

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

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

**PETITION FOR RECONSIDERATION  
OF  
THE CITY OF NEW ORLEANS, LOUISIANA  
VIRGINIA MUNICIPAL LEAGUE  
KENTUCKY LEAGUE OF CITIES  
MISSISSIPPI MUNICIPAL LEAGUE  
PENNSYLVANIA MUNICIPAL LEAGUE  
ALABAMA LEAGUE OF MUNICIPALITIES  
ARKANSAS MUNICIPAL LEAGUE  
NEVADA LEAGUE OF CITIES AND MUNICIPALITIES  
TOWN OF MIDDLEBURG, VIRGINIA  
JEFFERSON PARISH, LOUISIANA  
GOVERNMENT WIRELESS TECHNOLOGY & COMMUNICATIONS ASSOCIATION**

By: Alan S. Tilles, Esquire

Shulman Rogers Gandal Pordy & Ecker, P.A.  
12505 Park Potomac Ave., Sixth Floor  
Potomac, Maryland 20854  
(301) 230-5200

Date: November 14, 2018

**TABLE OF CONTENTS**

SUMMARY ..... ii

I. BACKGROUND ..... iii

    A. The Virginia Municipal League ..... 2

    B. Kentucky League Of Cities ..... 3

    C. Jefferson Parish, Louisiana ..... 4

    D. Mississippi League Of Cities ..... 5

    E. Pennsylvania Municipal League ..... 7

    F. Alabama League Of Municipalities ..... 7

    G. Arkansas Municipal League ..... 9

    H. Nevada League Of Cities And Municipalities ..... 10

    I. New Orleans, Louisiana ..... 10

    J. Town Of Middleburg, Virginia ..... 11

    K. Government Wireless Technology And Communications Association .... 12

    L. Prior Comments ..... 12

II. PETITION FOR RECONSIDERATION ..... 13

    A. The “Race” To 5G ..... 13

    B. The FCC’s Decision Is Inconsistent With Its Deregulatory Agenda ..... 15

    C. The Commission Fails To Account For True Cost Recovery ..... 16

    D. Municipalities And Businesses Should Not Be Competitors ..... 19

    E. The Definition Of “Effective Prohibition” Is Overly Broad ..... 20

    F. The Revised Shot Clock Pose Numerous Problems ..... 20

    G. Undergrounding Of Utilities Should Not Be Inhibited ..... 22

    H. Minimum Spacing Requirements Should Be Further Defined ..... 23

III. CONCLUSION ..... 24

## SUMMARY

The Joint Petitioners request that the Commission reconsider its decision its Wireless Deployment *Declaratory Ruling and Third Report and Order* in the above-captioned rulemaking. As discussed herein, the Commission's decision fails to take into account legitimate municipal costs, legitimate municipal concerns or legitimate municipal manpower limitations. The Commission has manufactured a massive shift of corporate costs from carriers to municipal governments by exaggerating the number of abuses by a limited number of municipalities, while at the same time ignoring abuses by wireless providers.

The end result of the Commission's unsupported decision is not the envisioned speedier deployment of wireless facilities. Rather, endless litigation (which has already begun) will only delay deployments. The decision creates an environment where municipalities are forced to lease facilities at rates that do not recover costs, and instead forces such entities to undercut the facility siting costs of the municipality's businesses. Further, lack of specificity in the Commission's *Report and Order* creates uncertainty regarding current agreements for deployments, further delaying real relief.

The Joint Petitioners support the reduction of unnecessary regulation inhibiting the deployment of advanced telecommunications facilities. However, the Commission's decision fails to accomplish its goal. On this basis, the Joint Petitioners request that the Commission eliminate the maximum fees imposed in the *Report and Order*, eliminate the ill-conceived changes to the Shot Clock, and permit municipalities which have made significant efforts to reach agreements with telecommunications companies to deploy facilities to make decisions on truly local issues.

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

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

**PETITION FOR RECONSIDERATION  
OF  
THE CITY OF NEW ORLEANS, LOUISIANA  
VIRGINIA MUNICIPAL LEAGUE  
KENTUCKY LEAGUE OF CITIES  
MISSISSIPPI MUNICIPAL LEAGUE  
PENNSYLVANIA MUNICIPAL LEAGUE  
ALABAMA LEAGUE OF MUNICIPALITIES  
ARKANSAS MUNICIPAL LEAGUE  
NEVADA LEAGUE OF CITIES AND MUNICIPALITIES  
TOWN OF MIDDLEBURG, VIRGINIA  
JEFFERSON PARISH, LOUISIANA  
GOVERNMENT WIRELESS TECHNOLOGY & COMMUNICATIONS ASSOCIATION**

The City of New Orleans, Louisiana (“New Orleans”), the Virginia Municipal League (“VML”), the Kentucky League of Cities (“KLC”), the Mississippi Municipal League (“MML”), the Pennsylvania Municipal League (“PML”), the Alabama League of Municipalities (“ALM”), the Arkansas Municipal League (“ARML”), the Nevada League of Cities and Municipalities (“NLC”), the Town of Middleburg, Virginia (“Middleburg”) and the Government Wireless Technology & Communications Association (“GWTCA”)(hereinafter the “Joint Petitioners”), through counsel and pursuant to Section 1.429 of the Commission’s Rules, 47 C.F.R. §1.429,

hereby respectfully submits the following Petition for Reconsideration of the Commission's Declaratory Ruling and Third Report and Order in the above-captioned proceeding.<sup>1</sup>

**I. BACKGROUND**

**A. The Virginia Municipal League**

The Virginia Municipal League (“VML”) is an association of political subdivisions of the Commonwealth of Virginia, currently consisting of 39 cities, 156 towns and 10 counties. VML was formed in 1905 and maintained pursuant to Va. Code §15.2-1303 for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial.

VML has worked diligently with Verizon, AT&T, Sprint and others (“the industry”) on legislation in Virginia for the last two General Assembly sessions in an effort to create responsible legislation that takes into account the need for faster deployment of 5G technology and the ability of localities to maintain their unique characteristics. VML, along with other local government groups, and the industry met on numerous occasions and discussed how to create a balance in the legislation that Virginia saw fit to pass. In 2017, SB835 dealing with co-location of small cells on existing structures passed the General Assembly and a workgroup was created with Senator Ryan T. McDougle and Delegate Terry G. Kilgore presiding. This group met over the summer of 2017 in addition to other meetings that local governments and industry held. In 2018, SB405 and SB823 were enacted into law after the Governor offered amendments to which the industry did not object. These bills dealt with right-of-way fees and zoning of all new structures and the Governor provided some helpful amendments to local governments.

---

<sup>1</sup> *Report and Order*, WT Docket No. 17-79, 83 FR 51867 (October 15, 2018).

## **B. Kentucky League of Cities**

The Kentucky League of Cities is a membership organization representing three hundred seventy-one (371) city governments throughout the Commonwealth of Kentucky. KLC's mission is to "serve as the united voice of cities by supporting community innovation, effective leadership, and quality governance." KLC achieves these goals by providing legislative advocacy, legal advocacy and services, community consulting, training, policy development, research and offer robust insurance services to local governments.

KLC was created in 1927 when twelve cities banded together to form a unified front on legislative issues and to combine bargaining power for contracting. In 1987, KLC developed a member-owned insurance pool, Kentucky League of Cities Insurance Services, to answer a crisis facing Kentucky cities in that most national companies were refusing to provide insurance coverage. In the intervening years KLC has continued to grow as its member cities needs grow. KLC remains committed to advocating for its member cities by all means at its disposal.

The Legislative and Legal advocacy programs are services offered by KLC to benefit its cities. These programs focus on preserving home rule for cities throughout Kentucky as well as securing federal and state constitutional and statutory municipal powers. Franchise rights to city rights-of-way in Kentucky are reserved exclusively to cities through the Kentucky Constitution. Section 163 of the Kentucky Constitution is entitled "Public utilities must obtain a franchise to use streets." This section expressly preserves the power to regulate and permit the use of a city's right-of-ways to the cities. Section 164 of the Kentucky Constitution grants cities the power to charge a franchise fee to utilities seeking to use a city right-of-way.

KRS 136.660 (1) (a-c) usurped the franchise rights of cities by making the state a collector of a telecommunications "tax," pooling what tax it would allow and distributing funds back to

local governments. Obviously attempting to circumvent the Constitution, the statute recognized city rights under Section 163 of the Kentucky Constitution to enter into agreements for the use of city rights-of-way. However, the Kentucky General Assembly believed it could prohibit cities from charging franchise fees and instead collect a tax and distribute funds to cities based upon various complex calculations determined by state statute. KLC joined with several Kentucky cities and challenged the statute as an unconstitutional infringement upon city power, after countless attempts to address the problem legislatively failed. On June 15, 2017, the Kentucky Supreme Court agreed. In *Kentucky CATV Association Inc. v. City of Florence*, 520 S.W.3d 355 (Ky. 2017), the Court recognized the constitutional powers to franchise and charge franchise fees granted to cities in Sections 163 and 164 of the Kentucky Constitution. KLC won that battle and continues to advocate on behalf of cities to preserve the constitutional authority to control city rights-of-way through franchise agreements and the imposition of franchise fees.

### **C. Jefferson Parish, Louisiana**

The Parish of Jefferson is the second most populous parish in the State of Louisiana with more than 430,000 residents. Together with its surrounding parishes, Jefferson Parish is part of the Greater New Orleans Region. Jefferson Parish was founded in 1825. The Jefferson Parish Council is the legislative body of the Parish. The Parish is governed by a President who serves as the chief administrative officer of the Parish and carries out the policies adopted by the Parish Council. Pursuant to Louisiana Constitution and the home rule Charter of Jefferson Parish, the Parish has the authority to grant franchises to use the public rights-of-way to provide wireless services.

Jefferson Parish has worked diligently with AT&T, Sprint, T-Mobile, Verizon, Cox Communications, Mobilitie, Crown Castle, Uniti and others in a collaborative effort to craft local

legislation that both: (a) facilitates the deployment of wireless facilities in the public rights-of-way to increase access for the citizens of Jefferson Parish to advanced 5G technology and information, and (b) protects and safeguards the health, safety, and welfare of the public, ensures that the public receives fair and reasonable compensation for use of the public rights-of-way, and preserves community character and aesthetic quality. As recently as September 19, 2018, the Parish Council was scheduled to consider approval of a proposed local ordinance to accomplish these goals. Consideration of the proposed ordinance was deferred at the request of wireless industry representatives, plainly in anticipation of the Commission's September 26, 2018 Declaratory Ruling and Third Report and Order in this matter.

Jefferson Parish is currently engaged in a beautification effort, especially along its transportation corridors. The Parish's zoning ordinance implements these beautification goals and includes several zoning districts dedicated to improving aesthetics in signage, landscaping, and design. The Parish is also currently engaged in an effort to beautify its public rights-of-way, including the installation of commissioned works of art in selected locations.

While Jefferson Parish fully supports the goal of bringing 5G technology to its residents, the Parish does not believe that the deployment of the numerous physical facilities associated with such technology should be accomplished at the expense of the citizens' rights to be fairly compensated for the use of their public rights-of-way or to protect the aesthetic qualities of their communities.

#### **D. Mississippi Municipal League**

The Mississippi Municipal League is a non-profit corporation organized under the laws of the State of Mississippi to advance the interest and general welfare of its member municipalities through education of their officials and advocating on their behalf. The MML's 292 members



consist of substantially all of the municipalities in the state of Mississippi. The issues before the Commission are of broad public importance to Mississippi municipalities because they question the authority of municipalities and, more importantly, their citizens, to regulate activities within their borders.

While the rural nature of the Mississippi and the municipalities therein make the expansion of 5G particularly attractive, such expansion should be not be accomplished at the expense of the citizens' rights to be fairly compensated for the use of their public rights of way. Instead, municipal officials need flexibility to negotiate with wireless network providers to obtain a fair and reasonable agreement that allows wireless expansion while taking into consideration each municipality's unique circumstances. Streets and highways, built and maintained at public expense, belong to the public, and no private individual or corporation has a right to use them for commercial purposes for private gain without consent of the state or municipality involved.<sup>2</sup> Accordingly, "municipalities shall have the power to grant the right for the erection of telegraph, electric light, or telephone poles, posts and wires along and upon any of the streets, alleys, or ways of the municipality, and change, modify, and regulate the same."<sup>3</sup> Hence, pursuant to Section 21-27-3 of the Mississippi Code of 1972, as amended, when granting a franchise "[n]o municipality shall grant, renew, or extend any such franchise, privilege or right, *without compensation* or for any longer period than twenty-five years." (emphasis added). And, finally, while the leasing or permitting of space on municipal light poles or other municipally-owned structures is not the granting of a franchise in Mississippi, it would be the leasing of space from which the fair market value for such lease would be required so as to not be considered an impermissible donation under

---

<sup>2</sup> See, *Payne v. Jackson City Lines, Inc.*, 220 Miss. 180, 70 So. 2d 520 (Miss. 1954).

<sup>3</sup> Miss. Code Ann. § 21-27-3.

Mississippi's constitution.<sup>4</sup> Further, in 2008 the MML successfully negotiated a statewide agreement with AT&T on behalf of its members, as did other leagues in other states, regarding the expansion of broadband service, the use of rights of way, and franchise fees, thus proving that agreements can be negotiated.

#### **E. Pennsylvania Municipal League**

The Pennsylvania Municipal League is a nonprofit, nonpartisan organization established in 1900 as an advocate for Pennsylvania's 3rd class cities. Today, The League represents participating Pennsylvania cities, boroughs, townships, home rule communities and towns that all share the League's municipal policy interests. PML's Board of Directors oversees the administration of a wide array of municipal services including legislative advocacy (on both the state and federal levels), publications designed to educate and inform, education and training certification programs, membership research and inquiries, consulting-based programs, and group insurance trusts.

PML is continually monitoring the needs of its members and it is committed to providing the Commonwealth's municipalities with cost-effective programs and services required to meet the distinct needs of their communities.

#### **F. Alabama League Of Municipalities**

The Alabama League of Municipalities ("ALM") is a voluntary association of which approximately 450 cities and towns of the State of Alabama are currently members. Since 1935, the League has worked to strengthen municipal government through advocacy, training and the advancement of local leadership. In addition, the League advises and educates municipal officials across the State on all aspects of municipal law.

---

<sup>4</sup> See, Miss. Att'y Gen. Op. No. 2006-00242, 2006 WL 2385507 (June 30, 2006); Miss. Const. art. 4, § 66.

Section 220 of the Alabama Constitution, 1901, provides that “No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village.” The Supreme Court of Alabama has labeled this grant of authority as “an essential and sovereign power in local authorities... in the nature of a bill of rights ... [that] recognize certain fixed, constitutional rights which shall not be invaded.”<sup>5</sup>

In construing this section, the Alabama Supreme Court has held that the power of a city to grant a franchise is by virtue of legislative authority, and Section 220 is not a grant of such power but the reservation of a restriction on legislative authority.<sup>6</sup> Section 11-49-1, Code of Alabama 1975, provides the legislative authority by providing that “No person, firm, association, or corporation shall be authorized to use the streets, avenues, alleys, and other public places of cities or towns for the construction or operation of any public utility or private enterprise without first obtaining the consent of the proper authorities of the city or town.”

Like many of its sister Leagues, over the past several legislative sessions ALM has worked diligently and met repeatedly with industry stakeholders to discuss possible practical and legislative solutions for expansion of wireless networks including the offer to work towards a suggested model franchise agreement which takes into account the needs of Alabama’s municipalities and the needs of industry to proceed in a consistent and timely fashion with expansion. Several years ago, the ALM worked with AT&T on a recommended model franchise agreement to implement an integrated Internet Protocol enabled platform of voice, data, and video services. The suggestion to work towards a similar model agreement, while met with initial

---

<sup>5</sup> *Birmingham Electric Co. v. Allen*, 177 So. 199, 202 (1928) (internal citations omitted).

<sup>6</sup> *Phenix City v. Alabama Power Co.*, 195 So. 894 (Ala. 1940).

interest, has not been pursued by the wireless industry. ALM remains willing to work towards that goal so long as it does not infringe on the essential and sovereign powers of Alabama's municipalities to regulate their rights of ways and public spaces.

### **G. Arkansas Municipal League**

The Arkansas Municipal League was founded in 1934 and exists to act as the official representative of the 500 Arkansas cities and towns, to provide a clearinghouse for information, and to offer a forum for discussion and sharing of mutual concerns faced by Arkansas's cities and towns. The League's mission is to build better local government and, consequently, better cities and towns for all Arkansans. Better local government and better cities and towns begins with allowing local control of local issues.

AML believes that the implementation of 5G technology is best left to local governments and wireless providers at the local level because those working at the *local level* know the best way to implement this technology at the *local level*. With that in mind, cities and towns of Arkansas have already begun to work with wireless providers at the local level to implement this much needed technology. As an example of this commitment, three of the State's largest cities – Little Rock, North Little Rock, and Conway – have already worked to negotiate fair and mutually beneficial agreements with wireless providers. Again, local issues require local solutions, and the cities and towns of Arkansas have already demonstrated their dedication to this concept, and AML is committed to ensuring the Arkansas communities continuing to do so.

AML is aware of the Comments submitted by the Arkansas Municipal Power Association (“AMPA”) submitted to the Commission in this proceeding on September 25, 2018. AML supports the AMPA comment, and incorporates AMPA's positions into AML's own positions.

## **H. Nevada League Of Cities And Municipalities**

The Nevada League of Cities and Municipalities is a professional association that serves as the state's primary champion of local government. As a statewide vehicle for collaboration, the League promotes positive and continuous community development through public policy formulation, advocacy, shared data and timely communication. Through analysis, education, planning and influential legislative representation, the League provides a potent central voice for all communities as they build a vibrant, sustainable and exceptional future for the citizens of Nevada.

Over the next decade, the state of Nevada will experience economic, social and cultural challenges that can only be met with insight, collaboration, optimism and deep commitment to every community. Through its dedicated members, the Nevada League of Cities and Municipalities will become Nevada's most influential and potent catalyst for economic development, social change and the legislative progress necessary to create a future characterized by leadership, vitality, vision and prosperity.

## **I. New Orleans, Louisiana**

As discussed in its original Comments in this proceeding, New Orleans is the largest city and metropolitan area in the State of Louisiana. With over 1.1 million residents in the greater New Orleans Metropolitan area, it is the 46<sup>th</sup> largest in the United States. New Orleans is also a major United States port.

There are several aspects of New Orleans which make the city unique and therefore important to the Commission's consideration of changes to broadband deployment policies. New Orleans is world-famous for its abundance of unique architectural styles, which reflect the city's historic roots and multicultural heritage. Twenty National Register Historic Districts have been

established, along with fourteen local historic districts. Thirteen of the local historic districts are administered by the New Orleans Historic District Landmarks Commission (“HDLC”), with one (the famous “French Quarter”) administered by the Vieux Carre Commission. In addition, the National Park Service, via the National Register of Historic Places, and the HDLC have landmarked individual buildings. These unique architectural aspects of New Orleans make the City one of the Top 10 most-visited cities in the United States. In 2004 alone, there were over 10.1 million visitors to the city. As a result, preservation of these historic landmarks and architectural styles mandate careful consideration of any proposal, which could alter these landmarks, or the character of these neighborhoods.

At the same time, the sheer number of visitors in the City at any one time mean that the City’s use of wireless communications is significantly higher than might otherwise be experienced by a City of the same size. Therefore, maximization of access to communications is also a vital interest to the City. The careful balancing of these competing interests gives New Orleans a unique background in matters of wireless deployment, and the Commission should carefully consider the City’s interests in attempting any rewrite of the Commission’s Rules.

**J. Town Of Middleburg, Virginia**

The Town of Middleburg, established in 1787, is a small village located in Loudoun County, Virginia. It is one of the oldest and most carefully preserved towns in the state. Much of its identity is rooted in its natural beauty and historic character of the town. Like New Orleans, Middleburg has carefully cultivated and worked hard to protect this character, which is essential to its tourism economy. Thus, issues such as the deployment of small cells are of particular concern to the Town, which must at all times be conserved with maintaining the character which is the Town’s defining attribute.

## **K. Government Wireless Technology And Communications Association**

The Government Wireless Technology & Communications Association (“GWTCA”) is a non-profit trade association created to advocate on behalf of government and non-government users of wireless technology and communications in the public service industries, such as public transit.<sup>7</sup> GWTCA’s membership includes government agencies, manufacturers, engineers and consultants working on a variety of issues impacting represented users. GWTCA’s Board of Directors includes representatives from Los Angeles and San Bernardino Counties in California, Motorola Solutions and Cisco.

## **L. Prior Comments**

The City of New Orleans submitted Comments in this proceeding on June 15, 2017.<sup>8</sup> GWTCA submitted Comments in WT Docket No. 16-421 (Streamlining Deployment of Small Cell Infrastructure) on May 8, 2017.<sup>9</sup> The Town of Middleburg submitted a letter to the Commission in this proceeding on September 21, 2018.<sup>10</sup> Thus, the backgrounds and interests of each of these Joint Petitioners are already on the record in this proceeding. In addition, KLC submitted a letter in this proceeding on September 14, 2018.<sup>11</sup> Both Kentucky and the Virginia Municipal League were part of a joint filing in WT Docket No. 16-421 on April 7, 2017.<sup>12</sup>

---

<sup>7</sup> [www.gwtca.org](http://www.gwtca.org).

<sup>8</sup> <https://www.fcc.gov/ecfs/filing/106160986116674>.

<sup>9</sup> <https://www.fcc.gov/ecfs/filing/103082609813389>.

<sup>10</sup> <https://ecfsapi.fcc.gov/file/1092166849166/FCC-WT%20DOCKET%20NO.%2017-84%20AND%2017-79.pdf>.

Middleburg also submitted Comments in WC Docket No. 11-59 (Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting) on July 15, 2011. <https://ecfsapi.fcc.gov/file/7021692388.pdf>.

<sup>11</sup> <https://ecfsapi.fcc.gov/file/1091406763815/20180913SmallCellCommentsFinal.pdf>.

<sup>12</sup> <https://ecfsapi.fcc.gov/file/10407758005427/NLC%20SML%20FCC%20WT%2016%20421%20reply%20comments.pdf>.

It is the concern of the Joint Petitioners that the Commission's *Report and Order* ignores the interests of municipalities nationwide, in an effort to serve the economic needs of wireless carriers. On this basis, the Joint Petitioners request reconsideration of the Commission's decision.

## **II. PETITION FOR RECONSIDERATION**

### **A. The "Race" To 5G**

The purported genesis of this proceeding is the perceived need for the United States to be the first country to implement 5G technology. The purported need has been expressed by wireless carriers,<sup>13</sup> wireless consultants,<sup>14</sup> the FCC<sup>15</sup> and the White House.<sup>16</sup> The rationale given for this driving need to be first has been variously couched as: (1) the "winning" country will set standards;<sup>17</sup> (2) economic benefits that accrue only to the winner;<sup>18</sup> and (3) 5G will provide high speed access to unserved rural areas.<sup>19</sup>

Unfortunately, these claims are inconsistent with reality. While initial deployments of wireless technologies might have benefitted in the creation of standards in prior generations, where there were multiple technological standards (for example, when both TDMA and CDMA technologies existed side-by-side), today there will not be multiple final 5G marketplace standards.

---

<sup>13</sup> <https://www.ctia.org/the-wireless-industry/the-race-to-5g>.

<sup>14</sup> <https://www.reuters.com/article/us-usa-telecoms-5g/united-states-falling-behind-china-in-race-to-5g-wireless-deloitte-report-idUSKBN1KSOBE>.

<sup>15</sup> <https://www.inverse.com/article/48228-why-china-is-winning-the-race-with-the-us-to-5g-internet>.

<sup>16</sup> <https://www.whitehouse.gov/articles/america-will-win-global-race-5g/>.

<sup>17</sup> "Billions of dollars are potentially at stake for the country that leads in 5G and sets global standards, as the United States did with the implementation of 4G." <https://www.politico.com/newsletters/morning-tech/2018/09/20/the-race-to-5g-345764>.

<sup>18</sup> "We've seen with prior generations, whether it was moving from 2G, 3G, or 4G, that there is a big economic advantage to be the first mover as a country and a region in terms of the technology being deployed in your country first." <https://www.inverse.com/article/48228-why-china-is-winning-the-race-with-the-us-to-5g-internet>.

"The first countries to adopt the next generation of wireless communications will experience 'disproportionate gains,' as 5G brings and 'era of untapped economic potential.'" <https://www.reuters.com/article/us-usa-telecoms-5g/united-states-falling-behind-china-in-race-to-5g-wireless-deloitte-report-idUSKBN1KSOBE>.

<sup>19</sup> <https://www.meritalk.com/articles/is-5g-the-magic-bullet-for-rural-internet-access/>.



One wireless carrier is even critical of another for deploying pre-standard 5G systems.<sup>20</sup> Further, the standard is set by a committee consisting of companies, not countries.<sup>21</sup> Thus, the standard will be set regardless of where pre-standard 5G systems have been deployed. While such deployments may assist in evaluating performance in the field of various configurations, the knowledge gained will be acquired without regard to where the pre-standard system has been deployed.

The Joint Petitioners agree that the deployment of 5G technology represents a significant economic boom to the United States, both in terms of workers engaging in the deployment as well as the economic benefits of system usage. However, such benefits accrue regardless of whether the United States is first to deploy, or second. Finally, given the more intensive infrastructure necessary for 5G deployment, particularly in the area of backhaul, it is impossible to believe that 5G deployments will be made in areas where wireless carriers have elected not to build 4G systems for economic reasons.

The skepticism of the Joint Petitioners in the need for speed should not be taken to indicate a lack of interest in 5G technology. Rather, the Joint Petitioners are excited about the prospect of 5G deployment. In particular, 5G is an enabling technology for a smart city. Laying the foundation for the technological infrastructure for connected building, vehicles, streets and more is a potential that should be encouraged and, to the extent possible, given every reasonable regulatory advantage. However, such deployments should be in cooperation with municipalities, and not in a manner which sets municipalities and carriers as opposing forces.

---

<sup>20</sup> "I can't believe that I have to say this, but yes, industry standards matter. Verizon's ignoring them in their rush to fixed 5G this year, but that just means that they're building a bridge to nowhere. 5G should be built with interoperability and scalability in mind... and that means respecting industry standards." <https://www.t-mobile.com/news/5g-ces-wrap-up>.

<sup>21</sup> <http://www.3gpp.org/about-3gpp/partners>.

## **B. The FCC's Decision Is Inconsistent With Its Deregulatory Agenda**

The current Commission (and Administration in general) has expressed the desire to deregulate whenever and wherever possible, applying “light touch” regulation instead.<sup>22</sup> However, the *Report & Order* represents an extreme overreach into issues that infringe on the sovereignty of states without any real justification. While the Joint Petitioners can appreciate the much-touted examples of municipal overreach in the antenna siting process, the Commission treats these situations as the norm, and not as outliers.

However, as discussed above, the norm is states, cities and counties working with carriers to enable and encourage bringing wireless services to citizens. These negotiations have been on a bipartisan basis, which have taken into account the unique geographic, economic, cultural and historic situations in each case. The Commission's *Report & Order* treats the entire country as homogenous, ignoring very differences which have made the country the most desirable place to implement 5G technologies.

At the same time, the Joint Petitioners are sensitive to the deployment difficulties that may ensue with differing regulatory schemes from one mile to the next. However, the Joint Petitioners are confident that the Commission, together with carriers and municipalities, can develop a true regulatory regime that can address the outlier municipalities that seek to truly prohibit the implementation of technological advances through limited, targeted rules. The Joint Petitioners recognize that this was the goal of the Commission's Broadband Deployment Advisory Committee (“BDAC”). Unfortunately, the BDAC was never able to fulfill its mission, as the imbalance between carrier and municipality representation prohibited a consensus result. At the end, the broad-reaching, intrusive *Report & Order* does not accomplish the goal of speeding broadband

---

<sup>22</sup> <https://www.reginfo.gov/public/do/eAgendaMain>.

deployments. Instead, it creates an environment where endless litigation will ensure the failure of the Commission's stated goals.

The following represents specific areas of concern to the Joint Petitioners.

**C. The Commission Fails To Account For True Cost Recovery**

The proposed recurring fee structure is an unreasonable overreach that will harm local policy and has the potential to discriminate against other industries. "Fair and reasonable compensation" as meaning approximately \$270 per small cell site is not reasonable. Local governments have worked to negotiate fair deals with wireless providers which may exceed that number or provide additional benefits to the community.<sup>23</sup> In addition, to mandate a fee for one industry has the potential to discriminate against another industry which may use the same asset.

The Commission seeks to substitute its judgment of "reasonable fees" for those municipalities that have reached agreements with wireless providers. However, the Commission has no specific expertise as to the costs of implementation in, for example, the City of Philadelphia, that is greater than the City's knowledge. Yet the City was able to successfully reach agreements with Verizon, Mobilitie, Crown Castle and AT&T.<sup>24</sup>

As an example of costs that must be attributable to site applications, in New Orleans there are several levels of application review by different departments. There is review by the New Orleans City Council Utilities Regulatory Office, City Attorney's Office and the New Orleans Finance Department. Site review, vital for safety and permitting, is performed by Information Technology and Innovation (ITI), Department of Public Works (DPW), the Department of Safety

---

<sup>23</sup> See, for example, Letter to FCC from the City of Upper Arlington, Ohio, dated September 19, 2018; Letter from Fort Pierce, Florida dated October 1, 2018;

<sup>24</sup> <https://ecfsapi.fcc.gov/file/103154366759/MOTON%20FOR%20STAY.pdf>.

and Permits, Historic District Landmarks Commission (HDLC) and Vieux Carre' Commission (VCC). Enforcement is provided by Safety and Permits, Finance, and the City Attorney's Office.

Middleburg utilizes similar procedures, as discussed in its July 15, 2011 Comments. Like New Orleans, the Town's "... economic success is largely dependent upon maintaining its existing historical character..."<sup>25</sup> In both situations, the municipalities have carefully crafted procedures to retain their character, while at the same time ensuring that their services are allowed to advance.

It is clear that a flat fee of \$270 per site does not provide cost recovery of these services. The Commission fails to recognize even the cost of routine maintenance around such sites, functions as routine as trash pick-up or lawn maintenance. Similarly, there's no recognition of the costs for when poles fall, where costs can include police, fire and EMS. Instead, the Commission would have such costs recoverable from municipal citizens through increased taxes, requiring citizens to subsidize the profits of wireless carriers. Further, the Commission negates the ability of municipalities to fairly spread such costs over all of the users of rights of way, potentially setting up the prospect of litigation over discriminatory treatment of such users.

In addition, municipalities are not mere landlords of municipal rights of way in the development of 5G services. Rather, municipalities represent the connectivity between carriers and users that are needed by wireless providers to make enhanced services successful. Smart cities and buildings do not happen without municipal involvement. Unfortunately, the Commission's *Report & Order* reduces, if not totally eliminates, the budgetary ability of municipalities to ensure that these advanced services become reality.

Lower fees that are limited to "cost recovery," limits localities' ability to capitalize on the new technology addressed by the order and the ability to make the necessary upgrades to

---

<sup>25</sup> Town of Middleburg July 15, 2011 Comments at 5.

technology systems, including: Advanced Metering Infrastructure/Smart Meters; Sensors; Emergency Management; and Grid Modernization. Thus, the very services which the Commission seeks to encourage, with the potential for greater usage fees by carriers, are pre-empted from implementation. By focusing on the supposedly limited capital budgets of wireless carriers (who appear to have an unlimited budgetary ability to bid on spectrum at auction), the Commission ignore the very real budget and resource availabilities of municipalities. Viewed another way, the Commission's action seems to be a massive reallocation of money from cities and counties to the federal budget, as the Commission's *Report & Order* frees up capital for wireless carriers to bid at auction, while depriving municipalities of needed capital to operate.

It has been claimed by the Commission that the *Report & Order* will save \$2 billion in deployment costs.<sup>26</sup> However, the real impact is that the *Report & Order* results in a massive shift of costs from carriers to the public, as municipalities will now have to recover costs from its citizens. In essence, the Commission has created a massive tax bill for consumers, to the economic benefit of for-profit corporations. However, even the FCC's Tax Bill doesn't yield faster 5G build-outs, according to the very carriers that the Commission seeks to benefit.<sup>27</sup> Indeed, the carriers have indicated that they won't be devoting more money to infrastructure build-outs as a result of the *Report & Order*, despite the FCC's stated intention.<sup>28</sup>

The Joint Petitioners are aware of the Letter sent by a number of members of the United States Congress dated September 25, 2018.<sup>29</sup> The Joint Petitioners agree that the FCC should set "guardrails" for small cell review. However, the Commission has failed to ensure that

---

<sup>26</sup> <https://www.theverge.com/2018/9/26/17905620/fcc-5g-deployment-shot-clock-vote>.

<sup>27</sup> <https://arstechnica.com/information-technology/2018/10/fccs-2-billion-giveaway-to-carriers-wont-speed-up-verizons-5g-deployment/>.

<sup>28</sup> *Id.*

<sup>29</sup> <https://www.fcc.gov/ecfs/filing/1092585347000>.

municipalities “... are fully compensated for their costs in issuing permits, overseeing deployment, and where necessary, managing the rights of way for use by communications providers.”<sup>30</sup>

The Commission seeks to bring uniformity to a country with diverse geography, history and development. The Commission’s goal of enabling faster deployment of wireless facilities will not be met by the imposition of unreasonable maximum fees has the exact opposite effect. Instead of rapid deployments and reduced litigation, the industry is now guaranteed litigation over the Commission’s rules itself, as well as multiple municipalities entering into individual litigation to demonstrate that their fees over the Commission’s minimum are reasonable. The Joint Petitioners cannot see this as a desirable outcome for anyone.

**D. MUNICIPALITIES AND BUSINESSES SHOULD NOT BE COMPETITORS**

Another consequence of the Commission’s *Report & Order* is that municipalities will now be in competition with the businesses that serve their cities and counties. Specifically, by not allowing market rates to prevail, municipalities are now priced less than the private buildings and private land owned within the municipality. Through this lens, it is clear that one of the reasons that carriers are driving the Commission to this result is to reduce their costs for providing any service.

The Commission should not be artificially reducing carrier costs by arbitrarily regulating the real estate marketplace. This is not a proper function for the Commission. Rather, the Commission should be enabling a competitive marketplace between the telecommunications carriers which it is charged to regulate.

---

<sup>30</sup> *Id.*

## **E. THE DEFINITION OF “EFFECTIVE PROHIBITION” IS OVERLY BROAD**

The definition of “effective prohibition” invites challenges to long-standing locally owned rights of way requirements unless they meet a subjective and unclear set of guidelines. This definition opens local governments to the likelihood of more, not less, conflict and litigation over requirements for aesthetics, spacing, and undergrounding.

The Commission finds that fees can be an “insurmountable barrier” to providing service.<sup>31</sup> However, the reality in the marketplace is that there regardless of how low fees are (even below the miniscule fees set in the *Report & Order*), the real “insurmountable barrier” is the barrier to **obtaining** service in extremely underserved areas, even within urban areas. Despite the Commission’s Secondary Markets Initiative,<sup>32</sup> it has been virtually impossible to encourage carriers to serve these areas. Rather, the focus has been on those areas with the greatest economic possibilities. By eliminating the ability of municipalities to create incentive to serve underserved areas through, for example, the creative initiatives by municipalities such as the City of San Jose, California,<sup>33</sup> the Commission’s *Report & Order* only deepens the digital divide which is decried by so many.<sup>34</sup>

## **F. THE REVISED “SHOT CLOCK” POSES NUMEROUS PROBLEMS**

The new expedited 60 day shot clock is problematic because it does not take into account a preexisting structures’ design or suitability for attaching wireless equipment. In addition, as these facilities are not subject to federal historical and environmental reviews this places an

---

<sup>31</sup> *Report & Order* at para. 41-42.

<sup>32</sup> <https://www.fcc.gov/wireless/bureau-divisions/technologies-systems-and-innovation-division/spectrum-leasing/secondary>.

<sup>33</sup> <https://www.fiercewireless.com/wireless/verizon-to-other-cities-don-t-use-san-jose-s-small-cell-deployment-model>.

<sup>34</sup> <https://www.axios.com/5g-digital-divide-19b70d34-4978-44df-a1cb-ae9222d113ef.html>;  
[http://www.bbcmag.com/2017mags/Mar\\_Apr/BBC\\_Mar17\\_5GNotAnswer.pdf](http://www.bbcmag.com/2017mags/Mar_Apr/BBC_Mar17_5GNotAnswer.pdf).

unreasonable burden on local governments to prevent historic preservation, environmental or safety harms to the community. In this regard, any redefined shot clock could result in the need for additional staff to meet these time frames, personnel that otherwise would not be necessary. Thus, “reasonable costs” should specifically allow for the recovery of costs for such personnel.

The Joint Petitioners do not seek to impede reasonable development within jurisdictions, however there are several areas where the newly adopted provisions fall short of their goal. For example, to avoid “presumptive prohibition” and “expedited relief in court,” the Commission should articulate a cap to the number of applications submitted at one time as well as period of time between submissions.<sup>35</sup> The Commission has also failed to sufficiently articulate procedures when the shot clock is missed. For example, may a municipality reject specific sites after an Order has been issued?<sup>36</sup> Would a declared emergency (such as a hurricane) presumptively a reasonable delay and exception to a shot clock?<sup>37</sup> In this regard, the Joint Petitioners believe that it would be more appropriate for there to be a finding of bad faith for a permanent injunction to be issued.<sup>38</sup>

In attempting to create a “one size fits all” environment, the Commission also fails to recognize (for example) issues such as the New Orleans Charter’s requirement of a three-week layover for franchise agreement. This dramatically impacts the City’s ability to meet a shot clock.

It is insufficient for the Commission to create a nationwide shot clock that mirrors the shot clocks adopted by several states without reviewing the totality of the rules adopted in each case.<sup>39</sup> Rather, other provisions adopted by these states, not similarly adopted by the Commission, make short shot clocks more palatable and are easier to achieve. If multiple carriers submitted

---

<sup>35</sup> See, *Report & Order* at para. 114.

<sup>36</sup> See, *Report & Order* at para. 116.

<sup>37</sup> See, *Report & Order* at para. 115.

<sup>38</sup> See, *Report & Order* at para. 117.

<sup>39</sup> See, *Report & Order* at para. 127.



applications for small cell approval of over 50 cells all on the same day to a City such as the City of Lexington, Virginia, where they outsource their planning department, it would be impossible to complete this timely review given their normal workflow.<sup>40</sup> Even for a large in-house planning departments, these small cell reviews should not be given preferred status over other types of planning review that were submitted before the particular small cell applications. Other localities have one person on staff who conduct these reviews and if that person were out of the office for medical reasons or vacation the locality would be adversely affected by this nationwide shot clock, merely because of their size.

#### **G. UNDERGROUNDING OF UTILITIES SHOULD NOT BE INHIBITED**

Local governments have worked hard to underground utilities at a substantial cost, but to the benefit of citizens. For example, Dominion Energy estimates that it has spent \$17,308,643.00 in undergrounding utilities at the request of localities. Dominion Energy has also invested in over 762 miles of underground projects from 2016-2018 at a cost of \$90,704,172.00 that Dominion identified. Dominion's total project will cost an estimated \$2 Billion.<sup>41</sup> Thwarting that initiative with a requirement of collocation of up to three cubic feet of antenna and 28 cubic feet of additional equipment could destroy the aesthetics of these areas. Localities should have the ability to prescribe the location and aesthetics of these collocations.

This is not to suggest that small cell deployment should be prohibited in such areas. However, the Commission's statement in paragraph 90 that "... a requirement that materially inhibits wireless service, even if it does not go so far as requiring that all wireless facilities be deployed underground, also would be considered an effective prohibition of service" is troubling.

---

<sup>40</sup> See, for example, the Letter from Representatives Denise Provost, Christine Barber, Mike Connolly and Senator Pat Jehlen, dated October 16, 2018.

<sup>41</sup> [https://www.richmond.com/business/local/dominion-virginia-power-launching-billion-program-to-underground-outage-prone/article\\_008d25a4-a78c-5811-a336-e76554f8f494.html](https://www.richmond.com/business/local/dominion-virginia-power-launching-billion-program-to-underground-outage-prone/article_008d25a4-a78c-5811-a336-e76554f8f494.html).

Such a vague standard as “materially inhibits” provides little guidance and will unquestionably lead to a significant amount of litigation. Again, the Commission’s action is directly contrary to its stated goal of speeding the construction of small cells. Rather, the *Report & Order* guarantees delays.<sup>42</sup>

#### **H. MINIMUM SPACING REQUIREMENTS SHOULD BE FURTHER DEFINED**

The Joint Petitioners are pleased that the Commission has not found that minimum spacing requirements from other facilities to, amongst other things, avoid excessive overhead “clutter” is not per se violative.<sup>43</sup> However, the Commission has not discussed the opposite issue, which is whether municipalities can **require** that new poles erected by carriers be capable of supporting more than one carrier.

The Joint Petitioners believe that aesthetic concerns are a proper consideration for municipalities. However, creating a de facto small cell monopoly by one or a few providers because of minimum spacing requirements should not be a necessary outcome. Thus, for newly installed (or replacement) facilities, municipalities should have the ability (but not the requirement) to require that such constructions be capable of accommodating more than one carrier (either through neutral hosting requirements or other space requirements). The Joint Petitioners urge the Commission to address this issue, and approve the proposal.

Additionally, the Commission has failed to adequately address the impact of the *Report & Order* on existing agreements between municipalities and communications providers. Thus, an

---

<sup>42</sup> While in some circumstances it might be argued that initial cases will create the groundwork for what constitutes “material,” if indeed the Commission’s goal is 5G deployments on an expedited basis, later deployments (which will have the benefit of a negotiated or litigated standard) will have failed to meet the expedited goal.

<sup>43</sup> See, *Report & Order* at para. 91.

additional detriment to the Commission's action is to create uncertainty regarding deployments under construction, thereby delaying the deployments that the Commission sought to accelerate.<sup>44</sup>

### **III. CONCLUSION**

The FCC's *Report and Order* effectively discards agreements made at the local level in favor of painting the canvas with too broad a brush. In doing so, the FCC ignores what is obvious: local people know how best to handle local issues. The implementation of 5G technology is no different. The challenges facing Philadelphia, PA are very different than those facing Conway, AR. Because of these differences, both Philadelphia and Conway should have as much leeway as possible to work with wireless providers at the local level to determine the best way to implement this technology. The FCC, while perhaps well meaning, does not know the best way for the cities and towns of Arkansas – or any city or town in America – to effectively and efficiently implement this much needed technology.

While the Commission's goal in streamlining small cell deployments is laudable, the *Report & Order* does so in a manner which is extremely prejudicial to municipalities. This is not to say that the Joint Petitioners oppose 5G build-outs. In fact, quite the opposite. The Joint Petitioners believe that 5G services bring the promise of connected buildings and connected cities to reality. Similarly, the Joint Petitioners do not support those municipalities that needlessly delay application reviews, or seek to use the process to extort carriers. Rather, the Joint Petitioners believe that sensible legislation can be enacted which serves the interests of timely application review, fair recovery of all costs related to use of rights of way, and proper consideration of local concerns.

---

<sup>44</sup> For this, and many other reasons, the Joint Petitioners support the Motion for Stay submitted by a coalition of multiple entities on October 31, 2018. <https://ecfsapi.fcc.gov/file/103154366759/MOTON%20FOR%20STAY.pdf>.

The Joint Petitioners urge the Commission to revisit its decisions, as discussed above, and create a regulatory framework that actually balances legitimate concerns between carriers and municipalities, and does not create an endless future of litigation. In doing so, the Commission must not set maximum site fees, but rather recognize that different localities have different costs and different tax structures. Further, the Commission must revise the shot clock rules to recognize individual circumstances.

WHEREFORE, the premises considered, it respectfully requested that the Commission RECONSIDER its *Report & Order*, and act in accordance with the views expressed herein.

Respectfully submitted,

CITY OF NEW ORLEANS, LOUISIANA  
VIRGINIA MUNICIPAL LEAGUE  
KENTUCKY LEAGUE OF CITIES  
MISSISSIPPI MUNICIPAL LEAGUE  
PENNSYLVANIA MUNICIPAL LEAGUE  
ALABAMA LEAGUE OF MUNICIPALITIES  
ARKANSAS MUNICIPAL LEAGUE  
NEVADA LEAGUE OF CITIES  
& MUNICIPALITIES  
JEFFERSON PARISH, LOUISIANA  
TOWN OF MIDDLEBURG, VIRGINIA  
GOVERNMENT WIRELESS TECHNOLOGY  
& COMMUNICATIONS ASSOCIATION

By: Alan S. Tilles, Esquire

Shulman Rogers Gandal Pordy & Ecker, P.A.  
12505 Park Potomac Ave., Sixth Floor  
Potomac, Maryland 20854  
(301) 230-5200

Date: November 14, 2018