interprets Section 253(a) – which the Commission has full legal authority to do, just as it may interpret any other provision of the Act. As the Commission concluded, "[W]e are not exercising our authority to enforce a substantive rule; rather, we are interpreting the scope of

[33] Smart Communities Pet. at 15.

[34] Ruling ¶ 157.

[35] Smart Communities Pet. at 21-23.

the substantive provision set forth in section 253(a)."[36] The Ruling thus does not (as Smart Communities insists) "render[] Section 253(d) a nullity."[37] To the contrary (and as the Commission reaffirms), Section 253(d) remains available to challenge a particular state or local requirement.[38] Moreover, as the Commission observed, courts that have interpreted Section 253(d) have not found it to be the exclusive enforcement mechanism and have noted that Section 253(a) is also available.[39]

B. The Ruling is an Appropriate Vehicle for the Commission to Interpret Section 253(a).

Smart Communities erroneously asserts that the Commission was required to act through rulemaking because "no specific statutory term is interpreted."[40] But the Commission *did* interpret specific language – Section 253(a) – and, as it correctly observed, "We also have authority under the Administrative Procedure Act (APA) and our rules to issue a declaratory ruling to terminate a controversy or remove uncertainty on our own motion."[41] Courts have repeatedly upheld the Commission's authority to interpret the Act through declaratory rulings – including interpreting provisions governing local review of wireless facilities siting.[42]

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[36] Ruling ¶ 164.

[37] Smart Communities Pet. at 23.

[38] Ruling ¶ 141; *id*. nn. 520-522 (citing Commission orders invoking Section 253(d) to preempt specific state and local actions).

[39] *Id*. ¶ 165 (citing, among other cases, *Puerto Rico Tel. Co.*, 450 F.3d at 16; and *Qwest Corp.*, 380 F.3d at 1266).

[40] Smart Communities Pet. at 21.

[41] Ruling ¶ 161 (citation omitted).

[42] *E.g.*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct 1863 (2013) (upholding declaratory ruling interpreting Section 332(c)(7)).

C. The Ruling Correctly Holds that Moratoria Violate Section 253(a) Even Where There is No Physical Gap in Network Coverage.

The City of New York wrongly argues that because Section 253(a) addresses "service," the Commission may not prohibit moratoria unless they prevent providers from closing a gap in service coverage, and may not prohibit moratoria that prohibit "deployment."[43] To the contrary, the Commission specifically finds that moratoria prohibit or effectively prohibit "the deployment of telecommunications services or telecommunications facilities."[44] It refers to both service and deployment because there can be no service without deployment. A moratorium on deployment stops service, rendering any such distinction meaningless.

The City of New York incorrectly assumes that unless there is a physical gap in any service, no actionable prohibition can exist under Section 253(a).[45] Under this theory, in a city where some service is available everywhere, the city could stop the deployment of updated or advanced services, such as 5G, or the entry of additional competitors. The Ruling, however, validly concludes that such a restricted reading of "service" would undermine the purpose of Section 253. It holds that a prohibition "could occur not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider, but also by prohibiting or effectively prohibiting the introduction of new services or significant improvements to existing services by an incumbent provider," and grounds that holding in the "goals outlined by Congress."[46] The City of New York fails to explain why the Commission's interpretation of Section 253(a) is unlawful.

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[43] City of New York Pet. at 4-5.

[44] Ruling ¶ 140.

[45] City of New York Pet. at 6-7.

[46] Ruling ¶ 162 n.594.

D. Section 253(b) and Section 253(c) Do Not Preclude the Commission from Declaring that Moratoria are Unlawful.

Smart Communities challenges the Ruling's interpretation of Section 253(a) by arguing that nothing in Section 253(b) indicates that "Congress intended states and localities to suspend their exercise of police powers when it came to telecommunications providers, except where 'essential,'" or "to prescribe timing, terms and conditions under which access must be granted."[47] But moratoria are not "time, place, and manner" restrictions – they are flat bans or operate as effective bans. Put another way, the Ruling does not prohibit localities from adopting regulations for approving deployments; instead it declares that localities cannot adopt rules, policies, or practices that block consideration of siting applications. Moreover, Smart Communities ignores the fact that because Section 253(b) applies only to a "State," it is inapplicable to local restrictions on service or facilities.[48]

Likewise, the City of New York provides no legal or factual support for its claim that barring wireless providers from access to rights-of-way ("ROW") is "competitively neutral" and thus lawful under Section 253(c), as long as wireless providers have access to *private* property *outside* the ROW.[49] To the contrary, denying ROW access to some but not other types of providers is inherently discriminatory. Moreover, allowing moratoria that deprive providers of ROW access for this reason would effectively nullify Section 253(c), which only applies in the context of the ROW. In any event, as the Commission correctly found, "most moratoria are not competitively neutral – they almost certainly will favor incumbents over new entrants and

[47] Smart Communities Pet. at 9.

[48] Ruling ¶ 154; *id*. n.568 (citing judicial precedent that Section 253(b) does not apply to municipalities).

[49] City of New York Pet. at 14.

existing modalities over new technologies."[50] The City of New York does not demonstrate why that finding was incorrect, precluding its attempt to shield moratoria from Section 253(a).[51]

E. Section 253(a) Applies to Commingled Facilities.

The City of New York incorrectly argues that the Commission's reclassification of broadband Internet access service as an information service precludes it from issuing the Ruling because Section 253(a) does not apply to "information services."[52] But the Commission correctly held, consistent with prior decisions, that where a facility can be used for commingled information and telecommunications services, Section 253(a) applies.[53] Again, the City of New York fails to demonstrate why this holding is an unreasonable interpretation of the Act.

The City of New York ignores the fact that infrastructure for wireless telecommunication services is frequently the same infrastructure used for the provision of broadband Internet access service. As such, this infrastructure – which is dynamic and constantly evolving to respond to changes in spectrum availability, spectral efficiency, and other conditions – falls squarely within the Commission's long-established authority over "cell towers and other forms of network equipment [that] can be used 'for the provision' of both personal wireless services and wireless broadband Internet access on a commingled basis"; authority the Commission reaffirmed when it reclassified broadband Internet access services.[54] Most recently, the Commission confirmed that

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[50] Ruling ¶ 155

[51] The Commission also notes that Section 253(c) authorizes state and local governments to "manage the public rights-of-way," language that enables them to, for example, coordinate construction schedules, enforce building codes, and oversee use of the streets, but that in contrast, moratoria bar providers from access to the rights of way *at all*. It thus correctly concludes, "[W]e fail to see how section 253(c) could save a moratorium from preemption." *Id.* ¶ 160. Petitioners do not rebut this conclusion.

[52] City of New York Pet. at 7-9.

[53] Ruling ¶ 167.

[54] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order and Order, 33 FCC Rcd 311, 424-25 ¶¶ 189-190 (2018) ("The Commission's rationale from 2007, that commingling service does not

both Sections 253(a) and 332(c)(7) apply to wireless telecommunications services and facilities because small cell facilities can be used to provide both telecommunications and broadband services.[55] The Commission's interpretation of Section 253(a) as applying where a facility is to be used for commingled information and telecommunications services fits well within its authority as the expert agency charged with interpreting the Act.

F. Enacting Moratoria is Not a "Proprietary" Action or Exempt from Section 253(a).

Smart Communities wrongly asserts that Section 253 does not apply to a locality's "non-regulatory" or "proprietary" decisions.[56] However, an ordinance that prohibits or effectively prohibits service is clearly regulatory – it is enacted like any other ordinance that the locality adopts. The cases Smart Communities cites as to proprietary actions are thus inapposite. Moratoria include explicit refusals to accept and process deployment applications that enable deployment – as well as dilatory tactics that amount to *de facto* refusals to process such applications – and these refusals are implemented by the adoption of rules, policies, or practices in the locality's regulatory capacity.[57]

Even still, Section 253(a) expressly prohibits certain state and local "legal requirements," making no distinction between a state or locality's regulatory and proprietary conduct. And

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change the fact that the facilities are being used for the provisioning of services within the scope of the statutory provision, remains equally valid today."); *see also, e.g.*, *Appropriate Regulatory Treatment of Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5923-24, ¶ 65 (2007).

[55] Local Siting Order ¶¶ 34-36.

[56] Smart Communities Pet. at 6.

[57] *See, e.g.*, *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at *16-18 (S.D.N.Y. 2004) (finding that a two-year delay and refusal by the city to grant access to poles in public ROWs absent a costly franchise violated Section 253, and agreeing that the city's actions "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy").

Section 253(d) directs the Commission to preempt "any" legal requirement that a state or locality has permitted or imposed that contravenes Section 253(a) – again allowing no exception for allegedly "proprietary" requirements. As the Commission has long recognized, Section 253(a)'s sweeping reference to "State [and] local statute[s] [and] regulation[s]" and "other State [and] local legal requirement[s]" demonstrates Congress's intent "to capture a *broad range of state and local actions* that prohibit or have the effect of prohibiting entities from providing telecommunications services."[58]

V. SECTION 332(C)(7) DOES NOT PRECLUDE THE COMMISSION FROM PROHIBITING MORATORIA.

The City of New York's argument that Section 332(c)(7)(A) "bars the use of 253(a) as a basis for preemption of local government decisions regarding deployment of wireless facilities"[59] lacks merit. The Commission correctly found that Section 253(a) on its face applies to "*any* interstate or intrastate telecommunications service," noting that the Supreme Court has held that wireless telecommunications services are included in that term.[60] Moreover, Section 253(e) expressly preserves "application of section 332(c)(3) of this title to commercial mobile service providers" notwithstanding Section 253. As the Commission recognized in the Local

[58] *See Petition of the State of Minnesota for Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21698-99 ¶ 3 (1999) (emphasis added); *see also* Local Siting Order ¶¶ 93-94.

[59] City of New York Pet. at 15-18.

[60] Ruling ¶ 140 (emphasis added); *id*. n.523 (citing *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co*., 534 U.S. 327, 340 (2002) ("A provider of wireless telecommunications service is a 'provider of telecommunications service'")). The City of New York supplies no basis for reconsidering this finding. *See also* Local Siting Order n.83 ("Common carrier wireless services meet the definition of 'telecommunications services,' and thus are within the scope of Section 253(a) of the Act.").

Siting Order, this provision "would be meaningless if wireless telecommunications services already fell outside the scope of Section 253."[61]

The Commission has also properly rejected the argument that Section 253(a) does not apply to wireless siting because Section 332(c)(7)(A) states that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a state or local government" over wireless facility siting "decisions." In the Local Siting Order, the Commission correctly explained that even if the phrase "nothing in this chapter" could be construed as insulating governmental decisions on approvals of personal wireless service facilities from preemption by other sections of the Act, Section 332(c)(7)(A) goes on to make clear that such state or local decisions are *not* immune from preemption if they violate any of the standards set forth in Section 332(c)(7)(B).[62] This includes Section 332(c)(7)(B)(i)(II)'s ban on requirements that "prohibit or have the effect of prohibiting" the provision of service – identical language to the prohibitory language in Section 253(a).

While Section 253(a) is broader because it applies to services *in addition to* personal wireless services, Section 332(c)(7)(B)(i)(II) supports the finding that moratoria on wireless facilities are unlawful.[63] In any event, as the Commission recently explained, "because Sections 332(c)(7)(B)(i)(II) and 253(a) use identical 'effective prohibition' language, the standard for what is saved and what is preempted is the same under both provisions."[64] The City of New

[61] Local Siting Order n.83 (citing 47 U.S.C. § 253(e)).

[62] *Id*. (citing 47 U.S.C. § 332(c)(7)(B)).

[63] *See* Ruling ¶ 137 ("Sections 253 and 332(c)(7) both provide for preemption of state and local laws that 'prohibit or have the effect of prohibiting' the deployment of telecommunications services."); *id*. n.606 ("Our decision today is consistent with the Commission's earlier decisions that state and local moratoria do not toll the 'shot clocks' for state or municipal review of wireless siting applications.").

[64] Local Siting Order n.83.

York's argument that Section 332(c)(7) bars the application of Section 253(a) to moratoria on wireless siting thus has no practical effect.

In addition, the Ruling is also supported by numerous judicial decisions applying Section 253(a) to state and local ordinances, regulations, and policies challenged as prohibiting or effectively prohibiting wireless telecommunications.[65] In short, the City of New York's argument that attempts to preclude the application of Section 253(a) to wireless deployments should be rejected.

VI. SECTION 224 OF THE ACT DOES NOT PRECLUDE THE COMMISSION FROM PROHIBITING MORATORIA THAT DENY ACCESS TO MUNICIPAL-OWNED POLES.

Petitioners incorrectly argue that because Section 224 of the Act does not apply to the attachment of communications equipment to poles owned by municipalities, the Commission cannot invoke its authority under Section 253 to prohibit moratoria that deny providers access to those poles.[66] However, Section 224 does not limit the application of Section 253. And, in any event, the Ruling does not regulate municipal poles – rather, it finds moratoria preventing deployment to be unlawful. Section 224 therefore does not restrict the Commission's authority under Section 253 (or Section 332) over municipal poles.

Section 224 obligates any "utility" to make its poles and ROWs available at reasonable rates for attachments to telecommunications carriers or cable companies, and authorizes the Commission to adopt rate formulas and complaint procedures implementing Section 224 (except

[65] *See, e.g.*, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579-80 (9th Cir. 2008); *Crown Castle NG W. LLC v. Town of Hillsborough*, 2018 U.S. Dist. LEXIS 134790, at *14-16 (N.D. Cal. 2018); *Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1336-39 (D.N.M. 2007); *Cox Communs. PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002).

[66] *See* Smart Communities Pet. at 8-9; City of New York Pet. at 15.

in states that have certified that they regulate pole attachments). The term "utility" exempts municipal-owned utilities and thus their poles.[67]

Smart Communities asserts that the inapplicability of Section 224 to municipal pole attachments completely removes all other Commission authority over such poles. But this argument reads language into the statute that does not exist. The fact that *Section 224* does not pertain to attachments on municipal poles does not prevent the Commission for exercising its lawful authority over such attachments under *other* sections of the Act. If Congress intended Section 224 to sweep away other statutory provisions, it would have said so.[68] Thus, as the Commission recently confirmed, Section 224 does *not* prevent Section 253(a) from applying to municipal poles – and Section 253(a) does not exclude municipal-owned infrastructure from its reach.[69] To the contrary, Section 253(a) expressly applies to any "local legal requirement" that prohibits or effectively prohibits telecommunications services. A moratorium that denies access to municipal-owned poles is thus clearly a barrier that is subject to Section 253(a).

VII. THE COMMISSION SHOULD REJECT PETITIONERS' CONSTITUTIONAL ARGUMENTS.

Smart Communities asserts that the Ruling constitutes an unconstitutional "taking" of private property in violation of the Fifth Amendment.[70] But the Ruling does not "take" any property, proprietary or otherwise. To establish a taking, localities must prove a near complete

[67] *See* 47 U.S.C. § 224(a)(1), (a)(4); *Implementation of Section 224 of the Act et al.*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5245 ¶ 9 (2011).

[68] *Cf. Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) (noting that absent a specific removal of jurisdictional authority, "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage"); *FCC v. NextWave Personal Communs. Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create statutory exceptions, "it has done so clearly and expressly").

[69] Local Siting Order n.253 (noting that "[n]othing in Section 253 suggests such a limited reading").

[70] Smart Communities Pet. at 24-25.

loss of economic value.[71] The Ruling does not diminish the value of the ROW, let alone compel such a loss of value. To the contrary, it merely prohibits a locality from refusing to consider siting applications. It does not compel the locality to grant particular applications or forbid it from being compensated for its costs in doing so.

Smart Communities separately contends that the Ruling violates the Tenth Amendment because it prescribes "specific rights-of-way management practices as impermissible" and "commandeers the local administration of public property in service of a federal regulatory program."[72] But there is no Tenth Amendment issue here. The Ruling does not compel grant of any application to install communications facilities or dictate how a locality manages public property; rather, it merely prohibits localities from refusing to process applications at all. As the Commission recently held in rejecting a Tenth Amendment challenge to its interpretation of Sections 253(a) and 332(c)(7)(B), the outcome of violations of these provisions "are no more than a consequence of 'the limits Congress already imposed on State and local governments' through its enactment of Section 332(c)(7)."[73]

Smart Communities' reliance on one Supreme Court decision[74] is misplaced. That case involved a federal requirement that states run background checks on handgun purchases, thus compelling states to enact (and incur the costs of) a specific program. No such compulsion is involved here. To the contrary, the Commission interpreted Section 253(a), which *limits* local

[71] *See, e.g.*, *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").

[72] Smart Communities Pet. at 23.

[73] Local Siting Order ¶ 101 (citation omitted).

[74] Smart Communities Pet. at 23 (citing *Printz v. United States*, 521 U.S. 898 (1997)).

authority. Thus, as the Fourth Circuit stated in upholding the Commission's "deemed granted" remedy for violations of Section 6409(a) of the 2012 Spectrum Act, "[W]e readily conclude that the FCC's 'deemed granted' procedure comports with the Tenth Amendment," because it does not require any affirmative governmental action.[75] Prohibiting moratoria similarly does not require a locality to take a specific action.

Finally, Smart Communities makes the meritless claim that the Ruling "raises concerns under the Guarantee Clause," referring to Article IV, Section 4 of the Constitution.[76] This constitutional provision addresses a *state's* distribution of power among it and local jurisdictions. The Ruling, in contrast, does not intrude into the respective roles of states and their localities; it merely says that states and localities may not impose moratoria. Smart Communities' related claim that the Guarantee Clause prohibits restricting the power of local government is likewise meritless; taking this argument to its logical conclusion, Section 253 itself (as well as many other provisions of the Act) would be unconstitutional.

[75] *Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015). The court went on to hold that "the 'deemed granted' procedure provides a remedy to ensure that states do not circumvent statutory requirements by failing to act upon applications." *Id.* Similarly, the Ruling ensures that local governments do not "circumvent" Section 253's objective to promote the deployment of service.

[76] Smart Communities Pet. at 24.

VIII. CONCLUSION.

The Ruling is solidly grounded in the Act and the record. It will help to advance the Act's objectives as well as the national priority to promote deployment of wireless services. Petitioners fail to demonstrate why the Commission's adoption of the Ruling or its interpretations of the Act were improper. The petitions should therefore be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rachel Sher, hereby certify that on this 9th day of November, 2018, a copy of the foregoing "Opposition to Petitions for Reconsideration" was served by first-class U.S. mail, postage prepaid, on the following:

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