Regular Meeting of the
City of Concord
Planning Commission

Wednesday, October 2, 2019  6:30 p.m.
Council Chamber
1950 Parkside Drive

AGENDIZED ITEMS - The public is entitled to address the Planning Commission on items appearing on the agenda before or during the Planning Commission's consideration of that item. Each speaker will be limited to approximately three minutes.

1. ROLL CALL

2. PLEDGE TO THE FLAG

3. PUBLIC COMMENT PERIOD

4. CONSENT CALENDAR
   A. 9/18/19 Meeting Minutes

5. PUBLIC HEARINGS
   A. City of Concord Policy for the Regulation of Small Wireless Facilities - Public hearing for the purposes of making a recommendation to the City Council regarding a City-initiated amendment to the City of Concord Development Code of adding a Subsection to Existing Wireless Chapter 18.205.030 to regulate small wireless facilities pursuant to applicable federal laws; and adopt a policy regulating small wireless facilities
as defined by the Federal Communications Commission. CEQA: Pursuant to CEQA Guidelines Section 15378 and Public Resources Code Section 21065, the adoption of a development review process for wireless communications facilities is not a “project” under CEQA because its adoption is not an activity that has the potential for a direct physical change or reasonably foreseeable indirect physical change in the environment. Accordingly, this Ordinance is not subject to CEQA. **Project Planner: Jessica Gonzalez @ (925) 603-5821**

6. **COMMISSION CONSIDERATIONS**

7. **STAFF REPORTS AND ANNOUNCEMENTS**

8. **COMMISSION REPORTS AND ANNOUNCEMENTS**

9. **FUTURE PUBLIC HEARING ITEMS**

10. **ADJOURNMENT**

Next Meeting: Regular Meeting  
Date: 10/16/2019 – 6:30 PM

**ADA NOTICE AND HEARING IMPAIRED PROVISIONS** - The Council Chamber is equipped with a T-Coil Hearing Loop. This system allows “T” coil reception of the audio proceedings. Please switch your hearing aid or cochlear device to the “T”, “T” Coil or telephone position. If you would like better audio reception, a loop receiver that picks up the audio loop is available from the City Clerk.

In accordance with the Americans with Disabilities Act and California Law, it is the policy of the City of Concord to offer its public programs, services and meetings in a manner that is readily accessible to everyone, including those with disabilities. If you are disabled and require a copy of a public hearing notice, or an agenda and/or agenda packet in an appropriate alternative format; or if you require other accommodation, please contact the ADA Coordinator at (925) 671-3243, at least five days in advance of the hearing. Advance notification within this guideline will enable the City to make reasonable arrangements to ensure accessibility.
A regular meeting of the Planning Commission, City of Concord, was called to order by Chair Barbour at 6:30 P.M., September 18, 2019, in the City Council Chamber.

1. ROLL CALL

COMMISSIONERS PRESENT: Chair Ray Barbour
Vice Chair John Mercurio
Commissioner Jason Laub
Commissioner Craig Mizutani
Commissioner Mark Weinmann

STAFF PRESENT: Frank Abejo, Principal Planner
Josh Clendenin, Senior Assistant City Attorney
Jerry Hittleman, Contract Planner
Bruce Davis, Senior Civil Engineer

2. PLEDGE TO THE FLAG

Vice Chair Mercurio led the pledge.

3. PUBLIC COMMENT PERIOD

No public comment was heard.

4. CONSENT CALENDAR

APPROVAL OF MINUTES

No public comment was heard.

Motion was made by Commissioner Laub and seconded by Commissioner Mizutani to approve the meeting minutes of September 4, 2019. The motion was passed by the following vote:

AYES: Laub, Mizutani, Barbour, Mercurio, Weinmann
NOES: None
ABSTAIN: None
ABSENT: None

5. PUBLIC HEARINGS

Myrtle Creek Estates Subdivision Amendment (PL19099 – TM, DR, RT) – Application for an amendment to an approved Tentative Major Subdivision Map, Design Review and
Tree Removal for a seven-lot subdivision on a 3.6-acre lot at 5019 Myrtle Drive. The General Plan designation is Rural Residential; Zoning classification is RR-20 (Rural Residential, 20,000 square foot minimum lot size); APN 117-050-008. CEQA: Categorically exempt under CEQA Guidelines Section 15332 “In-Fill Development Projects”. Project Planner: Lorna Villa @ (925) 671-3176

Jerry Hittleman, a contract planner on behalf of the City, presented the report and answered questions from the Planning Commission regarding reserve funds for a Homeowners Association, a clarification on condition 72 (modification to HOA condition) and whether a draft condition is an executable form, responsibility and enforcement of the shared maintenance agreement, differences between tree reports, and monitoring of the maintenance responsibility.

Frank Abejo clarified that the agreement in the staff report had not been vetted with the City Attorney’s Office and staff had asked the applicant to create a draft agreement for discussion which may look different than the final agreement.

Jackie Seeno, of Cyrus Land Development, explained the history of the project and the reasoning behind a shared maintenance agreement for this project. She also answered questions from the Commission about disclosure to the homeowners, how the maintenance is paid, and if on-going maintenance is currently being used on other properties, and whether she would consider a Homeowners’ Association being in effect the first year and then transition to a shared maintenance agreement.

Jennifer Tso, consulting arborist with Traverse Tree Service, explained the results of her arborist report.

Public Comment

Blaik Musolf asked if all of the eucalyptus trees were going to be removed and a clarification on when a healthy protected tree is kept instead of being removed.

Chair Barbour recommended Mr. Musolf speak with Jackie Seeno directly and she would be accommodating in answering his questions.

Bruce Davis, Senior Civil Engineer, answered a question pertaining to the expectant life span for a paved roadway before maintenance is required.

Commissioner Mizutani was hesitant to move forward with this project without assurance there will be a review of the shared cost agreement.

Commissioner Weinmann expressed the tree removal made sense to him though he has a bit of hesitation on the structure of the agreement.

Commissioner Laub stated he was okay with the trees being removed but was also hesitant of the shared agreement.
Vice Chair Mercurio explained the reasoning trees are removed in the City and liked the idea of the removal of trees for this project but was not supportive of a shared agreement but was supportive of a Homeowner’s Association.

Chair Barbour expressed his concern with the maintenance of the landscape, including street trees, by the homeowners and also mentioned he is okay with the removal of trees which are not protected.

Commissioner Laub asked Ms. Seeno what her preference would be between keeping the HOA conditions as they were originally approved or continuing the item to allow time for crafting the shared maintenance agreement after listening to the Commissioners comments and concerns.

Ms. Seeno stated she would prefer to continue the item rather than keeping the HOA conditions.

Motion was made by Commissioner Laub and seconded by Commissioner Weinmann to continue the item to a date uncertain. The motion was passed by the following vote:

AYES: Laub, Weinmann, Barbour, Mercurio, Mizutani
NOES: None
ABSTAIN: None
ABSENT: None

6. COMMISSION CONSIDERATIONS

There were none.

7. STAFF REPORTS / ANNOUNCEMENTS

There were none.

8. COMMISSION REPORTS / ANNOUNCEMENTS

Commissioner Weinmann announced he would not be in attendance at the October 2nd meeting.

9. FUTURE PUBLIC HEARING ITEMS

Frank Abejo announced the October 2nd meeting will contain a small cell sites wireless ordinance and the October 16th meeting has two items currently scheduled, a master sign program and a Use Permit for Diablo Valley Cremation.

10. ADJOURNMENT

Commissioner Mizutani moved to adjourn at 8:04 P.M. Vice Chair Mercurio seconded the motion. Motion to adjourn was passed by unanimous vote of the Commissioners present.
APPROVED:

Frank Abejo  
Principal Planner

Transcribed by Grant Spilman, 
Administrative Coordinator

CEQA: Not a project pursuant to CEQA Guidelines Section 15378 and Public Resources Code Section 21065, and exempt pursuant to CEQA Guidelines Section 15061(b)(3); accordingly, no further environmental review is required.

Recommendation: Adopt Resolution No. 19-17 PC, recommending the City Council approve an Ordinance to adopt a Text Amendment of the City of Concord Development Code Chapter 18.205.030 to regulate small wireless facilities pursuant to applicable federal laws; and adopt a policy and procedure regulating small wireless facilities as defined by the Federal Communications Commission.

I. Report in Brief

Due to new regulations issued by the Federal Communications Commission (“FCC”) concerning permissible regulation of small wireless facilities, staff recommends that the Planning Commission recommend that the City Council adopt a Development Code Text Amendment to the City’s existing Wireless Communications Facility regulations, which includes adding a new subsection authorizing the City Council to adopt a policy and procedure to establish regulations and procedures for small wireless facilities in compliance with the new FCC Order.

II. Background

On January 9, 2015, the FCC issued new regulations in response to the interpretation of certain provisions of Section 6409(a) of the federal Middle Class Tax Relief and Job Creation Act of 2012 (“Section 6409”) related to processing applications for wireless communications facilities. In brief, Section 6409 requires local jurisdictions to approve certain eligible collocations and modifications to existing wireless communications facilities. The FCC’s regulations, in turn, define Section 6409’s key terms to implement Congress’s broader mandate to meet the demand for additional wireless services and network infrastructure.

On September 5, 2017, the Concord City Council adopted Ordinance No. 17-11 to address the changes in federal regulations regarding Section 6409 and amended the Development Code by: (1) repealing and replacing Chapter 18.205 Wireless Communications Facilities for New and Substantially Changed Wireless Facilities; (2) adding Chapter 18.207 Wireless Communications Facilities for Eligible Facilities Requests; and (3) amending other various sections of the Development Code and Municipal Code to bring the City’s regulations into compliance with federal and state legislation.
On September 26, 2018, the FCC adopted a new Declaratory Ruling and Order (“the FCC Order”). The FCC Order is aimed at promoting the rapid deployment of small wireless facilities (SWFs) by limiting processing time, requirements, application fees, and further preempting any local regulation. Traditionally, wireless antennas and equipment were installed on large towers, commercial building rooftops, and private and public lands. To accommodate the increasing demand for wireless coverage, broadband services, and to upgrade equipment, the wireless industry is beginning to deploy small cell wireless technology. Small wireless facilities tend to take the form of smaller antennas (3-4 feet tall) that are placed on existing infrastructure, such as utility poles in the public right-of-way (ROW). They are also generally accompanied by equipment cabinets installed lower on the pole. The industry currently estimates that each national carrier will need to deploy between 30 and 60 small cells, connected by approximately 8 miles of fiber optic cable, per square mile.

While several lawsuits have been filed challenging the FCC Order on the grounds that the regulations are overly restrictive on local control, the FCC and the courts have refused to issue a stay and the FCC Order is controlling. The City’s current regulations for wireless communication facilities, outlined in Chapter 18.205 and 18.207 of the Development Code, may remain in place for applications and deployments on private property and for Section 6409 collocations that are not covered under the new FCC Order. However, the existing wireless Ordinance does not currently address the new federal regulations regarding SWFs, which require the City, in part, to provide for a streamlined, objective review process with limited time frame “shot clocks” and aesthetic regulations for SWFs.

However with the potential changes to the FCC Order due to the pending lawsuits as well as the evolving nature of this industry, staff recommends that the City adopt a new policy by ordinance to provide more flexibility for the City to change and revise its SWF application standards to address ongoing and eminent changes to technology, FCC regulation, and other state and federal laws. In order to address the new regulations, staff proposes a Development Code Text Amendment to the City’s existing Wireless Communications Facility regulations, which includes adding a new subsection authorizing the City Council to adopt a Policy and Procedure establishing regulations and procedures for SWFs in compliance with the Order.

III. Discussion

The Federal Telecommunications Act is also intended to ensure that the public has sufficient access to telecommunication services. Based on this federal law, a local government shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

The FCC Order

The FCC Order (Attachment 4) includes various requirements that significantly restrict and limit state and local management of SWFs in the public ROW and SWFs on private property. In summary, the FCC Order does the following:

- **Design Review and Aesthetic Regulation:** Preempts aesthetic regulations unless they are (1) reasonable (*i.e.*, technically feasible); (2) no more burdensome that those applied to other infrastructure deployments; (3) objective; and (4) published in advance.
**Shot clocks:** Shortens the timeframe “shot clocks” applicable to SWFs. The new shot clock for any small cell application is 60 days for facilities proposed on existing structures (regardless of whether the structure already supports a wireless service) or 90 days for facilities proposed on new or replacement structures. In comparison, the City previously had 150 days. The new shot clocks apply to the entire siting process including the review and permit issuance from planning, building, engineering, public works, and any licensing agreements needed for City-owned infrastructure. The shortened shot clocks also include any time needed to process appeals. The City must also notify the applicant within 10 days whether an application is “material complete.”

**Fees and Pole Charges:** Restricts and caps all fees local governments may charge to process applications and collect in rent/licensing fees if the facility is proposed on City-owned infrastructure. While the FCC Order allows cities to charge the actual and reasonable cost incurred for providing service to process the applications, it sets “safe harbor” fees at $100 per application, and $270 for the annual fee for installations on City-owned infrastructure. While the City has previously established actual costs related to processing wireless applications, analysis to comply with the costs incurred under the FCC Order would be established for rent/licensing fees.

**Radio Frequency Emissions:** The FCC Order does not change the existing Federal Telecommunications Act prohibiting the consideration of potential effects of radio frequency (RF) emissions in the decision making process. Further, no state or local government may dictate, or even consider, wireless entitlements based on “the environmental (health) effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” A zoning authority’s mere consideration of health effects, including potential effects on property values due to potential radio frequency emissions, may not serve as “substantial evidence” for purposes of denying a wireless facility.

### Small Wireless Facilities Definition

In order for an application to qualify as a SWF, the FCC has implemented a multi-part test that focuses on limiting physical dimensions. The test does include criteria for site location; however, the definition does not distinguish between whether the facility is or would be located in the public ROW. SWFs can be attached to existing utility poles, replacement poles, towers, streetlights, traffic signals, and buildings, located on either private or public property.

A small wireless facility is defined by the FCC Order as:

- SWFs can be up to 50 feet in height, including antennas, or mounted on structures no more than 10% taller than other adjacent structures; or that do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater.
- Each antenna must be less than 3 cubic feet in volume, no cumulative limit on antennas or antenna volume.
- All non-antenna equipment including any pre-existing equipment and any new equipment, must be less than 28 cubic feet in volume.
Facilities must not be subject to antenna structure registration under FCC (applies to 200 feet tall or in proximity to airport/tribal lands).

Facilities may not be placed in a manner that violates FCCs standards for RF emissions.

New Policy Changes

In light of the new limitations on local control, the City faces substantial exposure by failing to meet the new shot clock deadlines and enforcing subjective aesthetic standards. Failure to meet the deadline for action will be presumed to violate federal law. Accordingly, it is recommended that the City address the new Order in a three-step process. The first step is to adopt an Ordinance to add a new subsection to the Development Code authorizing the City Council to adopt a policy establishing the requirements and procedures for SWF under the FCC Order (Attachment 1, Exhibit B). The second step is to adopt the policy, which would include standards and procedures to comply with the Order (Attachment 1, Exhibit C). The policy could be adopted, amended and repealed by City Council resolution to allow the City to retain flexibility as changes in law and technology occur. The third step would be to develop new provisions related to pole licensing agreements and license fee analysis. Staff anticipates that step three or consideration of the City’s pole licensing agreements and associated fees will be brought forward for consideration following the successful completion of the first two steps.

In order to comply with the new Order, staff proposes the following changes to be implemented via the new policy (Attachment, Exhibit C):

- **Public Hearing/Appeal Process:** The City’s existing procedures require community meetings, public notification, and other public processes, including Planning Commission review, which cannot feasibly be completed within the new shortened shot clocks. In order to address the constraints of a 60-day shot clock, the new Policy and Procedure would remove the Planning Commission’s review and the public hearing processes from the consideration of SWF applications.

  Alternatively, a shortened review process would be adopted in the new Policy and Procedure, with final review authority by the City Manager, or designee, on any appeals instead of the Planning Commission. In the new Policy and Procedure, within approximately 10 days after an application is received and prior to any approval, conditional approval, or denial, the City would be required to mail a public notice to all properties within a 100-foot radius from the project site. The notice would contain information on the project and a statement that the Community and Economic Development Department will act on the application without a public hearing, but that any interested person or entity could appeal the decision directly to the City Manager, or his/her designee, within 10 days of the decision. The potential appellant/interested party would be required to request email notification on the decision and provide a valid email address.

  Following a full review of the application, the City would then issue a decision to the interested parties via email, and an appellant would have 10 days from the date of decision to submit an appeal to the City Manager or his/her designee for a final decision. Removing the public hearing process is the only viable way to meet the limited and mandated shot clocks,
maintain the City’s ability to realistically review and conditionally approve facilities, while leaving the final decision on any appeals to the City Manager.

- **Design Review and Aesthetic Standards:** The FCC Order requires that aesthetic standards be reasonable, objective, publically posted in advance, and no more burdensome than those imposed on other similar infrastructure. The FCC Order does not specify what types of aesthetic regulations would be objective but does clarify that they must be technically feasible and reasonably directed to avoid “intangible public harm” of unsightly out of character deployments. The City posted, on its website, objective Design Guidelines and Standards for wireless facilities on April 15, 2019 (Attachment 5). In addition to the criteria outlined in the Design Guidelines and Standards, the draft new SWF Policy and Procedure carries over some of the provisions in the existing ordinance that identify preferred locations and placement requirements while defining applicable physical design standards.

**Fees**

The City of Concord already has various wireless application fees contained in the City’s Master Fees and Charges Schedule. Staff has determined the lowest Council-adopted wireless application fee be a starting point for a deposit to review SWF applications in compliance with the Order, which limits fees for SWF applications to actual costs incurred. Currently the City’s Application fee for a Section 6409 Permit is $1,366.00 which includes: $279 for Engineering Division review, $82 for Building Division review, and $1,005 for the Planning Division review.

Under the Master Fees and Charges Schedule, adopted by Council in April 2019, the Planning Division’s hourly rate is charged at $201.00 per hour. Staff envisions the newly proposed Small Wireless Facility Application deposit being close to the fee collected for a Section 6409 Application at $1,005.00 for Planning’s review, which is roughly equivalent to 5 hours of review time. Staff will further assess review and processing time in order to calculate a proposed SWF Application deposit and will appropriately propose amendments to the City’s Master Fees and Charges Schedule, which will be considered by to the Council following the Commission’s approval of the Policy and Procedures, as proposed or with modifications. Modifications or amendments to the Policy and Procedure could impact the estimated review time and fee assessment. An existing Council adopted minor public notification fee of $402 will also be collected for SWF applications to cover the noticing cost.

**IV. Overview of Code Amendment**

In order to comply with the FCC Order, staff suggests the following text amendments to Chapter 18.205 (Wireless Communication Facilities for New and Substantially Changed Wireless Facilities):

As outlined in the proposed text amendments, (Attachment 1), a new definition for “Small Wireless Facilities” is proposed to be added to Development Code Section 18.205.020 in the Wireless Communications Chapter:

“‘Small Wireless Facility’ or “Small Wireless Facilities’ means wireless communication facilities that meet the following conditions: (1) the facilities are mounted on structures 50 feet or less in
height including their antennas, or are mounted on structures no more than 10 percent taller than adjacent structures, or do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and (2) with an antenna no more than three cubic feet and total wireless equipment no more than 28 cubic feet, or as defined by the Federal Communications Commission in 47 C.F.R §1.6002(l), as may be amended or superseded.”

In addition, the language and subsection underlined below are proposed to be added to the Development Code Section 18.205.030 under Applicability.

“D. Small Wireless Facilities. Notwithstanding any other provision of this chapter, all “Small Wireless Facilities” are subject to a permit as specified in a City Council policy, which may be adopted, amended and/or repealed by a resolution of the City Council. All small wireless facilities shall comply with the City Council policy. If such policy is repealed and not replaced, an application for a small wireless facility shall be processed pursuant to this chapter.”

The use of an ordinance to add similar language to the Development Code authorizing the Council to regulate SWF via an adopted Policy and Procedure has been the common approach by surrounding jurisdictions to comply with the new Order.

V. Fiscal Impact

The adoption of the proposed Ordinance and policy will not have any significant fiscal impact to the General Fund. Any potential impact to the General Fund under the new FCC Order will result in an analysis of the safe harbors fee rules when the pole license agreement changes are proposed.

VI. Environmental Determination

Pursuant to the California Environmental Quality Act of 1970, Public Resources Code Section 21000, et seq., as amended and implementing State CEQA Guidelines, Title 14, Chapter 3 of the California Code of Regulations (collectively, “CEQA “), this activity, the adoption of a development review process for wireless facilities is not considered a “project” as defined by CEQA Guidelines Section 15378 and Public Resources Code Section 21065. The adoption of this ordinance will not result in any activity that may cause a direct or reasonably foreseeable indirect physical change to the environment. Applications for any new small wireless facility or other infrastructure deployment, and/or change to an existing small wireless facility or other infrastructure deployment, would be subject to additional environmental review on a case-by-case basis. In addition, the proposed amendments to the Development Code are exempt pursuant to CEQA Guideline Section 15061(b)(3), “Review for Exemptions” of the CEQA Guidelines in that there is no possibility that the code amendments may have a significant effect on the environment and there is no reasonable possibility that the activity will have an effect on the environment due to unusual circumstances. Accordingly, no further environmental review is required.
VII. Public Contact

The Planning Commission Agenda was posted at least 72 hours prior to the public hearing. Additionally, the interested parties list, including the four major wireless providers Verizon, T-Mobile, AT&T, and Sprint were notified directly.

VIII. Summary and Recommendation

Staff recommends the Planning Commission adopt Resolution 19-17 PC, recommending the City Council approve an Ordinance to amend the City of Concord Development Code Chapter 18.205.030 to regulate small wireless facilities pursuant to applicable federal laws; and adopt a Policy and Procedure regulating small wireless facilities as defined by the Federal Communications Commission.

IX. Motion

I, (Comm. ______), hereby move that the Planning Commission adopt Resolution 19-17PC, recommending the City Council adopt an Ordinance to amend the City of Concord Development Code Chapter 18.205.030 to regulate small wireless facilities pursuant to applicable federal laws; and adopt a Policy and Procedure regulating small wireless facilities as defined by the Federal Communications Commission (PL19184). (Seconded by Comm._______.)

Prepared by: 
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Attachments:
1. PC Resolution No. 19-17.  
   Exhibit A. Text Amendment to 18.205.020.  
   Exhibit B. Text Amendment to 18.205.030.  
   Exhibit C. Draft City Council Policy and Procedure No. XX Regarding Small Wireless Facilities.
3. Telecom Law Firm, Wireless Facilities in Our Right of Way: Whose Streets are These Anyway?
BEFORE THE PLANNING COMMISSION
OF THE CITY OF CONCORD,
COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA

A RESOLUTION OF THE PLANNING
COMMISSION OF THE CITY OF CONCORD,
CALIFORNIA RECOMMENDING CITY
COUNCIL ADOPTION OF AN ORDINANCE
AMENDING CONCORD MUNICIPAL CODE
CHAPTER 18.205 FOR THE REGULATION OF
SMALL WIRELESS FACILITIES AND TO
APPROVE A POLICY AND PROCEDURE.

WHEREAS, in 2017, the City Council adopted Ordinance No. 17-11 to amend Chapter 18.205, Wireless Communication Facilities for New and Substantially Changed Wireless Facilities, and to add Chapter 18.207, Wireless Communication Facilities for Eligible Facilities Requests, to the Concord Municipal Code; and

WHEREAS, since the City amended its regulations, significant changes in federal laws that affect local authority over personal wireless service facilities and other related infrastructure deployments have occurred, which includes, without limitation, new regulations by the Federal Communications Commission (“FCC”) that: (1) prohibit temporary moratoria on telecommunications infrastructure deployment; (2) create a new regulatory classification for small wireless facilities; (3) alter existing “shot clock” regulations to require local public agencies to do more in less time; (4) establish a national standard for an effective prohibition that replaces the existing “significant gap” test adopted by the United States Court of Appeals for the Ninth Circuit; (5) and provide that a failure to act within the applicable shot clock timeframe presumptively constitutes an effective prohibition; and

WHEREAS, City staff, with assistance from outside counsel specialized in telecommunications infrastructure regulations, prepared a proposed amendment to the Concord Municipal Code that would allow the City to regulate small wireless facilities and other infrastructure deployments through a Policy and Procedure adopted by Council resolution rather than in a codified ordinance, (the “Amendment”). The proposed Amendment and Policy and Procedure are attached to this Resolution as Exhibits A, B, and C; and
WHEREAS, on October 2, 2019 at a duly noticed public hearing, the Planning Commission considered proposed Amendments to Chapter 18.205 of the Concord Development Code together with proposed Policy and Procedure regulations for compliance with changes in the law, reviewed and considered the staff report, other written reports, public testimony and other information contained in the record, hereinafter collectively referred to as “Project Information.” The Project Information that constitute the record of proceedings upon which the Planning Commission has based its recommendation are located in and may be obtained from the City of Concord Planning Division, 1950 Parkside Drive, Concord, CA 94519.

WHEREAS, the Planning Commission has determined and recommends that the City Council adopt the Ordinance with the proposed Amendment, and proposed Policy and Procedure.

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

The Planning Commission of the City of Concord does hereby make the following findings:

1. The recitals above are true and correct and are incorporated herein by reference.

2. The Planning Commission has reviewed, considered, and evaluated all of the Project Information prior to acting upon Amendment.

3. Pursuant to the California Environmental Quality Act of 1970, Public Resources Code Section 21000, et seq., as amended and implementing State CEQA Guidelines, Title 14, Chapter 3 of the California Code of Regulations (collectively, “CEQA”), this activity, the adoption of a development review process for wireless facilities is not considered a “project” as defined by CEQA Guidelines Section 15378 and Public Resources Code Section 21065. The adoption of this ordinance will not result in any activity that may cause a direct or reasonably foreseeable indirect physical change to the environment. Applications for any new small wireless facility or other infrastructure deployment, and/or change to an existing small wireless facility or other infrastructure deployment, would be subject to additional environmental review on a case-by-case basis. In addition, the proposed amendments to the Development Code are exempt pursuant to CEQA Guideline Section 15061(b)(3), “Review for Exemptions” of the CEQA
Guidelines in that there is no possibility that the code amendments may have a significant
effect on the environment and there is no reasonable possibility that the activity will have an
effect on the environment due to unusual circumstances. Accordingly, no further
environmental review is required.

Findings

4. Given the rapid and substantial changes in applicable law, the active and effective federal
prohibition on reasonable moratorium ordinances to allow local public agencies to study these
changes and develop appropriate responses and the significant adverse consequences for
noncompliance with these changes in applicable law, the Planning Commission finds that the
proposed Amendment, and Policy and Procedure allows for greater flexibility and
responsiveness to new federal and State laws in order to preserve the City’s traditional
authority to the maximum extent practicable.

5. Recent changes in federal law effectively limit local governments from exercising full zoning
controls over small wireless facilities and generally require that the regulations for small
wireless facilities be no more burdensome than those applied to other infrastructure
deployments. The proposed Amendment and Policy and Procedure would comply with the
recent changes in federal law by providing reasonable aesthetic regulations and a review and
approval process for such facilities within the City that is consistent with the new, shorter
timeframes to act on a permit application. The proposed Amendment would also instruct City
officials to use the standards in the proposed Policy and Procedure as guidelines for other
infrastructure deployments to the extent not specifically prohibited by applicable law.

General Plan

6. The proposed Amendment and Policy is consistent with the policies in the 2030 General Plan
and is necessary in order to improve the accuracy of the Development Code and its standards
and further achieve internal consistency and consistency with the rest of the Concord
Municipal and Development Code.

7. The proposed Amendments would not be detrimental to the public interest, health, safety,
convenience, or welfare of the City.

8. The Amendment is necessary in order for the Development Code to comply with both State and Federal law.

Amendment

9. The Planning Commission does hereby recommend that the City Council adopt an Ordinance to approve the Amendment and proposed Policy and Procedure, consistent with the revision exhibits identified in Exhibits A and B.

This resolution shall become effective immediately upon its passage and adoption.

PASSED AND ADOPTED this 2nd day of October, 2019 by the following vote:

AYES: Commissioners

NOES: Commissioners

ABSTAIN: Commissioners

ABSENT: Commissioners

Mindy Gentry
Secretary to the Planning Commission

Exhibits:

A. Text Amendment to 18.205.020 Definitions.
B. Text Amendment to 18.205.030 Applicability.
C. Policy and Procedure No. XX
“Section 6409” means Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. Section 1455(a), as may be amended.

“‘Small Wireless Facilities’ means wireless communication facilities that meet the following conditions: (1) the facilities are mounted on structures 50 feet or less in height including their antennas, or are mounted on structures no more than 10 percent taller than adjacent structures, or do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and (2) with an antenna no more than three cubic feet and total wireless equipment no more than 28 cubic feet, or as defined by the Federal Communications Commission in 47 C.F.R §1.6002(l), as may be amended or superseded.”

“Temporary wireless facilities” means portable wireless facilities intended or used to provide personal wireless services on a temporary or emergency basis, such as a large-scale special event in which more users than usual gather in a confined location or when a disaster disables permanent wireless facilities. Temporary wireless facilities include, without limitation, cells-on-wheels (“COWs”), sites-on-wheels (“SOWs”), cells-on-light-trucks (“COLTs”) or other similarly portable wireless facilities not permanently affixed to site on which it is located.
A. Applicable Wireless Facilities. This chapter applies to all existing wireless facilities within the city and all applications and requests for approval to construct, install, modify, collocate, relocate or otherwise deploy wireless facilities in the city, whether located or proposed to be located on private property or in the public right-of-way, unless exempted under subsection (B) of this section or governed under Chapter 18.207 CDC pursuant to subsection (C) of this section.

B. Exempt Wireless Facilities. Notwithstanding the provisions in subsection (A) of this section, the provisions in this chapter will not be applicable to:

1. Wireless facilities owned and operated by the city for public purposes;

2. Amateur radio facilities;

3. OTARD antennas;

4. Wireless facilities installed completely indoors and intended to extend signals for personal wireless services in a personal residence or a business (such as a femtocell or indoor distributed antenna system);

5. Wireless facilities or equipment owned and operated by CPUC-regulated electric companies for use in connection with electrical power generation, transmission and distribution facilities subject to CPUC General Order 131-D; and

6. Wireless facilities that are micro wireless facilities that are suspended on cables strung between existing utility poles in compliance with applicable codes by or for a communications services provider authorized to occupy the rights-of-way.

C. Request for Approval Pursuant to Section 6409. Any requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to Section 6409 will be first reviewed under Chapter 18.207 CDC. [Ord. 17-11 § 3 (Exh. 1)].
Proposed addition in **bold and red**

18.205.030 Applicability

D. Small Wireless Facilities. Notwithstanding any other provision of this chapter, all “small wireless facilities” as defined by the FCC in 47 C.F.R. § 1.6002(l), as may be amended or superseded, are subject to a permit as specified in a City Council policy, which may be adopted, amended and/or repealed by a resolution of the City Council. All small wireless facilities shall comply with the City Council policy. If such policy is repealed and not replaced, an application for a small wireless facility shall be processed pursuant to this chapter.
CITY COUNCIL POLICY AND PROCEDURE ON SMALL WIRELESS FACILITY INSTALLATIONS

1. BACKGROUND AND INTRODUCTION

The City of Concord continually strives for efficiency, sustainability, and transparency in City operations. Technology is a key component in achieving these goals. The use of tablets or similar devices (“tablets”) by designated such users will conserve both environmental, financial and staff resources.

In 1996, Congress adopted the Telecommunications Act to balance the national interest in advanced communications services and infrastructure with legitimate local government authority to enforce zoning and other regulations to manage infrastructure deployments on private property and in the public rights-of-way. Under section 704, which applies to personal wireless service facilities (i.e., cell sites), local governments retain all their traditional zoning authority subject to specifically enumerated limitations.\(^1\) Section 253 preempts local regulations that prohibit or effectively prohibit telecommunication services (i.e., common carrier services) except competitively neutral and nondiscriminatory regulations to manage the public rights-of-way and require fair and reasonable compensation.

Communication technologies have significantly changed since 1996. Whereas cell sites were traditionally deployed on tall towers and rooftops over low frequency bands that travel long distances, cell sites are increasingly installed on streetlights and utility infrastructure on new frequency bands that travel shorter distances. According to the Federal Communications Commission ("FCC") and the wireless industry, these so-called “small wireless facilities” or “small cells” are essential to the next technological evolution. The industry currently estimates that each national carrier will need to deploy between 30 and 60 small cells, connected by approximately 8 miles of fiber optic cable, per square mile.

On September 27, 2018, the FCC adopted a Declaratory Ruling and Third Report and Order, FCC 18-133 (the “FCC Order”), in connection with two informal rulemaking proceedings entitled Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, and Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84. In general, the FCC Order: (1) restricts the fees and other compensation state and local governments may receive from applicants; (2) requires all aesthetic regulations to be reasonable, no more burdensome than those applied to other infrastructure deployments, objective and published in advance; (3) mandates that local officials negotiate access agreements, review permit applications and conduct any appeals within significantly shorter timeframes; and (4) creates new evidentiary presumptions that make it more difficult for local governments to defend themselves if an action or failure to act is challenged in court. The regulations adopted in the FCC Order significantly curtail the local authority over wireless and wireline communication facilities reserved to State and local governments under sections 253 and 704 in the Telecommunications Act.

\(^1\) Local zoning regulations cannot prohibit or effectively prohibit personal wireless services, unreasonably discriminate among functionally equivalent services or regulate based on environmental impacts from radiofrequency (“RF”) emissions. In addition, local decisions must be made within a reasonable time and any denial requires a written decision based on substantial evidence in the written record.
2. PURPOSE AND INTENT

2.1. The City of Concord (“City”) intends this Policy and Procedure to establish reasonable, uniform and comprehensive standards and procedures for small wireless facilities deployment, construction, installation, collocation, modification, operation, relocation and removal within the City’s territorial boundaries, consistent with and to the extent permitted under federal and California state law. The standards and procedures contained in this Policy and Procedure are intended to, and should be applied to, protect and promote public health, safety and welfare, and balance the benefits that flow from robust, advanced wireless services with the City’s local values, which include without limitation the aesthetic character of the City, its neighborhoods and community. This Policy and Procedure is also intended to reflect and promote the community interest by (1) ensuring that the balance between public and private interests is maintained; (2) protecting the City’s visual character from potential adverse impacts and/or visual blight created or exacerbated by small wireless facilities and related communications infrastructure; (3) protecting and preserving the City’s environmental resources; (4) protecting and preserving the City’s public rights-of-way and municipal infrastructure located within the City’s public rights-of-way; and (5) promoting access to high-quality, advanced wireless services for the City’s residents, businesses and visitors.

2.2. This Policy and Procedure is intended to establish clear procedures for application intake and completeness review. The City of Concord City Council (“City Council”) finds that chronically incomplete applications significantly contribute to unreasonable delay and create barriers to infrastructure deployment. Chronically incomplete applications unfairly prejudice other applicants who may be prepared to submit complete applications for infrastructure in the same or substantially the same location. Chronically incomplete applications also unfairly prejudice the City’s ability to act on such applications within the “presumptively reasonable” timeframes established by the FCC. The provisions in this Policy and Procedure afford applicants and City staff opportunities for direct, real-time communication about completeness issues to mitigate incomplete applications prior to submittal. The provisions in this Policy and Procedure also encourage applicants to timely respond to incomplete notices.

2.3. This Policy and Procedure is intended to establish regulations, standards and guidelines for all infrastructure deployments unless specifically prohibited by applicable law. The City Council recognizes that different infrastructure deployments may be managed through other mechanisms, such as franchise or license agreements. Although such deployments may be exempt from the “small wireless facility administrative permit” established in this Policy and Procedure, the City Council intends that the City official or department that administers such deployment shall apply the same regulations, standards and guidelines to the permit or other approval issued in connection with a request for authorization under such franchise, license or other agreement. The City Council also recognizes that different infrastructure deployments may have different impacts on the public rights-of-way that require different regulations, standards or guidelines to protect public health, safety and welfare. However, to the extent that different regulations, standards or guidelines are applied to small wireless facilities or other infrastructure deployments, the City Council intends that one set be no more burdensome that the other when viewed under the totality of the circumstances.

2.4. This Policy and Procedure is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any personal wireless service provider’s ability to provide personal wireless services; (2) prohibit or effectively prohibit any entity’s ability to provide any telecommunications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management; (3) unreasonably discriminate among providers of functionally equivalent personal wireless services; (4) deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC’s regulations concerning such emissions; (5) prohibit any collocation or modification that the City may not deny under federal or California state law; (6) impose any unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee is charged; or (7) otherwise authorize the City to preempt any applicable federal or California law.
3. DEFINITIONS

The definitions in this Section 3 shall be applicable to the terms, phrases and words in this Policy and Procedure. Undefined terms, phrases or words will have the meanings assigned to them in 47 U.S.C. § 153 or, if not defined therein, will have the meaning assigned to them in Concord Municipal Code or, if not defined in either therein, will have their ordinary meanings. If any definition assigned to any term, phrase or word in this Section 3 conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

“Accessory equipment” means equipment other than antennas used in connection with a small wireless facility or other infrastructure deployment. The term includes “transmission equipment” as defined by the FCC in 47 C.F.R. § 1.6100(b)(8), as may be amended or superseded.

“Antenna” means the same as defined by the FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

“Batched application” means more than one application submitted at the same time.

“Collocation” means the same as defined by the FCC in 47 C.F.R. § 1.6002(g), as may be amended or superseded.

“Community and Economic Development Department” means the Community and Economic Development Department staff, which shall include the Planning, Engineering, Public Works, and Building Division as responsible for reviewing applications for small wireless administrative permit applications and vested with the authority to approve, conditionally approve, or deny such applications as provided in this Policy and Procedure.

“Community street” means a street designed to serve and connect to work, regional shopping, downtown, office, and civic destinations that are accessed by people coming from throughout Concord; medium to high volume of traffic with slow to moderate speeds; extensive vehicle and transit use, as well as extensive bicycle and pedestrian uses. The term “community street” is defined in the City of Concord General Plan, Chapter 5 Transportation.

“Concealed” or “Concealment” means concealing techniques that integrate the transmission equipment into the surrounding natural and/or built environment such that the average, untrained observer cannot directly view the equipment but would likely recognize the existence of the wireless facility or concealment technique. Camouflaging concealment techniques include but are not limited to: (1) antennas mounted within a radome above a streetlight; (2) equipment cabinets in the public rights-of-way painted or wrapped to match the background; and (3) cables and wiring concealed within a shroud and/or routed internally through the support structure. Where concealment measurements approved in this Policy and Procedure become technically infeasible due to advances in technology, the Community and Economic Development Department shall have the authority to approve alternative concealment techniques that are consistent with the goals and objectives of this Policy and Procedure.

“CPUC” means the California Public Utilities Commission established in the California Constitution, Article XII, § 5, or its duly appointed successor agency.

“Decorative pole” means any pole that includes decorative or ornamental features, design elements and/or materials intended to enhance the appearance of the pole or the public rights-of-way in which the pole is located.

“Downtown street” means a street designed to provide access to or directly serve the downtown core; including the surrounding mixed use and residential areas that transition to the downtown; medium to high volume of traffic and slow speeds; high mix of modes with a priority on pedestrian, bike and transit convenience. The term “downtown street” is defined in the City of Concord General Plan, Chapter 5 Transportation.

“Director” means the Community and Economic Development Director or his or her designee.

“FCC” means the Federal Communications Commission or its duly appointed successor agency.
“FCC Shot Clock” means the presumptively reasonable timeframe, accounting for any tolling or extension, within which the City generally must act on a request for authorization in connection with a personal wireless service facility, as such timeframe is defined by the FCC and as may be amended or superseded.

“Interested Persons entitled to notice” means the record owners and legal occupants of all properties within 100 feet from the proposed project site. Notice to the legal occupants shall be deemed given when sent to the property’s physical address.

“Ministerial permit” means any City-issued non-discretionary permit required to commence or complete any construction or other activity subject to the City’s jurisdiction. Ministerial permits may include, without limitation, any building permit, construction permit, electrical permit, encroachment permit, excavation permit, traffic control permit and/or any similar over-the-counter approval issued by the City’s departments.

“Neighborhood street” means a street designed to serve and connect to residential areas with destinations such as homes, schools, parks, and neighborhood retail; medium volume of traffic with slow to moderate speeds; significant walking and biking uses, in addition to autos. The term “neighborhood street” is defined in the City of Concord General Plan, Chapter 5 Transportation.

“OTARD” means an “over-the-air reception device” and includes all antennas and antenna supports covered by 47 C.F.R. § 1.4000(a)(1), as may be amended or superseded.

“Personal wireless services” means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

“Personal wireless service facilities” means the same as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded.

“Public right-of-way” or “public rights-of-way” means land or an interest in land which by deed, conveyance, agreement, easement, dedication, usage or process of law is reserved for or dedicated to or open to the use by the general public for road or highway purposes. The term does not include utility easements or private road easements unless such easement is reserved for, dedicated to, or open to the use by the general public for road or highway purposes.

“RF” means radio frequency or electromagnetic waves.

“Regional street” means a high-volume corridor with moderate to higher speeds serving vehicles traveling through Concord and beyond. Regional streets have four to six lanes, often with medians and parallel parking as appropriate. The term “regional street” is defined in the City of Concord General Plan, Chapter 5 Transportation.

“Residential street” means a quiet neighborhood street serving walkers, cyclists, and drivers with low traffic volumes and slow speeds. The term “residential street” as used in this Policy and Procedure is defined in the City of Concord General Plan, Chapter 5 Transportation.

“Service street” means a street designed to access office, service, and industrial uses; low to medium volume streets with slow to moderate speeds carrying truck traffic, in addition to passenger vehicles and low bicycle and pedestrian traffic. The term “service street” as used in this Policy and Procedure is defined in the City of Concord General Plan, Chapter 5 Transportation.

“Section 6409” means Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. § 1455(a), as may be amended or superseded.
“Shot clock days” means calendar days counted toward the presumptively reasonable time under the applicable FCC Shot Clock. The term “shot clock days” does not include any calendar days on which the FCC Shot Clock is tolled (i.e., “paused”). As an illustration and not a limitation, if an applicant applies on April 1, receives a valid incomplete notice on April 5 and then resubmits on April 20, only four “shot clock days” have elapsed because the time between the incomplete notice and resubmittal are not counted.

“Small wireless facility” or “small wireless facilities” means wireless communication facilities that meet the following conditions: (1) the facilities are mounted on structures 50 feet or less in height including their antennas, or are mounted on structures no more than 10 percent taller than adjacent structures, or do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and (2) with an antenna no more than three cubic feet and total wireless equipment no more than 28 cubic feet, or as defined by the Federal Communications Commission in 47 C.F.R §1.6002(l), as may be amended or superseded.

“Superintendent of Streets” means the same as defined in Concord Municipal Code Section 12.15.010, as may be amended or superseded.

“Support structure” means a “structure” as defined by the FCC in 47 C.F.R. § 1.6002(m), as may be amended or superseded.

“Technically infeasible” means a circumstance in which compliance with a specific requirement within this Policy and Procedure is physically impossible and not merely more difficult or expensive than a noncompliant alternative.

“Underground district” means any area in the City within which overhead wires, cables, cabinets and associated overhead equipment, appurtenances and other improvements are either (1) prohibited by ordinance, resolution or other applicable law; (2) scheduled to be relocated underground within 18 months from the time an application is submitted; or (3) primarily located underground at the time an application is submitted.

4. APPLICABILITY; REQUIRED PERMITS AND APPROVALS

4.1. Small Wireless Facilities. Except as expressly provided otherwise, the provisions in this Policy and Procedure shall be applicable to all existing small wireless facilities and all applications and requests for authorization to construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove or otherwise deploy small wireless facilities within the public rights-of-way within the City’s jurisdictional and territorial boundaries.

4.2. Small Wireless Facility Administrative Permit. A “small wireless facility administrative permit,” as in an application for an Administrative Permit subject to the Community and Economic Development Department review and approval, is required for any small wireless facility proposed on an existing, new or replacement structure.

4.3. Request for Approval Pursuant to Section 6409. Notwithstanding anything included in the Policy and Procedure to the contrary, requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to Section 6409 will be subject to Chapter 18.207 of the City’s Development Code and the current FCC rules and regulations “eligible facilities requests” as defined by FCC and as may be amended or superseded.

4.4. Other Permits and Approvals. In addition to a small wireless facility administrative permit, the applicant must obtain all other permits and regulatory approvals as may be required by any other federal, state or local government agencies, which includes without limitation any ministerial permits and/or other approvals issued by other City departments or divisions. All applications for ministerial permits submitted in connection with a proposed small wireless facility must contain a valid small wireless facility administrative permit issued by the City for the proposed facility. Any application for any ministerial permit(s) submitted without such small wireless facility administrative permit may be denied without
prejudice. Furthermore, any small wireless facility administrative permit granted under this Policy and Procedure shall remain subject to all lawful conditions and/or legal requirements associated with such other permits or approvals.

4.5. Other Infrastructure Deployments. To the extent that other infrastructure deployments, including without limitation any deployments that require approval pursuant to Concord Municipal Code Chapter 12.15, involve the same or substantially similar structures, apparatus, antennas, equipment, fixtures, cabinets, cables or improvements, the City Engineer shall apply the location and design provisions in this Policy and Procedure unless specifically prohibited by applicable law.

4.6. Exemptions. Notwithstanding anything in this Policy and Procedure to the contrary, a small wireless facility administrative permit shall not be required for:

a. wireless facilities or other infrastructure deployments owned and operated by the City for its use;
b. OTARD facilities; or
c. requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to Section 6409.

5. APPLICATION AND REVIEW PROCEDURES

5.1. Application Requirements for Small Wireless Facilities. In addition to any other publicly-stated requirements, all small wireless facility administrative permit applications for small wireless facilities must include the following information and materials:

a. Application Form. The applicant shall submit a complete, duly executed small wireless facility administrative permit application on the then-current form prepared by the City.

b. Application Fee. The applicant shall submit the applicable small wireless facility administrative permit application fee established by City Council resolution. Batched applications must include the applicable small wireless facility administrative permit application fee for each small wireless facility in the batch.

c. Small Wireless Facility Self Certification form. The applicant shall include a completed and signed self-certification form outlining how the proposed facility’s physical dimensions comply with the FCC Order definition of a wireless facility.

d. Construction Drawings. The applicant shall submit true and correct construction drawings, prepared, signed and stamped by a licensed or registered engineer, that depict all the existing and proposed improvements, equipment and conditions related to the proposed project, which includes without limitation any and all poles, posts, pedestals, traffic signals, towers, streets, sidewalks, pedestrian ramps, driveways, curbs, gutters, drains, handholes, manholes, fire hydrants, equipment cabinets, antennas, cables, trees and other landscape features. The construction drawings must: (i) contain cut sheets that contain the technical specifications for all existing and proposed antennas and accessory equipment, which includes without limitation the manufacturer, model number and physical dimensions; (ii) identify all potential support structures within 250 feet from the proposed project site and call out such structures’ overall height above ground level; (iii) depict the applicant’s preliminary plan for electric and data backhaul utilities, which shall include the anticipated locations for all conduits, cables, wires, handholes, junctions, transformers, meters, disconnect switches, and points of connection; and (iv) demonstrate that proposed project will be in full compliance with all applicable health and safety laws, regulations or other rules, which includes without limitation all building codes, electric codes, local street standards and specifications, and public utility regulations and orders.

e. Site Survey. For any small wireless facility, the applicant shall submit a survey prepared, signed and stamped by a licensed or registered engineer. The survey must identify and depict all existing...
boundaries, encroachments and other structures within 75 feet from the proposed project site and any new improvements, which includes without limitation all: (i) traffic lanes; (ii) all private properties and property lines; (iii) above and below-grade utilities and related structures and encroachments; (iv) fire hydrants, roadside call boxes and other public safety infrastructure; (v) streetlights, decorative poles, traffic signals and permanent signage; (vi) sidewalks, driveways, parkways, curbs, gutters and storm drains; (vii) benches, trash cans, mailboxes, kiosks and other street furniture; and (viii) existing trees, planters and other landscaping features.

f. **Photo Simulations.** The applicant shall submit site photographs and photo simulations that show the existing location and proposed small wireless facility in context from at least two vantage points within the public streets or other publicly accessible spaces, together with a vicinity map that shows the proposed site location and the photo location for each vantage point. At least one simulation must depict the small wireless facility from a vantage point approximately 50 feet from the proposed support structure or location. The photo simulations and vicinity map shall be incorporated into the construction plans submitted with the application.

g. **Project Narrative and Justification.** The applicant shall submit a written statement that explains in plain factual detail whether and why the proposed facility qualifies as a “small wireless facility” as defined by the FCC in 47 C.F.R. § 1.6002(l). A complete written narrative analysis will state the applicable standard and all the facts that allow the City to conclude the standard has been met—bare conclusions not factually supported do not constitute a complete written analysis. As part of the written statement the applicant must also include (i) whether and why the proposed support is a “structure” as defined by the FCC in 47 C.F.R. § 1.6002(m); and (ii) whether and why the proposed wireless facility meets each required finding for a small wireless facility administrative permit as provided in Section 7.2.

h. **RF Compliance Report.** The applicant shall submit an RF exposure compliance report that certifies that the proposed small wireless facility, both individually and cumulatively with all other emitters that contribute more than 5% to the cumulative emissions in the vicinity (if any), will comply with applicable federal RF exposure standards and exposure limits. The RF report must be prepared and certified by an RF engineer acceptable to the Director. The RF report must include the actual frequency and power levels (in watts effective radiated power) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also the boundaries of areas with RF exposures in excess of the controlled/occupational limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site. If the applicant submits a batched application, a separate RF report shall be prepared for each facility associated with the batch.

i. **Public Notices.** The applicant shall include with the application for each facility the current fee amount for Public Notifications as specified in the City Council approved Master Fees and Charges Schedule. The fee shall cover the staff time to prepare the public notice, compile addresses, and postage.

j. **Regulatory Authorization.** The applicant shall submit evidence of the applicant’s regulatory status under federal and California law to provide the services and construct the small wireless facility proposed in the application.

k. **Pole License Agreement.** For any small wireless facility proposed to be installed on any structure owned or controlled by the City and located within the public rights-of-way, the applicant shall submit an executed Pole License Agreement on a form prepared by the City that states the terms and conditions for such non-exclusive use by the applicant. No changes shall be
permitted to the City’s Pole License Agreement except as may be indicated on the form itself. Any unpermitted changes to the City’s Pole License Agreement shall be deemed a basis to deem the application incomplete. Refusal to accept the terms and conditions in the City’s Pole License Agreement shall be an independently sufficient basis to deny the application without prejudice.

l. Property Owner’s Authorization. The applicant shall submit a written authorization from the support structure owner(s) that authorizes the applicant to submit and accept a small wireless facility administrative permit in connection with the subject support structure.

m. Acoustic Analysis. The applicant shall submit an acoustic analysis prepared and certified by a licensed engineer for the proposed small wireless facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators demonstrating compliance with the City’s noise regulations. The acoustic analysis must also include an analysis of the manufacturers’ specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of an acoustic analysis, the applicant may submit evidence from the equipment manufacturer(s) that the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed the applicable noise limits.

5.2. Voluntary Presubmittal Conference. The City strongly encourages, but does not require, applicants to schedule and attend a presubmittal conference with the Director and other City staff. This voluntary, presubmittal conference does not cause the FCC Shot Clock to begin and is intended to streamline the review process through collaborative, informal discussion that includes, without limitation, the appropriate project classification and review process; any latent issues in connection with the proposed project and/or project site, including compliance with generally applicable rules for public health and safety; potential concealment issues or concerns (if applicable); coordination with other City departments implicated by the proposed project; and application completeness issues. Presubmittal conferences are especially encouraged when an applicant seeks to submit one or more batched applications so that the Director may advise the applicant about any staffing or scheduling issues that may hinder the City’s ability to meet the presumptively reasonable timeframes under the FCC Shot Clock. To mitigate unnecessary delays due to application incompleteness, applicants are encouraged (but not required) to bring any draft applications, plans, maps or other materials so that City staff may provide informal feedback and guidance about whether such applications or other materials may be incomplete or unacceptable in their then-current form. The Director will use reasonable efforts to provide the applicant with an appointment within approximately five working days after receiving a written request and any applicable fee or deposit to reimburse the City for its reasonable costs to provide the staff time and services rendered in the presubmittal conference.

5.3. Submittal Appointments. All applications must be submitted in person to the City at a pre-scheduled appointment with the Community and Economic Development Department, on the specified days authorized by the Department for submittal appointments which are Mondays and Tuesdays only. Prospective applicants may generally submit one application per appointment, or up to five individual applications per appointment as a batch. Potential applicants may schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants for any other development project as determined by the Director. The Director shall use reasonable efforts to offer an appointment within five working days after the Director receives a written request from a potential applicant. Any purported application received without an appointment, whether delivered in-person, by mail or through any other means, will not be considered duly filed, whether the City retains, returns or destroys the materials received.

5.4. Batched Applications. Applicants may submit up to five individual applications for a small wireless facility administrative permit in a “batch” to be reviewed together at the same time; provided, however, that (i) all small wireless facilities in a batch must be proposed with substantially the same equipment in
the same configuration on the same support structure type; (ii) each application in a batch must meet all
the requirements for a complete application, which includes without limitation the application fee for
each application in the batch; (iii) if any individual application within a batch is deemed incomplete, the
entire batch shall be automatically deemed incomplete; (iv) if any application is withdrawn or deemed
withdrawn from a batch, all other applications in the entire batch shall be automatically deemed
withdrawn; and (v) if any application in a batch fails to meet the required findings for approval, the
entire batch shall be denied in the manner described in Section 7.3.

5.5. Additional Procedures. The City Council authorizes the Community and Economic Development
Director to establish other reasonable rules and regulations for duly filed applications, which may
include, without limitation, regular hours for appointments with applicants, as the Community and
Economic Development Director deems necessary or appropriate to organize, document and manage the
application intake process. All such rules and regulations must be in written form and publicly stated to
provide all interested parties with prior notice.

5.6. Incomplete Applications Deemed Withdrawn. Any application governed under this Policy and
Procedure shall be automatically deemed withdrawn by the applicant when the applicant fails to submit a
substantive response to the Director within 60 calendar days after the Community and Economic
Development Department deems the application incomplete by written notice. As used in this subsection
(5.6.), a “substantive response” must include, at a minimum, the complete materials identified as
incomplete in the written incomplete notice.

5.7. Additional Administrative Requirements and Regulations. The City Council authorizes the Director
to develop, publish and from time to time update or amend permit application requirements, forms,
checklists, guidelines, informational handouts and other related materials that the Director finds
necessary, appropriate or useful for processing any application governed under this Policy and
Procedure. The Director further authorizes the Director to establish other reasonable rules and
regulations for duly filed applications, which may include without limitation regular hours for
appointments and/or submittals without appointments, as the Director deems necessary or appropriate to
organize, document and manage the application intake process. All such requirements, materials, rules
and regulations must be in written form and publicly stated to provide all interested parties with prior
notice.

6. PUBLIC NOTICES

6.1. Application Submittal Notice. Within approximately 10 calendar days after an application is received
and prior to any approval, conditional approval or denial, the City shall mail public notice to interested
persons entitled to notice. The notice must contain: (1) a general project description; (2) the applicant’s
identification and contact information as provided on the application submitted to the City; (3) contact
information for the Community and Economic Development Department contact person for interested
parties to submit comments; (4) a statement that the Community and Economic Development
Department will act on the application without a public hearing but that any interested person or entity
may appeal the Community and Economic Development Department’s decision directly to the City
Manager or his/her designee; and (5) if the application is for a small wireless facility, a general statement
that the FCC requires the City to take final action on such applications within 60 days for collocations
and 90 days for facilities on new support structures; (6) if any persons or entities want to be notified of
the decision, they must provide a valid email address to the Community and Economic Development
contact person identified on the public notice.

6.2. Application Decision Notice. Within five calendar days after the Community and Economic
Development Department renders a decision on a small wireless facility administrative permit
application, the Director shall notify the applicant and any persons or entities that have specifically
requested to be notified of the decision. If the Community and Economic Development Department
denies the application (with or without prejudice), the written notice must contain the reasons for the decision.

7. DECISIONS

7.1. Administrative Decision. Not less than 10 calendar days after the public notice required in Section 6.1. is sent, and not more than 29 calendar days after the application has been deemed complete, Community and Economic Development Department shall approve, conditionally approve or deny a complete and duly filed small wireless facility administrative permit application without a public hearing.

7.2. Required Findings for Approval. The Community and Economic Development Department may approve or conditionally approve a duly filed application for a small wireless facility administrative permit, when all the findings can be made:

a. The application is complete or deemed complete;

b. The proposed project complies with all applicable design standards in this Policy and Procedure and any published City Design Guidelines;

c. The proposed project would be in the most preferred location within 250 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more-preferred location(s) within 250 feet would be technically infeasible;

d. The proposed project would not be located on a prohibited support structure identified in this Policy and Procedure;

e. The proposed project would be on the most preferred support structure within 250 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more-preferred support structure(s) within 250 feet would be technically infeasible;

f. If the proposed project involves a wireless facility, the proposed project fits within the definition for a “small wireless facility” as defined by the FCC;

g. If the proposed project involves a wireless facility, the applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions; and

h. All public notices required for the application have been given.

7.3. Conditional Approvals; Denials Without Prejudice. Subject to any applicable federal or California laws, nothing in this Policy and Procedure is intended to limit the Community and Economic Development Department’s ability to conditionally approve or deny without prejudice any small wireless facility administrative permit application as may be necessary or appropriate to ensure compliance with this Policy and Procedure.

7.4. Appeals. Any interested person or entity may appeal the decision by the Community and Economic Development Director to the City Manager. Appeals must be filed within seven days after the date of the Community Development Director’s decision; provided, however, that appeals from an approval shall not be permitted when based solely on the environmental effects from radio frequency emissions that are compliant with applicable FCC regulations and guidelines. The notice of appeal must contain a short and plain statement of the basis for the appeal. The City Manager or his/her designee shall consider the
appeal de novo and issue the applicant and the appellant a written decision within 15 calendar days of receipt of the appeal.

8. CONDITIONS OF APPROVAL

8.1. Standard Conditions. Except as may be authorized in subsection (8.2.), all small wireless facility administrative permits issued under this Policy and Procedure shall be automatically subject to the conditions in this subsection (8.1.).

a. Permit Term. This permit will automatically expire 10 years and one day from its issuance unless California Government Code § 65964(b) authorizes the City to establish a shorter term for public safety reasons. Any other permits or approvals issued in connection with any collocation, modification or other change to this wireless facility, which includes without limitation any permits or other approvals deemed-granted or deemed-approved under federal or state law, will not extend this term limit unless expressly provided otherwise in such permit or approval or required under federal or state law.

b. Permit Renewal. Not more than one year before this small wireless facility administrative permit expires, the permittee may apply for permit renewal. The permittee must demonstrate that the subject small wireless facility or other infrastructure deployment complies with all the conditions of approval associated with this small wireless facility administrative permit and all applicable provisions in the Concord Municipal Code and this Policy and Procedure that exist at the time the decision to renew or not renew is rendered. The Director may modify or amend the conditions on a case-by-case basis as may be necessary or appropriate to ensure compliance with the Concord Municipal Code, this Policy and Procedure or other applicable law. Upon renewal, this small wireless facility administrative permit will automatically expire 10 years and one day from its issuance.

c. Post-Installation Certification. Within 60 calendar days after the permittee commences full, unattended operations of a small wireless facility or other infrastructure deployment approved or deemed-approved, the permittee shall provide the Director with documentation reasonably acceptable to the Director that the small wireless facility or other infrastructure deployment has been installed and/or constructed in strict compliance with the approved construction drawings and photo simulations. Such documentation shall include without limitation as-built drawings, GIS data and site photographs.

d. Build-Out Period. This small wireless facility administrative permit will automatically expire 12 months from the approval date (the "build-out period") unless the permittee obtains all other permits and approvals required to install, construct and/or operate the approved small wireless facility or other infrastructure deployment, which includes without limitation any permits or approvals required by the any federal, state or local public agencies with jurisdiction over the subject property, support structure or the small wireless facility or other infrastructure deployment and its use. The permittee may request in writing, and the City may grant in writing, one six-month extension if the permittee submits substantial and reliable written evidence demonstrating justifiable cause for a six-month extension. If the build-out period and any extension finally expires, the permit shall be automatically void but the permittee may resubmit a complete application, including all application fees, for the same or substantially similar project.

e. Site Maintenance. The permittee shall keep the site, which includes without limitation any and all improvements, equipment, structures, access routes, fences and landscape features, in a neat, clean and safe condition in accordance with the approved construction drawings and all conditions in this ROW use permit. The permittee shall keep the site area free from all litter and debris at all times. The permittee, at no cost to the City, shall remove and remediate any graffiti.
or other vandalism at the site within 48 hours after the permittee receives notice or otherwise becomes aware that such graffiti or other vandalism occurred.

f. **Compliance with Laws.** The permittee shall maintain compliance at all times with all federal, state and local statutes, regulations, orders or other rules that carry the force of law (“laws”) applicable to the permittee, the subject property, the small wireless facility or other infrastructure deployment or any use or activities in connection with the use authorized in this small wireless facility administrative permit, which includes without limitation any laws applicable to human exposure to RF emissions. The permittee expressly acknowledges and agrees that this obligation is intended to be broadly construed and that no other specific requirements in these conditions are intended to reduce, relieve or otherwise lessen the permittee’s obligations to maintain compliance with all laws. No failure or omission by the City to timely notice, prompt or enforce compliance with any applicable provision in the Concord Municipal Code, this Policy and Procedure any permit, any permit condition or any applicable law or regulation, shall be deemed to relieve, waive or lessen the permittee’s obligation to comply in all respects with all applicable provisions in the Concord Municipal Code, this Policy and Procedure, any permit, any permit condition or any applicable law or regulation.

g. **Adverse Impacts on Other Properties.** The permittee shall use all reasonable efforts to avoid any and all unreasonable, undue or unnecessary adverse impacts on nearby properties that may arise from the permittee’s or its authorized personnel’s construction, installation, operation, modification, maintenance, repair, removal and/or other activities on or about the site. The permittee shall not perform or cause others to perform any construction, installation, operation, modification, maintenance, repair, removal or other work that involves heavy equipment or machines except during normal construction work hours authorized by the Concord Municipal Code. The restricted work hours in this condition will not prohibit any work required to prevent an actual, immediate harm to property or persons, or any work during an emergency declared by the City or other state or federal government agency or official with authority to declare an emergency within the City. The Director may issue a stop work order for any activities that violates this condition in whole or in part.

h. **Inspections; Emergencies.** The permittee expressly acknowledges and agrees that the City’s officers, officials, staff, agents, contractors or other designees may enter onto the site and inspect the improvements and equipment upon reasonable prior notice to the permittee. Notwithstanding the prior sentence, the City’s officers, officials, staff, agents, contractors or other designees may, but will not be obligated to, enter onto the site area without prior notice to support, repair, disable or remove any improvements or equipment in emergencies or when such improvements or equipment threatens actual, imminent harm to property or persons. The permittee, if present, may observe the City’s officers, officials, staff or other designees while any such inspection or emergency access occurs.

i. **Permittee’s Contact Information.** Within 10 calendar days after the final permit approval is issued, the permittee shall furnish the City with accurate and up-to-date contact information for a person responsible for the small wireless facility or other infrastructure deployment, which includes without limitation such person’s full name, title, direct telephone number, facsimile number, mailing address and email address. The permittee shall keep such contact information up-to-date at all times and promptly provide the City with updated contact information if either the responsible person or such person’s contact information changes.

j. **Indemnification.** The permittee and, if applicable, the property owner upon which the small wireless facility or other infrastructure deployment is installed shall defend, indemnify and hold harmless the City, City Council and the City’s boards, commissions, agents, officers, officials, employees and volunteers (collectively, the “indemnities”) from any and all (i) damages,
liabilities, injuries, losses, costs and expenses and from any and all claims, demands, law suits, writs and other actions or proceedings (“claims”) brought against the indemnitees to challenge, attack, seek to modify, set aside, void or annul the City’s approval of this small wireless facility administrative permit, and (ii) other claims of any kind or form, whether for personal injury, death or property damage, that arise from or in connection with the permittee’s or its agents’, directors’, officers’, employees’, contractors’, subcontractors’, licensees’ or customers’ acts or omissions in connection with this small wireless facility administrative permit or the small wireless facility or other infrastructure deployment. In the event the City becomes aware of any claims, the City will use best efforts to promptly notify the permittee and the property owner (if applicable) and shall reasonably cooperate in the defense. The permittee expressly acknowledges and agrees that the City shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the City’s defense, and the property owner and/or permittee (as applicable) shall promptly reimburse the City for any costs and expenses directly and necessarily incurred by the City in the course of the defense. The permittee expressly acknowledges and agrees that the permittee’s indemnification obligations under this condition are a material consideration that motivates the City to approve this small wireless facility administrative permit, and that such indemnification obligations will survive the expiration, revocation or other termination of this small wireless facility administrative permit.

k. **Performance Bond.** Before the City issues any permits required to commence construction in connection with this permit, the permittee shall post a performance bond from a surety and in a form acceptable to the Director in an amount reasonably necessary to cover the cost to remove the improvements and restore all affected areas based on a written estimate from a qualified contractor with experience in wireless facilities or other infrastructure removal. The written estimate must include the cost to remove all equipment and other improvements, which includes without limitation all antennas, radios, batteries, generators, utilities, cabinets, mounts, brackets, hardware, cables, wires, conduits, structures, shelters, towers, poles, footings and foundations, whether above ground or below ground, constructed or installed in connection with the wireless facility, plus the cost to completely restore any areas affected by the removal work to a standard compliant with applicable laws. In establishing or adjusting the bond amount required under this condition, the Director shall take into consideration any information provided by the permittee regarding the cost to remove the small wireless facility or other infrastructure deployment to a standard compliant with applicable laws. The performance bond shall expressly survive the duration of the permit term to the extent required to effectuate a complete removal of the subject wireless facility or other infrastructure deployment in accordance with this condition. Alternatively a wireless carrier may enter into a Substantial Performance Bond Agreement to meet the Performance Bond requirements and intent, which could be used to cover the individual application requirements for each small wireless facility administrative permit application submitted by or on behalf of the carrier. The Substantial Performance Bond amount is required to be approved by the City of Concord and shall include a Bond Agreement in a form acceptable to the City of Concord. Language in the Substantial Performance Bond Agreement would clarify the Substantial Performance Bond could be used by the City in lieu of individual Performance Bonds required for each small wireless facility administrative application permit.

l. **Permit Revocation.** Any permit granted under this Policy and Procedure may be revoked in accordance with this Policy and Procedure. The Director may initiate revocation proceedings when the Director has information that the facility may not be in compliance with all applicable laws, which includes without limitation, any permit in connection with the facility and any associated conditions with such permit(s). Before any public hearing to revoke a permit granted under this Policy and Procedure, the Director must issue a written notice to the permittee that specifies (i) the facility; (ii) the violation(s) to be corrected; (iii) the timeframe in which the permittee must correct such violation(s); and (iv) that, in addition to all other rights and remedies the City may pursue, the City may initiate revocation proceedings for failure to correct such
violation(s). A permit granted under this Policy and Procedure may be revoked only by the City Council after a duly notice public hearing. The City Council may revoke a permit when it finds substantial evidence in the written record to show that the facility is not in compliance with any applicable laws, which includes without limitation, any permit in connection with the facility and any associated conditions with such permit(s). Any decision by the City Council to revoke or not revoke a permit shall be final and not subject to any further appeals. Within five business days after the City Council adopts a resolution to revoke a permit, the Director shall provide the permittee with a written notice that specifies the revocation and the reasons for such revocation.

m. **Record Retention.** Throughout the permit term, the permittee must maintain a complete and accurate copy of the written administrative record, which includes without limitation the small wireless facility administrative permit, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval, any ministerial permits or approvals issued in connection with this approval and any records, memoranda, documents, papers and other correspondence entered into the public record in connection with the small wireless facility administrative permit (collectively, “records”). If the permittee does not maintain such records as required in this condition, any ambiguities or uncertainties that would be resolved by inspecting the missing records will be construed against the permittee. The permittee shall protect all records from damage from fires, floods and other hazards that may cause deterioration. The permittee may keep records in an electronic format; provided, however, that hard copies or electronic records kept in the City’s regular files will control over any conflicts between such City-controlled copies or records and the permittee’s electronic copies, and complete originals will control over all other copies in any form. The requirements in this condition shall not be construed to create any obligation to create or prepare any records not otherwise required to be created or prepared by other applicable laws. Compliance with the requirements in this condition shall not excuse the permittee from any other similar record-retention obligations under applicable law.

n. **Abandoned Facilities.** The small wireless facility or other infrastructure deployment authorized under this small wireless facility administrative permit shall be deemed abandoned if not operated for any continuous six-month period. Within 90 days after a small wireless facility or other infrastructure deployment is abandoned or deemed abandoned, the permittee and/or property owner shall completely remove the small wireless facility or other infrastructure deployment and all related improvements and shall restore all affected areas to a condition compliant with all applicable laws, which includes without limitation the Concord Municipal Code. In the event that neither the permittee nor the property owner complies with the removal and restoration obligations under this condition within said 90-day period, the City shall have the right (but not the obligation) to perform such removal and restoration with or without notice, and the permittee and property owner shall be jointly and severally liable for all costs and expenses incurred by the City in connection with such removal and/or restoration activities.

o. **Landscaping.** The permittee shall replace any landscape features damaged or displaced by the construction, installation, operation, maintenance or other work performed by the permittee or at the permittee’s direction on or about the site. If any trees are damaged or displaced, the permittee shall hire and pay for a licensed arborist to select, plant and maintain replacement landscaping in an appropriate location for the species. Only International Society of Arboriculture certified workers under the supervision of a licensed arborist shall be used to install the replacement tree(s). Any replacement tree must be substantially the same size as the damaged tree or as otherwise approved by the City. The permittee shall, at all times, be responsible to maintain any replacement landscape features.

p. **Cost Reimbursement.** The permittee acknowledges and agrees that (i) the permittee’s request for authorization to construct, install and/or operate the wireless facility will cause the City to incur
costs and expenses; (ii) the permittee shall be responsible to reimburse the City for all costs incurred in connection with the permit, which includes without limitation costs related to application review, permit issuance, site inspection and any other costs reasonably related to or caused by the request for authorization to construct, install and/or operate the wireless facility or other infrastructure deployment; (iii) any application fees required for the application may not cover all such reimbursable costs and that the permittee shall have the obligation to reimburse the City for all such costs 10 days after a written demand for reimbursement and reasonable documentation to support such costs; and (iv) the City shall have the right to withhold any permits or other approvals in connection with the wireless facility until and unless any outstanding costs have been reimbursed to the City by the permittee.

q. Future Undergrounding Programs. Notwithstanding any term remaining on any ROW use permit, if other utilities or communications providers in the public rights-of-way underground their facilities in the segment of the public rights-of-way where the permittee’s small wireless facility or other infrastructure deployment is located, the permittee must also underground its equipment, except the antennas and any approved electric meter, at approximately the same time. Accessory equipment such as radios and computers that require an environmentally controlled underground vault to function shall not be exempt from this condition. Small wireless facilities and other infrastructure deployments installed on wood utility poles that will be removed pursuant to the undergrounding program may be reinstalled on a streetlight that complies with the City’s standards and specifications. Such undergrounding shall occur at the permittee’s sole cost and expense except as may be reimbursed through tariffs approved by the state public utilities commission for undergrounding costs.

r. Electric Meter Upgrades. If the commercial electric utility provider adopts or changes its rules obviating the need for a separate or ground-mounted electric meter and enclosure, the permittee on its own initiative and at its sole cost and expense shall remove the separate or ground-mounted electric meter and enclosure. Prior to removing the electric meter, the permittee shall apply for any encroachment and/or other ministerial permit(s) required to perform the removal. Upon removal, the permittee shall restore the affected area to its original condition that existed prior to installation of the equipment.

s. Rearrangement and Relocation. The permittee acknowledges that the City, in its sole discretion and at any time, may: (i) change any street grade, width or location; (ii) add, remove or otherwise change any improvements in, on, under or along any street owned by the City or any other public agency, which includes without limitation any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric or telecommunications; and/or (iii) perform any other work deemed necessary, useful or desirable by the City (collectively, “City work”). The City reserves the rights to do any and all City work without any admission on its part that the City would not have such rights without the express reservation in this small wireless facility administrative permit. If the Superintendent of Streets determines that any City work will require the permittee’s small wireless facility located in the public rights-of-way to be rearranged and/or relocated, the permittee shall, at its sole cost and expense, do or cause to be done all things necessary to accomplish such rearrangement and/or relocation. If the permittee fails or refuses to either permanently or temporarily rearrange and/or relocate the permittee’s small wireless facility or other infrastructure deployment within a reasonable time after the Superintendent of Streets’ notice, the City may (but will not be obligated to) cause the rearrangement or relocation to be performed at the permittee’s sole cost and expense. The City may exercise its rights to rearrange or relocate the permittee’s small wireless facility or other infrastructure deployment without prior notice to permittee when the Superintendent of Streets determines that City work is immediately necessary to protect public health or safety. The permittee shall reimburse the City for all costs and expenses in connection with such work within 10 days after a written demand for reimbursement and reasonable documentation to support such costs.
t. **Truthful and Accurate Statements.** The permittee acknowledges that the City’s approval relies on the written and/or oral statements by permittee and/or persons authorized to act on permittee’s behalf. In any matter before the City in connection with the small wireless facility administrative permit or the small wireless facility or other infrastructure approved under the small wireless facility administrative permit, neither the permittee nor any person authorized to act on permittee’s behalf shall, in any written or oral statement, intentionally provide material factual information that is incorrect or misleading or intentionally omit any material information necessary to prevent any material factual statement from being incorrect or misleading.

8.2. **Modified Conditions.** The City Council authorizes the Director to modify, add or remove conditions to any small wireless facility administrative permit as the Director deems necessary or appropriate to: (1) protect and/or promote the public health, safety and welfare; (2) tailor the standard conditions in subsection (8.1.) to the particular facts and circumstances associated with the deployment; and/or (3) memorialize any changes to the proposed deployment need for compliance with the Concord Municipal Code, this Policy and Procedure, generally applicable health and safety requirements and/or any other applicable laws. To the extent required by applicable FCC regulations, the Director shall take care to ensure that any different conditions applied to small wireless facilities are no more burdensome than those applied to other infrastructure deployments.

9. **LOCATION STANDARDS**

9.1. **Location Preferences.** To better assist applicants and decision makers understand and respond to the community’s aesthetic preferences and values, this subsection sets out listed preferences for locations to be used in connection with small wireless facilities in an ordered hierarchy. Applications that involve lesser-preferred locations may be approved so long as the applicant demonstrates by clear and convincing evidence in the written record that either (1) no more preferred locations or structures exist within 250 feet from the proposed site; or (2) any more preferred locations or structures within 250 feet from the proposed site would be technically infeasible as supported. The City prefers small wireless facilities in the public rights-of-way to be installed in locations, ordered from most preferred to least preferred, as follows:

a. locations on or along regional streets;
b. locations on or along service streets;
c. locations on or along downtown streets;
d. locations on or along community streets;
e. locations on or along neighborhood streets;
f. any location within 250 feet from an existing small wireless facility;
g. any location within 250 feet from any structure approved for a residential use;
h. any location within 100 feet from any structure approved for a residential use.

9.2. **Prohibited Support Structures.** Except when authorized as a pre-approved design pursuant to this Policy and Procedure, small wireless facilities shall not be permitted on the following support structures:

a. decorative poles;
b. new, non-replacement wood poles;
c. any utility pole scheduled for removal or relocation within 18 months from the time the Director acts on the application.

9.3. **Encroachments Over Private Property.** No small wireless facility antennas, accessory equipment or other improvements may encroach onto or over any private or other property outside the public rights-of-way without the property owner’s express written consent.
9.4. **No Interference with Other Uses.** Small wireless facilities and any associated antennas, accessory equipment or improvements shall not be located in any place or manner that would physically interfere with or impede access to any: (1) worker access to any above-ground or underground infrastructure for traffic control, streetlight or public transportation, including without limitation any curb control sign, parking meter, vehicular traffic sign or signal, pedestrian traffic sign or signal, barricade reflectors; (2) access to any public transportation vehicles, shelters, street furniture or other improvements at any public transportation stop; (3) worker access to above-ground or underground infrastructure owned or operated by any public or private utility agency; (4) fire hydrant or water valve; (5) access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way; or (6) access to any fire escape.

9.5. **Replacement Pole Location.** All replacement poles must: (1) be located as close to the removed pole as possible; (2) be aligned with the other existing poles along the public rights-of-way; and (3) be compliant with all applicable standards and specifications by the Superintendent of Streets or his or her designee.

9.6. **Additional Placement Requirements.** In addition to all other requirements in this Policy and Procedure, small wireless facilities, other infrastructure deployments and all related equipment and improvements shall:
   a. be placed as close as possible to the property line between two parcels that abut the public rights-of-way;
   b. not be placed directly in front of any door or window;
   c. not be placed within any sight distance triangles at any intersections;
   d. be placed at least five feet away from any driveway or established pedestrian pathway between a residential structure and the public rights-of-way;
   e. be placed at least 50 feet away from any driveways for police stations, fire stations or other emergency responder facilities.

10. **DESIGN STANDARDS**

10.1. **Finishes.** All exterior surfaces shall be painted, colored and/or wrapped in flat, nonreflective hues that match the underlying support structure or blend with the surrounding environment. All surfaces shall be treated with graffiti-resistant sealant. All finishes shall be subject to the Director’s prior approval.

10.2. **Noise.** Small wireless facilities and all associated antennas, accessory equipment and other improvements must comply with all applicable noise control standards and regulations in Concord Municipal Code Section 18.150.130, as may be amended or superseded, the City’s general plan, and shall not exceed, either individually or cumulatively, the applicable ambient noise limit in the subject zoning district.

10.3. **Lights.** All lights and light fixtures must be aimed and shielded so that their illumination effects are directed downwards and confined within the public rights-of-way in a manner consistent with any other standards and specifications by the Superintendent of Streets or his or her designee. All antennas, accessory equipment and other improvements with indicator or status lights must be installed in locations and within enclosures that mitigate illumination impacts visible from publicly accessible areas.

10.4. **Trees and Landscaping.** Small wireless facilities and other infrastructure deployments shall not be installed (in whole or in part) within any tree drip line. Small wireless facilities and other infrastructure deployments may not displace any existing tree or landscape features unless: (A) such displaced tree or landscaping is replaced with native and/or drought-resistant trees, plants or other landscape features approved by the Director and (B) the applicant submits and adheres to a landscape maintenance plan. Only International Society of Arboriculture certified workers under a licensed arborist’s supervision shall be used to install the replacement tree(s). Any replacement tree must be
substantially the same size as the damaged tree unless approved by the Director. The permittee shall, at all times, be responsible to maintain any replacement landscape features.

10.5. **Signs and Advertisements.** All small wireless facilities and other infrastructure deployments that involve RF transmitters must include signage that accurately identifies the site owner/operator, the owner/operator’s site name or identification number and a toll-free number to the owner/operator’s network operations center. Small wireless facilities and other infrastructure deployments may not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under FCC or other United States governmental agencies for compliance with RF emissions regulations.

10.6. **Site Security Measures.** Small wireless facilities and other infrastructure deployments may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices, to prevent unauthorized access, theft or vandalism. The Director shall not approve any barbed wire, razor ribbon, electrified fences or any similarly dangerous security measures. All exterior surfaces on small wireless facilities shall be constructed from or coated with graffiti-resistant materials.

10.7. **Compliance with Health and Safety Regulations.** All small wireless facilities and other infrastructure deployments shall be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions and compliance with the federal Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.).

10.8. **Antennas.** The provisions in this subsection (10.8.) are generally applicable to all antennas.

   a. **Shrouding.** All antennas and associated cables, jumpers, wires, mounts, masts, brackets and other connectors and hardware must be installed within a single shroud or radome. For pole-top antennas, the shroud shall not exceed two times the median pole diameter and must taper down to pole. For side-arm antennas, the shroud must cover the cross arm and any cables, jumpers, wires or other connectors between the vertical riser and the antenna.

   b. **Antenna Volume.** Each individual antenna associated with a single small wireless facility shall not exceed three cubic feet. The cumulative volume for all antennas on a single small wireless facility shall not exceed: (A) three cubic feet in residential areas; or (B) six cubic feet in nonresidential areas.

   c. **Overall Height.** No antenna may extend more than five feet above the support structure, plus any minimum separation between the antenna and other pole attachments required by applicable health and safety regulations.

   d. **Horizontal Projection.** Side-mounted antennas, where permitted, shall not project: (A) more than 24 inches from the support structure; (B) over any roadway for vehicular travel; or (C) over any abutting private property. If applicable laws require a side-mounted antenna to project more than 24 inches from the support structure, the projection shall be no greater than required for compliance with such laws.

10.9. **Accessory Equipment Volume.** The cumulative volume for all accessory equipment for a single small wireless facility or other infrastructure deployment shall not exceed: (A) 9.5 cubic feet in residential areas or (B) 17 cubic feet in nonresidential areas. The volume limits in this subsection do not apply to any undergrounded accessory equipment.

10.10. **Undergrounded Accessory Equipment.**
a. **Where Required.** Accessory equipment (other than any electric meter (where permitted) emergency disconnect switch) shall be placed underground when proposed in any (A) underground district or (B) any location where the Director finds substantial evidence that the additional above-ground accessory equipment would incommode the public’s uses in the public rights-of-way. Notwithstanding the preceding sentence, the Director may grant an exception when the applicant demonstrates by clear and convincing evidence that compliance with this section would be technically infeasible.

b. **Vaults.** All undergrounded accessory equipment must be installed in an environmentally controlled vault that is load-rated to meet the City’s standards and specifications. Underground vaults located beneath a sidewalk must be constructed with a slip-resistant cover. Vents for airflow shall be flush-to-grade when placed within the sidewalk and may not exceed two feet above grade when placed off the sidewalk.

**10.11. Pole-Mounted Accessory Equipment.** The provisions in this subsection (10.11.) are applicable to all pole-mounted accessory equipment in connection with small wireless facilities and other infrastructure deployments.

a. **Preferred Concealment Techniques.** Applicants should propose to place any pole-mounted accessory equipment in a single shroud or enclosure in the least conspicuous position under the circumstances presented by the proposed pole and location. Pole-mounted accessory equipment may be installed behind street, traffic or other signs to the extent that the installation complies with applicable public health and safety regulations.

b. **Minimum Vertical Clearance.** The lowest point on any pole-mounted accessory equipment shall be at least 10 feet above ground level adjacent to the pole. If applicable laws require any pole-mounted accessory equipment component to be placed less than 10 feet above ground level, the clearance from ground level shall be no less than required for compliance with such laws.

c. **Horizontal Projection.** Pole-mounted accessory equipment shall not project: (i) more than 24 inches from the pole surface; (ii) over any roadway for vehicular travel; or (iii) over any abutting private property. All pole-mounted accessory equipment shall be mounted flush to the pole surface. If applicable laws preclude flush-mounted equipment, the separation gap between the pole and the accessory equipment shall be no greater than required for compliance with such laws and concealed by opaque material (such as cabinet “flaps” or “wings”).

d. **Orientation.** Unless placed behind a street sign or some other concealment that dictates the equipment orientation on the pole, all pole-mounted accessory equipment should be oriented away from prominent views. In general, the proper orientation will likely be toward the street to reduce the overall profile when viewed from the nearest abutting properties. If orientation toward the street is not feasible, then the proper orientation will most likely be away from oncoming traffic. If more than one orientation would be technically feasible, the Director may select the most appropriate orientation.

**10.12. Ground-Mounted or Base-Mounted Accessory Equipment.** The provisions in this subsection (10.12.) are applicable to all ground-mounted and base-mounted accessory equipment in connection with small wireless facilities and other infrastructure deployments.

a. **Ground-Mounted Concealment.** Except for regional streets, the City prefers ground-mounted accessory equipment to be concealed as follows: (A) within a landscaped parkway, median or similar location, behind or among new/existing landscape features and painted or wrapped in flat natural colors to blend with the landscape features; and (B) if landscaping concealment is not technically feasible, disguised as other street furniture adjacent to the support structure, such as,
for example, mailboxes, benches, trash cans and information kiosks. On regional streets outside underground districts, proposed ground-mounted accessory equipment should be completely shrouded or placed in a cabinet substantially similar in appearance to existing ground-mounted accessory equipment cabinets.

b. **Public Safety Visibility.** To promote and protect public health and safety and prevent potential hazards hidden behind large equipment cabinets, no individual ground-mounted accessory equipment cabinet may exceed four feet in height or four feet in width. Ground-mounted and base-mounted equipment cabinets shall not have any horizontal flat surfaces greater than 1.5 square inches to prevent litter or other objects left on such surfaces.

10.13. **Utilities.** The provisions in this subsection (10.13.) are applicable to all utilities and other related improvements that serve small wireless facilities and other infrastructure deployments.

a. **Overhead Lines.** The Director shall not approve any new overhead utility lines in underground districts. In areas with existing overhead lines, new communication lines shall be “overlashed” with existing communication lines. No new overhead utility lines shall be permitted to traverse any roadway used for vehicular transit.

b. **Vertical Cable Risers.** All cables, wires and other connectors must be routed through conduits within the pole or other support structure, and all conduit attachments, cables, wires and other connectors must be concealed from public view. To the extent that cables, wires and other connectors cannot be routed through the pole, such as with wood utility poles, applicants shall route them through a single external conduit or shroud that has been finished to match the underlying pole.

c. **Spools and Coils.** To reduce clutter and deter vandalism, excess fiber optic or coaxial cables shall not be spooled, coiled or otherwise stored on the pole outside equipment cabinets or shrouds.

d. **Electric Meters.** Small wireless facilities and other infrastructure deployments shall use flat-rate electric service or other method that obviates the need for a separate above-grade electric meter. If flat-rate service is not available, applicants may install a shrouded smart meter. If the proposed project involves a ground-mounted equipment cabinet, an electric meter may be integrated with and recessed into the cabinet, but the Director shall not approve a separate ground-mounted electric meter pedestal.

e. **Existing Conduit or Circuits.** To reduce unnecessary wear and tear on the public rights-of-way, applicants are encouraged to use existing conduits and/or electric circuits whenever available and technically feasible. Access to any conduit and/or circuits owned by the City shall be subject to the Director’s prior written approval, which the Director may withhold or condition as the Director deems necessary or appropriate to protect the City’s infrastructure, prevent interference with the City’s municipal functions and public health and safety.

11. **PREAPPROVED DESIGNS**

**11.1. Purpose.** To expedite the review process and encourage collaborative designs among applicants and the City, the City Council authorizes the Director to designate one or more preapproved designs for small wireless facilities and other infrastructure deployments. This Section 11 sets out the process to establish or repeal a preapproved design and the expedited review procedures and findings applicable to these applications.
11.2. **Adoption.** The Director may, in the Director’s discretion, establish a preapproved design when the Director finds that a proposed preapproved design exceeds the design standards in this Policy and Procedure. The Director shall post a public notice posted at Concord City Hall, with the City Clerk and in a newspaper of general circulation within the City. The notice must generally describe the preapproved design, include a photograph or photo simulation, specify whether the preapproved design would be limited or restricted in any districts and contain a reference to the appeal procedure. Unless appealed pursuant to the Concord Municipal Code, the preapproved design shall become effective 15 days from the notice required in this subsection. A decision by the Director not to adopt a proposed preapproved design or the Director’s failure to act on a request for a proposed preapproved design is not appealable.

11.3. **Repeal.** The Director may repeal any preapproved design by written notice posted at Concord City Hall. The repeal shall be immediately effective. The Director’s repeal, refusal to repeal or failure to act on a request to repeal a preapproved design is not appealable.

11.4. **Modified Review Process.** In nonresidential districts, applications for a preapproved design shall not be subject to the notice requirements in Section 6 or any potential appeals under Section (7.4.). In residential districts, applications for a preapproved design shall remain subject to the notice requirements in Section 6 and any potential appeals under Subsection (7.4.).

11.5. **Modified Findings.** When an applicant submits a complete application for a preapproved design, the Director shall presume that the findings for approval in Subsections (7.2.b), (7.2.d.) and (7.2.f.) are satisfied and shall evaluate the application for compliance with the findings for approval in Subsections (7.2.a), (7.2.c.), (7.2.e.), (7.2.g.) and (7.2.h.).

11.6. **Nondiscrimination.** Any applicant may propose to use any preapproved design whether the applicant initially requested that the Director adopt such preapproved design or not. The Director’s decision to adopt a preapproved design expresses no preference or requirement that applicants use the specific vendor or manufacturer that fabricated the design depicted in the preapproved plans. Any other vendor or manufacturer that fabricates a facility to the standards and specifications in the preapproved design with like materials, finishes and overall quality shall be acceptable as a preapproved design.
Summary of Final FCC Small Cell Order

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Declaratory Ruling and Third Report and Order; WT Docket No. 17-79; WC Docket No. 17-84

Prepared in collaboration with Mark Del Bianco, Principal,
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DISCLAIMER: This document is intended to be a tool for education and information. It offers a summary of the proposed FCC order. This document is not intended to provide legal advice, or to be a legal analysis or a comprehensive list of all potential outcomes of this order. We offer this information for reference purposes only, as a starting point for analysis by interested parties.

At its September 2018 open meeting, the FCC adopted a report and order (collectively, the "Order") in its ongoing proceeding to streamline the rollout of infrastructure for broadband services, including small cells for 4G and 5G wireless service. This summary addresses the effect of the Order on the issues of most importance to NCC members that have or are considering enacting small cell ordinances, or have or will be negotiating agreements with carriers or infrastructure providers such as Mobilitie or Crown Castle.

The Order has two parts: (1) an new set of regulations (the "Rules") that govern shot clocks and other limited aspects of the rollout of small wireless facilities (a/k/a "small cells") and (2) a Declaratory Ruling that does not enact any new regulations but is the FCC's interpretation of how the provisions of Section 253 and 332(c)(7) of the Communications Act that limit state or local regulations that "effectively prohibit" the provision of wireless services should be applied. The Declaratory Ruling portion of the Order adopts the position that a state or local government need only "materially inhibit" a particular small wireless facility deployment in order for its action to constitute an "effective prohibition" under Section 253 or 332(c)(7). Based on this conclusion, the Declaratory Ruling provides guidance on fees local governments may charge and on how they may regulate ancillary rollout issues such as tower spacing, equipment design and other aesthetic concerns. In lay terms, this means the FCC is making it easier for private companies to take local governments to court if they believe municipal policies are effectively prohibiting network investment.
Key Takeaways from the Order

- The Order is a blatant effort by the FCC to strengthen the hand of carriers in negotiations with local governments over small cell deployment and to limit the ability of local governments to negotiate in the public interest around small cells.

- The good news is that the FCC has left local governments with some power and flexibility to enact reasonable regulations governing small cell deployments. With the right approach and partner, local governments have a higher hill to climb but can still negotiate win-win outcomes that benefit carriers while addressing citizens’ concerns.

- Local governments should immediately take proactive steps to maintain their leverage in possible negotiations with carriers.

- Local governments should move expeditiously to enact zoning and other regulations to address issues of importance to their community. These may include application processing cost recovery, antenna design, location and spacing, additional pole and equipment aesthetic requirements, and other factors of local concern.

- In particular, setting out and standardizing aesthetic requirements, including pre-approval of antenna, equipment cabinet and street furniture designs where appropriate, will make it easier for local governments to process applications reasonably expeditiously and to defend challenged siting decisions or failures to meet shot clock deadlines.

Key Issues for Members

What types of facilities does the Order apply to?

The Order applies to all types of facilities used to provide wireless services. There are specific shot clock and other rules that govern certain small wireless facilities, i.e., generally those less than 50 feet tall and on which the antenna size is less than 3 cubic feet.

What happens if a local government already has an agreement with a carrier or infrastructure provider that covers small wireless facilities?

- The FCC did not address whether existing agreements are preempted by the Order. While existing agreements were not explicitly grandfathered, there is no obvious means of voiding them. The result is that local governments should be able to keep existing agreements.

- In order to preempt existing agreements involving private parties, the FCC would have to make certain findings that doing so was in the public interest. It did not do so in the Order.
Further evidence that the FCC did not intend to preempt existing agreements is its expressed intent in the Order to facilitate "mutually agreed solutions."

Any attempt to preempt an existing agreement would require the carrier to file a lawsuit against the municipality, which seems very unlikely.

Even if a carrier filed a case, we do not believe it would be able to convince a court to void a freely negotiated commercial agreement.

**Going forward, can a local government negotiate new agreements with carriers or infrastructure providers? If so, are there issues that cannot be addressed in an agreement?**

- Yes, local governments can still negotiate with carriers and infrastructure providers. Nothing in the Order preempts local governments' ability to negotiate future agreements in order to provide a mutually acceptable process for deployment of small cells.[iii] However, the Rules and presumptions created by the Order give carriers more leverage when negotiating with local governments and reduce the ability of local governments to enact regulations that achieve desirable outcomes when carriers are unwilling to engage in good faith negotiations, or to negotiate at all.

- The Declaratory Ruling provides guidance on some parameters of the deployment of small cells, including such factors as the cost, aesthetic requirements and location, but it does not prohibit local governments or carriers from reaching their own arrangements on these or any other factors. This means that if a local government wants to follow the Lincoln model of offering very rapid permitting in return for fees higher than the FCC sets, it may still do so.

**Are there limits on the amounts that local governments can charge for small cell application and use fees?**

- There is a presumed safe harbor for application and use fees, but no specific cap on fees.
- The safe harbor amounts are (a) $500 for a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, (b) $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW, and (c) $1,000 for non-recurring fees for a new pole.
- The FCC views these amounts as safe harbors because it believes they are low enough that no carrier would challenge them if they were imposed unilaterally in a local government's regulations.
- Nothing in the Order prevents a local government from charging higher fees. However, under the FCC's framework, if a carrier files a lawsuit challenging the fees imposed by a local government, the burden would be on the local government to demonstrate that the amount is a reasonable approximation of its costs and that its costs are reasonable.
- The FCC did not specify a methodology for calculating cost, or what expenses could be included.
• We believe that the revenue-reducing effect of a cost-based methodology will be much greater for usage fees than for application fees, because usage fees are recurring.

Can a local government require in-kind contributions or set application or use fees at levels to achieve social goals such as closing the digital divide?

• If a court were to accept the FCC conclusion that fees must be cost-based, local governments would not be able to require in-kind contributions or set application or usage fees above cost.
• Local governments can still negotiate agreements containing provisions for non-cost-based fees (as San Jose and Honolulu did), but the Order attempts to remove most of a local government's negotiating leverage on these issues, so there will now be little incentive for a provider to agree to do so.

What are the new application shot clocks?

• The Rules create four new shot clocks:
  § Collocation of small wireless facilities: Local government has 60 days to act upon an application
  § Collocation of facilities other than small wireless facilities: 90 days.
  § Construction of new small wireless facilities: 90 days.
  § Construction of new facilities other than small wireless facilities: 150 days.
• The Rules also provide for the resetting or pausing of the shot clock when a local government determines that an application is incomplete. If a municipality determines that an application is materially incomplete within ten day of filing and notifies the applicant of the deficiencies, the shot clock resets when the completed application is filed. In order to prevent last minute “pausing” of the shot clock by local governments, an incompleteness determination must be made by the 30th day after an application is filed, and within 10 days after resubmission if a re-submitted application is still incomplete.

What is the legal effect of the new shot clocks?

• The shot clock deadlines have no direct legal effect.
• If an application is not acted on within the deadline, nothing happens unless a carrier either commences a formal complaint proceeding at the FCC or files a case in state or federal court. In either case, the carrier would have to demonstrate that the failure to act on the application amounts to an "effective prohibition" on wireless service under Section 253 or 332.
• Either process will take months, perhaps years.
• The Order recognizes that the shot clock is only a presumption, and that local governments have the ability to demonstrate to a court that the delay is reasonable under the circumstances.
• If a court finds that a shot clock violation is an effective prohibition, it will most likely order the local government simply to make a decision by a specific date in
the near future; a court is very unlikely to order a local government to grant a specific application.

- We believe that carriers prefer certainty and rather than litigate over a few shot clock violations will be willing to negotiate a reasonable time for guaranteed local government action on applications.

Do different shot clock deadlines apply when multiple applications are filed at the same time (batched)?

- No.
- However, the FCC acknowledged that batched applications could strain local governments’ resources and potentially justify a failure to meet shot clock deadlines.[iv]
- We believe that in any carrier lawsuit that was based on a failure to meet the shot clock deadlines on a large batch of applications, a court would be very sympathetic to a local government’s argument that the batch application had caused a legitimate overload on its permitting resources.

What types of local government permits/authorizations do the new shot clocks apply to?

- The Rule applies to any request for authorization to place, construct, or modify wireless service facilities, including a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit.
- The Order does not specify whether or how the shot clocks apply to requests to use light poles and other government facilities, whether located in or outside the right of way.

May a local government still take aesthetics into account in its small cell zoning regulations?

- Yes.
- Aesthetic requirements must be reasonable, no more burdensome than those applied to similar types of infrastructure deployments (e.g., equipment cabinet size and color requirements would need to be similar to those for telco or cable company cabinets), and objective and published in advance.[v]

May a local government require minimum spacing between small wireless facilities?

- Yes. The Order considers spacing requirements to be a subset of aesthetics requirements, and thus subject to same standard.
- The Order gives no guidance on what might be a reasonable spacing distance.
What if a local government has an undergrounding requirement for all utilities?

- Regulations requiring all utility facilities (including antennas) to be placed underground would effectively prohibit wireless services because antennas have to be placed above ground in order to function.
- Regulations requiring all wireless equipment other than antennas to be placed underground would be permissible, so long as they are applied on a non-discriminatory basis to other service providers, e.g. telco and cable companies.
- It is not clear what sorts of poles or other above ground antenna facilities a local government would have to allow access to in order to avoid being considered “effectively prohibiting wireless service.”

Frequently Asked Questions

What happens if a city is in negotiations with a carrier and they demand that the agreement provisions on such issues as fees, spacing and aesthetic requirements follow the "guidelines" in the FCC small cell Order?

In that case, the city has two or perhaps three options. First, the city can capitulate to the carrier's claims about what the Order requires. Obviously, we do not believe any city should do so. The second option is for the city to abandon the negotiation process and instead act unilaterally to adopt an ordinance, a set of regulations or a model franchise agreement (if it has a franchising process in place) that it believes is consistent with the desires of its residents and at the same time presents a low (and thus acceptable) risk of a court challenge.

If a city has already negotiated a small cell facility agreement with one or more carriers/infrastructure providers, it has a third option. It can adopt an ordinance or draft a template agreement reflecting essentially the same terms as the executed agreement. In either case, it becomes much more difficult (albeit not impossible) for other carriers to challenge the model agreement or ordinance on its face because it contains essentially the same terms that the first carrier has already agreed do not effectively prohibit it from providing a wireless service.

What are cities doing to prepare for the Jan 13 deadline?

Most NCC members seem to be either negotiating agreements with carriers, taking unilateral steps to develop and put in place a process for consideration of applications to place small cell wireless facilities, or doing both simultaneously.

If a city enters into an agreement with a carrier and then the Order is overturned, is the city stuck with the agreement?

The answer in general is yes. No city is required to enter into any agreement with a carrier or infrastructure provider. If a city does so voluntarily, it will almost certainly be held to the terms of the agreement by a court. However, a city might be able to resolve this problem by including in the agreement a clause voiding the agreement or requiring
its modification, in the event of a regulatory change (including the overturning of the Order). Many types of telecommunications agreements contain such regulatory change clauses because parties recognize that the wording or scope of specific provisions in the agreement has been dictated by the then-existing telecommunications regulatory scheme, and should be changed if the regulations change.

If a city enacts an ordinance and then the Order is overturned, can it adjust the ordinance?

Yes. However, unless the original ordinance specifically permits retroactive application of aesthetic or other requirements, existing wireless facilities approved under the first ordinance may be effectively grandfathered. Almost certainly, neither application nor usage fee increases could be applied retroactively.

What is the risk if a city does not have an ordinance in place prior to the Jan 13 deadline?

The only risk we are aware of for a city that has no process in place to consider applications for placement of small cell wireless facilities is the risk that it will be sued in state or federal court by a carrier arguing that the failure constitutes a city action that "effectively prohibits" it from providing wireless service. In the short term (say 180 days after January 13), there is very little risk that a carrier will bring such a lawsuit. There is little benefit to a carrier in doing so. The only relief a carrier could get in such a case would be an order requiring the city to enact an ordinance within a certain period of time. A court could not order the placement of specific antennas or create its own process for a city to follow. If a city is taking observable public steps to develop an ordinance, a lawsuit is unlikely and it is even more unlikely that a judge would rule against a city.

In the longer term (say after mid-2019), the risk of a lawsuit will increase and it becomes less defensible for a city not to have an approval process in place (or at least publicly in development). That is why we recommend that cities publicly begin developing a process for small cell facility regulation now. Doing so will allow adequate time for consideration of all the issues and the development of a policy that reflects residents' concerns, while at the same time providing for placement of infrastructure for the next generation of wireless services.

The Order identifies application and usage fee amounts that are neither caps nor safe harbors, but simply what the FCC believes are levels at which carriers will not file legal challenges. What local government usage fees are covered by these FCC “guidelines”?

The Order identifies $270 per year as a presumptively reasonable annual usage fee. This covers the right to attach an antenna to a pole or other facility and to locate associated equipment nearby. But if a city is providing not just the right to place antennas on city-owned poles, but ancillary facilities or services (such as access to electricity, existing underground ducts and underground casements at each pole), the FCC fee "guidelines" do not apply and the city can set the usage fees at any level it
wishes. Cities should not be misled by carriers falsely claiming that the FCC’s $270 annual usage fee includes anything other than the right to mount an antenna on a pole and put equipment nearby.

**Does the Order impose non-discrimination requirements, i.e., does it require municipalities to treat wireless carriers the same as they treat electric companies, cable companies or other utilities?**

No. The non-discrimination requirements identified in the Order are the FCC's interpretations of the language of Sections 253 and 332(C)(7), and are limited in scope. Section 253(a) addresses only state or local government actions (including discrimination) that effectively prohibit "any interstate or intrastate telecommunications service," while Section 332(c)(7)(B)(i)(II) is even narrower: only actions that effectively prohibit "personal wireless services," which is a small subset of telecommunications service. Thus, Section 253 only limits discrimination between providers of "telecommunications service," and the only type of discrimination that could potentially be problematic under Section 332(C)(7) would discrimination between "competing wireless services." Therefore, the Order does not (and the FCC could not) prohibit discrimination in fees, aesthetic requirements and application requirements as between wireless carriers and companies that do not provide "telecommunications service," a category that includes not only traditional utilities, but also cable companies and even wireline broadband Internet access providers (which under current FCC rules are not providers of telecommunications services).

**How does the Order's interpretation of the "effective prohibition" language affect the ability of localities to regulate the number or location of small cell wireless antennas? If a carrier has full geographic coverage already, can a locality require it to justify the need to add additional capacity?**

In the Small Cell Order, the FCC reaffirmed its interpretation that a locality can violate the "effective prohibition" language of Sections 253 and 332 by enacting regulations that merely "materially inhibit" the ability of wireless carriers to provide services. It specifically included in this category local regulations that affect carriers' ability to densify their networks or to add capacity to their networks. If this interpretation survives on appeal, then it would be unlikely that a locality could successfully defend a broad regulation that required a carrier to justify every requested small cell facility placement. However, NCC believes that a regulation that allows for reasonable rollout of small cell facilities based on objective criteria that reflect community concerns would be consistent with the FCC's interpretation. Such a regulation should not be seen as "materially inhibiting" any carrier's ability to offer its services, so long as a reasonable number of potential wireless facility locations would be available under the objective criteria. Such a regulation would be even more defensible if it has a "safety valve" that allows a carrier to meet capacity needs by allowing for placement of additional wireless facilities that do not meet the objective criteria. The regulation could even place the burden on the carrier to demonstrate the need for any additional non-compliant facility. A single "safety valve" decision would involve a limited geographic area and would be fact-specific, and should not be challengeable as a "material inhibition" on provision of wireless service in the locality.
Bottom Line

- This order significantly diminishes local decision making, but does not eliminate it.
- Local governments cannot say no to all small cell antennas within specific neighborhoods or other areas of their communities.
- Local governments can charge more than the recommended permitting fees and annual fees, but may have to show how the fees correlate with the local government's cost for managing the permitting and right of way.
- The order decreases a community's capacity to receive recompense for the use of their right of way that is in excess of the cost of managing that right of way.
- Local governments that are prepared by proactively putting in place policies and procedures will be able to retain some local control.
- If you have an existing agreement, we believe it will be hard for a vendor to justify a request to change that agreement and it seems unlikely that the courts would side with them.
- There will very likely be court challenges to this order.

Important Tips and Action Steps

- ANTENNA PLACEMENT - you cannot say no to any antennas on poles in an area. However, you can say no to a specific placement as long as there is a reasonable alternative.
- UNDERGROUND - you cannot require that all of this infrastructure be placed underground, but you may be able to require that all but the antenna be placed underground. However, if you are planning to do so, you must do so for ALL utilities and you must have an ordinance in place.
- STREET FURNITURE - you can require that street furniture have a certain aesthetic and a setback from the street (for both aesthetic and public safety reasons, such as to prevent loss of parking due to inability to open car doors). You must have an ordinance in place that applies to ALL utilities’ street furniture in the local government's right of way.
- SHROUDING - You can require a certain aesthetic for certain neighborhoods and certain types of poles. If these requirements are in place in advance of a carrier approaching you, you are less likely to experience push back and your position will be more defensible if challenged in court.
- PERMITTING - The time to revise and organize your permitting process is now. If your permitting process includes a plan to adhere to the shot clocks in the order, you will more likely be able to meet them.
- SHOT CLOCK DEADLINES - The deadlines may be difficult to meet, but there is NO DEEMED GRANTED provision in this order. Batch permitting may be particularly problematic for local governments as the scope of such requests can overwhelm a permitting department, but if you work in good faith, keep the carrier updated, and are still unable to meet the deadline, it is likely the carrier will work with you. If instead they take you to court, your due diligence and proactive efforts will work in your favor.
- APPLICATION COSTS - The costs listed in the order are for guidance. If you stay at or below them, your fees very likely will not be challenged in court. However, you can charge more if you have evidence that your costs are higher.
Including your engineering costs, permitting staff costs, and post-installation inspection costs may justify a higher application fee. If those costs are reasonable, the fee is unlikely to be challenged and if challenged, will likely be upheld even under the FCC’s test.

- **ANNUAL ROW FEE** - If at or below the cost specified by the order ($270/year), this fee will very likely be unchallenged by carriers. If higher, a court may require the local government to justify the fee as being directly related to cost.

- **NEGOTIATING** - Remember that one of the single most valuable characteristics of your permitting from the carrier perspective is predictability. If you can give a high degree of certainty that permits will be finished in a predictable manner, carriers will be much more willing to negotiate for higher fees or more public interest requirements than those set by the FCC.
Endnotes

[i] Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79; WC Docket No. 17-84 (the "Order").

[ii] Section 253(a) provides that “[n]o 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 intrastate telecommunications service.” Section 332(c)(7) provides that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

[iii] However, parts of the Declaratory Ruling and even the Rules acknowledge the ability of local governments and carriers to negotiate outcomes different from those envisioned in the Declaratory Ruling. For example, with regard to proposals to allow local governments to implement best practices or an informal dispute resolution process, the FCC stated "Although we do not at this time adopt these proposals, we note that the steps taken in this order are intended to facilitate cooperation between parties to reach mutually agreed upon solutions. For example, as explained below, mutual agreement between the parties will toll the running of the shot clock period, thereby allowing parties to resolve disagreements in a collaborative, instead of an adversarial, setting." Order, ¶ 131. That reference is to 47 C.F.R. § 1.6003(d), which allows local governments and carriers to agree to toll (i.e., lengthen) the shot clock period for any type of wireless facility. Similarly, nothing in the Declaratory Ruling prohibits local governments from reaching agreements with carriers and infrastructure providers that contain provisions fleshing out (or even departing from) the broad FCC guidelines on cost, aesthetic requirements, antenna location and other factors.

[iv] The FCC noted that under its “approach, in extraordinary cases, a siting authority, as discussed below, can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority’s resources. Thus, contrary to some localities’ arguments, our approach provides for a certain degree of flexibility to account for exceptional circumstances. * * *

The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services. Order, ¶¶ 115-119.

[v] The Order’s discussion of the first two factors is brief and provides little guidance: "[A]esthetic requirements that are technically feasible and reasonable in that they are reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable
and directed at remedying the impact of the wireless infrastructure deployment." Order, ¶ 87.
Wireless Facilities in Our Right of Way: Whose Streets are These Anyway?

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League of California Cities
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Wireless Facilities in Our Right of Way: Whose Streets are These Anyway?

I. INTRODUCTION

On May 3, 2018, I presented a paper to this Conference that described the legal distinction between municipal regulatory and proprietary authority over wireless facilities in the public rights-of-way. My thesis was that, while various provisions in federal and state law curtailed local police powers, neither hindered the freedom cities enjoyed in their proprietary capacities. Less than six months later, on September 26, 2018, the Federal Communications Commission ("FCC") issued new regulations that contradicted the United States Constitution, the federal Communications Act, Supreme Court precedent and—of course—most everything I said on that day in May.

Part II in this paper revisits the basic California and federal statutory provisions applicable to local control over communication facilities and their relation to property rights. Part III summarizes the FCC’s 2018 rulemakings, their impacts on the law and the litigation and legislative responses to these changes. Finally, Part IV offers some perspective on the current state of municipal property rights over their ROW infrastructure and a few practical pointers.

II. STATUTORY CONTEXT

A. California Law

Public Utilities Code § 7901 grants telephone corporations the right to operate within the public rights-of-way without a local franchise.¹ Early court decisions interpreted § 7901 as a “statewide franchise” for telephone and telegraph companies. Local governments cannot require telephone corporations to obtain a local franchise fee as a precondition to access.² Likewise, municipalities cannot charge a revenue-generating fee in connection with encroachment or other permits issued to telephone corporations.³ These limitations extend to wireless service providers.⁴

However, the so-called statewide franchise covers only the real property that comprises the public rights-of-way and does not compel municipalities to grant access to their personal property, such as street lights, traffic signals and other street furniture.⁵ This is a distinction with an important difference. Whereas § 7901 may preclude market-rate compensation for the general right to use the public rights-of-way, municipalities may charge a market rate for telecommunications equipment attached to their infrastructure

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¹ See T-Mobile W. LLC v. City and Cnty. of San Francisco, S238001 (Cal. Apr. 4, 2019).
² See Western Union Tel. Co. v. Hopkins, 116 P. 557, 561 (Cal. 1911).
³ See CAL. GOV’T CODE § 50030; Williams Communications, LLC v. City of Riverside, 8 Cal. Rptr. 3d 96, 106 (Ct. App. 2003) (invalidating fees charged as “rent or an easement or license fee in consideration for such use of the City’s streets”).
within the public rights-of-way. Indeed, the California Constitution regards government property leased at below-market rates as potentially improper gifts.⁶

B. Federal Law

1. Section 332(c)(7)

Section 332(c)(7) generally preserves local authority over personal wireless service facilities, subject to certain substantive and procedural limitations.⁷ Local governments may not (1) prohibit or effectively prohibit personal wireless services; (2) unreasonably discriminate among functionally equivalent service providers; or (3) regulate personal wireless service facilities based on the environmental effects from radio frequency emissions to the extent such emissions meet FCC guidelines.⁸ Local authorities must act within a reasonable time on requests for authorization to construct or alter personal wireless service facilities.⁹ Denials—and the reasons for the denial—must be in writing and based on substantial evidence in the written record.¹⁰ Federal courts from around the United States have routinely interpreted the preemptive effect under § 332(c)(7)(B) as cabined to land-use decisions or similar governmental acts undertaken in a regulatory capacity.¹¹

2. Section 253

Section 253(a) bars any “State or local statute, regulation, or other State or local legal requirement” that prohibits or effectively prohibits any person’s or entity’s ability to provide any telecommunications service.¹² However, a safe harbor provision preserves State and local authority to manage the public rights-of-way and to require “fair and reasonable compensation” on a “competitively neutral and nondiscriminatory basis . . . if the compensation required is publicly disclosed by such government.”¹³

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⁶ See CAL. CONST., ART. XVI, § 6; see also Allen v. Hussey, 225 P.2d 674, 684 (Cal. Ct. App. 1950) (finding that a $1-per-year lease from an irrigation district to a private person to operate an airport constituted a “gift”).

⁷ Compare 47 U.S.C. § 332(c)(7)(A) (preserving local authority), with id. § 332(c)(7)(B) (listing exceptions to the local authority preserved in subsection (A)); see also Omnipoint Communications, Inc. v. City of Huntington Beach, 738 F.3d 192, 195 (9th Cir. 2013) (“We conclude that § 332(c)(7)(A) functions to preserve local land use authorities’ legislative and adjudicative authority subject to certain substantive and procedural limitations.”).


⁹ See id. § 332(c)(7)(B)(ii).

¹⁰ See id. § 332(c)(7)(B)(iii); see also T-Mobile So. LLC v. City of Roswell, --- U.S. ---, 135 S.Ct. 808, 816 (2015) (“Because an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality’s reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial.”).

¹¹ See, e.g., Huntington Beach, 738 F.3d at 199–200; Omnipoint Holdings, Inc. v. City of Southfield, 355 F.3d 601, 607 (6th Cir. 2004); Sprint Spectrum LP v. Mills, 283 F.3d 404, 420 (2nd Cir. 2002).


¹³ See id. § 253(c).
The Ninth Circuit interprets § 253(a) as preempting only regulatory schemes" and not reaching contractual relationships.14 Several lower courts have also found that § 253(a) does not preempt agreements between public agencies and telecommunications providers.15

3. Section 6409

Section 6409(a) requires that State and local governments “may not deny, and shall approve” any “eligible facilities request” for a wireless site collocation or modification so long as it does not cause a “substant[ial] change in [that site’s] physical dimensions.”16 FCC regulations interpret key terms in this statute and impose certain substantive and procedural limitations on local review.17 In 2014, the FCC expressly found that Section 6409 does not apply to “proprietary” decisions by state or local governments.

III. RECENT FCC RULEMAKINGS

In 2017, the Commission opened two related rulemaking proceedings intended to dramatically reinterpret provisions in the Communications Act and preempt state and local authority over wireless and wireline communications infrastructure deployments.18 In 2018, the Commission acted on these proceedings and issued two controversial orders broadly preempting state and local authority over communications infrastructure.19

A. Moratorium Order

On August 2, 2018, the FCC adopted the Moratorium Order, which held that “Section 253 applies to wireless and wireline telecommunication services”, “both [express

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14 See Qwest Corp. v. City of Portland, 385 F.3d 1236, 1240 (9th Cir. 2004) (finding that § 253 preempts only “regulatory schemes”).
15 See, e.g., Superior Communications v. City of Riverview, 230 F. Supp. 3d 778, 794-95 (E.D. Mich. 2017) (relying in Mills to find that a city’s refusal to approve an upgrade to a tenant’s equipment did not violate § 253(a) because the denial could not be properly characterized as “regulation”); T-Mobile W. Corp. v. Crow, No. CV08-1337-PHX-NVW, 2009 WL 5128562, at *16 (D. Ariz. Dec. 17, 2009) (finding that ASU’s “grant of an exclusive right to NextG to install the DAS and manage facilities is the proprietary decision of a property owner, not a ‘regulation’ or ‘legal requirement’ under § 253(a’)).
and de facto] moratoria violate [S]ection 253(a) and generally do not fall within the [S]ection 253(b) and (c) exceptions.\textsuperscript{20}

Express moratoria refer to:

state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.\textsuperscript{21}

This classification includes temporary moratoria imposed to protect new resurfaced roads, observe “freeze and frost” periods in colder states and to allow municipalities to develop local regulations in response to regulatory and technological changes.\textsuperscript{22} The FCC found that Congress’ safe harbor in Section 253(c) for “right-of-way management” did not encompass these purposes.\textsuperscript{23}

De facto moratoria refer to:

state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.\textsuperscript{24}

In the FCC’s view, a de facto moratorium exists when “applicants cannot reasonably foresee when approval will be granted . . . .”\textsuperscript{25} Although most examples the FCC cited to illustrate a de facto moratorium concerned protracted contract negotiations between municipalities and service and/or infrastructure providers, the FCC ultimately explained that fee disputes fall outside the definition for a de facto moratorium.\textsuperscript{26}

Exceptions to the FCC’s ban on moratoria come few and far between. For example, the FCC found that a temporary moratoria on new deployments may be permissible after a natural disaster, but only if the state imposes the moratorium and only if such moratorium is competitively neutral, necessary to address the disaster at hand and limited to only those geographic areas impacted by such disaster.\textsuperscript{27} Local government right-of-way management must relate to the provider’s actual uses and include functions such as coordinating construction schedules; determining insurance,  

\textsuperscript{20}Moratorium Order at ¶¶ 142 and 144.  
\textsuperscript{21}Id. at ¶ 145.  
\textsuperscript{22}See id. at ¶¶ 145–148.  
\textsuperscript{23}See id. at ¶ 148.  
\textsuperscript{24}Id. at ¶ 149.  
\textsuperscript{25}Id. at ¶ 151.  
\textsuperscript{26}Compare Moratorium Order at ¶ 150 (citing vague anecdotes from Lightower, CTIA, T-Mobile and others), with id. at ¶ 159 (“For purposes of this Declaratory Ruling, we exclude the imposition of fees from the definition of de facto moratoria”).  
\textsuperscript{27}Id. at ¶ 157. The FCC spills significant ink on this subject, even though the administrative record contains precisely zero evidence that any state ever imposed such a moratorium.
bonding and indemnity requirements; establishing and enforcing building codes; and tracking users and uses to prevent interference among them.\textsuperscript{28}

\section*{B. Small Cell Order}

On September 26, 2018, the FCC adopted the \textit{Small Cell Order} that further limited local authority over wireless infrastructure deployments. This section summarizes the many changes in the law in this order that became fully effective on April 15, 2019.

1. Small Wireless Facilities: A New Regulatory Classification

The FCC defines a “small wireless facility” through a multi-part test that largely focuses on physical dimensions.\textsuperscript{29} Although some criteria concern the site location, the definition does not depend on whether the facility is or would be located within the public rights-of-way.

The overall height must be less than 50 feet, no more than 10\% taller than adjacent structures or no more than 50 feet or 10\% taller than the support structure, whichever is greater.\textsuperscript{30} Each antenna must be less than three cubic feet in volume, with no cumulative limit on antennas or antenna volume.\textsuperscript{31} All non-antenna equipment, which includes any preexisting equipment plus any new equipment, must be less than 28 cubic feet in volume.\textsuperscript{32}

The photograph below shows what a typical small wireless facility may look like. This installation includes two six-foot long antennas, each less than three cubic feet, mounted on a typical street light with a 22.5-cubic-foot equipment cabinet mounted in the parkway.

\begin{center}
\includegraphics[width=\textwidth]{small_facility.png}
\end{center}

\begin{center}[space intentionally left blank]\end{center}

\begin{itemize}
\item \textsuperscript{28} See \textit{id. at ¶ 160.}
\item \textsuperscript{29} See 47 C.F.R. § 1.6002(l).
\item \textsuperscript{30} See \textit{id. § 1.6002(l)(1)}. This complex height restriction is derived from the FCC rules for categorical exclusion from preconstruction authorization and the FCC’s obligation to conduct environmental review. See 47 C.F.R. § 1.1312.
\item \textsuperscript{31} See 47 C.F.R. § 1.6002(l)(2).
\item \textsuperscript{32} See \textit{id. § 1.6002(l)(3)}.
\end{itemize}
Location restrictions are mostly nominal. First, the facilities must not be subject to antenna structure registration under the FCC’s rules.\textsuperscript{33} Registration is required for any structure over 200 feet tall or within a specific distance from an airport that depends on terrain and airport size.\textsuperscript{34} Second, the facilities must not be located on Tribal lands.\textsuperscript{35} Finally, the facilities must not be placed or operated in a manner that violates the FCC’s standards for human exposure to RF emissions.\textsuperscript{36}

2. Abrogated Distinction Between Regulatory and Proprietary Capacities

In a departure from doctrine and precedent, the FCC declared that its regulations would be equally applicable to state and municipal proprietary conduct as it would be to regulatory conduct. The FCC stated that interpretations in the \textit{Small Cell Order}:

extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such

\begin{itemize}
\item \textsuperscript{33} See id. § 1.6002(l)(4).
\item \textsuperscript{34} See 47 C.F.R. § 17.7.
\item \textsuperscript{35} See 47 C.F.R. § 1.6002(l)(5); see also 36 C.F.R. § 800.16(x) (defining “Tribal lands”).
\item \textsuperscript{36} See id. § 1.6002(l)(6).
\end{itemize}
as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities. 37

The FCC reasoned that the preemption in the Communications Act extends to proprietary conduct absent any express reservation in the statute and, in the alternative, that all state and local conduct with respect to the public rights-of-way must be regulatory because it necessarily furthers local public policies. 38 The upshot is that all state and local conduct in connection with wireless or wireline communication facilities is now potentially subject to judicial review under Section 253, Section 332(c)(7) or both.

3. Effective Prohibitions

The FCC reinterpreted the “effective prohibition” restrictions in Sections 332 and 253 to align with the FCC’s 1997 decision in California Payphone, which held that a local ordinance violated Section 253(a) if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” 39 This “new” test purports to replace existing judicial interpretations—such as the Ninth Circuit’s “significant gap” test in MetroPCS and “actual prohibition” test in Sprint Telephony—and substantially lower the bar for preemption. 40

Perhaps because the California Payphone test is clear as mud, the FCC clarified its application to state and municipal fees and aesthetic regulations:

i. Restrictions on Fees

“Fees” subject to the Small Cell Order include one-time charges, annual charges to use or attach to municipal property and annual charges for the right to access and use the public ROW. 41 All these fees must be (1) reasonably approximate to costs, (2) objectively reasonable and (3) no higher than those charged to similarly-situated competitors in similar situations. 42

The FCC also established fee “safe harbors”. 43 One-time fees at or below $100 per collocation application or $1,000 per new pole application and annual fees at or below $270 for both access to municipal poles and the pubic ROW are “presumptively reasonable”. 44 These are not fee caps. Rather, these levels set the threshold for evidentiary presumptions: the challenger bears the burden at trial when fees are at or

37 See Small Cell Order at ¶ 92.
38 See id. at ¶ 93–96. Both these rationales are deeply flawed.
39 See id. at ¶ 37 (citing In re California Payphone Ass’n, 12 FCC Rcd. 14191, 14206 at ¶ 31 (Jul. 16, 1997)).
40 See Small Cell Order at ¶¶ 37–40; see also id. at ¶ 40 n.94 (“we reject both the version of the “coverage gap” test followed by the First, Fourth, and Seventh Circuits . . . and the version endorsed by the Second, Third, and Ninth Circuits”).
41 See id. at ¶ 50 n.131.
42 See id. at ¶ 50.
43 See id. at ¶¶ 78–80.
44 See id. at ¶ 79.
below these levels, whereas the local government bears the burden in a challenge to fees that exceed these thresholds.45

ii. Restrictions on Aesthetics and Other Non-Fee Requirements

All aesthetic and other non-fee regulations must be (1) reasonable, (2) no more burdensome than those applied to other infrastructure deployments, (3) objective and (4) published in advance.46 The FCC attempted to explain its test as just another way to promote a cost-based regulatory scheme: unsightly infrastructure deployments impose a “cost” on communities and so communities may impose certain aesthetic restrictions to offset those costs.47

“Reasonable” aesthetic restrictions mean those that are “technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments . . . .”48 The “technically feasible” component is not well elaborated within the Small Cell Order but the FCC did mention that it would consider some undergrounding and minimum separation requirements unreasonable to the extent such requirements rendered the deployment technically infeasible.49 However, at the same time, the FCC did not prohibit either undergrounding or minimum separation requirements.50

The “no more burdensome” element is ambiguously described in the Small Cell Order and lacks a clear definition. On one hand, the FCC says that aesthetic regulations for wireless facilities must be “no more burdensome than those applied to other infrastructure deployments,” which appears to refer to all other infrastructure whether related to wireless facilities or not.51 In the very next paragraph, the FCC says wireless aesthetic rules must be “applied to similar infrastructure deployments” in order to show that the rules are “directed at remedying the impact of wireless infrastructure deployment.”52

4. Shot Clocks

The September Order also modified the shot clock rules that interpret the presumptively reasonable time for local review. As explained below, the FCC continues to require state and local governments to do more with less time and fewer resources.

General Shot Clock Rules: The FCC created a newer, shorter shot clock for small wireless facilities and reinterpreted “collocation” to effectively cut the presumptively reasonable timeframe for most new macro sites in half. Small wireless facilities on any

45 See Small Cell Order at ¶ 80.
46 See id. at ¶ 86.
47 See id. at ¶ 87.
48 See id. at ¶ 87.
49 See id. at ¶¶ 90–91.
50 See id.
51 See Small Cell Order at ¶ 86 (emphasis added).
52 See id. at ¶ 87 (emphasis added).
existing structure (whether the structure has wireless facilities on it or not) must processed in 60 days and small wireless facilities on new structures must be processed in 90 days. Whereas “collocation” used to mean two wireless facilities in the same location, the FCC now defines it to mean a wireless facility on any existing structure whether the structure has prior-existing wireless facilities on it or not. To further complicate matters, this new definition for collocation does not apply to “collocations” under Section 6409, which still means two wireless facilities in the same location. Table 1 summarizes these classifications.

Table 1: Basic Shot Clock Classifications

<table>
<thead>
<tr>
<th>Shot Clock</th>
<th>Application Type</th>
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| 60 Days    | 1. Section 6409 (i.e., modification to an existing wireless facility that does not cause a substantial change)  
2. Small wireless facility attached to an existing structure (i.e., utility pole, tower, streetlight, traffic signal, building, etc.) |
| 90 Days    | 1. Small wireless facility attached to a new/replacement structure  
2. Mounting/installation of non-small wireless facility to an existing structure (i.e., rooftop, building facade, field light, etc.) |
| 150 Days   | 1. New, freestanding non-small wireless facilities (i.e., tower, monopole, monopine, etc.)  
2. Non-small wireless facilities on a replacement structure (i.e., replacement field light at a public park) |

The shot clock begins to run when an application is submitted whether the application is complete or not. For macro sites and eligible facilities requests, the shot clock never resets, it only pauses and resumes. For small wireless facilities, the shot clock resets once if the first submittal is “materially” incomplete, but thereafter only pauses and resumes for each incomplete notice and resubmittal.

Completeness Review Rules: Incomplete notices remain subject to the same byzantine regulatory scheme as before but with shorter deadlines for small wireless facilities. Application requirements must be in some publicly stated format (e.g. municipal code, wireless policy, online materials, handouts, checklists, guidelines, etc.) available to the applicant prior to submittal. The first incomplete notice must contain all the missing or incomplete information and any overlooked or later-discovered incompleteness cannot be used as a basis to deem the application incomplete. The incomplete notice must specifically cite the incompleteness and the publicly stated requirement the applicant failed to meet.

Prior to the September Order, local officials could use the first 30 calendar days to review a submittal and determine whether to issue an incomplete notice and would always have 10 calendar days after a resubmittal to evaluate compliance with the incomplete notice. Now, for small wireless facilities, the FCC requires both the initial and any subsequent completeness reviews to be performed within 10 calendar days. Table 2 summarizes these rules.
### Table 2: Summarized Completeness Review Rules

<table>
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<tr>
<th>APPLICATION COMPLETENESS REVIEW</th>
<th>Small Wireless Facilities</th>
<th>Other Wireless Facilities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initial Submittal</strong></td>
<td>1. Shot clock begins on day 1 on the day after the application is submitted (i.e. if submitted on a Monday, day 1 begins on Tuesday)</td>
<td>1. Shot clock begins on day 1 on the day after the application is submitted</td>
</tr>
<tr>
<td></td>
<td>2. 10 days to review for completeness</td>
<td>2. 30 days to review for completeness</td>
</tr>
<tr>
<td></td>
<td>3. Must identify all incomplete/missing documentation in the first notice</td>
<td>3. Must identify all incomplete/missing documentation in the first notice</td>
</tr>
<tr>
<td></td>
<td>4. Notice must identify incomplete/missing documentation based on publicly stated application requirements</td>
<td>4. Notice must identify incomplete/missing documentation based on publicly stated application requirements</td>
</tr>
<tr>
<td></td>
<td>5. Notice must reference the specific rule/regulation(s) (i.e. application requirement) that is incomplete/missing</td>
<td>5. Notice must reference the specific rule/regulation (i.e. application requirement) that is incomplete/missing</td>
</tr>
<tr>
<td></td>
<td>6. Shot clock resets to day 0 upon resubmittal if the application is deemed “materially incomplete” in a timely and valid written notice</td>
<td>6. Shot clock tolls/pauses on the date the city issues a timely and valid written notice</td>
</tr>
<tr>
<td></td>
<td>7. Shot clock may reset only one time</td>
<td>7. Shot clock does not reset</td>
</tr>
<tr>
<td><strong>Resubmittal</strong></td>
<td>1. Shot clock resumes on day 0 if reset</td>
<td>1. Shot clock resumes on the day after the application is submitted (i.e. if deemed incomplete on day 9, day 10 begins on the day after resubmittal)</td>
</tr>
<tr>
<td></td>
<td>2. Shot clock resumes on the day after the application is submitted (i.e. if deemed incomplete on day 9, day 10 begins on the day after resubmittal)</td>
<td>2. 10 days to review for completeness to toll/pause the shot clock</td>
</tr>
<tr>
<td></td>
<td>3. 10 days to review for completeness to toll/pause the shot clock</td>
<td>3. Shot clock tolls/pauses if the application remains incomplete based on materials the city identified in the prior incomplete notice</td>
</tr>
<tr>
<td></td>
<td>4. Shot clock tolls/pauses if the application remains incomplete based on materials the city identified in the prior incomplete notice</td>
<td></td>
</tr>
</tbody>
</table>

If the state local government fails to properly and timely issue an incomplete notice, the application is deemed complete by the operation of law. However, municipalities and applicants may “toll” (i.e., pause) the shot clock by mutual agreement.

**Batched Applications for “Small Wireless Facilities”:** State and local governments cannot refuse to process “batched” applications for small wireless facilities. The FCC defines a “batch” as either multiple separate applications submitted at the same time or a single application submitted for multiple sites. The FCC places no upper limit on how many facilities can be included in one “batch”.

The longest shot clock applicable to a single site in the batch applies to the entire batch. For example, if an applicant submits a batch of five total small wireless facilities on
existing utility poles, the entire batch is subject to one 60-day shot clock. Alternatively, if an applicant submits a batch of seven total small wireless facilities with six on existing utility poles and one on a new pole, the entire batch is subject to one 90-day shot clock.

**Remedies:** The FCC did not extend a “deemed granted” remedy for failures to act within the shot clock timeframe for small wireless facilities. Rather, the FCC established two evidentiary presumptions against municipalities: first, the municipality is presumed to have failed to act within a reasonable time as required under § 332(c)(7)(B)(iii) and, second, the municipality’s failure to act is presumptive evidence that it intended to effectively prohibit personal wireless service facilities under § 332(c)(7)(B)(i)(II). Although rebuttable, these presumptions together happen to be the common findings that federal courts rely on to grant injunctive relief and order local officials to issue the permits sought by the applicant.

C. **Pending Litigation and Legislative Responses**

To no one’s surprise, local public agencies, municipal utilities and investor-owned utilities filed various petitions for review against both the Moratorium Order and the Small Cell Order. The litigation involves 14 separate petitions for review: nine by local public agencies, four by wireless service providers and one by investor-owned utilities. The total petitioners, intervenors and amici exceed 100 real parties in interest.

The litigation wound its way through a procedurally complex path to the Ninth Circuit. The first petition filed against the Moratorium Order established venue in the Ninth Circuit by a first-in-time rule. In an initially successful forum-shopping gambit, several wireless providers filed petitions against the FCC’s Small Cell Order in circuits unfriendly to municipalities. These petitions each contained a single claim: that the FCC’s Small Cell Order did not go far enough and should have included a deemed granted remedy for shot clock violations. Although the Tenth Circuit was selected by judicial lottery, the court ultimately held that the two orders constituted the “same order” for judicial review purposes and transferred the Small Cell Order petitions back to the Ninth Circuit.

53 See 28 U.S.C. § 2112(a)(1) (establishing venue where the first petition was filed if no petition was filed within the first 10 days after publication in the Federal Register). The American Public Power Ass’n filed a petition against the Moratorium Order in the Eleventh Circuit, which was subsequently transferred to the Ninth Circuit and consolidated with Portland’s petition.

54 See 28 U.S.C. § 2112(a)(1) (triggering a judicial lottery to determine venue when multiple petitions are filed in different circuits within the first 10 days after publication in the Federal Register).

55 Puerto Rico Tel. Co., Inc. v. FCC, No. 18-2063 (1st Cir. Oct. 25, 2018); Verizon v. FCC, No. 18-3255 (2nd Cir. Oct. 25, 2018); Sprint Corp. v. FCC, No. 18-9563 (10th Cir. Oct. 25, 2018); AT&T Servs. Inc. v. FCC, No. 18-1294 (D.C. Cir. filed Oct. 25, 2018). Although forum shopping in agency review cases is not per se impermissible, the alleged coordination between the FCC and wireless carriers in a plan to dilute the judicial lottery process is. On January 24, 2019, the House Committee on Energy and Commerce and the House Subcommittee on Communications and Technology requested information from the FCC on alleged coordination with the industry petitioners who challenged the Small Cell Order in favorable circuits. See Letter from Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, to Ajit Pai, Chairman, FCC (Jan. 24, 2019), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20Ltr%201.24.19.pdf.
At the time this paper was submitted, the litigation was under a temporary abeyance and without a briefing schedule. The abeyance was triggered by petitions for reconsideration filed with the FCC, which allows agencies the opportunity to change their minds before further litigation ensues. The temporary status is because no one genuinely expects the FCC to change its mind. In a rare move for appellate courts, the Ninth Circuit has prudently ordered a case management conference with its most senior appellate commissioner to determine whether and at what pace the litigation should move forward notwithstanding the pending administrative proceedings.

Hijinks at the FCC have not gone unnoticed on Capitol Hill. On January 14, 2019, Representative Anna Eshoo (D-CA-18) introduced the “Accelerating Broadband Deployment by Empowering Local Communities Act of 2019” (“H.R. 530”). This bill would void the Moratorium Order and the Small Cell Order. A companion bill in the Senate is expected to be introduced by Senator Diane Feinstein sometime in April. Although encouraging and well-supported by local officials, the likelihood that either bill will be signed into law seems low.

V. TAKEAWAYS AND PRACTICAL RESPONSES FOR CALIFORNIA CITIES

Taken together, the Moratorium Order and the Small Cell Order turn municipal property rights within the public ROW upside down. Municipal proprietary acts or omissions potentially subject to the same restrictions applicable to regulatory conduct. At the same time, these regulations fundamentally change the traditional zoning process—with subjective standards and public participation—into something akin to a ministerial review. To further confuse the matter, the FCC’s recent regulations are currently the law but may not be for much longer. Opposition is broad, organized and fortunate to have the law on their side.

California cities should consider the following responses:

- **Narrow the Scope of Site License Agreements:** Prior to the FCC’s recent rulemakings, broad “master license agreements” or “MLAs” made good sense as a vehicle to avoid potentially repetitious negotiations between carriers and cities. However, an MLA entered at this time may lock the city into a long-term agreement on regulated terms and conditions that may not be the law after judicial review of the Small Cell Order is completed. While cities may not be able to deny access to all their infrastructure under the current law, a more prudent approach to limit the impact of agreements for the use of city-owned infrastructure would be to proceed by a separate license for each small wireless facility (or at least a significantly shorter term if an MLA is still desirable for other reasons).

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56 H.R. 530 (Eshoo) § 2 (“Actions by the Federal Communications Commission in “Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment” (83 Fed. Reg. 51867) and the Federal Communications Commission’s Declaratory Ruling in “Third Report and Order and Declaratory Ruling” (FCC 18–111) shall have no force or effect.”)
• **Skip the Negotiation Process:** If the FCC dictated the price for access to the city’s infrastructure, what incentive is there to negotiate away any other protections? By developing template license agreements that include the regulated terms and conditions mandated by the FCC, the city can avoid negotiation and ensure that all other terms and conditions are protective of their rights. By the same token, this approach mitigates the lost efficiencies of an MLA versus an individual site license. The template license agreement should be a requirement for a complete application to avoid wasting staff time on applications for city-owned infrastructure if the carrier balks at the city’s terms.

• **Don’t Accept Less than Your Actual Costs—But Keep Your Receipts:** The FCC’s “presumptively reasonable” fees are ridiculously low and, in many cases, wouldn’t even cover an hour of staff time. Carriers have routinely told cities that they won’t pay more than $100 per application and, when forced to pay the actual fee, do so under protest. The truth is that the FCC does allow for cost recovery but places the burden on the city to prove up their costs that exceed the presumptively reasonable threshold. If your city hasn’t done a recent cost study, now would be a good time to get one underway. In any event, cities should be closely tracking their staff time and material costs to protect their right to cost recovery.

• **Adopt Flexible Regulatory Structures:** The turbulent technological and regulatory landscape suggests that whatever cities do today will be wrong six months from now. Moreover, ordinances can take time more time to develop, introduce, adopt and implement than the FCC allows for most small wireless facility permit reviews. Cities should consider amendments to their code that allow the legislative body to adopt resolutions with policies and procedures for these facilities. This more nimble and flexible structure will enable quicker responses to changes in the law or technology.

• **Consider Whether Subjective Zoning Standards Can be Rearticulated as Objective Criteria:** The Small Cell Order requires that aesthetic requirements be objective. This means that traditional findings for approval, such as “the use will not be injurious to neighborhood character”, are no longer enforceable. Cities should take the time to think about what makes a particular use “injurious to neighborhood character” and try to articulate those criteria in an objective way. For example, if the city has invested in beautifully landscaped medians or adopted view preservation procedures, alternative objective criteria might prohibit installations in specific locations or above a specific height limit to minimize the impacts these facilities would have on those community assets.

• **Be Realistic About What the FCC Rules Allow:** The regulations in the Moratorium Order and the Small Cell Order are manifestly intended to prevent cities from exercising their traditional authority in both their proprietary and regulatory capacities. Although there is good reason to believe that the FCC overstepped its authority, these regulations are still the law. Conversations with the public and with elected officials about whether public hearings are possible
within the timeframes allotted, whether facilities can be prohibited in residential areas and whether the carriers can be forced to provide meaningful community benefits above the cost to issue the permits will be difficult. But these are necessary conversations to have in order to develop a response that is most appropriate for your community.
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

WT Docket No. 17-79

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

WC Docket No. 17-84

DECLARATORY RULING AND THIRD REPORT AND ORDER

Adopted: September 26, 2018
Released: September 27, 2018

By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements; Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement.

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APPENDIX B -- Comments and Reply Comments
APPENDIX C -- Final Regulatory Flexibility Analysis
I. INTRODUCTION

1. America is in the midst of a transition to the next generation of wireless services, known as 5G. These new services can unleash a new wave of entrepreneurship, innovation, and economic opportunity for communities across the country. The FCC is committed to doing our part to help ensure the United States wins the global race to 5G to the benefit of all Americans. Today’s action is the next step in the FCC’s ongoing efforts to remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new services. We proceed by drawing on the balanced and commonsense ideas generated by many of our state and local partners in their own small cell bills.

2. Supporting the deployment of 5G and other next-generation wireless services through smart infrastructure policy is critical. Indeed, upgrading to these new services will, in many ways, represent a more fundamental change than the transition to prior generations of wireless service. 5G can enable increased competition for a range of services—including broadband—support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs. It is estimated that wireless providers will invest $275 billion\(^1\) over the next decade in next-generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation’s GDP by half a trillion dollars.\(^2\) Moving quickly to enable this transition is important, as a new report forecasts that speeding 5G infrastructure deployment by even one year would unleash an additional $100 billion to the U.S. economy.\(^3\) Removing barriers can also ensure that every community gets a fair shot at these deployments and the opportunities they enable.

3. The challenge for policymakers is that the deployment of these new networks will look different than the 3G and 4G deployments of the past. Over the last few years, providers have been increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack. From a regulatory perspective, these raise different issues than the construction of large, 200-foot towers that marked the 3G and 4G deployments of the past. Indeed, estimates predict that upwards of 80 percent of all new deployments will be small cells going forward.\(^4\) To support advanced 4G or 5G offerings, providers must build out small cells at a faster pace and at a far greater density of deployment than before.

4. To date, regulatory obstacles have threatened the widespread deployment of these new services and, in turn, U.S. leadership in 5G. The FCC has lifted some of those barriers, including our decision in March 2018, which excluded small cells from some of the federal review procedures designed for those larger, 200-foot towers. But as the record here shows, the FCC must continue to act in partnership with our state and local leaders that are adopting forward leaning policies.

5. Many states and localities have acted to update and modernize their approaches to small cell deployments. They are working to promote deployment and balance the needs of their communities. At the same time, the record shows that problems remain. In fact, many state and local officials have urged the FCC to continue our efforts in this proceeding and adopt additional reforms. Indeed, we have

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heard from a number of local officials that the excessive fees or other costs associated with deploying small scale wireless infrastructure in large or otherwise “must serve” cities are materially inhibiting the buildout of wireless services in their own communities.

6. We thus find that now is the appropriate time to move forward with an approach geared at the conduct that threatens to limit the deployment of 5G services. In reaching our decision today, we have benefited from the input provided by a range of stakeholders, including state and local elected officials. FCC leadership spent substantial time over the course of this proceeding meeting directly with local elected officials in their jurisdictions. In light of those discussions and our consideration of the record here, we reach a decision today that does not preempt nearly any of the provisions passed in recent state-level small cell bills. We have reached a balanced, commonsense approach, rather than adopting a one-size-fits-all regime. This ensures that state and local elected officials will continue to play a key role in reviewing and promoting the deployment of wireless infrastructure in their communities.

7. Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches. We have carefully considered these views, but nevertheless find our actions here necessary and fully supported. By building on state and local ideas, today’s action boosts the United States’ standing in the race to 5G. According to a study submitted by Corning, our action would eliminate around $2 billion in unnecessary costs, which would stimulate around $2.4 billion of additional buildouts. And that study shows that such new service would be

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5 See, e.g., Letter from Brian D. Hill, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 31, 2018) (“While the FCC and the Ohio Legislature have worked to reduce the timeline for 5G deployment, the same cannot be said for all local and state governments. Regulations written in a different era continue to dictate the regulatory process for 5G infrastructure”); Letter from Maureen Davey, Commissioner, Stillwater County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) (“The Commission’s actions to lower regulatory barriers can enable more capital spending to flow to areas like ours. Reducing fees and shortening review times in urban areas, thereby lowering the cost of deployment in such areas, can promote speedier deployment across all of America.”); Letter from Board of County Commissioners, Yellowstone County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 21, 2018) (“Reducing these regulatory barriers by setting guidelines on fees, siting requirements and review timeframes, will promote investment including rural areas like ours.”); Letter from Board of Commissioners, Harney County, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 5, 2018) (“By taking action to speed and reduce the costs of deployment across the country, and create a more uniform regulatory framework, the Commission will lower the cost of deployment, enabling more investment in both urban and rural communities.”); Letter from Niraj J. Antani, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 4, 2018) (“To truly expedite the small cell deployment process, broader government action is needed on more than just the state level.”); Letter from Michael C. Taylor, Mayor, City of Sterling Heights, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 30, 2018) (“There are significant, tangible benefits to having a nation-wide rule that promotes the deployment of next-generation wireless access without concern that excessive regulation or small cell siting fees slows down the process.”).


deployed where it is needed most: 97 percent of new deployments would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide.\footnote{Id.}

8. The FCC will keep pressing ahead to ensure that every community in the country gets a fair shot at the opportunity that next-generation wireless services can enable. As detailed in the sections that follow, we do so by taking the following steps.

9. In the Declaratory Ruling, we note that a number of appellate courts have articulated different and often conflicting views regarding the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332. We thus address and reconcile this split in authorities by taking three main actions.

10. First, we express our agreement with the U.S. Courts of Appeals for the First, Second, and Tenth Circuits that the “materially inhibit” standard articulated in 1997 by the Clinton-era FCC’s California Payphone decision is the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332.

11. Second, we note, as numerous courts and prior FCC cases have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress’s limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision.\footnote{“Small Wireless Facilities,” as used herein and consistent with section 1.1312(e)(2), encompasses facilities that meet the following conditions:}

12. Third, we focus on a subset of other, non-fee provisions of local law that could also operate as prohibitions on service. We do so in particular by addressing state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities, recognizing that certain reasonable aesthetic considerations do not run afoul of Sections 253 and 332. This responds in particular to many concerns we heard from state and local governments about deployments in historic districts.

\footnote{\textit{Id.}}

\footnote{“Small Wireless Facilities,” as used herein and consistent with section 1.1312(e)(2), encompasses facilities that meet the following conditions:}

\begin{itemize}
  \item [(1)] The facilities—
  \begin{itemize}
    \item [(i)] are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
    \item [(ii)] are mounted on structures no more than 10 percent taller than other adjacent structures, or
    \item [(iii)] do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
  \end{itemize}
  \item [(2)] Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;
  \item [(3)] All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
  \item [(4)] The facilities do not require antenna structure registration under part 17 of this chapter;
  \item [(5)] The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and
  \item [(6)] The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).
\end{itemize}
13. Next, we issue a Report and Order that addresses the “shot clocks” governing the review of wireless infrastructure deployments. We take three main steps in this regard. First, we create a new set of shot clocks tailored to support the deployment of Small Wireless Facilities. In particular, we read Sections 253 and 332 as allowing 60 days for reviewing the application for attachment of a Small Wireless Facility using an existing structure and 90 days for the review of an application for attachment of a small wireless facility using a new structure. Second, while we do not adopt a “deemed granted” remedy for violations of our new shot clocks, we clarify that failing to issue a decision up or down during this time period is not simply a “failure to act” within the meaning of applicable law. Rather, missing the deadline also constitutes a presumptive prohibition. We would thus expect any locality that misses the deadline to issue any necessary permits or authorizations without further delay. We also anticipate that a provider would have a strong case for quickly obtaining an injunction from a court that compels the issuance of all permits in these types of cases. Third, we clarify a number of issues that are relevant to all of the FCC’s shot clocks, including the types of authorizations subject to these time periods.

II. BACKGROUND

A. Legal Background

14. In the Telecommunications Act of 1996 (the 1996 Act), Congress enacted sweeping new provisions intended to facilitate the deployment of telecommunications infrastructure. As U.S. Courts of Appeals have stated, “[t]he [1996] Act ‘represents a dramatic shift in the nature of telecommunications regulation.’”10 The Senate floor manager, Senator Larry Pressler, stated that “[t]his is the most comprehensive deregulation of the telecommunications industry in history.”11 Indeed, the purpose of the 1996 Act is to “provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition.”12 The conference report on the 1996 Act similarly indicates that Congress “intended to remove all barriers to entry in the provision of telecommunications services.”13 The 1996 Act thus makes clear Congress’s commitment to a competitive telecommunications marketplace unhindered by unnecessary regulations, explicitly directing the FCC to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”14

15. Several provisions of the 1996 Act speak directly to Congress’s determination that certain state and local regulations are unlawful. Section 253(a) provides that “[n]o 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 intrastate telecommunications service.”15 Courts have observed that Section 253 represents a “broad preemption of laws that inhibit competition.”16

16. The Commission has issued several rulings interpreting and providing guidance regarding the language Congress used in Section 253. For instance, in the 1997 California Payphone decision, the Commission, under the leadership of then Chairman William Kennard, stated that, in determining whether a state or local law has the effect of prohibiting the provision of telecommunications services, it

10 Sprint Telephony PCS LP v. County of San Diego, 543 F.3d 571, 575 (9th Cir. 2008) (en banc) (County of San Diego) (quoting Cablevision of Boston, Inc. v. Pub. Improvement Comm’n, 184 F.3d 88, 97 (1st Cir. 1999)).
“consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”17

17. Similar to Section 253, Congress specified in Section 332(c)(7) that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”18 Clause (B)(ii) of that section further provides that “[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.”19

Section 332(c)(7) generally preserves state and local authority over the “placement, construction, and modification of personal wireless service facilities” but with the important limitations described above.20 Section 332(c)(7) also sets forth a judicial remedy, stating that “[a]ny person adversely affected by any final action or failure to act by a State or local government” that is inconsistent with the requirements of Section 332(c)(7) “may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.”21 The provision further directs the court to “decide such action on an expedited basis.”22

18. The Commission has previously interpreted the language Congress used and the limits it imposed on state and local authority in Section 332. For instance, in interpreting Section 332(c)(7)(B)(i)(II), the Commission has found that “a State or local government that denies an application for personal wireless service facilities siting solely because ‘one or more carriers serve a given geographic market’ has engaged in unlawful regulation that ‘prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,’ within the meaning of Section 332(c)(7)(B)(i)(II).”23 In adopting this interpretation, the Commission explained that its “construction of the provision achieves a balance that is most consistent with the relevant goals of the Communications Act” and its understanding that “[i]n promoting the construction of nationwide wireless networks by multiple carriers, Congress sought ultimately to improve service quality and lower prices for consumers.”24 The Commission also noted that an alternative interpretation would “diminish the service provided to [a wireless provider’s] customers.”25

19 47 U.S.C § 332(c)(7)(B)(ii).
20 47 U.S.C. § 332(c)(7)(A) (stating that, “[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities”). The statute defines “personal wireless services” to include CMRS, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. § 332(c)(7)(C). In 2012, Congress expressly modified this preservation of local authority by enacting Section 6409(a), which requires local governments to approve certain types of facilities siting applications “[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law.” Spectrum Act, 47 U.S.C. § 6409(a)(1).
25 Id.
19. In the 2009 Declaratory Ruling, the Commission acted to speed the deployment of then-new 4G services and concluded that, “[g]iven the evidence of unreasonable delays [in siting decisions] and the public interest in avoiding such delays,” it should offer guidance regarding the meaning of the statutory phrases “reasonable period of time” and “failure to act” “in order to clarify when an adversely affected service provider may take a dilatory State or local government to court.” The Commission interpreted “reasonable period of time” under Section 332(c)(7)(B)(ii) to be 90 days for processing collocation applications and 150 days for processing applications other than collocations. The Commission further determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days. In litigation involving the 90-day and 150-day time frames, the locality may attempt to “rebut the presumption that the established timeframes are reasonable.” If the agency fails to make such a showing, it may face “issuance of an injunction granting the application.” In its 2014 Wireless Infrastructure Order, the Commission clarified that the time frames under Section 332(c)(7) are presumptively reasonable and begin to run when the application is submitted, not when it is found to be complete by a siting authority.

20. In 2012, Congress adopted Section 6409 of the Middle Class Tax Relief and Job Creation Act (the Spectrum Act), which provides further evidence of Congressional intent to limit state and local laws that operate as barriers to infrastructure deployment. It states that, “[n]otwithstanding section 704 of the Telecommunications Act of 1996 (codified as 47 U.S.C. § 332(c)(7)) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” Subsection (a)(2) defines the term “eligible facilities request” as any request for modification of an existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment. In implementing Section 6409 and in an effort to “advance[e] Congress’s goal

26 Id. at 14008, para. 37; see also id. at 14029 (Statement of Chairman Julius Genachowski) (“[T]he rules we adopt today...will have an important effect in speeding up wireless carriers’ ability to build new 4G networks--which will in turn expand and improve the range of wireless choices available to American consumers.”).

27 Id. at 14012, para. 45.

28 Id. at 14005, 14012, paras. 32, 45.

29 Id. at 14008-10, 14013-14, paras. 37-42, 49-50.

30 Id. at 14009, para. 38; see also City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005) (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional tort damages).

31 Specifically, the Commission determined that once a siting application is considered complete for purposes of triggering the Section 332(c)(7) shot clocks, those shot clocks run regardless of any moratoria imposed by state or local governments, and the shot clocks apply to DAS and small-cell deployments so long as they are or will be used to provide “personal wireless services.” Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report & Order, 29 FCC Rcd 12865, 12966, 12973, paras. 243, 270, (2014) (2014 Wireless Infrastructure Order), aff’d, Montgomery County v. FCC, 811 F.3d 121 (4th Cir. 2015) (Montgomery County); see also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3339, para. 22 (2017) (Wireless Infrastructure NPRM/NOI); Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 and WT Docket No. 17-79, FCC 18-111, paras. 140-68 (rel. Aug. 3, 2018) (Moratoria Declaratory Ruling).

32 2014 Wireless Infrastructure Order, 29 FCC Rcd at 12970, para. 258. (“Accordingly, to the extent municipalities have interpreted the clock to begin running only after a determination of completeness, that interpretation is incorrect.”).


34 Id.
of facilitating rapid deployment,” the Commission adopted rules to expedite the processing of eligible facilities requests, including documentation requirements and a 60-day period for states and localities to review such requests. The Commission further determined that a “deemed granted” remedy was necessary for cases in which the reviewing authority fails to issue a decision within the 60-day period in order to “ensur[e] rapid deployment of commercial and public safety wireless broadband services.” The Fourth Circuit, affirming that remedy, explained that “[f]unctionally, what has occurred here is that the FCC—pursuant to properly delegated Congressional authority—has preempted state regulation of wireless towers.”

21. Consistent with these broad federal mandates, courts have recognized that the Commission has authority to interpret Sections 253 and 332 of the Act to further elucidate what types of state and local legal requirements run afoul of the statutory parameters Congress established. For instance, the Fifth Circuit affirmed the 2009 Declaratory Ruling in City of Arlington. The court concluded that the Commission possessed the “authority to establish the 90– and 150–day time frames” and that its decision was not arbitrary and capricious. More generally, as the agency charged with administering the Communications Act, the Commission has the authority, responsibility, and expert judgment to issue interpretations of the statutory language and to adopt implementing regulations that clarify and specify the scope and effect of the Act. Such interpretations are particularly appropriate where the statutory language is ambiguous, or the subject matter is “technical, complex, and dynamic,” as it is in the Communications Act, as recognized by the Supreme Court. Here, the Commission has ample experience monitoring and regulating the telecommunications sector. It is well-positioned, in light of this experience and the record in this proceeding, to issue a clarifying interpretation of Sections 253 and 332(c)(7) that accounts both for the changing needs of a dynamic wireless sector that is increasingly reliant on Small Wireless Facilities and for state and local oversight that does not materially inhibit wireless deployment.

22. The congressional and FCC decisions described above point to consistent federal action, particularly when faced with changes in technology, to ensure that our country’s approach to wireless infrastructure deployment promotes buildout of the facilities needed to provide Americans with next-generation services. Consistent with that long-standing approach, in the 2017 Wireless Infrastructure NPRM/NOI, the Commission sought comment on whether the FCC should again update its approach to infrastructure deployment to ensure that regulations are not operating as prohibitions in violation of Congress’s decisions and federal policy. In August 2018, the Commission concluded that state and local moratoria on telecommunications services and facilities deployment are barred by Section 253(a).

36 Id. at 12922, 12956-57, paras. 135, 214-15.
37 Id. at 12961-62, paras. 226, 228.
38 Montgomery County, 811 F.3d at 129.
39 See, e.g., City of Arlington, 668 F.3d at 253-54; County of San Diego, 543 F.3d at 578; RT Commc’ns., Inc. v. FCC, 201 F.3d 1264, 1268 (10th Cir. 2000).
40 City of Arlington, 668 F.3d at 254, 260-61.
42 See generally Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3332-39, paras. 4-22.
43 See generally Moratoria Declaratory Ruling, FCC 18-111, paras. 140-68.
B. The Need for Commission Action

23. In response to the opportunities presented by offering new wireless services, and the problems facing providers that seek to deploy networks to do so, we find it necessary and appropriate to exercise our authority to interpret the Act and clarify the preemptive scope that Congress intended. The introduction of advanced wireless services has already revolutionized the way Americans communicate and transformed the U.S. economy. Indeed, the FCC’s most recent wireless competition report indicates that American demand for wireless services continues to grow exponentially. It has been reported that monthly data usage per smartphone subscriber rose to an average of 3.9 gigabytes per subscriber per month, an increase of approximately 39 percent from year-end 2015 to year-end 2016.\textsuperscript{44} As more Americans use more wireless services, demand for new technologies, coverage and capacity will necessarily increase, making it critical that the deployment of wireless infrastructure, particularly Small Wireless Facilities, not be stymied by unreasonable state and local requirements.

24. 5G wireless services, in particular, will transform the U.S. economy through increased use of high-bandwidth and low-latency applications and through the growth of the Internet of Things.\textsuperscript{45} While the existing wireless infrastructure in the U.S. was erected primarily using macro cells with relatively large antennas and towers, wireless networks increasingly have required the deployment of small cell systems to support increased usage and capacity. We expect this trend to increase with next-generation networks, as demand continues to grow, and providers deploy 5G service across the nation.\textsuperscript{46} It is precisely “[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country’s wireless broadband needs and implement next-generation technologies” that the Commission has acknowledged “an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.”\textsuperscript{47} As explained below, the need to site so many more 5G-capable nodes leaves providers’ deployment plans and the underlying economics of those plans vulnerable to increased per site delays and costs.

25. Some states and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure, looking to bring greater connectivity to their communities through forward-looking policies. Leaders in these states are working hard to meet the needs of their communities and balance often competing interests. At the same time, outlier conduct persists. The record here suggests that the legal requirements in place in other state and local jurisdictions are materially impeding that deployment in various ways.\textsuperscript{48} Crown Castle, for example, describes “excessive and unreasonable” “fees


\textsuperscript{45} See Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3331, para. 1.

\textsuperscript{46} See, e.g., Letter from Brett Haan, Principal, Deloitte Consulting, U.S., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 17, 2018) (“Significant investment in new network infrastructure is needed to deploy 5G networks at-scale in the United States. 5G’s speed and coverage capabilities rely on network densification, which requires the addition of towers and small cells to the network. . . . This requires carriers to add 3 to 10 times the number of existing sites to their networks. Most of this additional infrastructure will likely be built with small cells that use lampposts, utility phones, or other structures of similar size able to host smaller, less obtrusive radios required to build a densified network.” (citation omitted)); see also Deloitte LLP, 5G: The Chance to Lead for a Decade (2018) (Deloitte 5G Paper), available at https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5gdeployment-imperative.pdf.

\textsuperscript{47} See Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3331, para. 2.

\textsuperscript{48} See, e.g., Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 10, 2018) (“Unfortunately, many municipalities are unable, unwilling, or do not make it a priority to act on applications within the shot clock period.” ); Letter from Keith Buell, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Aug. 13, 2018) (Sprint Aug. 13, 2018 Ex Parte Letter); Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21,
to access the [rights-of-way] that are completely unrelated to their maintenance or management.” It also points to barriers to market entry “for independent network and telecommunications service providers,” including municipalities that “restrict access to the [right-of-way] only to providers of commercial mobile services” or that impose “onerous zoning requirements on small cell installations when other similar [right of way] utility installations are erected with simple building permits.”

Crown Castle is not alone in describing local regulations that slow deployment. AT&T states that localities in Maryland, California, and Massachusetts have imposed fees so high that it has had to pause or decrease deployments. Likewise, AT&T states that a Texas city has refused to allow small cell placement on any structures in a right-of-way (ROW). T-Mobile states that the Town of Hempstead, New York requires service providers who seek to collocate or upgrade equipment on existing towers that have been properly constructed pursuant to Class II standards to upgrade and certify these facilities under Class III standards that apply to civil and national defense and military facilities. Verizon states that a Minnesota town has proposed barring construction of new poles in rights-of-way and that a Midwestern suburb where it has been trying to get approval for small cells since 2014 has no established procedures for small cell approvals. Verizon states that localities in New York and Washington have required special use permits involving multiple layers of approval to locate small cells in some or all zoning districts. While some localities dispute some of these characterizations, their submissions do not persuade us that there is no basis or need for the actions we take here.

Further, the record in this proceeding demonstrates that many local siting authorities are not complying with our existing Section 332 shot clock rules. WIA states that its members routinely face lengthy delays and specifically cite localities in New Jersey, New Hampshire, and Maine as being

(Continued from previous page)
problematic.\textsuperscript{56} Similarly, AT&T identified an instance in which it took a locality in California 800 days to process an application.\textsuperscript{57} GCI provides an example in which it took an Alaska locality nine months to decide an application.\textsuperscript{58} T-Mobile states that a community in Colorado and one in California have lengthy pre-application processes for all small cell installations that include notification to all nearby households, a public meeting, and the preparation of a report, none of which these jurisdictions view as triggering a shot clock.\textsuperscript{59} Similarly, Lightower provides examples of long delays in processing siting applications.\textsuperscript{60} Finally, Crown Castle describes a case in which a “town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even ‘deem complete’ Crown Castle’s application.”\textsuperscript{61}

27. Our Declaratory Ruling and Third Report and Order are intended to address these issues and outlier conduct. Our conclusions are also informed by findings, reports, and recommendations from the FCC Broadband Deployment Advisory Committee (BDAC), including the Model Code for Municipalities, the Removal of State and Local Regulatory Barriers Working Group report, and the Rates and Fees Ad Hoc Working Group report, which the Commission created in 2017 to identify barriers to deployment of broadband infrastructure, many of which are addressed here.\textsuperscript{62} We also considered input from numerous state and local officials about their concerns, and how they have approached wireless deployment, much of which we took into account here. Our action is also consistent with congressional efforts to hasten deployment, including bi-partisan legislation pending in Congress like the STREAMLINE Small Cell Deployment Act and SPEED Act. The STREAMLINE Small Cell Deployment Act proposes to streamline wireless infrastructure deployments by requiring siting agencies to act on deployment requests within specified time frames and by limiting the imposition of onerous

\textsuperscript{56} WIA Comments at 8. WIA states that one of its “member reports that the wireless siting approval process exceeds 90 days in more than 33% of jurisdictions it surveyed and exceeds 150 days in 25% of surveyed jurisdictions.” WIA Comments at 8. In some cases, WIA members have experienced delays ranging from one to three years in multiple jurisdictions—significantly longer than the 90- and 150-day time frames that the Commission established in 2009.

\textsuperscript{57} See WIA Comments at 9 (citing and discussing AT&T’s Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

\textsuperscript{58} GCI Comments at 5-6.

\textsuperscript{59} T-Mobile Comments at 21.

\textsuperscript{60} Lightower submits that average processing timeframes have increased from 300 days in 2016 to approximately 570 days in 2017, much longer than the Commission’s shot clocks. Lightower states that “forty-six separate jurisdictions in the last two years had taken longer than 150 days to consider applications, with twelve of those jurisdictions—representing 101 small wireless facilities—taking more than a year.” Lightower Comments at 5-6. See also WIA Comments at 9 (citing and discussing Lightower’s Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

\textsuperscript{61} WIA Comments at 8 (citing and discussing Crown Castle’s Comments in 2016 Streamlining Public Notice, WT Docket No. 16-421).

conditions and fees. The SPEED Act would similarly streamline federal permitting processes. In the same vein, the Model Code for Municipalities adopts streamlined infrastructure siting requirements while other BDAC reports and recommendations emphasize the negative impact of high fees on infrastructure deployments.

28. As do members of both parties of Congress and experts on the BDAC, we recognize the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G. State government officials also have urged us to act to expedite the deployment of 5G technology, in particular, by streamlining overly burdensome regulatory processes to ensure that 5G technology will expand beyond just urban centers. These officials have expressed their belief that reducing high regulatory costs and delays in urban areas would leave more money and encourage development in rural areas. “[G]etting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure.” State officials have acknowledged that current regulations are “outdated” and “could hinder the timely arrival of 5G throughout the country,” and urged the FCC “to push for more reforms that will streamline infrastructure rules from coast to coast.” Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches, arguing, among other points,

66 See, e.g., Letter from Patricia Paoletta, Counsel to Deloitte Consulting LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) (“Deloitte noted that, as with many technology standard evolutions, the value of being a first-mover in 5G will be significant. Being first to LTE afforded the United States macroeconomic benefits, as it became a test bed for innovative mobile, social, and streaming applications. Being first to 5G can have even greater and more sustained benefits to our national economy given the network effects associated with adding billions of devices to the 5G network, enabling machine-to-machine interactions that generates data for further utilization by vertical industries”).
68 Letter from LaWana Mayfield, City Council Member, Charlotte, NC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (LaWana Mayfield July 31, 2018 Ex Parte Letter); see also Letter from South Carolina State Representative Terry Alexander to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed August 7, 2018) (“[P]olicymakers at all levels of government must streamline complex siting stipulations that will otherwise slow down 5G buildout for small cells in particular.”); Letter from Sal Pace, Pueblo County Commissioner, District 3, CO, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 30, 2018) (Sal Pace July 30, 2018 Ex Parte Letter) (“[T]he FCC should ensure that localities are fully compensated for their costs . . . Such fees should be reasonable and non-discriminatory, and should ensure that localities are made whole. Lastly, the FCC should set reasonable and enforceable deadlines for localities to act on wireless permit applications. . . . The distinction between siting large macro-towers and small cells should be reflected in any rulemaking.”)
69 Letter from Dr. Carolyn A. Prince, Chairwoman, Marlboro County Council, SC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Dr. Carolyn Prince July 31, 2018 Ex Parte Letter)
that the FCC lacks authority to take certain actions. We have carefully considered these views, but nevertheless find our actions here necessary and fully supported.

29. Accordingly, in this Declaratory Ruling and Third Report and Order, we act to reduce regulatory barriers to the deployment of wireless infrastructure and to ensure that our nation remains the leader in advanced wireless services and wireless technology.

III. DECLARATORY RULING

30. In this Declaratory Ruling, we note that a number of appellate courts have articulated different and often conflicting views regarding the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332. In light of these diverging views, Congress’s vision for a consistent, national policy framework, and the need to ensure that our approach continues to make sense in light of the relatively new trend towards the large-scale deployment of Small Wireless Facilities, we take this opportunity to clarify and update the FCC’s reading of the limits Congress imposed. We do so in three main respects.

31. First, in Part III.A, we express our agreement with the views already stated by the First, Second, and Tenth Circuits that the “materially inhibit” standard articulated in 1997 by the Clinton-era FCC’s California Payphone decision is the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332.

32. Second, in Part III.B, we note, as numerous courts have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can effectively prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress’s limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they represent a reasonable approximation of the local government’s objectively reasonable costs, and are non-discriminatory.

71 In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation, while recognizing that it is the standard itself, not the particular, presumptive fee levels we articulate, that ultimately will govern whether a particular fee is allowed under Sections 253 and 332. So fees above

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70 See, e.g., City of Manhattan, KS Sept. 13, 2018 Ex Parte Letter at 1-2; Ronny Berdugo Sept. 18, 2018 Ex Parte Letter at 1-2; Damon Connolly Sept. 17, 2018 Ex Parte Letter at 1-2.

71 Fees charged by states or localities in connection with Small Wireless Facilities would be “compensation” for purposes of Section 253(c). This Declaratory Ruling interprets Section 253 and 332(c)(7) in the context of three categories of fees, one of which applies to all deployments of Small Wireless Facilities while the other two are specific to Small Wireless Facilities deployments inside the ROW. (1) “Event” or “one-time” fees are charges that providers pay on a non-recurring basis in connection with a one-time event, or series of events occurring within a finite period. The one-time fees addressed in this Declaratory Ruling are not specific to the ROW. For example, a provider may be required to pay fees during the application process to cover the costs related to processing an application building or construction permits, street closures, or a permitting fee, whether or not the deployment is in the ROW. (2) Recurring charges for a Small Wireless Facility’s use of or attachment to property inside the ROW owned or controlled by a state or local government, such as a light pole or traffic light, is the second category of fees addressed here, and is typically paid on a per structure/per year basis. (3) Finally, ROW access fees are recurring charges that are assessed, in some instances, to compensate a state or locality for a Small Wireless Facility’s access to the ROW, which includes the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property (including when such property is government-owned). A ROW access fee may be charged even if the Small Wireless Facility is not using government owned property within the ROW. AT&T Comments at 18 (describing three categories of fees); Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 11 (filed Aug. 10, 2018) (Verizon Aug. 10, 2018 Ex Parte Letter) (characterizing fees as recurring or non-recurring); see also Draft BDAC Rates and Fees Report at p. 15-16. Unless otherwise specified, a reference to “fee” or “fees” herein refers to any one of, or any combination of, these three categories of charges.
those levels would be permissible under Sections 253 and 332 to the extent a locality’s actual, reasonable costs (as measured by the standard above) are higher.

33. Finally, in Part III.C, we focus on a subset of other, non-fee provisions of state and local law that could also operate as prohibitions on service. We do so in particular by addressing state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities. We note that the Small Wireless Facilities that are the subject of this Declaratory Ruling remain subject to the Commission’s rules governing Radio Frequency (RF) emissions exposure.72

A. Overview of the Section 253 and Section 332(c)(7) Framework Relevant to Small Wireless Facilities Deployment

34. In Sections 253(a) and 332(c)(7)(B) of the Act, Congress determined that state or local requirements that prohibit or have the effect of prohibiting the provision of service are unlawful and thus preempted.73 Section 253(a) addresses “any interstate or intrastate telecommunications service,” while Section 332(c)(7)(B)(i)(II) addresses “personal wireless services.”74 Although the provisions contain identical “effect of prohibiting” language, the Commission and different courts over the years have each employed inconsistent approaches to deciding what it means for a state or local legal requirement to have the “effect of prohibiting” services under these two sections of the Act. This has caused confusion among both providers and local governments about what legal requirements are permitted under Sections 253 and 332(c)(7). For example, despite Commission decisions to the contrary construing such language under Section 253, some courts have held that a denial of a wireless siting application will “prohibit or have the effect of prohibiting” the provision of a personal wireless service under Section 332(c)(7)(B)(i)(II) only if the provider can establish that it has a significant gap in service coverage in the

72 See 47 CFR §§ 1.1307, 1.1310. We disagree with commenters who oppose the Declaratory Ruling on the basis of concerns regarding RF emissions. See, e.g., Comments from Judy Aizuss, Comments from Jeffrey Arndt, Comments from Jeanice Barcelo, Comments from Kristin Beatty, Comments from James M. Benster, Comments from Terrie Burns, Comments from EMF Safety Network, Comments from Kate Reese Hurd, Comments from Marilyne Martin, Comments from Lisa Mayock, Comments from Kristen Moriarty Termunde, Comments from Sage Associates, Comments from Elizabeth Shapiro, Comments from Paul Silver, Comments from Natalie Ventrice. The Commission has authority to adopt and enforce RF exposure limits, and nothing in this Declaratory Ruling changes the applicability of the Commission’s existing RF emissions exposure rules. See, e.g., Section 704(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104 (directing Commission to “prescribe and make effective rules regarding the environmental effects of radio frequency emissions” upon completing action in then-pending rulemaking proceeding that included proposals for, inter alia, maximum exposure limits); 47 U.S.C. § 332(c)(7)(B)(iv) (recognizing legitimacy of FCC’s existing regulations on environmental effects of RF emissions of personal wireless service facilities, by proscribing state and local regulation of such facilities on the basis of such effects, to the extent such facilities comply with Commission regulations concerning such RF emissions); 47 U.S.C. § 151 (creating the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service, . . . for the purpose of [inter alia] promoting safety of life and property through the use of wire and radio communications”). See also H.R. Rep. No. 204(I), 104th Cong., 1st Sess. 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61 (1996) (in legislative history of Section 704 of 1996 Telecommunications Act, identifying “adequate safeguards of the public health and safety” as part of a framework of uniform, nationwide RF regulations); Reassessment of FCC Radiofrequency Exposure Limits and Policies, First Report and Order, Further Notice of Proposed Rulemaking and Notice of Inquiry, 28 FCC Rcd 3498, 3530-31, para. 103, n.176 (2013).


74 Id. The actions in this proceeding update the FCC’s approach to Sections 253 and 332 by addressing effective prohibitions that apply to the deployment of services covered by those provisions. Our interpretations in this proceeding do not provide any basis for increasing the regulation of services deployed consistent with Section 621 of the Cable Communications Policy Act of 1984.
area and a lack of feasible alternative locations for siting facilities. Courts vary widely regarding the type of showing needed to satisfy the second part of that standard. The First, Fourth, and Seventh Circuits have imposed a “heavy burden” of proof on applicants to establish a lack of alternative feasible sites, requiring them to show “not just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try.” Green Mountain Realty Corp. v. Leonard, 750 F.3d 30, 40 (1st Cir. 2014); accord New Cingular Wireless PCS, LLC v. Fairfax County, 674 F.3d 270, 277 (4th Cir. 2012); T-Mobile Northeast LLC v. Fairfax County, 672 F.3d 259, 266-68 (4th Cir. 2012) (en banc); Helcher v. Dearborn County, 595 F.3d 710, 723 (7th Cir. 2010) (Helcher). The Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the “least intrusive means” for filling a coverage gap in light of the aesthetic or other values that the local authority seeks to serve. Sprint Spectrum, LP v. Willoth, 176 F.3d 630, 643 (2d Cir. 1999) (Willoth); APT Pittsburgh Ltd. P’ship v. Penn Township, 196 F.3d 469, 480 (3d Cir. 1999) (APT); American Tower Corp. v. City of San Diego, 763 F.3d 1035, 1056-57 (9th Cir. 2014); T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 995-99 (9th Cir. 2009) (City of Anacortes).

35. In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in California Payphone, namely, that a state or local legal requirement constitutes an effective prohibition if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” We then explain how this “material inhibition” standard applies in the context of state and local fees and aesthetic requirements. In doing so, we confirm the First, Second, and Tenth Circuits’ understanding that under this analytical framework, a legal requirement can “materially inhibit” the provision of services even if it is not an insurmountable barrier. We also resolve the conflicting court interpretations of the standard that has been employed not only by the Commission but also many courts, those arguments do not persuade us to depart from the California Payphone standard here.

Courts vary widely regarding the type of showing needed to satisfy the second part of that standard. The First, Fourth, and Seventh Circuits have imposed a “heavy burden” of proof on applicants to establish a lack of alternative feasible sites, requiring them to show “not just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try.” Green Mountain Realty Corp. v. Leonard, 750 F.3d 30, 40 (1st Cir. 2014); accord New Cingular Wireless PCS, LLC v. Fairfax County, 674 F.3d 270, 277 (4th Cir. 2012); T-Mobile Northeast LLC v. Fairfax County, 672 F.3d 259, 266-68 (4th Cir. 2012) (en banc); Helcher v. Dearborn County, 595 F.3d 710, 723 (7th Cir. 2010) (Helcher). The Second, Third, and Ninth Circuits have held that an applicant must show only that its proposed facilities are the “least intrusive means” for filling a coverage gap in light of the aesthetic or other values that the local authority seeks to serve. Sprint Spectrum, LP v. Willoth, 176 F.3d 630, 643 (2d Cir. 1999) (Willoth); APT Pittsburgh Ltd. P’ship v. Penn Township, 196 F.3d 469, 480 (3d Cir. 1999) (APT); American Tower Corp. v. City of San Diego, 763 F.3d 1035, 1056-57 (9th Cir. 2014); T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 995-99 (9th Cir. 2009) (City of Anacortes).

California Payphone, 12 FCC Rcd at 14206, para. 31. A number of circuit courts have cited California Payphone as the leading authority regarding the standard to be applied under Section 253(a). See, e.g., County of San Diego, 543 F.3d at 579-80; Level 3 Commc’ns, LLC v. City of St. Louis, 477 F.3d 528, 533-34 (8th Cir. 2007) (City of St. Louis).

See Puerto Rico Tel. Co. v. Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006) (Municipality of Guayanilla); TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002) (City of White Plains); RT Communications v. FCC, 201 F.3d 1264, 1268 (10th Cir. 2000) (“[Section] 253(a) forbids any statute which prohibits or has ‘the effect of prohibiting’ entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.”) (RT Communications) (affirming Silver Star Tel. Co. Petition for Preemption and Declaratory Ruling, 12 FCC Rcd 15639 (1997)).

California Payphone, 12 FCC Rcd at 14206, para. 31. A number of circuit courts have cited California Payphone as the leading authority regarding the standard to be applied under Section 253(a). See, e.g., County of San Diego, 543 F.3d at 578; City of St. Louis, 477 F.3d at 533; Municipality of Guayanilla, 450 F.3d at 18; Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1270 (10th Cir. 2004) (City of Santa Fe); City of White Plains, 305 F.3d at 76. Crown Castle argues that the Eighth and Ninth Circuit cited the FCC’s California Payphone decision, but read the standard in an overly narrow fashion. See, e.g., Letter from Kenneth J. Simon, Senior Vice Pres. and Gen. Counsel, Crown Castle, et al., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 12 (filed June 7, 2018) (Crown Castle June 7, 2018 Ex Parte Letter); see also Smart Communities Comments at 60-61 (describing circuit split). Some commenters cite selected dictionary definitions or otherwise argue for a narrow definition of “prohibit.” See, e.g., Smart Communities Reply at 53. But because they do not go on to dispute the validity of the California Payphone standard that has been employed not only by the Commission but also many courts, those arguments do not persuade us to depart from the California Payphone standard here.

See, e.g., City of White Plains, 305 F.3d at 76; Municipality of Guayanilla, 450 F.3d at 18; see also, e.g., Crown Castle June 7, 2018 Ex Parte Letter at 12. Because the clarifications in this order should reduce uncertainty regarding the application of these provisions for state and local governments as well as stakeholders, we are not persuaded by some commenters’ arguments that an expedited complaint process is required. See, e.g., AT&T Comments at 28; CTIA Reply at 21. We do not address, at this time, recently-filed petitions for reconsideration of our August 2018 Moratoria Declaratory Ruling. See, e.g., Smart Communities Petition for Reconsideration, WC
‘effective prohibition’ language so that continuing confusion on the meaning of Sections 253 and 332(c)(7) does not materially inhibit the critical deployments of Small Wireless Facilities and our nation’s drive to deploy 5G.\footnote{See County of San Diego, 543 F.3d at 579 (“We see nothing suggesting that Congress intended a different meaning of the text ‘prohibit or have the effect of prohibiting’ in the two statutory provisions, enacted at the same time, in the same statute. * * * * * As we now hold, the legal standard is the same under either [Section 253 or 332(c)(7)].”); see also, e.g., Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1946 (citing Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning); Northcross v. Board of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973) (per curiam) (“[S]imilarity of language . . . is . . . a strong indication that the two statutes should be interpreted pari passu”); Verizon Comments at 9-10; AT&T Reply at 3-4; Crown Castle June 7, 2018 Ex Parte Letter at 15.)}

36. As an initial matter, we note that our Declaratory Ruling applies with equal measure to the effective prohibition standard that appears in both Sections 253(a) and 332(c)(7).\footnote{Common carrier wireless services meet the definition of “telecommunications services,” and thus are within the scope of Section 253(a) of the Act. See, e.g., Moratoria Declaratory Ruling, FCC 18-111, para 142 n.523; see also, e.g., League of Minnesota Cities Comments at 11; Verizon Reply at 9-10. While some commenters cite certain distinguishing factual characteristics between wireline and wireless services, the record does not reveal why those distinctions would be material to whether wireless telecommunications services are covered by Section 253 in the first instance. See, e.g., City of San Antonio et al. Comments, Exh. A at 13; Virginia Joint Commenters Comments at 5, Exh. A at 45-46. To the contrary, Section 253(e) expressly preserves “application of section 332(c)(3) of this title to commercial mobile service providers” notwithstanding Section 253—a provision that would be meaningless if wireless telecommunications services already fell outside the scope of Section 253. 47 U.S.C. § 253(e). For this same reason, we also reject claims that the existence of certain protections for personal wireless services in Section 332(c)(7), or the phrase “nothing in this chapter” in Section 332(c)(7)(A), demonstrate that states’ or localities’}

(Continued from previous page)
When densifying a wireless network, introducing new services or otherwise improving service, the placement, construction, or modification of personal wireless service facilities from preemption by other sections of the Communications Act, Section 332(c)(7)(B)(i)(II)'s ban of requirements that “prohibit or have the effect of prohibiting” the provision of service, which is identical to the preemption provision in Section 253(a). Thus, states and localities may charge fees and dispose of applications relating to the matters subject to Section 332(c)(7) in any manner they deem appropriate, so long as that conduct does not amount to a prohibition or effective prohibition, as interpreted in this Declaratory Ruling or otherwise run afoul of federal or state law; but 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.

See also Bastien v. AT&T Wireless Servs., Inc.,
capabilities. Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways—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 in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.

38. Our reading of Section 253(a) and Section 332(c)(7)(B)(i)(II) reflects and supports a marketplace in which services can be offered in a multitude of ways with varied capabilities and performance characteristics consistent with the policy goals in the 1996 Act and the Communications Act. To limit Sections 253(a) and 332(c)(7)(B)(i)(II) to protecting only against coverage gaps or the like would be to ignore Congress’s contemporaneously-expressed goals of “promot[ing] competition[,] . . . secur[ing] . . . higher quality services for American telecommunications consumers and encourage[ing] the rapid deployment of new telecommunications technologies.” In addition, as the Commission recently explained, the implementation of the Act “must factor in the fundamental objectives of the Act, including the deployment of a ‘rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges’ and ‘the development and rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays[, and] efficient and

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86 See, e.g., Crown Castle Comments at 54-55; Free State Foundation Comments at 12; T-Mobile Comments at 43-45; CTIA Reply at 14; WIA Reply at 26; Crown Castle June 7, 2018 *Ex Parte* Letter at 13-14; Letter from Kara Romagnino Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 8-9 (filed June 27, 2018) (CTIA June 27, 2018 *Ex Parte* Letter). As T-Mobile explains, for example, a provider might need to improve “signal strength or system capacity to allow it to provide reliable service to consumers in residential and commercial buildings.” T-Mobile Comments at 43; see also, e.g., *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, et al., Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14253, para. 38 (2013) (observing that “DAS and small cell facilities[ ] are critical to satisfying demand for ubiquitous mobile voice and broadband services”). The growing prevalence of smart phones has only accelerated the demand for wireless providers to take steps to improve their service offerings. *See, e.g., Twentieth Wireless Competition Report*, 32 FCC Rcd at 9011-13, paras. 62-65.

87 Our conclusion finds further support in our broad understanding of the statutory term “service,” which, as we explained in our recent *Moratoria Declaratory Ruling*, means “any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities.” *Moratoria Declaratory Ruling*, FCC 18-111, para. 162 n.594; see also *Public Utility Comm'n of Texas Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3496, para. 74 (1997) (*Texas PUC Order*) (interpreting the scope of ‘telecommunications services’ covered by Section 253(a) and clarifying that it would be an unlawful prohibition for a state or locality to specify “the means or facilities” through which a service provider must offer service); Crown Castle June 7, 2018 *Ex Parte* Letter at 10-11 (discussing this precedent). We find this interpretation of “service” warranted not only under Section 253(a), but Section 332(c)(7)(B)(i)(II)’s reference to “services” as well.

88 Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996). Consequently, we reject arguments suggesting that the provision of some level of wireless service in the past necessarily demonstrates that there is no effective prohibition of service under the state or local legal requirements that applied during those periods or that an effective prohibition only is present if a provider can provide no covered service whatsoever. *See, e.g., City and County of San Francisco Comments at 25-26; Virginia Joint Commenters Comments, Exh. A at 31-33. Nor, in light of these goals, do we find it reasonable to interpret the protections of these provisions as doing nothing more than guarding against a monopoly as some suggest. *See, e.g., Smart Communities Comments, WC Docket No. 17-84, at 8-9 (filed June 15, 2017) cited in Smart Communities Comments at 57 n.141.*
intensive use of the electromagnetic spectrum.”

These provisions demonstrate that our interpretation of Section 253 and Section 332(c)(7)(B)(i)(II) is in accordance with the broader goals of the various statutes that the Commission is entrusted to administer.

39. California Payphone further concluded that providers must be allowed to compete in a “fair and balanced regulatory environment.” As reflected in decisions such as the Commission’s Texas PUC Order, a state or local legal requirement can function as an effective prohibition either because of the resulting “financial burden” in an absolute sense, or, independently, because of a resulting competitive disparity. We clarify that “[a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the disfavored facilities will experience prohibition.” This conclusion is consistent with both Commission and judicial precedent recognizing the prohibitory effect that results from a competitor being treated materially differently than similarly-situated providers. We provide our authoritative interpretation below of the circumstances in which a “financial burden,” as described in the Texas PUC Order, constitutes an effective prohibition in the context of certain state and local fees.

40. As we explained above, we reject alternative readings of the effective prohibition language that have been adopted by some courts and used to defend local requirements that have the effect of prohibiting densification of networks. Decisions that have applied solely a “coverage gap”-based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace. Those cases, including some that formed the foundation for

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90 California Payphone, 12 FCC Rcd at 14206, para. 31.

91 Texas PUC Order, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; see also, e.g., Crown Castle June 7, 2018 Ex Parte at 10-11, 13.


94 Smart Communities seeks clarification of whether this Declaratory Ruling is meant to say that the “coverage gap” standard followed by a number of courts should include consideration of capacity as well as coverage issues. Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Att. at 17 (Sept. 19, 2018) (Smart Communities Sept. 19 Ex Parte Letter). We are not holding that prior “coverage gap” analyses are consistent with the standards we articulate here as long as they also take into account “capacity gaps”; rather, we are articulating here the effective prohibition standard that should apply while, at the same time, noting one way in which prior approaches erred by requiring coverage gaps. Accordingly, we reject both the version of the “coverage gap” test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show “just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try”) and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the “least intrusive means” for filling a coverage gap) See supra n. 75. We also note that some courts have expressed concern about alternative readings of the statute that would lead to extreme outcomes—either always requiring a grant under some interpretations, or never preventing a denial under other interpretations. See, e.g., Willoth, 176 F.3d at 639-41; APT, 196 F.3d at 478-79; Town of Amherst v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999); AT&T Wireless PCS v. City Council of Virginia Beach, 155 F.3d 423, 428 (4th Cir. 1998) (City Council of Virginia Beach); see also, e.g., Greenling Comments at 2; City and County of San Francisco Reply
“coverage gap”-based analytical approaches, appear to view wireless service as if it were a single, monolithic offering provided only via traditional wireless towers.\(^5\) By contrast, the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies.\(^6\) As Crown Castle explains, coverage gap-based approaches are “simply (Continued from previous page) ———————————————————-

at 16. Our interpretation avoids those concerns while better reflecting the text and policy goals of the Communications Act and 1996 Act than coverage gap-based approaches ultimately adopted by those courts. Our approach ensures meaningful constraints on state and local conduct that otherwise would prohibit or have the effect of prohibiting the provision of personal wireless services. At the same time, our standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities, as explained below. See infra III.B, C.

\(^5\) See, e.g., Willth, 176 F.3d at 641-44; 360 Degrees Commc’ns Co. v. Board of Supervisors of Albemarle County, 211 F.3d 79, 86-88 & n.1 (4th Cir. 2000) (Albemarle County); see also, e.g., ExteNet Comments at 29; T-Mobile Comments at 42; Verizon Comments at 18; WIA Comments at 38-40. Even some cases that implicitly recognize the limitations of a gap-based test fail to account for those limitations in practice when applying Section 332(c)(7)(B)(i)(II). See, e.g., Second Generation Properties v. Town of Pelham, 313 F.3d 620, 633 n.14 (4th Cir. 2002) (discussing scenarios where a carrier has coverage but insufficient capacity to adequately handle the volume of calls or where new technology emerges and a carrier would like to use it in areas that already have coverage using prior-generation technology). Courts that have sought to identify limited set of characteristics of personal wireless services covered by the Act essentially allow actual or effective prohibition of many personal wireless services that providers wish to offer with additional or more advanced characteristics. See, e.g., Willth, 176 F.3d at 641-43 (drawing upon certain statutory definitions); Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64, 70 (3d Cir. 1999) (Borough of Ho-Ho-Kus) (concluding that it should be up to state or local authorities to assess and weigh the benefits of differing service qualities); Albemarle County, 211 F.3d at 87 (citing 47 CFR §§ 22.99, 22.911(b) as noting the possibility of some ‘dead spots’); cf. USOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines, 465 F.3d 817 (8th Cir. 2006) (describing as a “dubious proposition” the argument that a denial of a request to construct a tower resulting in “less than optimal” service quality could be an effective prohibition). An outcome that allows the actual or effective prohibition of some covered services is contrary to the Act. Section 253(a) applies to any state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing “any” interstate or intrastate telecommunications service, 47 U.S.C. § 253(a). Similarly, Section 332(c)(7)(B)(i)(II) categorically precludes state or local regulation of the placement, construction, or modification of personal wireless service facilities that prohibits or has the effect of prohibiting the provision of personal wireless “services.” 47 U.S.C. § 332(c)(7)(B)(i)(II). We find the most natural interpretation of these sections is that any service that meets the definition of “telecommunications service” or “personal wireless service” is encompassed by the language of each provision, rather than only some subset of such services or service generally. The notion that such state or local regulation permissibly could prohibit some personal wireless services, so long as others are available, is at odds with that interpretation. In addition, as we explain above, a contrary approach would fail to advance important statutory goals as well as the interpretation we adopt. Further, the approach reflected in these court decisions could involve state or local authorities “inquir[ing] into and regulat[ing] the services offered—an inquiry for which they are ill-qualified to pursue and which could only delay infrastructure deployment.” Crown Castle June 7, 2018 Ex Parte Letter at 14. Instead, our effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.

\(^6\) See generally, e.g., Twentieth Wireless Competition Report, 32 FCC Rcd at 8968; see also, e.g., T-Mobile Comments at 42-43; AT&T Reply at 4-5; CTIA Reply at 13-14; WIA Reply at 23-24; Crown Castle June 7, 2018 Ex Parte Letter at 15. We do not suggest that viewing wireless service as if it were a single, monolithic offering provided only via traditional wireless towers would have reflected an accurate understanding of the marketplace in the past, even if it might have been somewhat more understandable that courts held such a simplified view at that time. Rather, the current marketplace conditions highlight even more starkly the shortcomings of coverage gap-based approaches, which do not account for other characteristics and deployment strategies. See, e.g., Twentieth Wireless Competition Report, 32 FCC Rcd at 8974-75, para. 12 (observing that “[p]roviders of mobile wireless services typically offer an array of mobile voice and data services,” including “interconnected mobile voice services”); id. at 8997-97, paras. 42-43 (discussing various types of wireless infrastructure deployment to, among
incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage.”

Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings.  

41. Likewise, we reject the suggestion of some courts like the Eighth and Ninth Circuits that evidence of an existing or complete inability to offer a telecommunications service is required under 253(a). Such an approach is contrary to the material inhibition standard of California Payphone and the correct recognition by courts “that a prohibition does not have to be complete or ‘insurmountable’” to constitute an effective prohibition. Commission precedent beginning with California Payphone itself makes clear that an insurmountable barrier is not required to find an effective prohibition under Section 253(a). The “effectively prohibit” language must have some meaning independent of the “prohibit”

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other things, “improve spectrum efficiency for 4G and future 5G services,” “to fill local coverage gaps, to densify networks and to increase local capacity”).

97 Crown Castle June 7, 2018 Ex Parte Letter at 15; see also id. at 13 (“Densification of networks will be key for augmenting the capacity of existing networks and laying the groundwork for the deployment of 5G.”); id. at 15-16 (“When trying to maximize spectrum re-use and boost capacity, moving facilities by just a few hundred feet can mean the difference between excellent service and poor service. The FCC’s rules, therefore, must account for the effect siting decisions would have on every level of service, including increasing capacity and adding new spectrum bands. Practices and decisions that prevent carriers from doing either materially prohibit the provision of telecommunications service and thus should be considered impermissible under Section 332.”). Contrary approaches appear to occur in part when courts’ policy balancing places more importance on broadly preserving state and local authority than is justified. See, e.g., APT, 196 F.3d at 479; Albermarle County, 211 F.3d at 86; City Council of Virginia Beach, 155 F.3d at 429; National Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14 (1st Cir. 2002); see also, e.g., League of Arizona Cities et al. Joint Comments at 45; Smart Communities Reply at 33. As explained above, our interpretation of “telecommunications services” in Section 253(a) and “personal wireless services” in Section 332(c)(7)(B)(i)(II) are focused on the covered services that providers seek to provide—including the relevant service characteristics they seek to incorporate—not only is consistent with the text of those provisions but better reflects the broader policy goals of the Communications Act and the 1996 Act.

98 See WIA Comments at 39; T-Mobile Comments at 43-44.

99 See, e.g., County of San Diego, 543 F.3d at 577, 579-80; City of St. Louis, 477 F.3d at 533-34; see also, e.g., Virginia Joint Commenters Comments, Exh. A at 39-41. Although the Ninth Circuit in County of San Diego found that “the unambiguous text of §253(a)” precluded a prior Ninth Circuit approach that found an effective prohibition based on broad governmental discretion and the “mere possibility of prohibition,” that holding is not implicated by our interpretations here. County of San Diego, 543 F.3d at 578; cf. City of St. Louis, 477 F.3d at 532. Consequently, those decisions do not preclude the Commission’s interpretations here, see, e.g., Verizon Reply at 7, and we reject claims to the contrary. See, e.g., Smart Communities Comments at 60.

100 City of White Plains, 305 F.3d at 76 (citing RT Commc’ns, 201 F.3d at 1268); see also, e.g., Municipality of Guayanilla, 450 F.3d at 18 (quoting City of White Plains, 305 F.3d at 76 and citing City of Santa Fe, 380 F.3d at 1269); Crown Castle June 7, 2018 Ex Parte Letter at 12; Verizon Aug. 10, 2018 Ex Parte Letter, Attach at 5. Indeed, the Eighth Circuit’s City of St. Louis decision acknowledges that under Section 253 “[t]he plaintiff need not show a complete or insurmountable prohibition,” even while other aspects of that decision suggest that an insurmountable barrier effectively would be required. City of St. Louis, 477 F.3d at 533 (citing City of White Plains, 305 F.3d at 76).

101 In California Payphone, the Commission concluded that the ordinance at issue “does not ‘prohibit’ the ability of any payphone service provider to provide payphone service in the Central Business District within the meaning of section 253(a),” but went on to evaluate the possibility of an effective prohibition by considering “whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” California Payphone, 12 FCC Rcd at 14205, 14206, paras. 28, 31. In the Texas PUC Order, the Commission found that state law build-out requirements would require “substantial financial investment” and a “comparatively high cost per loop sold” in particular areas, interfering with the
language, and we find that the interpretation of the First, Second, and Tenth Circuits reflects that principle, while being more consistent with the California Payphone standard than the approach of the Eighth and Ninth Circuits. The reasonableness of our interpretation that ‘effective prohibition’ does not require a showing of an insurmountable barrier to entry is demonstrated not only by a number of circuit courts’ acceptance of that view, but in the Supreme Court’s own characterization of Section 253(a) as “prohibit[ing] state and local regulation that impedes the provision of ‘telecommunications service.’”

42. The Eighth and Ninth Circuits’ suggestion that a provider must show an insurmountable barrier to entry in the jurisdiction imposing the relevant regulation is at odds with relevant statutory purposes and goals, as well. Section 253(a) is designed to protect “any entity” seeking to provide telecommunications services from state and local barriers to entry, and Sections 253(b) and (c) emphasize the importance of “competitively neutral” and “nondiscriminatory” treatment of providers. Yet focusing on whether the carrier seeking relief faces an insurmountable barrier to entry would lead to disparities in statutory protections among providers based merely on considerations such as their access to capital and the breadth or narrowness of their entry strategies. In addition, the Commission has observed in connection with Section 253: “Each local government may believe it is simply protecting the

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interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress’ recognition of this fact was the genesis of its grant of preemption authority to this Commission.”

As illustrated by our consideration of effective prohibitions flowing from state and local fees, there also can be cases where a narrow focus on whether an insurmountable barrier can be shown within the jurisdiction imposing a particular legal requirement would neglect the serious effects that flow through in other jurisdictions as a result, including harms to regional or national deployment efforts.

B. State and Local Fees

43. Federal courts have long recognized that the fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed in the effective prohibition standard embodied in Sections 253 and 332. In Municipality of Guayanilla, for example, the First Circuit addressed whether a city could lawfully charge a 5 percent gross revenue fee. The court found that the “5% gross revenue fee would constitute a substantial increase in costs” for the provider, and that the ordinance consequently “will negatively affect [the provider’s] profitability.”

The fee, together with other requirements, thus “place a significant burden” on the provider. In light of this analysis, the First Circuit agreed that the fee is “materially inhibits or limits the ability” of the provider “to compete in a fair and balanced legal and regulatory environment.”

The court thus held that the fee does not survive scrutiny under Section 253. In doing so, the First Circuit also noted that the inquiry is not limited to the impact that a fee would have on deployment in the jurisdiction that imposes the fee. Rather, the court noted the aggregate effect of fees when totaled across all relevant jurisdictions. At the same time, the First Circuit did not decide whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or, at the very least, related to the actual use of the ROW.

44. In City of White Plains, the Second Circuit likewise faced a 5 percent gross revenue fee, which it found to be “[t]he most significant provision” in a franchise agreement implementing an ordinance that the court concluded effectively prohibited service in violation of Section 253. While the court noted that “compensation is . . . sometimes used as a synonym for cost,” it ultimately did not resolve whether fair and reasonable compensation “is limited to cost recovery, or whether it also extends to a reasonable rent,” relying instead on the fact that “White Plains has not attempted to charge Verizon


107 See infra Part III.B.

108 The Commission also has recognized the potential for fees to result in an effective prohibition. See, e.g., Pittencrief, 13 FCC Rcd at 1751-52, para. 37 (observing that “even a neutral [universal service] contribution requirement might under some circumstances effectively prohibit an entity from offering a service”).

109 Municipality of Guayanilla, 450 F.3d at 18-19.

110 Id. at 19.

111 Id. (quoting City of White Plains, 305 F.3d at 76).

112 Municipality of Guayanilla, 450 F.3d at 17 (looking at the aggregate cost of fees charged across jurisdictions given the interconnected nature of the service).

113 Id. at 22 (“We need not decide whether fees imposed on telecommunications providers by state and local governments must be limited to cost recovery. We agree with the district court’s reasoning that fees should be, at the very least, related to the actual use of rights of way and that ‘the costs [of maintaining those rights of way] are an essential part of the equation.’”).

114 City of White Plains, 305 F.3d at 77.

115 Id. In this context, the court stated that the term “compensation” is “flexible” and capable of different meanings depending on the context in which it is used. Id.
the fee that it seeks to charge TCG,” thus failing Section 253’s “competitively neutral and nondiscriminatory” standard.\textsuperscript{116} But the court did observe that “Section 253(c) requires compensation to be reasonable essentially to prevent monopolist pricing by towns.”\textsuperscript{117}

45. In another example, the Tenth Circuit in \textit{City of Santa Fe} addressed a $6,000 per foot fee set for Qwest’s use of the ROW.\textsuperscript{118} The court held “that the rental provisions are prohibitive because they create[d] a massive increase in cost” for Qwest.\textsuperscript{119} The court recognized that Section 253 allows the recovery of cost-based fees, though it ultimately did not decide whether to “measure ‘fair and reasonable’ by the City’s costs or by a ‘totality of circumstances test’” applied in other courts because it determined that the fees at issue were not cost-based and “fail[ed] even the totality of the circumstances test.”\textsuperscript{120} Consequently, the fee was preempted under Section 253.

46. At the same time, the courts have adopted different approaches to analyzing whether fees run afoul of Section 253, at times failing even to articulate a particular test.\textsuperscript{121} Among other things, courts have expressed different views on whether Section 253 limits states’ and localities’ fees to recovery of their costs or allows fees set in excess of that level.\textsuperscript{122} We articulate below the Commission’s interpretation of Section 253(a) and the standards we adopt for evaluating when a fee for Small Wireless Facility deployment is preempted, regardless how the fee is challenged. We also clarify that the Commission interprets Section 332(c)(7)(B)(i)(II) to have the same substantive meaning as Section 253(a).

47. \textit{Record Evidence on Costs Associated with Small Wireless Facilities}. Keeping pace with the demands on current 4G networks and upgrading our country’s wireless infrastructure to 5G require

\textsuperscript{116} \textit{City of White Plains}, 305 F.3d at 79. In particular, the court concluded that “fees that exempt one competitor are inherently not ‘competitively neutral,’ regardless of how that competitor uses its resulting market advantage,” \textit{id.} at 80, and thus “[a]llowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the [1996 Act],” \textit{id.} at 79.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{City of Santa Fe}, 380 F.3d at 1270-71.

\textsuperscript{119} \textit{Id.} at 1271.

\textsuperscript{120} \textit{Id.} at 1272 (observing that “[t]he City acknowledges . . . that the rent required by the Ordinance is not limited to recovery of costs”).

\textsuperscript{121} Compare, e.g., \textit{Municipality of Guayanilla}, 450 F.3d at 18-19 (finding that fees were significant and had the effect of prohibiting service); \textit{City of Santa Fe}, 380 F.3d at 1271 (similar); with, e.g., \textit{Qwest v. Elephant Butte Irrigation Dist.}, 616 F. Supp. 2d 1110, 1123-24 (D.N.M. 2008) (rejecting Qwest’s reliance on preceding finding of effective prohibition from quadrupled costs where the fee at issue was a penny per foot); \textit{Qwest v. City of Portland}, 2006 WL 2679543, *15 (D. Or. 2006) (asserting with no explanation that “a registration fee of $35 and a refundable deposit of $2,000 towards processing expenses . . . could not possibly have the effect of prohibiting Qwest from providing telecommunications services”).

\textsuperscript{122} For example and as noted above, in \textit{Municipality of Guayanilla} the First Circuit reserved judgment on whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or if it was sufficient if the compensation was related to the actual use of rights of way. \textit{Municipality of Guayanilla}, 450 F.3d at 22. Other courts have found reasonable compensation to require cost-based fees. \textit{XO Missouri v. City of Maryland Heights}, 256 F. Supp. 2d 987, 993-95 (E.D. Mo. 2003) (\textit{City of Maryland Heights}); \textit{Bell Atlantic–Maryland, Inc. v. Prince George’s County}, 49 F. Supp. 2d 805, 818 (D. Md. 1999) (\textit{Prince George’s County}) vacated on other grounds, 212 F.3d 863 (4th Cir. 2000). Still other courts have applied a test that weighs a number of considerations when evaluating whether compensation is fair and reasonable. \textit{TCG Detroit v. City of Dearborn}, 206 F.3d 618, 625 (6th Cir. 2000) (\textit{City of Dearborn}) (considering “the amount of use contemplated . . . the amount that other providers would be willing to pay . . . and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it now was challenging as unfair”).
the deployment of many more Small Wireless Facilities. For example, Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades. Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years. A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is “roughly double the number of macro cells built over the last 30 years.”

48. The many-fold increase in Small Wireless Facilities will magnify per-facility fees charged to providers. Per-facility fees that once may have been tolerable when providers built macro towers several miles apart now act as effective prohibitions when multiplied by each of the many Small Wireless Facilities to be deployed. Thus, a per-facility fee may affect a prohibition on 5G service or the densification needed to continue 4G service even if that same per-facility fee did not effectively prohibit previous generations of wireless service.

49. Cognizant of the changing technology and its interaction with regulations created for a previous generation of service, the 2017 Wireline Infrastructure NPRM/NOI sought comment on whether government-imposed fees could act as a prohibition within the meaning of Section 253, and if so, what fees would qualify for 253(c)’s savings clause. The 2017 Wireless Infrastructure NPRM/NOI similarly sought comment on the scope of Sections 253 and 332(c)(7) and on any new or updated guidance the Commission should provide, potentially through a Declaratory Ruling. In particular, the Commission sought comment on whether it should provide further guidance on how to interpret and apply the phrase “prohibit or have the effect of prohibiting.”

50. We conclude that ROW access fees, and fees for the use of government property in the ROW, such as light poles, traffic lights, utility poles, and other similar property suitable for hosting

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123 See CTIA June 27, 2018 Ex Parte Letter at 6 (“[s]mall cell technology is needed to support 4G densification and 5G connectivity.”); see also Accelerating Wireless Deployment by Removing Barriers to Infrastructure Investment, Report and Order, 32 FCC Rcd 9760, 9765, para. 12 (2017) (2017 Pole Replacement Order) (recognizing that Small Wireless Facilities will be increasingly necessary to support the rollout of next-generation services).

124 See Verizon Comments at 3; AT&T Comments at 1.

125 See Letter from Keith C. Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Feb. 21, 2018).

126 Accelerating Future Economic Value Report at 6; see also Deloitte 5G Paper.


129 Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3362, para. 90.

130 We do not find these fees to be taxes within the meaning of Section 601(c)(2) of the 1996 Act. See, e.g., Smart Communities Reply at 36 (quoting the savings clause for “State or local law pertaining to taxation” in Section 601(c)(2) of the 1996 Act). It is ambiguous whether a fee charged for access to ROWs should be viewed as a tax for purposes of Section 601(c)(2) of the 1996 Act. See, e.g., City of Dallas v. FCC, 118 F.3d 393, 397-98 (5th Cir. 1997) (distinguishing “the price paid to rent use of public right-of-ways” from a “tax” and citing similar precedent). Given that Congress clearly contemplated in Section 253(c) that states’ and localities’ fees for access to ROWs could be subject to preemptation where they violate Section 253—or else the savings clause in that regard would be superfluous—we find the better view is that such fees do not represent a tax encompassed by Section 601(c)(2) of
Small Wireless Facilities, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities inside and outside the ROW, violate Sections 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government’s costs,131 (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.132

51. We base our interpretation on several considerations, including the text and structure of the Act as informed by legislative history, the economics of capital expenditures in the context of Small Wireless Facilities (including the manner in which capital budgets are fixed ex ante), and the extensive record evidence that shows the actual effects that state and local fees have in deterring wireless providers from adding to, improving, or densifying their networks and consequently the service offered over them (including, but not limited to, introducing next-generation 5G wireless service). We address each of these considerations in turn.

52. Text and Structure. We start our analysis with a consideration of the text and structure of Section 253. That section contains several related provisions that operate in tandem to define the roles that Congress intended the federal government, states, and localities to play in regulating the provision of telecommunications services. Section 253(a) sets forth Congress’s intent to preempt state or local legal requirements that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”133 Section 253(b), in turn, makes clear Congress’s intent that state “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights (Continued from previous page)
of consumers” are not preempted.\textsuperscript{134} Of particular importance in the fee context, Section 253(c) reflects a considered policy judgment that “[n]othing in this section” shall prevent states and localities from recovering certain carefully delineated fees. Specifically, Section 253(c) makes clear that fees are not preempted that are “fair and reasonable” and imposed on a “competitively neutral and nondiscriminatory basis,” for “use of public rights-of-way on a “nondiscriminatory basis,”” so long as they are “publicly disclosed” by the government.\textsuperscript{135} Section 253(d), in turn, provides one non-exclusive mechanism by which a party can obtain a determination from the Commission of whether a specific state or local requirement is preempted under Section 253(a)—namely, by filing a petition with the Commission.\textsuperscript{136}

53. In reviewing this statutory scheme, the Commission previously has construed Section 253(a) as “broadly limit[ing] the ability of state[s] to regulate,” while the remaining subsections set forth “defined areas in which states may regulate.”\textsuperscript{137} We reaffirm this conclusion, consistent with the view of most courts to have considered the issue—namely, that Sections 253(b) and (c) make clear that certain state or local laws, regulations, and legal requirements are not preempted under the expansive scope of Section 253(a).\textsuperscript{138} Our interpretation of Section 253(a) is informed by this statutory context,\textsuperscript{139} and the observation of courts that when a preemption provision precedes a narrowly-tailored savings clause, it is reasonable to infer that Congress intended a broad preemptive scope.\textsuperscript{140} We need not decide today whether Section 253(a) preempts all fees not expressly saved by Section 253(c) with respect to all types of deployments. Rather, we conclude, based on the record before us, that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment.\textsuperscript{141} Against this backdrop, and in light of significant evidence, set forth herein, that Congress intended Section 253 to preempt legal requirements that effectively prohibit service, including wireless infrastructure deployment, we view the substantive standards for fees that Congress sought to insulate from preemption in Section 253(c) as an appropriate ceiling for state and local fees that apply to the deployment of Small Wireless Facilities in public ROWs.\textsuperscript{143}

\textsuperscript{134} 47 U.S.C. § 253(b).

\textsuperscript{135} 47 U.S.C. § 253(c).

\textsuperscript{136} 47 U.S.C. § 253(d).

\textsuperscript{137} Texas PUC Order, 13 FCC Rcd at 3481, para. 44.

\textsuperscript{138} See, e.g., Connect America Fund; Sandwich Isles Communications, Inc., Memorandum Opinion and Order, 32 FCC Rcd 5878, 5881, 5885-87, paras. 8, 19-25 (2017) (Sandwich Isles Section 253 Order); Texas PUC Order, 13 FCC Rcd at 3480-81, paras. 41-44; Global Network Commc’ns, Inc. v. City of New York, 562 F.3d 145, 150-51 (2d Cir. 2009); Southwestern Bell Tel. Co. v. City of Houston, 529 F.3d 257, 262 (5th Cir. 2008); City of St. Louis, 477 F.3d at 531-32 (8th Cir. 2007); Municipality of Guayanilla, 450 F.3d at 15-16; City of Santa Fe, 380 F.3d at 1269; BellSouth Telecomm’s, Inc. v. Town of Palm Beach, 252 F.3d 1169, 1187-89 (11th Cir. 2001). Some courts appear to have viewed Section 253(c) as an independent basis for preemption. See, e.g., City of Dearborn, 206 F.3d at 624 (after concluding that a franchise fee did not violate Section 253(a), going on to evaluate whether it was “fair and reasonable” under Section 253(c)). We find more persuasive the Commission and other court precedent to the contrary, which we find better adheres to the statutory language.

\textsuperscript{139} See, e.g., Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2442 (2014).


\textsuperscript{141} See infra paras. 62-63.

\textsuperscript{142} See, e.g., Wireless Infrastructure Second R&O, FCC 18-30, at para. 64.

\textsuperscript{143} See, e.g., Verizon Aug. 10, 2018 Ex Parte Letter, Attach. at 9-10. We therefore reject the view of those courts that have concluded that Section 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based. See, e.g., Qwest v. City of Berkeley, 433 F.3d 1253, 1257 (9th Cir. 2006) ("we
54. In addition, notwithstanding that Section 253(c) only expressly governs ROW fees, we find it appropriate to look to its substantive standards as a ceiling for other state and local fees addressed by this Declaratory Ruling.\(^{144}\) For one, our evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment—and we see no reason why the Act would tolerate a greater prohibitory effect in the case of application or review fees than for ROW fees.\(^{145}\) In addition, elements of the substantive standards for ROW fees in Section 253(c) appear at least analogous to elements of the California Payphone standard for evaluating an effective prohibition under Section 253(a). In pertinent part, both incorporate principles focused on the legal requirements to which a provider may be fairly subject,\(^{146}\) and seek to guard against competitive disparities.\(^{147}\) Without resolving the precise interplay of those concepts in Section 253(c) and the California Payphone standard, their similarities support our use of the substantive standards of Section 253(c) to inform our evaluation of fees at issue here that are not directly governed by that provision.

55. From the foregoing analysis, we can derive the three principles that we articulate in this Declaratory Ruling about the types of fees that are preempted. As explained in more detail below, we also interpret Section 253(c)’s “fair and reasonable compensation” provision to refer to fees that represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being passed on are themselves objectively reasonable.\(^{148}\) Although there is precedent that “fair and reasonable” compensation could mean not only cost-based charges but also market-based charges in certain instances,\(^{149}\) the statutory context persuades us to adopt a cost-based interpretation here. In particular, while the general purpose of Section 253(c) is to preserve certain state and local conduct from preemption, it includes qualifications and limitations to cabin state and local action under that savings clause in ways that ensure appropriate protections for service providers. The reasonableness of interpreting the qualifications and limitations in the Section 253(c) savings clause as designed to protect the interests of service providers is emphasized by the statutory language. The “competitively neutral and

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\(^{144}\) See supra note 71.

\(^{145}\) Cf. Cheney R. Co. v. ICC, 902 F.2d 66, 69 (D.C. Cir. 1990) (observing that the expressio unius canon is a “feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved,” and concluding there that “Congress’s mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion”).

\(^{146}\) For ROW compensation to be saved under Section 253(c) it must be “fair and reasonable,” while the California Payphone standard looks to whether a legal requirement “materially limits or inhibits” the ability to compete in a “fair” legal environment for a covered service. California Payphone, 12 FCC Rcd at 14206, para. 31.

\(^{147}\) For ROW compensation to be saved under Section 253(c) it also must be “competitively neutral and nondiscriminatory,” while the California Payphone standard also looks to whether a legal requirement “materially limits or inhibits” the ability to compete in a “balanced” legal environment for a covered service. California Payphone, 12 FCC Rcd at 14206, para. 31.

\(^{148}\) See infra paras. 69-77; see also, e.g., City of Maryland Heights, 256 F. Supp. 2d at 993-95; Bell Atlantic–Maryland, 49 F. Supp. 2d at 818.

\(^{149}\) See, e.g., NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) (statute did not unambiguously require the SEC to interpret “fair and reasonable” to mean cost-based, and the SEC’s reliance on market-based rates as “fair and reasonable” where there was competition was a reasonable interpretation).
nondiscriminatory” and public disclosure qualifications in Section 253(c) appear most naturally understood as protecting the interest of service providers from fees that otherwise would have been saved from preemption under Section 253(c) absent those qualifiers. Under the noscitur a sociis canon of statutory interpretation, that context persuades us that the “fair and reasonable” qualifier in Section 253(c) similarly should be understood as focused on protecting the interest of providers. As discussed in greater detail below, while it might well be fair for providers to bear basic, reasonable costs of entry, the record does not reveal why it would be fair or reasonable from the standpoint of protecting providers to require them to bear costs beyond that level, particularly in the context of the deployment of Small Wireless Facilities. In addition, the text of Section 253(c) provides that ROW access fees must be imposed on a “competitively neutral and nondiscriminatory basis.” This means, for example, that fees charged to one provider cannot be materially higher than those charged to a competitor for similar uses.

56. Other considerations support our approach, as well. By its terms, Section 253(a) preempts state or local legal requirements that “prohibit” or have the “effect of prohibiting” the provision of services, and we agree with court precedent that “[m]erely allowing the [local government] to recoup its processing costs . . . cannot in and of itself prohibit the provision of services.” The Commission has long understood that Section 253(a) is focused on state or local barriers to entry for the provision of service, and we conclude that states and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market. We decline to interpret a government’s recoupment of such fundamental costs of entry as having the effect of prohibiting the provision of services, nor has any commenter argued that recovery of cost by a government would prohibit service in a manner restricted by Section 253(a). Reasonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for

150 See, e.g., Life Technologies Corp. v. Promega Corp., 137 S. Ct. 734 (2017) (“A word is given more precise content by the neighboring words with which it is associated.” (internal alteration and quotation marks omitted)).

151 See infra para. 56.

152 See, e.g., City of White Plains, 305 F.3d at 80.

153 City of Santa Fe, 380 F.3d at 1269; see also Verizon Comments at 17.

154 See, e.g., Sandwich Isles Section 253 Order, 32 FCC Rcd at 5878, 5882-83, paras. 1, 13; Western Wireless Order, 15 FCC Rcd at 16231, para. 8; Petition of the State of Minnesota for a 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, 21707, para. 18 (Minnesota Order); Hyperion Order, 14 FCC Rcd at 11070, para. 13; Texas PUC Order, 13 FCC Rcd at 3480, para. 41; TCI Cablevision Order, 12 FCC Rcd at 21399, para. 7; California Payphone, 12 FCC Rcd at 14209, para. 38; see also, e.g., AT&T Comm’ns of the Sw. v. City of Dallas, 8 F. Supp. 2d 582, 593 (N.D. Tx. 1998) (AT&T v. City of Dallas) (“[A]ny fee that is not based on AT&T’s use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry.”); Verizon Comments at 11-12; Verizon Aug. 10, 2018 Ex Parte Letter, Attach. at 7. Because we view the California Payphone standard as reflecting a focus on barriers to entry, we decline requests to adopt a distinct, additional standard with that as an explicit focus. See, e.g., T-Mobile Comments at 35.

155 See, e.g., Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5301-03, paras. 142-45 (2011) (rejecting an approach to defining a lower bound rate for pole attachments that “would result in pole rental rates below incremental cost” as contrary to cost causation principles); Investigation of Interstate Access Tariff Non-Recurring Charges, Memorandum Opinion and Order, 2 FCC Rcd 3498, 3502, para. 34 (1987) (observing in the rate regulation context that “the public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from the cost-causer”). Our interpretation limiting states and localities to the recovery of a reasonable approximation of objectively reasonable cost also takes into account state and local governments’ exclusive control over access to the ROW.

156 For example, Verizon states that “[a]lthough any fee could be said to raise the cost of providing service,” Verizon Aug. 10, 2018 Ex Parte Letter, Attach. at 9, “[t]he Commission should interpret . . . Section 253(a) to allow cost-based fees for access to public rights-of-way and structures within them, but to prohibit above-cost fees that generate revenue in excess of state and local governments’ actual costs.” Id., Attach. at 6.
communications services by protecting property rights and guarding against conflicting deployments that could harm or otherwise interfere with others’ use of property.\textsuperscript{157} By contrast, fees that recover more than the state or local costs associated with facilities deployment—or that are based on unreasonable costs, such as exorbitant consultant fees or the like—go beyond such governmental recovery of fundamental costs of entry. In addition, interpreting Section 253(a) to prohibit states and localities from recovering a reasonable approximation of reasonable costs could interfere with the ability of states to exercise the police powers reserved to them under the Tenth Amendment.\textsuperscript{158} We therefore conclude that Section 253(a) is circumscribed to permit states and localities to recover a reasonable approximation of their costs related to the deployment of Small Wireless Facilities.

57.  Commission Precedent. We draw further confidence in our conclusions from the Commission’s California Payphone decision, which we reaffirm here, finding that a state or local legal requirement would violate Section 253(a) if it “materially limits or inhibits” an entity’s ability to compete in a “balanced” legal environment for a covered service.\textsuperscript{159} As explained above, fees charged by a state or locality that recover the reasonable approximation of reasonable costs do not “materially inhibit” a provider’s ability to compete in a “balanced” legal environment. To the contrary, those costs enable localities to recover their necessary expenditures to provide a stable and predictable framework in which market participants can enter and compete. On the other hand, in the Texas PUC Order interpreting California Payphone, the Commission concluded that state or local legal requirements such as fees that impose a “financial burden” on providers can be effectively prohibitive.\textsuperscript{160} As the record shows, excessive state and local governments’ fees assessed on the deployment of Small Wireless Facilities in the ROW in fact materially inhibit the ability of many providers to compete in a balanced environment.\textsuperscript{161}

58.  California Payphone and Texas PUC separately support the conclusion that fees cannot be discriminatory or introduce competitive disparities, as such fees would be inconsistent with a “balanced” regulatory marketplace. Thus, fees that treat one competitor materially differently than other competitors in similar situations are themselves grounds for finding an effective prohibition—even in the case of fees that are a reasonable approximation of the actual and reasonable costs incurred by the state or locality. Indeed, the Commission has previously recognized the potential for subsidies provided to one

\textsuperscript{157}See, e.g., TCI Cablevision Order, 12 FCC Rcd at 21441, para. 103; see also, e.g., Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968). States’ or localities’ regulation premised on addressing effects of deployment besides these costs caused by facilities deployment are distinct issues, which we discuss below. See infra Part III.C.

\textsuperscript{158}The Supreme Court has recognized that land use regulation can involve an exercise of police powers. See, e.g., Hodel v. Va. Surface Min. & Reclamation Ass’n, Inc., 452 U.S. 264, 289 (1981). As that Court observed, “[i]t would . . . be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity.” Id. at 292. At the same time, the Court also has held that “historic police powers of the States” are not to be preempted by federal law “unless that was the clear and manifest purpose of Congress.” Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (internal quotation marks omitted). As relevant here, we see no clear and manifest intent that Congress intended to preempt publicly disclosed, objectively reasonable cost-based fees imposed on a nondiscriminatory basis, particularly in light of Section 253(c).

\textsuperscript{159}We disagree with suggestions that the Commission applied an additional and more stringent “commercial viability” test in California Payphone. See, e.g., Crown Castle June 7, 2018 Ex Parte Letter at 10. Instead, the Commission was simply evaluating the Section 253 petition on its own terms. see, e.g., California Payphone, 12 FCC Rcd at 14204, 14210, paras. 27, 41, and, without purporting to define the bounds of Section 253(a), explaining that the petitioner “had not sufficiently supported its allegation” that the provision of service at issue “would be ‘impractical and uneconomic.’” Id. at 14210, para. 41. Confirming that this language was simply the Commission’s short-hand reference to arguments put forward by the petitioner itself, and not a Commission-announced standard for applying Section 253, the Commission has not applied a “commercial viability” standard in other decisions, as these same commenters recognize. See, e.g., Crown Castle June 7, 2018 Ex Parte Letter at 10.

\textsuperscript{160}Texas PUC Order, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81.

\textsuperscript{161}See infra paras. 60-65.
competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a). We reaffirm that conclusion here.

59. Legislative History. While our interpretation follows directly from the text and structure of the Act, our conclusion finds further support in the legislative history, which reflects Congress’s focus on the ability of states and localities to recover the reasonable costs they incur in maintaining the rights of way. Significantly, Senator Dianne Feinstein, during the floor debate on Section 253(c), “offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including [to] ‘require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation.’” Representative Bart Stupak, a sponsor of the legislation, similarly explained during the debate on Section 253 that “if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings,” making clear that the compensation described in the statute is related to the burden, or cost, from a provider’s use of the ROW. These statements buttress our interpretation of the text and structure of Section 253 and confirm Congress’s apparent intent to craft specific safe harbors for states and localities, and to permit recovery of reasonable costs related to the ROW as “fair and reasonable compensation,” while preempting fees above a reasonable approximation of cost that improperly inhibit service.

60. Capital Expenditures. Apart from the text, structure, and legislative history of the 1996 Act, an additional, independent justification for our interpretation follows from the simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether the reduction takes place on a local, regional or national level. We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid) amount of resources to use for the deployment of infrastructure. This does not mean that these resources are limitless, however. We conclude that fees imposed by localities, above and beyond the recovery of localities’ reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere. This and regulatory uncertainty created by such effectively prohibitive conduct creates an

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162 See, e.g., Western Wireless Order, 15 FCC Rcd at 16231, para. 8.
163 See, e.g., WIA Comments, Attach. 2 at 70.
164 WIA Comments, Attach. 2 at 70 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added)); see also, e.g., Verizon Comments at 15 (similar); City of Maryland Heights, 256 F. Supp. 2d at 995-96.
166 We reject other comments downplaying the relevance of legislative statements by some commenters as inconsistent with the text and structure of the Act. See, e.g., League of Arizona Cities et al. Joint Comments at 27-28; NATOA Comments, Exh. A at 26-28; Smart Communities Reply at 57-58; Cities of San Antonio et al. Reply at 20-21; see also, e.g., City of Portland v. Electric Lightwave, Inc., 452 F. Supp. 2d 1049, 1071-72 (D. Or. 2005).
167 At a minimum, this analysis complements and reinforces the justifications for our interpretation provided above. While the relevant language of Section 253(a) and Section 332(c)(7)(B)(i)(II) is not limited just to Small Wireless Facilities, we proceed incrementally in our Declaratory Ruling here and address the record before us, which indicates that our interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment.
168 For example, the precise amount of these resources might shift as a service provider encounters unexpected costs, recovers costs passed on to subscribers, or earns a profit above those costs.
169 As Verizon observes, “[a] number of states enacted infrastructure legislation because they determined that rate relief was necessary to ensure wireless deployment,” and thus could be seen as having “acknowledged that excessive fees impose a substantial barrier to the provision of service.” Verizon Aug. 10, 2018 Ex Parte Letter, Attach. at 7-8. In view of the evidence in the record regarding the effect of state and local fees on capital expenditures, see, e.g., Corning Sept. 5, 2018 Ex Parte Letter (noting that cost savings from reduced small cell attachment and application
appreciable impact on resources that materially limits plans to deploy service. This record evidence emphasizes the importance of evaluating the effect of fees on Small Wireless Facility deployment on an aggregate basis. Consistent with the First Circuit’s analysis in Municipality of Guayanilla, the record persuades us that fees associated with Small Wireless Facility deployment lead to “a substantial increase in costs”—particularly when considered in the aggregate—thereby “plac[ing] a significant burden” on carriers and materially inhibiting their provision of service contrary to Section 253 of the Act.

61. The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees. As AT&T explains, “[a]ll providers have limited capital dollars to invest, funds that are quickly depleted when drained by excessive ROW fees.” AT&T added that “[c]ompetitive demands will force carriers to deploy small cells in the largest cities. But, when those largest cities charge excessive fees to access ROWs and municipal ROW structures, carriers’ finite capital dollars are prematurely depleted, leaving less for investment in mid-level cities and smaller communities. Larger municipalities have little incentive to not overcharge, and mid-level cities and smaller

(Continued from previous page) fees could result in $2.4 billion in capital expenditure and that 97% of this capital expenditure would go toward investments in rural and suburban areas), we disagree with arguments that fees do not affect the deployment of wireless facilities in rural and underserved areas. See, e.g., Letter from Sam Liccardo, Mayor, City of San Jose, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed Sept. 18, 2018) (City of San Jose Sept. 18, 2018 Ex Parte Letter) (stating that “whether or not a provider wishes to invest in a dense urban area, including underserved urban areas, or a rural area is fundamentally based on the size of the customer base and the market demand for service—not on the purported wiles of a ‘must-serve’ jurisdiction somehow forcing investment away from rural areas because a right of way or attachment fee is charged.”); Letter from Joanne Hovis, Chief Executive Officer, Coalition for Local Internet Choice, James Baller, President, Coalition for Local Internet Choice, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 3 (filed Sept. 18, 2018) (“in lucrative areas, carriers will pay market fees for access to property just as they would any other cost of doing business. But they will not, as rational economic actors, necessarily apply new profits (created by FCC preemption) to deploying in otherwise unattractive areas.”).

170 See, e.g., CTIA Comments at 32 (identifying “disparate interpretations” regarding the fees that are preempted and seeking FCC clarification to “dispel the resulting uncertainty”); Verizon Comments at 10 (similar); Letter from Cathleen A. Massey, Vice Pres.-Fed. Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 7 (filed Sept. 21, 2017) (seeking clarification of Section 253); BDAC Regulatory Barriers Report, p. 9 (“The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not ‘fair and reasonable.’ The Commission should specifically clarify that ‘fair and reasonable’ compensation for right-of-way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.”).

171 Municipality of Guayanilla, 450 F.3d at 19.

172 See, e.g., AT&T Comments at 2; Conterra Broadband et al. Comments at 6; Mobilitie Comments at 3; Sprint Comments at 17; Letter from Courtney Neville, Associate General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed July 16, 2018) (CCA July 16, 2018 Ex Parte Letter); Letter from Henry Hultquist, Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 8, 2018) (AT&T June 8, 2018 Ex Parte Letter); Crown Castle June 7, 2018 Ex Parte Letter at 2; Letter from Katharine R. Saunders, Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 21, 2018) (Verizon June 21, 2018 Ex Parte Letter); Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Oct. 30, 2017); Verizon Aug. 10, 2018 Ex Parte Letter, Attach. at 2-4. When developing capital budgets, companies rationally would account for anticipated revenues associated with the services that can be provided by virtue of planned facilities deployment, and the record does not reveal—nor do we see any basis to assume—that such revenues would be so great as to eliminate constraints on providers’ capital budgets so as to enable full deployment notwithstanding the level of state and local fees.

173 AT&T Aug. 6, 2018 Ex Parte Letter at 2.
municipalities have no ability to avoid this harm.” As to areas that might not be sufficiently crucial to deployment to overcome high fees, AT&T identified jurisdictions in Maryland, California, and Massachusetts where high fees have directly resulted in paused or decreased deployments. Limiting localities to reasonable cost recovery will “allow[] AT&T and other providers to stretch finite capital dollars to additional communities.” Verizon similarly explains that “[c]apital budgets are finite. When providers are forced to spend more to deploy infrastructure in one locality, there is less money to spend in others. The leverage that some cities have to extract high fees means that other localities will not enjoy next generation wireless broadband services as quickly, if at all.” Sprint, too, affirms that, because “all carriers face limited capital budgets, they are forced to limit the number and pace of their deployment investments to areas where the delays and impediments are the least onerous, to the detriment of their customers and, ultimately and ironically, to the very jurisdictions that imposed obstacles in the first place.” Sprint gives a specific example of its deployments in two adjacent jurisdictions—the City of Los Angeles and Los Angeles County—and describes how high fees in the county prevented Sprint from activating any small cells there, while more than 500 deployments occurred in the city, which had significantly lower fees. Similarly, Conterra Broadband states that “[w]hen time and capital are diverted away from actual facility installation and instead devoted to clearing regulatory roadblocks, consumers and enterprises, including local small businesses, schools and healthcare centers, suffer.” Based on the record, we find that fees charged by states and localities are causing actual delays and restrictions on deployments of Small Wireless Facilities in a number of places across the country in violation of Section 253(a).

62. Our conclusion finds further support when one considers the aggregate effects of fees imposed by individual localities, including, but not limited to, the potential limiting implications for a nationwide wireless network that reaches all Americans, which is among the key objectives of the statutory provisions in the 1996 Act that we interpret here. When evaluating whether fees result in an effective prohibition of service due to financial burden, we must consider the marketplace regionally and nationally and thus must consider the cumulative effects of state or local fees on service in multiple geographic areas that providers serve or potentially would serve. Where providers seek to operate on a regional or national basis, they have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider’s capital budget for a given

174 Id.
175 Id. (pausing or delaying deployments in Citrus Heights, CA, Oakland, CA and three Maryland counties; decreasing deployments in Lowell, MA and decreasing deployments from 98 to 25 sites in Escondido, CA).
176 Id.
178 Sprint Comments at 17.
180 Conterra Broadband et al. Comments at 6; see also Letter from John Scott, Counsel for Mobilitie, LLC to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (“high fees imposed by some cities hurt other cities that have reasonable fees, because they reduce capital resources that might have gone to those cities, and because they pressure other financially strapped cities not to turn away what appears to be a revenue opportunity”).
period of time is often set in advance.\textsuperscript{183} In such cases, the resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.\textsuperscript{184} The text of Section 253(a) is not limited by its terms only to effective prohibitions within the geographic area targeted by the state or local fee. Where a fee in a geographic area affects service outside that geographic area, the statute is most naturally read to encompass consideration of all affected areas.

63. A contrary, geographically-restrictive interpretation of Section 253(a) would exacerbate the digital divide by giving dense or wealthy states and localities that might be most critical for a provider to serve the ability to leverage their unique position to extract fees for their own benefit at the expense of regional or national deployment by decreasing the deployment resources available for less wealthy or dense jurisdictions.\textsuperscript{185} As a result, the areas likely to be hardest hit by excessive government fees are not necessarily jurisdictions that charge those fees, but rather areas where the case for new, expanded, or improved service was more marginal to start—and whose service may no longer be economically justifiable in the near-term given the resources demanded by the “must-serve” areas. To cite some examples of harmful aggregate effects, AT&T notes that high annual recurring fees are particularly harmful because of their “continuing and compounding nature.”\textsuperscript{186} It also states that, “if, as S&P Global Market Intelligence estimates, small-cell deployments reach nearly 800,000 by 2026, a ROW fee of $1000 per year … would result in nearly $800 million annually in forgone investment.” \textsuperscript{187} Yet another commenter notes that, “[f]or a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible,” and “far exceed[ing] any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure.”\textsuperscript{188} Endorsing such a result would thwart the purposes underlying Section 253(a). As Crown Castle observes, “[e]ven where the fees do not result in a direct lack of service in a high-demand area like a city or urban core, the high cost of building and operating facilities in these jurisdictions consume [sic] capital and revenue that could otherwise be used to expand wireless infrastructure in higher cost areas. This impact of egregious fees is prohibitory and should be taken into account in any prohibition analysis.”\textsuperscript{189}

64. Some municipal commenters endorse a cost-based approach to “ensure that localities are fully compensated for their costs [and that] fees should be reasonable and non-discriminatory, and should ensure that localities are made whole”\textsuperscript{190} in recognition that “getting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources.”\textsuperscript{191} Commenters from smaller municipalities recognize that “thousands and thousands of small cells are needed for 5G… [and]
old regulations could hinder the timely arrival of 5G throughout the country.” and urge the Commission to “establish some common-sense standards insofar as it relates to fees associated with the deployment of small cells [due to] a cottage industry of consultants [] who have wrongly counseled communities to adopt excessive and arbitrary fees.”

Representatives from non-urban areas in particular caution that, “if the investment that goes into deploying 5G on the front end is consumed by big, urban areas, it will take longer for it to flow outwards in the direction of places like Florence, [SC].”

“[R]educing the high regulatory costs in urban areas would leave more dollars to development in rural areas [because] most of investment capital is spent in the larger urban areas [since] the cost recovery can be made in those areas. This leaves the rural areas out.”

We agree with these commenters, and we further agree with courts that have considered “the cumulative effect of future similar municipal [fees ordinances]” across a broad geographic area when evaluating the effect of a particular fee in the context of Section 253(a).

To the extent that other municipal commenters argue that our interpretation gives wireless providers preferential treatment compared to other users of the ROW, the record does not contain data about other users that would support such a conclusion.

In any event, Section 253 of the Communications Act expressly bars legal requirements that effectively prohibit telecommunications service without regard to whether it might result in preferential treatment for providers of that service.

Applying this approach here, the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated Small Wireless Facility deployment. The record reveals that these effects can take several forms. In some cases, the fees in a particular jurisdiction will lead to reduced or entirely forgone deployment of Small Wireless Facilities in the near term for that

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192 Dr. Carolyn Prince July 31, 2018 Ex Parte Letter at 2.
195 Senator Duane Ankney July 31, 2018 Ex Parte Letter at 1; see also Letter from Elder Alexis D. Pipkins, Sr. to the Hon. Brendan Carr, Commissioner, FCC at 1 (filed July 26, 2018) (“the race to 5G is global…instead of each city or state for itself, we should be working towards aligned, streamlined frameworks that benefit us all.”); Letter from Jeffrey Bohm, Chairman of the Board of Commissioners, County of St. Clair to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed August 22, 2018) (“Smaller communities, such as those located in St. Clair County would benefit from having the Commissions reduce the costly and unnecessary fee’s that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage”); Letter from Scott Niesler, Mayor, City of Kings Mountain, to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed June 4, 2018) (“the North Carolina General Assembly has enacted legislation to encourage the deployment of small cell technology to limit exorbitant fees which can siphon off capital from further expansion projects. I was encouraged to see the FCC taking similar steps to enact policies that help clear the way for the essential investment”).
196 Guayanilla District Ct. Opinion, 354 F. Supp. 2d at 111-12; but see, e.g., Letter from Nina Beety to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Sept. 17, 2018) (Nina Beety Sept. 17, 2018 Ex Parte Letter) (asserting that providers artificially under-capitalized their deployment budgets to build the case for poverty).
197 Letter from Larry Hanson, Executive Director, Georgia Municipal Association to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 17, 2018) (Georgia Municipal Association Sept. 17, 2018 Ex Parte Letter).
199 See, e.g., Wireless Infrastructure Second R&O, FCC 18-30, at para. 64. In addition, although one could argue that, in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service in a particular instance, the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus.
jurisdiction. In other cases, where it is essential for a provider to deploy in a given area, the fees charged in that geographic area can deprive providers of capital needed to deploy elsewhere, and lead to reduced or forgone near-term deployment of Small Wireless Facilities in other geographic areas. In both of those scenarios the bottom-line outcome on the national development of 5G networks is the same—diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks.

Some have argued that our decision today regarding Sections 253 and 332 should not be applied to preempt agreements (or provisions within agreements) entered into prior to this Declaratory Ruling. We note that courts have upheld the Commission’s preemption of the enforcement of provisions in private agreements that conflict with our decisions. We therefore do not exempt existing agreements (or particular provisions contained therein) from the statutory requirements that we interpret here. That said, however, this Declaratory Ruling’s effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case.

Relationship to Section 332. While the above analysis focuses on the text and structure of the Act, legislative history, Commission orders, and case law interpreting Section 253(a), we reiterate that in the fee context, as elsewhere, the statutory phrase “prohibit or have the effect of prohibiting” in Section 332(c)(7)(B)(i)(II) has the same meaning as the phrase “prohibits or has the effect of prohibiting” in Section 253(a). As noted in the prior section, there is no evidence to suggest that Congress intended for virtually identical language to have different meanings in the two provisions. Instead, we find it

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200 See, e.g., AT&T June 8, 2018 Ex Parte Letter at 1-2; Crown Castle June 7, 2018 Ex Parte Letter at 2.
201 AT&T June 8, 2018 Ex Parte Letter at 1-2; Crown Castle June 7, 2018 Ex Parte Letter at 2; Verizon June 21, 2018 Ex Parte Letter at 2; CCA July 16, 2018 Ex Parte Letter at 2-3.
202 See, e.g., Letter from Thomas J. Navin, Counsel to Corning, Inc. to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan 25, 2018), Attach. at 6-7 (comparing different effects on deployment between a base case and a high fee case, and estimating that pole attachment fees nationwide assuming high fees would result in 28.2M fewer premises passed, or 31 percent of the 5G Base case results, and an associated $37.9B in forgone network deployment).
203 City of San Jose Sept. 18, 2018 Ex Parte Letter at 1-2.
204 See, e.g., Building Owners and Managers Ass’n Int’l v. FCC, 254 F.3d 89 (D.C. Cir. 2001) (OTARD rules barring exclusivity provisions in lease agreements). As the D.C. Circuit has recognized, “[w]here the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law.” Id. at 96; see also Lansdowne on the Potomac Homeowners Ass’n v. OpenBand at Lansdowne, LLC, 713 F.3d 187 (4th Cir. 2013).
205 For example, the City of Los Angeles asserts that fee provisions in its agreements with providers are not prohibitory and must be examined in light of a broader exchange of value contemplated by the agreements in their entirety. Letter from Eric Garcetti, Mayor, City of Los Angeles to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 (filed Sept 18, 2018). We agree that agreements entered into before this decision will need to be examined in light of their potentially unique circumstances before a decision can be reached about whether those agreements or any particular provisions in those agreements are or are not impacted by today’s FCC decision.
206 We reject the claims of some commenters that Section 332(c)(7)(B)(i)(II) is limited exclusively to decisions on individual requests and therefore must be interpreted differently than Section 253(a). See, e.g., San Francisco Comments at 24-26. Section 332(c)(7)(B)(i) explicitly applies to “regulation of the placement, construction, and modification,” and it would be irrational to interpret “regulation” in that paragraph to mean something different from the term “regulation” as used in 253(a) or to find that it does not encompass generally applicable “regulations” as well as decisions on individual applications. Moreover, even assuming arguendo that San Francisco’s position reflects the appropriate interpretation of the scope of Section 332(c)(7)(B)(i)(II), the record does not reveal why a
more reasonable to conclude that the language in both sections generally should be interpreted to have the same meaning and to reflect the same standard, including with respect to preemption of fees that could “prohibit” or have “the effect of prohibiting” the provision of covered service. Both sections were enacted to address concerns about state and local government practices that undermined providers’ ability to provide covered services, and both bar state or local conduct that prohibits or has the effect of prohibiting service.

68. To be sure, Sections 253 and 332(c)(7) may relate to different categories of state and local fees. Ultimately, we need not resolve here the precise interplay between Sections 253 and 332(c)(7). It is enough for us to conclude that, collectively, Congress intended for the two provisions to cover the universe of fees charged by state and local governments in connection with the deployment of telecommunications infrastructure. Given the analogous purposes of both sections and the consistent language used by Congress, we find the phrase “prohibit or have the effect of prohibiting” in Section 332(c)(7)(B)(i)(II) should be construed as having the same meaning and governed by the same preemption standard as the identical language in Section 253(a).

69. Application of the Interpretations and Principles Established Here. Consistent with the interpretations above, the requirement that compensation be limited to a reasonable approximation of objectively reasonable costs and be non-discriminatory applies to all state and local government fees paid in connection with a provider’s use of the ROW to deploy Small Wireless Facilities including, but not limited to, fees for access to the ROW itself, and fees for the attachment to or use of property within the ROW owned or controlled by the government (e.g., street lights, traffic lights, utility poles, and other infrastructure within the ROW suitable for the placement of Small Wireless Facilities). This interpretation applies with equal force to any fees reasonably related to the placement, construction, maintenance, repair, movement, modification, upgrade, replacement, or removal of Small Wireless Facilities within the ROW, including, but not limited to, application or permit fees such as siting applications, zoning variance applications, building permits, electrical permits, parking permits, or excavation permits.

70. Applying the principles established in this Declaratory Ruling, a variety of fees not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7) in the context of Small Wireless Facility deployments. For example, we agree with courts that have recognized that gross distinction between broadly-applicable requirements and decisions on individual requests would call for a materially different analytical approach, even if it arguably could be relevant when evaluating the application of that analytical approach to a particular preemption claim. In addition, although some commenters assert that such an interpretation “would make it virtually impossible for local governments to enforce their zoning laws with regard to wireless facility siting,” they provide no meaningful explanation why that would be the case. See, e.g., San Francisco Reply at 16. While some local commenters note that the savings clauses in Section 253(b) and (c) do not have express counterparts in the text of Section 332(c)(7)(B)(i), see, e.g., San Francisco Comments at 26, we are not persuaded that this compels a different interpretation of the virtually identical language restricting actual or effective prohibitions of service in Section 253(a) and Section 332(c)(7)(B)(i)(II), particularly given our reliance on considerations in addition to the savings clauses themselves when interpreting the “effective prohibition” language. See supra paras. 57-65. We offer these interpretations both to respond to comments and in the event that some court decision could be viewed as supporting a different result.

207 Section 253(a) expressly addresses state or local activities that prohibit or have the effect of prohibiting “any entity” from providing a telecommunications service. 47 U.S.C. § 253(a). In the 2009 Declaratory Ruling, the Commission likewise interpreted Section 332(c)(7)(B)(i)(II) as implicated where the state or local conduct prohibits or has the effect of prohibiting the provision of personal wireless service by one entity even if another entity already is providing such service. See 2009 Declaratory Ruling, 24 FCC Rcd at 14016-19, paras. 56-65.

208 We acknowledge that a fee not calculated by reference to costs might nonetheless happen to land at a level that is a reasonable approximation of objectively reasonable costs, and otherwise constitute fair and reasonable compensation as we describe herein. If all these criteria are met, the fee would not be preempted.
revenue fees generally are not based on the costs associated with an entity’s use of the ROW, and where that is the case, are preempted under Section 253(a). In addition, although we reject calls to preclude a state or locality’s use of third party contractors or consultants, or to find all associated compensation preempted, we make clear that the principles discussed herein regarding the reasonableness of cost remain applicable. Thus, fees must not only be limited to a reasonable approximation of costs, but in order to be reflected in fees, the costs themselves must also be reasonable. Accordingly, any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual “cost” to the government. If a locality opts to incur unreasonable costs, Sections 253 and 332(c)(7) do not permit it to pass those costs on to providers. Fees that depart from these principles are not saved by Section 253(c), as we discuss below.

71. Interpretation of Section 253(c) in the Context of Fees. In this section, we turn to the interpretation of several provisions in Section 253(c), which provides that state or local action that otherwise would be subject to preemption under Section 253(a) may be permissible if it meets specified criteria. Section 253(c) expressly provides that state or local governments may require telecommunications providers to pay “fair and reasonable compensation” for use of public ROWs but requires that the amounts of any such compensation be “competitively neutral and nondiscriminatory” and “publicly disclosed.”

72. We interpret the ambiguous phrase “fair and reasonable compensation,” within the statutory framework we outlined for Section 253, to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments’ actual and reasonable costs. We conclude that an appropriate yardstick for “fair and reasonable compensation,” and therefore an indicator of whether a fee violates Section 253(c), is whether it recovers a reasonable approximation of a state or local government’s objectively reasonable costs of, respectively, maintaining the ROW, maintaining a structure within the ROW, or processing an application or permit.

73. We disagree with arguments that “fair and reasonable compensation” in Section 253(c) should somehow be interpreted to allow state and local governments to charge “any compensation,” and we give weight to BDAC comments that, “[a]s a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment.” Several commenters argue, in

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209 See, e.g., Municipality of Guayanilla, 450 F.3d at 21; City of Maryland Heights, 256 F. Supp. 2d at 993-96; Prince George’s County, 49 F. Supp. 2d at 818; AT&T v. City of Dallas, 8 F. Supp. 2d at 593; see also, e.g., CTIA Comments at 30, 45; id. Attach. at 17; ExteNet Comments, Exh. 1 at 41; T-Mobile Comments at 7; WIA Comments at 52-53.

210 See, e.g., CCA Comments at 17-21 (asking the Commission to declare franchise fees or percentage of revenue fees outside the scope of fair and reasonable compensation and to prohibit state and localities from requiring service providers to obtain business licenses for individual cell sites). For example, although fees imposed by a state or local government calculated as a percentage of a provider’s revenue are unlikely to be a reasonable approximation of cost, if such a percentage-of-revenue fee were, in fact, ultimately shown to amount to a reasonable approximation of costs, the fee would not be preempted.

211 47 U.S.C. § 253(c).

212 Guayanilla District Ct. Opinion, 354 F. Supp. 2d at 114 (“fees charged by a municipality need to be related to the degree of actual use of the public rights-of-way” to constitute fair and reasonable compensation under Section 253(c)); New Jersey Payphone Ass’n, Inc. v. Town of West New York, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), aff’d 299 F. 3d 235 (3d Cir. 2002) (New Jersey Payphone) (“Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry.”)

213 BDAC Regulatory Barriers Report, Appendix C, p. 3 (a “[ROW] burden-oriented [fee] standard is flexible enough to suit varied localities and network architectures, would ensure that fees are not providing additional
particular, that Section 253(c)'s language must be read as permitting localities latitude to charge any fee at all \(^{214}\) or a "market-based rent." \(^{215}\) Many of these arguments seem to suggest that Section 253 or 332 have not previously been read to impose limits on fees, but as noted above courts have long read these provisions as imposing such limits. Still others argue that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies' use of public resources. \(^{216}\)

We find little support in the record, legislative history, or case law for that position. \(^{217}\) Indeed, our

(Continued from previous page)

revenues for other localities purposes unrelated to providing and maintaining the ROW, and would provide some basis to challenge fees that, on their face, are so high as to suggest their sole intent is to maximize revenue.

\(^{214}\) See, e.g., Baltimore Comments at 15-16 (noting that local governments traditionally impose fees based on rent, and other ROW users pay market-based fees and arguing that citizens should not have to "subsidize" wireless deployments); Bellevue \textit{et al.} Reply at 12-13 (stating that "the FCC should compensate municipalities at fair market value because any physical invasion is a taking under the Fifth Amendment, and just compensation is "typically" calculated using fair market value."); NLC Comments at 5 ("local governments, like private landlords, are entitled to collect rent for the use of their property and have a duty to their residents to assess appropriate compensation. This does not necessarily translate to restricting this compensation to just the cost of managing the asset—just as private property varies in value, so does municipal property."); Smart Communities Reply at 7-10 (stating that "fair and reasonable compensation (i.e., fair market value) is not, as some commenters contend, measured by the regulatory cost for use of a ROW or other property; rather it is measured by what it would cost the user of the ROW to purchase rights form a local property owner.").

\(^{215}\) Draft BDAC Rates and Fees Report, p. 10 (listing “Local Government Perspectives”).

\(^{216}\) See, e.g., NLC Comments, Statement of the Hon. Gary Resnick, Mayor, Wilton Manors, FL Comments at 6-7 ("preemption of local fees or rent for use of government-owned light and traffic poles, or fees for use of the right-of-way amounts to a taxpayer subsidy of wireless providers and wireless infrastructure companies. There is no corresponding benefit for such taxpayers such as requiring the broadband industry to reduce consumer rates or offer advanced services to all communities within a certain time frame."); Letter from Rondella M. Hawkins, Officer, City of Austin—Telecommunications & Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 7, 2018) at 1. These commenters do not explain why allowing recovery of a reasonable approximation of the state or locality’s objectively reasonable costs would involve a taxpayer subsidy of service providers, and we are not persuaded that our interpretation would create a subsidy.

\(^{217}\) As discussed more fully above, Congress intended through Section 253 to preempt state and local governments from imposing barriers in the form of excessive fees, while also preserving state and local authority to protect specified interests through competitively neutral regulation consistent with the Act. Our interpretation of Section 253(c) is consistent with Congress’s objectives. Our interpretation of “fair and reasonable compensation” in Section 253(c) is also consistent with prior Commission action limiting fees, and easing access, to other critical communications infrastructure. For example, in implementing the requirement in the Pole Attachment Act that utilities charge “just and reasonable” rates, the Commission adopted rules limiting the rates utilities can impose on cable companies for pole attachments. Based on the costs associated with building and operation of poles, the rates the Commission adopted were upheld by the Supreme Court, which found that the rates imposed were permissible and not “confiscatory” because they “provid[ed] for the recovery of fully allocated cost, including the actual cost of capital.” See \textit{FCC v. Florida Power Corp.}, 480 U.S. 245, 254 (1987). Here, based on the specific language in the separate provision of Section 253, we interpret the “effective prohibition” language, as applied to small cells, to permit state and local governments to recover only “fair and reasonable compensation” for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities. Relatedly, Smart Communities errs in arguing that the Commission’s Order “provides localities 60 days to provide access and sets the rate for access,” making it a “classic taking.” Smart Communities Sept. 19, 2018 \textit{Ex Parte} Letter at 25. To the contrary, the Commission has not given providers any right to compel access to any particular state or local property. \textit{Cf. Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419 (1982). There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis. In this regard, we note that the record in this proceeding reflects that the vast majority of local jurisdictions voluntarily accept placement of wireless, utility, and other facilities in their rights-of-way. And in any event, cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities. See \textit{Alabama Power Co. v. FCC}, 311 F.3d 1357, 1368, 1370-71 (11th Cir. 2002). See also \textit{United States v. 564.54 Acres
approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure.

74. The existence of Section 253(c) makes clear that Congress anticipated that “effective prohibitions” could result from state or local government fees, and intended through that clause to provide protections in that respect, as discussed in greater detail herein.\textsuperscript{218} Against that backdrop, we find it unlikely that Congress would have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments.\textsuperscript{219} Our interpretation of Section 253(c), in fact, is consistent with the views of many municipal commenters, at least with respect to one-time permit or application fees, and the members of the BDAC Ad Hoc Committee on Rates and Fees, who unanimously concurred that one-time fees for municipal applications and permits, such as an electrical inspection or a building permit, should be based on the cost to the government of processing that application.\textsuperscript{220} The Ad Hoc Committee noted that “[t]he cost-based fee structure [for one-time fees] unanimously approved by the committee accommodates the different siting related costs that different localities may incur to review and process permit applications, while precluding excessive fees that impede deployment.\textsuperscript{221} We find that the same reasoning should apply to other state and local government fees such as ROW access fees or fees for the use of government property within the ROW.\textsuperscript{222}

75. We recognize that state and local governments incur a variety of direct and actual costs in connection with Small Wireless Facilities, such as the cost for staff to review the provider’s siting application, costs associated with a provider’s use of the ROW, and costs associated with maintaining the ROW itself or structures within the ROW to which Small Wireless Facilities are attached.\textsuperscript{223} We also recognize that direct and actual costs may vary by location, scope, and extent of providers’ planned deployments, such that different localities will have different fees under the interpretation set forth in this Declaratory Ruling.

\textsuperscript{218} See supra Parts III.A, B.
\textsuperscript{219} See, e.g., City of White Plains, 305 F.3d at 78-79; Guayanilla District Ct. Opinion, 354 F. Supp. 2d at 114. We disagree with arguments that competition between municipalities, or competition from adjacent private landowners, would be sufficient to ensure reasonable pricing in the ROW. See e.g., Smart Communities Comments, Exh. 2, The Economics of Government Right of Way Fees, Declaration of Kevin Cahill, Ph.D at para. 15. We find this argument unpersuasive in view of the record evidence in this proceeding showing significant fees imposed on providers in localities across the country. See, e.g., AT&T Comments at 18; Verizon Comments at 6-7; see also BDAC Regulatory Barriers Report, Appendix C, p. 2.
\textsuperscript{220} See, e.g., Smart Communities Comments Cahill 2A at 2-3 (noting that “…a common model is to charge a fee that covers the costs that a municipality incurs in conducting the inspections and proceedings required to allow entry, fees that cover ongoing costs associated with inspection or expansion of facilities ...’’); Colorado Comm. and Utility All. \textit{et al.} Comments at 19 (noting that “application fees are based upon recovery of costs incurred by localities.”); Draft BDAC Rates and Fees Report, p. 15-16.
\textsuperscript{221} See also Draft BDAC Rates and Fees Report, p. 15-16. Although the BDAC Ad Hoc Rates and Fees Committee and municipal commenters only support a cost-based approach for one-time fees, we find no reason not to extend the same reasoning to ROW access fees or fees for the use of government property within the ROW, when all three types of fees are a legal requirement imposed by a government and pose an effective prohibition. The BDAC Rates and Fees Report did not provide a recommendation on fees for ROW access or fees for the use of government property within the ROW, and we disagree with suggestions that our ruling, which was consistent with the committee’s recommendation for one-time fees, circumvents the efforts of the Ad Hoc Rates and Fees Committee. See Georgia Municipal Association Sept. 17, 2018 \textit{Ex Parte} Letter at 3.
\textsuperscript{222} See \textit{supra} para. 50.
\textsuperscript{223} See, e.g., Colorado Comm. and Utility All. \textit{et al.} Comments at 18-19 (discussing range of costs that application fees cover).
76. Because we interpret fair and reasonable compensation as a *reasonable approximation* of costs, we do not suggest that localities must use any specific accounting method to document the costs they may incur when determining the fees they charge for Small Wireless Facilities within the ROW. Moreover, in order to simplify compliance, when a locality charges both types of recurring fees identified above (i.e., for access to the ROW and for use of or attachment to property in the ROW), we see no reason for concern with how it has allocated costs between those two types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved.\(^{224}\) Fees that cannot ultimately be shown by a state or locality to be a reasonable approximation of its costs, such as high fees designed to subsidize local government costs in another geographic area or accomplish some public policy objective beyond the providers’ use of the ROW, are not “fair and reasonable compensation…for *use* of the public rights-of-way” under Section 253(c).\(^{225}\) Likewise, we agree with both industry and municipal commenters that excessive and arbitrary consulting fees or other costs should not be recoverable as “fair and reasonable compensation,”\(^{226}\) because they are not a function of the provider’s “use” of the public ROW.

77. In addition to requiring that compensation be “fair and reasonable,” Section 253(c) requires that it be “competitively neutral and nondiscriminatory.” The Commission has previously interpreted this language to prohibit states and localities from charging fees on new entrants and not on incumbents.\(^{227}\) Courts have similarly found that states and localities may not impose a range of fees on one provider but not on another\(^{228}\) and even some municipal commenters acknowledge that governments should not discriminate as to the fees charged to different providers.\(^{229}\) The record reflects continuing concerns from providers, however, that they face discriminatory charges.\(^{230}\) We reiterate the Commission’s previous determination that state and local governments may not impose fees on some providers that they do not impose on others. We would also be concerned about fees, whether one-time or recurring, related to Small Wireless Facilities, that exceed the fees for other wireless telecommunications infrastructure in similar situations, and to the extent that different fees are charged

\(^{224}\) See supra note 71 (identifying three categories of fees charged by states and localities).

\(^{225}\) 47 U.S.C. § 253(c) (emphasis added). Our interpretation is consistent with court decisions interpreting the “fair and reasonable” compensation language as requiring fees charged by municipalities relate to the degree of actual use of a public ROW. See, e.g., Puerto Rico Tel. Co. v. Municipality of Guayanilla, 283 F. Supp. 2d 534, 543-44 (D.P.R. 2003); see also Municipality of Guayanilla, 450 F.3d at 21-24; City of Maryland Heights, 256 F. Supp. 2d at 984.

\(^{226}\) See Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018); see also, Illinois Municipal League Comments at 2 (noting that proposed small cell legislation in Illinois allows municipalities to recover “reasonable costs incurred by the municipality in reviewing the application.”).


\(^{228}\) City of White Plains, 305 F.3d 80.

\(^{229}\) City of Baltimore Reply at 15 (“The City does agree that rates to access the right of way by similar entities must be nondiscriminatory.”). Other commenters argue that nothing in Section 253 can apply to property in the ROW. City of San Francisco Reply at 2-3, 19 (denying that San Francisco is discriminatory to different providers but also asserting that “[l]ocal government fees for use of their poles are simply beyond the purview of section 253(c)”).

\(^{230}\) See, e.g., CFP Comments at 31-33 (noting that the City of Baltimore charges incumbent Verizon “less than $.07 per linear foot for the space that it leases in the public right-of-way” while it charges other providers “$3.33 per linear foot to lease space in the City’s conduit). Some municipal commenters argue that wireless infrastructure occupies more space in the ROW. See Smart Communities Reply Comments at 82 (“wireless providers are placing many of those permanent facilities in the public rights-of-way, in ways that require much larger deployments. It is not discrimination to treat such different facilities differently, and to focus on their impacts”). We recognize that different uses of the ROW may warrant charging different fees, and we only find fees to be discriminatory and not competitively neutral when different amounts are charged for similar uses of the ROW.
for similar use of the public ROW.\footnote{Our interpretation is consistent with principles described by the BDAC’s Ad Hoc Committee on Rates and Fees. Draft BDAC Rates and Fees Report at 5 (Jul. 24, 2018) (listing “neutral treatment and access of all technologies and communication providers based upon extent/nature of ROW use” as principle to guide evaluation of rates and fees).}

78. **Fee Levels Likely to Comply with Section 253.** Our interpretation of Section 253(a) and “fair and reasonable compensation” under Section 253(c) provides guidance for local and state fees charged with respect to one-time fees generally, and recurring fees for deployments in the ROW. Following suggestions for the Commission to “establish a presumptively reasonable ‘safe harbor’ for certain ROW and use fees,”\footnote{BDAC Regulatory Barriers Report, Appendix C, p. 3.} and to facilitate the deployment of specific types of infrastructure critical to the rollout of 5G in coming years, we identify in this section three particular types of fee scenarios and supply specific guidance on amounts that presumptively are not prohibited by Section 253. Informed by our review of information from a range of sources, we conclude that fees at or below these amounts presumptively do not constitute an effective prohibition under Section 253(a) or Section 332(c)(7), and are presumed to be “fair and reasonable compensation” under Section 253(c).

79. Based on our review of the Commission’s pole attachment rate formula, which would require fees below the levels described in this paragraph, as well as small cell legislation in twenty states, local legislation from certain municipalities in states that have not passed small cell legislation, and comments in the record, we presume that the following fees would not be prohibited by Section 253 or Section 332(c)(7): (a) $500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, or $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and (b) $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.\footnote{These presumptive fee limits are based on a number of different sources of data. Many different state small cell bills, in particular, adopt similar fee limits despite their diversity of population densities and costs of living, and we expect that these presumptive fee limits will allow for recovery in excess of costs in many cases. 47 CFR § 1.1409; National Conference of State Legislatures, Mobile 5G and Small Cell Legislation, (May 7, 2018), \url{http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx} (providing description of state small cell legislation); Little Rock, Ark. Ordinance No. 21,423 (June 6, 2017); NCTA August 20, 2018 Ex Parte Letter, Attachment; \textit{see also} H.R. 2365, 2018 Leg. 2d Reg. Sess. (Ariz. 2018) ($100 per facility for first 5 small cells in application; $50 annual utility attachment rate, $50 ROW access fee); H.R. 189 149th Gen. Assemb. Reg. Sess. (Del. 2017) ($100 per small wireless facility on application; fees not to exceed actual, direct and reasonable cost); S. 21320th Gen. Assemb. Reg. Sess. (Ind. 2017) ($100 per small wireless facility; H.R. 1991, 99th Gen. Assemb. 2nd Reg. Sess. (Missouri, 2018) ($100 for each facility collocated on authority pole; $150 annual fee per pole); H.R. 38 2018 Leg. Assemb. 2d Reg. Sess. (N.M. 2018) ($100 for each of first 5 small facilities in an application; $20 per pole annually; $250 per facility annually for access to ROW); S. 189, 2018 Leg. Gen. Sess. (Utah 2018) ($100 per facility to collocate on existing or replacement utility pole; $250 annual ROW fee per facility for certain attachments). \textit{See also} Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, and D. Zachary Champ, Director, Government Affairs, WIA to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018) Attach. (listing fees in twenty state small cell legislations) (CTIA/WIA Aug. 10, 2018 \textit{Ex Parte} Letter; Letter from Scott K. Bergmann, Sen. Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 4, 2018) at 3, Attach. (analyzing average and median recurring fee levels permitted under state legislation). These examples suggest that the fee levels we discuss above may be higher than what many states already allow and further support our finding that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. We recognize that certain fees in a minority of state small cell bills are above the levels we presume to be allowed under Section 253. Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.}
that there would be almost no litigation by providers over fees set at or below these levels. Likewise, our review of the record, including the many state small cell bills passed to date, indicate that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. In those limited circumstances, a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the limits imposed by Section 253—that is, they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory.234 Allowing localities to charge fees above these levels upon this showing recognizes local variances in costs.235

C. Other State and Local Requirements that Govern Small Facilities Deployment

81. There are also other types of state and local land-use or zoning requirements that may restrict Small Wireless Facility deployments to the degree that they have the effect of prohibiting service in violation of Sections 253 and 332. In this section, we discuss how those statutory provisions apply to requirements outside the fee context, both generally and with a particular focus on aesthetic and undergrounding requirements.

82. As discussed above, a state or local legal requirement constitutes an effective prohibition if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”236 Our interpretation of that standard, as set forth above, applies equally to fees and to non-fee legal requirements. And as with fees, Section 253 contains certain safe harbors that permit some legal requirements that might otherwise be preempted by Section 253(a). Section 253(b) saves state “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.237 And Section 253(c) preserves state and local authority to manage the public rights-of-way.238

83. Given the wide variety of possible legal requirements, we do not attempt here to determine which of every possible non-fee legal requirements are preempted for having the effect of prohibiting service, although our discussion of fees above should prove instructive in evaluating specific requirements. Instead, we focus on some specific types of requirements raised in the record and provide guidance on when those particular types of requirements are preempted by the statute.

84. Aesthetics. The Wireless Infrastructure NPRM/NOI sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how Sections 253 and 332(c)(7) should be applied to them.239 Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize

234 Several state and local commenters express concern about the presumptively reasonable fee levels we establish, including concerns about the effect of the fee levels on existing fee-related provisions included in state and local legislation. See e.g., Letter from Kent Scarlett, Exec. Director, Ohio Municipal League to Marlene H. Dortch, Secretary, FCC at 1 (filed Sept. 18, 2018); Letter from Liz Kniss, Mayor, City of Palo Alto to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84 at 1 (filed Sept. 17, 2018). As stated above, while the fee levels we establish reflect our presumption regarding the level of fees that would be permissible under Section 253 and 332(c)(7), state or local fees that exceed these levels may be permissible if the fees are based on a reasonable approximation of costs and the costs themselves are objectively reasonable.

235 We emphasize that localities may charge fees to recover their objectively reasonable costs and thus reject arguments that our approach requires localities to bear the costs of small cell deployment or applies a one-size-fits-all standard. See, e.g., Letter from Mike Posey, Mayor, City of Huntington Beach, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 11, 2018) (Mike Posey Sept. 11, 2018 Ex Parte Letter).

236 California Payphone, 12 FCC Rcd at 14206, para. 31; see supra paras. 34-42.


238 47 U.S.C. § 253(c).

burdensome requirements to deploy facilities using “stealth” designs or other means of camouflage as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details. Providers also assert that the procedures some localities use to evaluate the appearance of proposed facilities and to decide whether they comply with applicable land-use requirements are overly restrictive. Many providers are particularly critical of the use of unduly vague or subjective criteria that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning and adding to the time necessary to deploy facilities. At the same time, we have heard concerns in the record about carriers deploying unsightly facilities that are significantly out of step with similar, surrounding deployments.

85. State and local governments add that many of their aesthetic restrictions are justified by factors that the providers fail to mention. They assert that their zoning requirements and their review and enforcement procedures are properly designed to, among other things, (1) ensure that the design, appearance, and other features of buildings and structures are compatible with nearby land uses; (2) manage ROW so as to ensure traffic safety and coordinate various uses; and (3) protect the integrity of

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240 See, e.g., CCIA Comments at 14-15 (discussing regulations enacted by Village of Skokie, Illinois); WIA Reply Comments (WT Docket No. 16-421) at 9-10 (discussing restrictions imposed by Town of Hempstead, New York); see also AT&T Comments at 14-17; PTA-FLA Comments at 19; Verizon Comments at 19-20; AT&T Aug. 6, 2018 ex parte at 3.

241 See, e.g., CCIA Comments at 13-14 (describing regulations established by Skokie, Illinois that prescribe in detail the permissible colors of paint and their potential for reflecting light); AT&T Aug. 6, 2018 ex parte at 3 (“Some municipalities require carriers to paint small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the ROW by electric incumbents, competitive telephone companies, or cable companies,” and asserts that it often “is highly burdensome to maintain non-factory paint schemes over years or decades, including changes to the municipal paint scheme,” due to “technical constraints as well such as manufacture warranty or operating parameters, such as heat dissipation, corrosion resistance, that are inconsistent with changes in color, or finish.”); AT&T Comments at 16-17 (contending that some localities “allow for a single size and configuration for small cell equipment while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance,” and thus effectively compel “providers [to] incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the delays associated with the approval of an alternative equipment design and the risk of rejection of that design.”); id. at 17 (some local governments “prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district”).

242 See, e.g., Crown Castle Comments at 14-15 (criticizing San Francisco’s aesthetic review procedures that discriminate against providers and criteria and referring to extended litigation); CTIA Reply Comments at 17 (“San Francisco imposes discretionary aesthetic review for wireless ROW facilities.”); T-Mobile Comments at 40; but see San Francisco Comments at 3-7 (describing aesthetic review procedures). See also AT&T Comments at 13-17; Extenet Comments at 37; CTIA Comments at 21-22; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8.

243 See, e.g., AT&T Comments at 13-17; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8. WIA cites allegations that an unnamed city in California recently declined to support approval of a proposed small wireless installation, claiming that the installations do not meet “Planning and Zoning Protected Location Compatibility Standards,” even though the same equipment has been deployed elsewhere in the city dozens of times, and even though the “Protected Location” standards should not apply because the proposals are not on “protected view” streets). WIA Reply Comments, WT Docket No. 16-421 at 9-10; id. at 8 (noting that one city changed its aesthetic standards after a proposal was filed); AT&T Comments at 17 (noting that a design approval took over a year); Virginia Joint Commenters, WT Docket No. 16-421 (state law providing discretion for zoning authority to deny application because of “aesthetics” concerns without additional guidance); Extenet Reply Comments at 13 (noting that some “local governments impose aesthetic requirements based entirely on subjective considerations that effectively give local governments latitude to block a deployment for virtually any aesthetically-based reason”).
their historic, cultural, and scenic resources and their citizens’ quality of life. 244

86. Given these differing perspectives and the significant impact of aesthetic requirements on the ability to deploy infrastructure and provide service, we provide guidance on whether and in what circumstances aesthetic requirements violate the Act. This will help localities develop and implement lawful rules, enable providers to comply with these requirements, and facilitate the resolution of disputes. We conclude that aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.

87. Like fees, compliance with aesthetic requirements imposes costs on providers, and the impact on their ability to provide service is just the same as the impact of fees. We therefore draw on our analysis of fees to address aesthetic requirements. We have explained above that fees that merely require providers to bear the direct and reasonable costs that their deployments impose on states and localities should not be viewed as having the effect of prohibiting service and are permissible. 245 Analogously, aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment. For example, a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service.

88. Finally, in order to establish that they are reasonable and reasonably directed to avoiding aesthetic harms, aesthetic requirements must be objective — i.e., they must incorporate clearly-defined and ascertainable standards, applied in a principled manner — and must be published in advance. 246 “Secret” rules that require applicants to guess at what types of deployments will pass aesthetic muster substantially increase providers’ costs without providing any public benefit or addressing any public harm. Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site. 247

244 See, e.g., NLC Comments, WT Docket No. 16-421 at 8-10; Smart Communities Comments, WT Docket No. 16-421 at 35-36; New York City Comments at 10-15; New Orleans Comments at 1-2, 5-8; San Francisco Comments at 3-12; CCUA Reply Comments at 5; Irvine (CA) Comments at 2; Oakland County (MI) Comments at 3-5; Florida Coalition of Local Gov’ts Reply Comments at 6-12 (justifications for undergrounding requirements); id. at 16-421 (justifications for municipal historic-preservation requirements); id. at 22-16 (justifications for aesthetics and design requirements).

245 See supra paras. 55-56.

246 Our decision to adopt this objective requirement is supported by the fact that many states have recently adopted limits on their localities’ aesthetic requirements that employ the term “objective.” See, e.g., Letter from Scott Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 19, 2018) (noting requirements enacted in the states of Arizona, Delaware, Missouri, North Carolina, Ohio, and Oklahoma, that local siting requirements for small wireless facilities be “objective”); see also Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 4, 2018)

247 Some local governments argue that, because different aesthetic concerns may apply to different neighborhoods, particularly those considered historic districts, it is not feasible for them to publish local aesthetic requirements in advance. See, e.g., Letter from Mark J. Schwartz, County Manager, Arlington County, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018) (Arlington County Sept. 18 Ex Parte Letter); Letter from Allison Silberberg, Mayor, City of Alexandria, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018). We believe this concern is unfounded. As noted above, the fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision. Moreover, the aesthetic requirements to be published in advance need not
89. We appreciate that at least some localities will require some time to establish and publish aesthetics standards that are consistent with this Declaratory Ruling. Based on our review and evaluation of commenters’ concerns, we anticipate that such publication should take no longer than 180 days after publication of this decision in the Federal Register.

90. **Undergrounding Requirements.** We understand that some local jurisdictions have adopted undergrounding provisions that require infrastructure to be deployed below ground based, at least in some circumstances, on the locality’s aesthetic concerns. A number of providers have complained that these types of requirements amount to an effective prohibition.\(^{248}\) In addressing this issue, we first reiterate that, while undergrounding requirements may well be permissible under state law as a general matter, any local authority to impose undergrounding requirements under state law does not remove such requirements from the provisions of Section 253. In this regard, we believe that a requirement that all wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals. In this sense, we agree with the U.S. Court of Appeals for the Ninth Circuit when it observed that, “[i]f an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services.”\(^{249}\) Further, 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. Thus, the same criteria discussed above in the context of aesthetics generally would apply to state or local undergrounding requirements.

91. **Minimum Spacing Requirements.** Some parties complain of municipal requirements regarding the spacing of wireless installations—i.e., mandating that facilities be sited at least 100, 500, or 1,000 feet, or some other minimum distance, away from other facilities, ostensibly to avoid excessive overhead “clutter” that would be visible from public areas.\(^{250}\) We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements.\(^{251}\) For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use. Such a rule change with retroactive effect would

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prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards.

\(^{248}\) See, e.g., AT&T Comments at 14-15; Crown Castle Comments at 54-56; T-Mobile Comments at 38; Verizon Comments at 8-9; WIA Comments at 56; CTIA Reply at 16. But see Chicago Comments at 15; City of Claremont (CA) Comments at 1; City of Kenmore (WA) Comments at 1; City of Mukilteo (WA) Comments at 2; Florida Coalition of Local Gov’ts Comments at 6-12; Smart Communities Comments at 74.

\(^{249}\) County of San Diego, 543 F.3d at 580, accord, BDAC Model Municipal Code at 13, § 2.3.e (providing for municipal zoning authority to allow providers to deploy small wireless facilities on existing vertical structures where available in neighborhoods with undergrounding requirements, or if no technically feasible structures exist, to place vertical structures commensurate with other structures in the area).

\(^{250}\) See, e.g., Verizon Comments at 8 (describing requirements imposed by Buffalo Grove, Illinois); CCIA Comments at 14-15 (“These restrictions stifle technological innovation and unnecessarily burden the ability of a provider to use the best available technological to serve a particular area. For example, 5G technology will require higher band spectrum for greater network capacity, yet some millimeter wave spectrum simply cannot propagate long distances over a few thousand feet—let alone a few hundred. Therefore, a local requirement of, for example, a thousand-foot minimum separation distance between small cells would unnecessarily forestall any network provider seeking to use higher band spectrum with greater capacity when that provider needs to boost coverage in a specific area of a few hundred feet.”). See also AT&T Comments at 15; CTIA Reply at 17.

\(^{251}\) 47 U.S.C. § 253(a).
almost certainly have the effect of prohibiting service under the standards we articulate here. Therefore, such requirements should be evaluated under the same standards for aesthetic requirements as those discussed above.\textsuperscript{252}

D. States and Localities Act in Their Regulatory Capacities When Authorizing and Setting Terms for Wireless Infrastructure Deployment in Public Rights of Way

92. We confirm that our interpretations today extend to state and local governments’ terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.\textsuperscript{253} As explained below, for two alternative and independent reasons, we disagree with state and local government commenters who assert that, in providing or denying access to government-owned structures, these governmental entities function solely as “market participants” whose rights cannot be subject to federal preemption under Section 253(a) or Section 332(c)(7).\textsuperscript{254}

93. First, this effort to differentiate between such governmental entities’ “regulatory” and “proprietary” capacities in order to insulate the latter from preemption ignores a fundamental feature of the market participant doctrine.\textsuperscript{255} As the Ninth Circuit has observed, at its core, this doctrine is “a

\textsuperscript{252}Another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit \textit{quid pro quo} in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an “in-kind” service or benefit to the municipality, such as installing a communications network dedicated to the municipality’s exclusive use. \textit{See}, \textit{e.g.}, Comcast Comments at 9-10 Verizon Comments at 7, Crown Castle Comments at 55-56. Such requirements impose costs, but rarely, if ever, yield benefits directly related to the deployment. Additionally, where such restrictions are not cost-based, they inherently have “the effect of prohibiting” service, and thus are preempted by Section 253(a). \textit{See also} BDAC Regulatory Barriers Report, Appendix E at 1 (describing “conditions imposed that are unrelated to the project for which they were seeking ROW access” as “inordinately burdensome”); BDAC Model Municipal Code at 19, § 2.5a.(v)(F) (providing that municipal zoning authority “may not require an Applicant to perform services . . . or in-kind contributions [unrelated] to the Communications Facility or Support Structure for which approval is sought”).

\textsuperscript{253}\textit{See supra} paras. 50-91. Some have argued that Section 224 of the Communications Act’s exception of state-owned and cooperative-owned utilities from the definition of “utility,” “[a]s used in this section,” suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. City of Mukilteo, et. al. Ex Parte Comments on the Draft Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from James Bradford Ramsay, General Counsel, NARUC to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79 at 7 (filed Sept. 19, 2018). We see no basis for such a reading. Nothing in Section 253 suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. \textit{Compare} 47 U.S.C. § 224 with 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.

\textsuperscript{254}\textit{See, e.g.}, AASHTO Comments, Att. 1 (Del. DOT Comments) at 3-5; New York City Comments at 2-8; San Antonio \textit{et al.} Comments at 14-15; Smart Communities Comments at 62-66; San Francisco Comments at 28-30; League of Arizona Cities \textit{et al.} Comments, WT Docket No. 16-421 at 3-9; San Antonio \textit{et al.} Comments, WT Docket No. 16-421 at 14-15. \textit{See also Wireless Infrastructure NPRM/NOI}, 32 FCC Red at 3364-65, para. 96 (seeking comment on this issue).

\textsuperscript{255}The market participant doctrine establishes that, unless otherwise specified by Congress, federal statutory provisions may be interpreted as preemption or superseding state and local governments’ activities involving regulatory or public policy functions, but not their activities as “market participants” to serve their “purely proprietary interests,” analogous to similar transactions of private parties. \textit{Building & Construction Trades Council
presumption about congressional intent,” which “may have a different scope under different federal statutes.” The Supreme Court has likewise made clear that the doctrine is applicable only “[i]n the absence of any express or implied indication by Congress.” In contrast, where state action conflicts with express or implied federal preemption, the market participant doctrine does not apply, whether or not the state or local government attempts to impose its authority over use of public rights-of-way by permit or by lease or contract. Here, both Sections 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct.

94. Specifically, Section 253(a) expressly preempts certain state and local “legal requirements” and makes no distinction between a state or locality’s regulatory and proprietary conduct. Indeed, 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.” Section 253(b) mentions “requirement[s],” a phrase that is even broader than that used in Section 253(a) but covers “universal service,” “public safety and welfare,” “continued quality of telecommunications,” and “safeguard[s for the] rights of consumers.” The subsection does not recognize a distinction between regulatory and proprietary. Section 253(c), which expressly insulates from preemption certain state and local government activities, refers in relevant part to “manag[ing] the public rights-of-way” and “requir[ing] fair and reasonable compensation,” while eliding any distinction between regulatory and proprietary action in either context. The Commission has previously observed that Section 253(c) “makes explicit a local government’s continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public

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256 See, e.g., Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1042 (9th Cir. 2007); Johnson v. Rancho Santiago Comm. College, 623 F.3d 1011, 1022 (9th Cir. 2010).

257 See Boston Harbor, 507 U.S. at 231.


259 At a minimum, we conclude that Congress’s language has not unambiguously pointed to such a distinction. See Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Aug. 23, 2018) (Verizon Aug. 23, 2018 Ex Parte Letter). Furthermore, we contrast these statutes with those that do not expressly or impliedly preempt proprietary conduct. Compare, e.g., American Trucking, 569 U.S. 641 (finding that FAA Authorization Act of 1994’s provision that “State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property” expressly preempted the terms of a standard-form concession agreement drafted to govern the relationship between the Port of Los Angeles and any trucking company seeking to operate on the premises), and Gould, 475 U.S. at 289 (finding that NLRA preempted a state law barring state contracts with companies with disfavored labor practices because the state scheme was inconsistent with the federal scheme), with Boston Harbor, 507 U.S. at 224-32. In Boston Harbor, the Supreme Court observed that the NLRA contained no express preemption provision or implied preemption scheme and consequently held:

In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.

Id. (internal citations omitted).

260 See Minnesota Order, 14 FCC Rcd at 21707, para. 18. We find these principles to be equally applicable to our interpretation of the meaning of “regulation[s]” referred to under Section 332(c)(7)(B) insofar as such actions impermissibly “prohibit or have the effect of prohibiting the provision of personal wireless services.” Supra paras. 34-42.
We conclude here that, as a general matter, “manage[ment]” of the ROW includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary. This reading, coupled with Section 253(c)’s narrow scope, suggests that Congress’s omission of a blanket proprietary exception to preemption was intentional, and thus, that such conduct can be preempted under Section 253(a). We therefore construe Section 253(c)’s requirements, including the requirement that compensation be “fair and reasonable,” as applying equally to charges imposed via contracts and other arrangements between a state or local government and a party engaged in wireless facility deployment. This interpretation is consistent with Section 253(a)’s reference to “State or local legal requirement[s],” which the Commission has consistently construed to include such agreements. In light of the foregoing, whatever the force of the market participant doctrine in other contexts, we believe the language, legislative history, and purpose of Sections 253(a) and (c) are incompatible with the application of this doctrine in this context. We observe once more that “[o]ur conclusion that Congress intended this language to be interpreted broadly is reinforced by the scope of section 253(d),” which “directs the Commission to preempt any statute, regulation, or legal requirement permitted or imposed by a state or local government if it contravenes sections 253(a) or (b). A more restrictive interpretation of the term ‘other legal requirements’ easily could permit state and local restrictions on competition to escape preemption based solely on the way in which [state] action was structured. We do not believe that Congress intended this result.”

Similarly, and as discussed elsewhere, we interpret Section 332(c)(7)(B)(ii)’s references to “any request[s] for authorization to place, construct, or modify personal wireless service facilities” broadly, consistent with Congressional intent. As described below, we find that “any” is unqualifiedly broad, and that “request” encompasses anything required to secure all authorizations necessary for the deployment of personal wireless services infrastructure. In particular, we find that Section 332(c)(7) includes authorizations relating to access to a ROW, including but not limited to the

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262 Indeed, to permit otherwise could limit the utility of ROW access for telecommunications service providers and thus conflict with the overarching preemption scheme set up by Section 253(a), for which 253(b) and 253(c) are exceptions. By construing “manage[ment]” of a ROW to include some proprietary behaviors, we mean to suggest that conduct taken in a proprietary capacity is likewise subject to 253(c)’s general limitations, including the requirement that any compensation charged in such capacity be “fair and reasonable.”

263 Cf. Minnesota Order, 14 FCC Rcd at 21729-30, para. 61-62 (internal citations omitted) (“Moreover, Minnesota has not shown that the compensation required for access to the right-of-way is ‘fair and reasonable.’ The compensation appears to reflect the value of the exclusivity inherent in the Agreement [which provides the developer with exclusive physical access, for at least ten years, to longitudinal rights-of-way along Minnesota’s interstate freeway system] rather than fair and reasonable charges for access to the right-of-way. Nor has Minnesota shown that the Agreement provides for ‘use of public rights-of-way on a nondiscriminatory basis.’”) C 7.

264 Cf. Crown Castle June 7, 2018 Ex Parte Letter at 17 n.83 (“Section 253(c), which carves out ROW management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute’s sweep.”).

265 We acknowledge that the Commission previously concluded that “Section 6409(a) applies only to State and local governments acting in their role as land use regulators” and found that “this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt ‘non regulatory decisions[,]” See 2014 Wireless Infrastructure Order, 29 FCC Rcd at 12964-65, paras. 237-240. To the extent necessary, we clarify here that the actions and analysis there were limited in scope given the different statutory scheme and record in that proceeding, which did not, at the time, suggest a need to “further elaborate as to how this principle should apply to any particular circumstance” (there, in connection with application of Section 6409(a)). Here, in contrast, as described herein, we find that further elucidation by the Commission is needed.

266 Minnesota Order, 14 FCC Rcd at 21707, para. 18 (internal citations omitted) (emphasis omitted).

267 See infra Part IV.C.1 (Authorizations Subject to the “Reasonable Period of Time” Provision of Section 332(c)(7)(B)(ii)).
“place[ment], construct[ion], or modif[ication]” of facilities on government-owned property, for the purpose of providing “personal wireless service.” We observe that this result, too, is consistent with Commission precedent such as the Minnesota Order, which involved a contract that provided exclusive access to a ROW. As but one example, to have limited that holding to exclude government-owned property within the ROW even if the carrier needed access to that property would have the effect of diluting or completely defeating the purpose of Section 332(c)(7).

96. Second, and in the alternative, even if Section 253(a) and Section 332(c)(7) were to permit leeway for states and localities acting in their proprietary role, the examples in the record would be excepted because they involve states and localities fulfilling regulatory objectives. In the proprietary context, “a State acts as a ‘market participant with no interest in setting policy.’” We contrast state and local governments’ purely proprietary actions with states and localities acting with respect to managing or controlling access to property within public ROW, or to decisions about where facilities that will provide personal wireless service to the public may be sited. As several commenters point out, courts have recognized that states and localities “hold the public streets and sidewalks in trust for the public” and “manage public ROW in their regulatory capacities.” These decisions could be based on a number of regulatory objectives, such as aesthetics or public safety and welfare, some of which, as we note elsewhere, would fall within the preemption scheme envisioned by Congress. In these situations, the state or locality’s role seems to us to be indistinguishable from its function and objectives as a regulator.

268 See also infra para. 134-36 and cases cited therein. Precedent that may appear to reach a different result can be distinguished in that it resolves disputes arising under Section 332 and/or 253(a) without analyzing the scope of Section 253(c). Furthermore, those situations did not involve government-owned property or structures within a public ROW. See, e.g., Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 420-21 (2d Cir. 2002) (declining to find preemption under Section 332 applicable to terms of a school rooftop lease); Omnipoint Commc’ns, Inc. v. City of Huntington Beach, 738 F.3d 192, 195-96, 200-01 (9th Cir. 2013) (declining to find preemption under Section 332 applicable to restrictions on lease of parkland).

269 In this regard, also relevant to our interpretations here is courts’ admonition that government activities that are characterized as transactions but in reality are “tantamount to regulation” are subject to preemption, Gould, 475 U.S. at 289, and that government action disguised as private action may not be relied on as a pretext to advance regulatory objectives. See, e.g., Coastal Communications Service v. City of New York, 658 F. Supp. 2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to section 253(a) where the advertising was a material factor in the provider’s ability to provide the payphone service itself).


271 See Verizon Comments at 26-28 & n.85; T-Mobile Comments at 50 & n.210 and cases cited therein.

272 Indeed, the Commission has long recognized that, in enacting Sections 253(c) and 332(c)(7), Congress affirmatively protected the ability of state and local governments to carry out their responsibilities for maintaining, managing, and regulating the use of ROW and structures therein for the benefit of the public. TCI Cablevision Order, 12 FCC Rcd at 21441, para. 103 (1997) (“We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. 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, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.”); Moratoria Declaratory Ruling, FCC 18-111, para. 142 (same); Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling, and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103, para. 39 (1996) (same). We find these situations to be distinguishable from those where a state or locality might be engaged in a discrete, bona fide transaction involving sales or purchases of services that do not otherwise violate the law or interfere with a preemption scheme. Compare, e.g., Cardinal Towing & Auto Repair, Inc., v. City of Bedford, 180 F.3d 686, 691, 693-94 (5th Cir. 1999) (declining to find that the FAA Authorization Act of 1994, as amended by the ICC Termination Act of 1995, preempted an ordinance and contract specifications that were designed only to procure services that a municipality itself needed, not to regulate the conduct of others), with NextG Networks of N.Y., Inc. v. City of New York, 2004 WL 2884308 (N.D.N.Y., Dec. 10, 2004) (crediting allegations that a city’s actions, such as issuing a request for proposal and implementing a general franchising scheme, were not of a purely proprietary nature, but rather, were taken in pursuit of a regulatory objective or policy). This action could include, for example, procurement of services for the state or locality, or a
the extent that there is some distinction, the temptation to blend the two roles for purposes of insulating conduct from federal preemption cannot be underestimated in light of the overarching statutory objective that telecommunications service and personal wireless services be deployed without material impediments.

97. Our interpretation of both provisions finds ample support in the record of this proceeding. Specifically, commenters explain that public ROW and government-owned structures within such ROW are frequently relied upon to supply services for the benefit of the public, and are often the best-situated locations for the deployment of wireless facilities.\(^{273}\) However, the record is also replete with examples of states and localities refusing to allow access to such ROW or structures, or imposing onerous terms and conditions for such access.\(^{274}\) These examples extend far beyond governments’ treatment of single structures;\(^{275}\) indeed, in some cases it has been suggested that states or localities are using their proprietary roles to effectuate a general municipal policy disfavoring wireless deployment in public ROW.\(^{276}\) We believe that Section 253(c) is properly construed to suggest that Congress did not intend to permit states and localities to rely on their ownership of property within the ROW as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted.\(^{277}\) Our interpretations here are intended to facilitate the implementation of the scheme Congress intended and to provide greater regulatory certainty to states, municipalities, and regulated parties about what conduct is preempted under Section 253(a). Should factual questions arise about whether a state or locality is engaged in such behavior, Section 253(d) affords state and local governments and private parties an avenue for specific preemption challenges.

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contract for employment services between a state or locality and one of its employees. We do not intend to reach these scenarios with our interpretations today.

\(^{273}\) See, e.g., Verizon Aug. 23, 2018 Ex Parte Letter at 4-5.

\(^{274}\) See supra para. 25.


\(^{276}\) See NextG Networks of N.Y., Inc. v. City of New York, 2004 WL 2884308; Coastal Communications Service v. City of New York, 658 F. Supp. 2d at 441-42.

\(^{277}\) We contrast this instance to others in which we either declined to act or responded to requests for action with respect to specific disputes. See, e.g., 2014 Wireless Infrastructure Order, 29 FCC Rcd at 12964-65, paras. 237-240; Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules, Memorandum Opinion and Order, 21 FCC Rcd 13201, 13220, para. 43 (2006) (observing, in the context of a different statutory and regulatory scheme, that “[g]iven that the Commission intended to preempt restrictions [regarding restrictions on Continental’s use of its Wi-Fi antenna] in private lease agreements, however, Massport would be preempted even if it is acting in a private capacity with regard to its lease agreement with Continental.”); Sandwich Isles Section 253 Order, 32 FCC Rcd at 5883, para. 14 (rejecting argument that argument that Section 253(a) is inapplicable where it would affect the state’s ability to “deal[] with its real estate interests . . . as it sees fit,” such as by granting access to “rights-of-way over land that it owns); Minnesota Order, 14 FCC Rcd at 21706-08, paras. 17-19; cf. Amigo.Net Petition for Declaratory Ruling, Memorandum Opinion and Order, 17 FCC Rcd 10964, 10967 (WCB 2002) (Section 253 did not apply to carrier’s provision of network capacity to government entities exclusively for such entities’ internal use); T-Mobile West Corp. v. Crow, 2009 WL 5128562 (D. Ariz., Dec. 17, 2009) (Section 332(c)(7) did not apply to contract for deployment of wireless facilities and services for use on state university campus). We clarify here that such prior instances are not to be construed as a concession that Congress did not make preemption available, or that the Commission lacked the authority to support parties’ attempts to avail themselves of relief offered under preemption schemes, when confronted with instances in which a state or locality is relying on its proprietary role to skirt federal regulatory reach. Indeed, these instances demonstrate the opposite—that preemption is available to effectuate Congressional intent—and merely illustrate application of this principle. Also, we do not find it necessary to await specific disputes in the form of Section 253(d) petitions to offer these interpretations. In the alternative and as an independent means to support the interpretations here, we clarify that we intend for our views to guide how preemption should apply in fact-specific scenarios.
E. Responses to Challenges to Our Interpretive Authority and Other Arguments

98. We reject claims that we lack authority to issue authoritative interpretations of Sections 253 and 332(c)(7) in this Declaratory Ruling. As explained above, we act here pursuant to our broad authority to interpret key provisions of the Communications Act, consistent with our exercise of that interpretive authority in the past. In this instance, we find that issuing a Declaratory Ruling is necessary to remove what the record reveals is substantial uncertainty and to reduce the number and complexity of legal controversies regarding certain fee and non-fee state and local requirements in connection with Small Wireless Facility infrastructure. We thus exercise our authority in this Declaratory Ruling to interpret Section 253 and Section 332(c)(7) and explain how those provisions apply in the specific scenarios at issue here.

99. Nothing in Sections 253 or 332(c)(7) purports to limit the exercise of our general interpretive authority. Congress’s inclusion of preemption provisions in Section 253(d) and Section 332(c)(7)(B)(v) does not limit the Commission’s ability pursuant to other sections of the Act to construe and provide its authoritative interpretation as to the meaning of those provisions. Any preemption under Section 253 and/or Section 332(c)(7)(B) that subsequently occurs will proceed in accordance with the enforcement mechanisms available in each context. But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in Section 253 or Section 332(c)(7) prevents the Commission from declaring that a category of state or local laws is inconsistent with Section 253(a) or Section 332(c)(7)(B)(i)(II) because it prohibits or has the effect of prohibiting the relevant covered service.


279 Targeted interpretations of the statute like those we adopt here fall far short of a “federal regulatory program dictating the scope and policies involved in local land use” that some commenters fear. League of Minnesota Cities Comments at 9.

280 We also reject claims that Section 601(c)(1) of the 1996 Act constrains our interpretation of these provisions. See, e.g., NARUC Reply at 3; Smart Communities Reply at 33, 35-36. That provision guards against implied preemption, while Section 253 and Section 332(c)(7)(B) both expressly restrict state and local activities. See, e.g., Texas PUC Order, 13 FCC Rcd at 3485-86, para. 51. Courts also have read that provision narrowly. See, e.g., In re FCC 11-161, 753 F.3d 1015, 1120 (10th Cir. 2014); Quest Corp. v. Minnesota Pub. Utilities Comm’n, 684 F.3d 721, 730-31 (8th Cir. 2012); Farina v. Nokia Inc., 625 F.3d 97, 131 (3d Cir. 2010). Although the Ninth Circuit in County of San Diego asserted that there is a presumption that express preemption provisions should be read narrowly, and that the presumption would apply to the interpretation of Section 253(a), County of San Diego, 543 F.3d at 548, the cited precedent applies that presumption where “the State regulates in an area where there is no history of significant federal presence.” Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm’n, 410 F.3d 1126, 1136 (9th Cir. 2005). Whatever the applicability of such a presumption more generally, there is a substantial history of federal involvement here, particularly insofar as interstate telecommunications services and wireless services are implicated. See, e.g., Ting v. AT&T, 319 F.3d 1126, 1136 (9th Cir. 2003); Ivy Broadcasting Co. v. Am. Tel. & Tel. Co., 391 F.2d 490–92 (2d Cir. 1968); 47 U.S.C., Title III.

281 See, e.g., California PUC Comments at 11; Verizon Comments at 31-33; CTIA Reply at 22-23; WIA Reply at 16-18. We thus reject claims to the contrary. See, e.g., City of New York Comments at 8; Virginia Joint Commenters Comments, Exh. A at 41-44; City of New York Reply at 1-2; NATOA Reply at 9-10; Smart Communities Reply at 34. Indeed, the Fifth Circuit upheld just such an exercise of authority with respect to the interpretation of Section 332(c)(7) in the past. See generally City of Arlington, 668 F.3d at 249-54. While some commenters assert that the questions addressed by the Commission in the order underlying the Fifth Circuit’s City of Arlington decision are somehow more straightforward than our interpretations here, they do not meaningfully explain why that is the case, instead seemingly contemplating that the Commission would address a wider, more general range of circumstances than we actually do here. See, e.g., Virginia Joint Commenters Comments, Exh. A at 44-45.

282 Consequently, we reject claims that relying on our general interpretative authority to interpret Section 253 and Section 332(c)(7) would render any provisions of the Act mere surplusage, see, e.g., Smart Communities Reply at 34-35, or would somehow “usurp the role of the judiciary.” Washington State Cities Reply at 14. We likewise
100. Although some commenters contend in general terms that differences in judicial approaches to Section 253 are limited and thus there is little need for Commission guidance, the interpretations we offer in this Declaratory Ruling are intended to help address certain specific scenarios that have caused significant uncertainty and legal controversy, irrespective of the degree to which this uncertainty has been reflected in court decisions. We also reject claims that a Supreme Court brief joined by the Commission demonstrates that there is no need for the interpretations in this Declaratory Ruling. To the contrary, that brief observed that some potential interpretations of certain court decisions “would create a serious conflict with the Commission’s understanding of Section 253(a), and [...] would undermine the federal competition policies that the provision seeks to advance.” The brief also noted that, if warranted, “the Commission can restore uniformity by issuing authoritatively rulings on the application of Section 253(a) to particular types of state and local requirements.” Rather than cutting against the need for, or desirability of, the interpretations we offer in this Declaratory Ruling, the brief instead presaged them.

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reject other arguments insofar as they purport to treat Section 253(d)’s provision for preemption as more specific than, or otherwise controlling over, other Communications Act provisions enabling the Commission to authoritatively interpret the Act. See, e.g., Virginia Joint Commenters Comments, Exh. A at 43. To the contrary, “[t]he specific controls but only within its self-described scope.” Nat’l Cable & Telecomm. Ass’n v. Gulf Power, 534 U.S. 327, 336 (2002). In addition, concerns that the Commission might interpret Section 253(c) in a manner that would render it a nullity or in a manner divorced from relevant context—things we do not do here—bear on the reasonableness of a given interpretation and not on the existence of interpretive authority in the first instance, as some contend. See, e.g., Virginia Joint Commenters Comments, Exh. A at 43-44.

283 See, e.g., City of San Antonio et al. Comments, Exh. B at 26-27; Fairfax County Comments at 20; Smart Communities Comments at 61. Some commenters assert that there are reasonable, material reliance interests arising from past court interpretations that would counsel against our interpretations in this order because “localities and providers have adjusted to the tests within their circuits” and “reflected those standards in local law.” Smart Communities Comments, WT Docket No. 16-141 at 67 (filed Mar. 8, 2017) cited in City of Austin Comments at 2 n.3. Arguments such as these, however, merely underscore the regulatory patchwork that inhibits the development of a robust nationwide telecommunications and private wireless service as envisioned by Congress. By offering interpretations of the relevant statutes here, we intend, thereby, to eliminate potential regional regulatory disparities flowing from differing interpretations of those provisions. See, e.g., WIA Reply at 19-20.

284 See City of San Antonio et al. Comments, Exh. B at 27 (citing Brief for the United States as Amicus Curiae, Level 3 Commc’ns v. City of St. Louis, Nos. 08-626, 08-759 at 9, 11 (filed May 28, 2009) (Amicus Brief)).

285 Amicus Brief at 12-13. The brief also identified other specific areas of concern with those cases. See, e.g., id. at 13 (“The court appears to have accorded inordinate significance to Level 3’s inability to ‘state with specificity what additional services it might have provided’ if it were not required to pay St. Louis’s license fee. That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3’s case—is not central to a proper Section 253(a) inquiry.” (citation omitted)); id. at 14 (“Portions of the Ninth Circuit’s decision, moreover, could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. As discussed above, limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote.” (citation omitted)).

286 Id. at 18.

287 Contrary to some claims, the need for these clarifications also is not undercut by prior determinations that advanced telecommunications capability is being deployed in a reasonable and timely fashion to all Americans. See, e.g., Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) (NATOA June 21, 2018 Ex Parte Letter) (citing Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 33 FCC Rcd 1660, 1707-08, para. 94 (2018) (2018 Broadband Deployment Report)). These commenters do not explain why the distinct standard for evaluating deployment of advanced telecommunications capability, see 2018 Broadband Deployment Report, 33 FCC Rcd at 1663-76, paras. 9-39, should bear on the application of Section 253 or Section 332(c)(7). Further, as the Commission itself observed, “[a] finding that deployment of advanced
101. Our interpretations of Sections 253 and Section 332(c)(7) are likewise not at odds with the Tenth Amendment and constitutional precedent, as some commenters contend. The outcome of violations of Section 253(a) or Section 332(c)(7)(B) of the Act 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).

102. We also reject the suggestion that the limits Section 253 places on state and local ROW fees and management will unconstitutionally interfere with the relationship between a state and its political subdivisions. As relevant to our interpretations here, it is not clear, at first blush, that such concerns would be implicated. Because state and local legal requirements can be written and structured in myriad ways, and challenges to such state or local activities could be framed in broad or narrow terms, we decline to resolve such questions here, divorced from any specific context.

IV. THIRD REPORT AND ORDER

103. In this Third Report and Order, we address the application of shot clocks to state and local review of wireless infrastructure deployments. We do so by taking action in three main areas. First, we adopt a new set of shot clocks tailored to support the deployment Small Wireless Facilities. Second, we adopt a specific remedy that applies to violations of these new Small Wireless Facility shot clocks, which we expect will operate to significantly reduce the need for litigation over missed shot clocks. Third, we clarify a number of issues that are relevant to all of the FCC’s shot clocks, including the types of authorizations subject to these time periods.

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telecommunications capability is reasonable and timely in no way suggests that we should let up in our efforts to foster greater deployment.” Id. at 1664, para. 13.

288 See, e.g., City of San Antonio et al. Comments, Exh. A at 28; Smart Communities Comments at 77-78; Smart Communities Reply at 48-50; NATOA June 21, 2018 Ex Parte Letter at 3.


290 2009 Declaratory Ruling, 24 FCC Rcd at 14002, para. 25. The Communications Act establishes its own framework for oversight of wireless facility deployment—one that is largely deregulatory, see, e.g., Wireless Infrastructure Second R&O, FCC 18-30, at para. 63; Implementation of Sections 3(n) and 32 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480-81, para. 182 (1994)—and it is reasonable to expect state and local governments electing to act in that area to do so only in a manner consistent with the Act’s framework. See, e.g., Murphy, 138 S. Ct. at 1470-71, 1480. Thus, the application of Section 253 and Section 332(c)(7)(B) is clearly distinguishable from the statute the Supreme Court struck down in Murphy, which did not involve a preemption scheme but nonetheless prohibited state authorization of sports gambling. Id. at 1481. The application here is also clearly distinguishable from the statute in Printz, which mandated states to run background checks on handgun purchases, Printz, 521 U.S. at 904–05, and the statute in New York, which required states to enact state laws that provide for the disposal of radioactive waste or else take title to such waste. New York, 505 U.S. at 151–52.

291 See, e.g., City of New York Comments at 9-10; Smart Communities Comments at 78.; see also, e.g., Nixon v. Mo. Mun. League, 541 U.S. 125, 134 (2004) (identifying Tenth Amendment issues with the application of Section 253 where that application would implicate “state or local governmental self-regulation (or regulation of political inferiors”)).

292 For example, where a state or local law or other legal requirement simply sets forth particular fees to be paid, or where the legal requirement at issue is simply an exercise of discretion that governing law grants the state or local government, it is not clear that preemption would unconstitutionally interfere with the relationship between a state and its political subdivisions.
A. New Shot Clocks for Small Wireless Facility Deployments

104. In 2009, the Commission concluded that we should use shot clocks to define a presumptive “reasonable period of time” beyond which state or local inaction on wireless infrastructure siting applications would constitute a “failure to act” within the meaning of Section 332.293 We adopted a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations. The record here suggests that our two existing Section 332 shot clocks have increased the efficiency of deploying wireless infrastructure. Many localities already process wireless siting applications in less time than required by those shot clocks, and a number of states have enacted laws requiring that collocation applications be processed in 60 days or less.294 Some siting agencies acknowledge that they have worked to gain efficiencies in processing siting applications and welcome the addition of new shot clocks tailored to the deployment of small scale facilities.295 Given siting agencies’ increased experience with existing shot clocks, the greater need for rapid siting of Small Wireless Facilities nationwide, and the lower burden siting of these facilities places on siting agencies in many cases, we take this opportunity to update our approach to speed the deployment of Small Wireless Facilities.296

1. Two New Section 332 Shot Clocks for Deployment of Small Wireless Facilities

105. In this section, using authority confirmed in City of Arlington, we adopt two new Section 332 shot clocks for Small Wireless Facilities—60 days for review of an application for collocation of Small Wireless Facilities using a preexisting structure and 90 days for review of an application for attachment of Small Wireless Facilities using a new structure. These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority “within a reasonable period of time… taking into account the nature and scope of the request.”297 Further, our decision is consistent with the BDAC’s Model Code for Municipalities’ recommended timeframes, which utilize this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures298 and are similar to shot clocks enacted in state level small cell bills and the real world

293 2009 Declaratory Ruling, 24 FCC Rcd at 13994.

294 See infra para. 106.

295 Chicago Comments at 7 (“[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists.”); New Orleans Comments at 3 (“City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.”).

296 See LaWana Mayfield July 31, 2018 Ex Parte Letter at 2 (“However, getting this infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure.”); Letter from John Richard C. King, House of Representatives, South Carolina, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed Aug. 27, 2018) (“A patchwork system of town-to-town, state-to-state rules slows the approval of small cell installations and delays the deployment of 5G. We need a national framework with guardrails to streamline the path forward to our wireless future”); Letter from Andy Thompson, State Representative, Ohio House District 95, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 24, 2018) (“In order for 5G to arrive as quickly and as effectively as possible, relevant infrastructure regulations must be streamlined. It makes very little sense for rules designed for 100-foot cell towers to govern the path to deployment for modern equipment called small cells that can fit into a pizza box.”); Letter from Todd Nash, Wallowa County Board of Commissioners, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed Sept. 10, 2018) (FCC should streamline regulatory processes by, for example, tightening the deadlines for states and localities to approve new network facilities).


298 The BDAC Model Municipal Code recommended, for certain types of facilities, shot clocks of 60 days for collocations and 90 days for new constructions on applications for siting Small Wireless Facilities. BDAC Model
experience of many municipalities which further supports the reasonableness of our approach. Our actions will modernize the framework for wireless facility siting by taking into consideration that states and localities should be able to address the siting of Small Wireless Facilities in a more expedited review period than needed for larger facilities.

106. We find compelling reasons to establish a new presumptively reasonable Section 332 shot clock of 60 days for collocations of Small Wireless Facilities on existing structures. The record demonstrates the need for, and reasonableness of, expediting the siting review of these collocations. Notwithstanding the implementation of the current shot clocks, more streamlined procedures are both reasonable and necessary to provide greater predictability for siting applications nationwide for the deployment of Small Wireless Facilities. The two current Section 332 shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted nine years ago. Since 2009, localities have gained significant experience processing wireless siting applications. Indeed, many localities already process wireless siting applications in less than the required time and several

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Municipal Code at §§ 2.2, 2.3, 3.2a(i)(B). Our approach utilizes the same timeframes set forth in the Model Municipal Code, and we disagree with comments that it is inconsistent with or ignores the work of the BDAC.

GMA September 17 Ex Parte Letter at 4-5.

299 For instance, while the City of Chicago opposes the shot clocks adopted here, we note that the City has also stated that, “[d]espite th[e] complex review process, involving many utilities and other entities, CDOT on average processed small cell applications last year in 55 days.” Letter from Edward N. Siskel, Corp. Counsel, Dept. of Law, City of Chicago, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 19, 2018).

300 Just like the shot clocks originally established in 2009—later affirmed by the Fifth Circuit and the Supreme Court—the shot clocks framework in this Third Report and Order are no more than an interpretation of “the limits Congress already imposed on State and local governments” through its enactment of Section 332(c)(7). 2009 Declaratory Ruling, 24 FCC Rcd at 14002, para. 25. See also City of Arlington, 668 F.3d at 259. As explained in the 2009 Declaratory Ruling, the shot clocks derived from Section 332(c)(7) “will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification,” and they “will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A).” 2009 Declaratory Ruling, 24 FCC Rcd at 14002, para. 25.

301 CTIA Comments, WT Docket No. 16-421, at 33 (filed Mar. 8, 2017); Letter from Juan Huizar, City Manager of the City of Pleasanton, TX, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed June 4, 2018) (describing the firsthand benefit of small cells and noting that communications infrastructure is a critical component of local growth); Letter from Sara Blackhurst, President, Action 22, to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 at 2 (filed Sept. 5, 2018) (encourages the Commission to remove unnecessary barriers such as unreasonable delays so deployment can proceed expeditiously); Fred A. Lamphere Sept. 11, 2018 Ex Parte Letter at 1 (It is critical that the Commission continue to remove barriers to building new wireless infrastructure such as by setting reasonable timelines to review applications).

303 T-Mobile Comments at 20; Crown Castle Reply at 5 (noting that the adoption of similar time frames by several states for small cell siting review confirms their reasonableness, and the Commission should apply these deadlines on a nationwide basis).

303 Alaska Dep’t of Natural Resources Comments at 2 (“[W]e are currently meeting or exceeding the proposed timeframe of the ‘Shot Clock.’”); see also CTIA Aug. 30, 2018 Ex Parte Letter at 5 (“Eleven states—Delaware, Florida, Indiana, Kansas, Missouri, North Carolina, Rhode Island, Tennessee, Texas, Utah, and Virginia—recently adopted small cell legislation that includes 45-day or 60-day shot clocks for small cell collocations.”); Jason R. Saine Sept. 14, 2018 Ex Parte Letter.
jurisdictions require by law that collocation applications be processed in 60 days or less.\textsuperscript{304} With the passage of time, siting agencies have become more efficient in processing siting applications.\textsuperscript{305} These facts demonstrate that a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable.\textsuperscript{306}

107. As we found in 2009, collocation applications are generally easier to process than new construction because the community impact is likely to be smaller.\textsuperscript{307} In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community.\textsuperscript{308} The size of Small Wireless Facilities poses little or no risk of adverse effects on the environment or historic preservation.\textsuperscript{309} Indeed, many jurisdictions do not require public hearings for approval of such attachments, underscoring their belief that such attachments do not implicate complex issues requiring a more searching review.\textsuperscript{310}

108. Further, we find no reason to believe that applying a 60-day time frame for Small Wireless Facility collocations under Section 332 creates confusion with collocations that fall within the scope of “eligible facilities requests” under Section 6409 of the Spectrum Act, which are also subject to a 60-day review.\textsuperscript{311} The type of facilities at issue here are distinctly different and the definition of a Small Wireless Facility is clear. Further, siting authorities are required to process Section 6409 applications involving the swap out of certain equipment in 60 days, and we see no meaningful difference in processing these applications than processing Section 332 collocation applications in 60 days. There is

\textsuperscript{304} North Carolina requires its local governments to decide collocation applications within 45 days of submission of a complete application. N.C. Gen. Stat. Ann. § 153A-349.53(a2). The same 45-day shot clock applies to certain collocations in Florida. Fla. Stat. Ann. § 365.172(13)(a)(1), (d)(1). In New Hampshire, applications for collocation or modification of wireless facilities generally have to be decided within 45 days (subject to some exceptions under certain circumstances) or the application is deemed approved. N.H. Rev. Stat. Ann. § 12-K:10. Wisconsin requires local governments to decide within 45 days of receiving complete applications for collocation on existing support structure that does not involve substantial modification, or the application will be deemed approved, unless the local government and applicant agree to an extension. Wis. Stat. Ann. § 66.0404(3)(c). Local governments in Indiana have 45 days to decide complete collocation applications, unless an extension is allowed under the statute. Ind. Code Ann. § 8-1-32.3-22. Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. Minn. Stat. § 15.99, subd. 2(a). By not requiring hearings, collocation applications in these states can be processed in a timely manner.

\textsuperscript{305} Chicago Comments at 7 (“[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists.”); New Orleans Comments at 3 (“City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.”); Action 22 Ex Parte at 2 (“While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.”).

\textsuperscript{306} CCA Comments at 11-14; T-Mobile Comments at 20; Incompas Reply at 9; Sprint Comments at 45-47 (noting that Florida, Indiana, Kansas, Texas and Virginia all have passed small cell legislation that requires small cell application attachments to be acted upon in 60 days); T-Mobile Comments at 18 (arguing that the Commission should accelerate the Section 332 shot clocks for all sites to 60 days for collocations, including small cells).

\textsuperscript{307} 2009 Declaratory Ruling, 24 FCC Rcd at 14012, para. 40.

\textsuperscript{308} TIA Comments at 4.

\textsuperscript{309} Wireless Infrastructure Second R&O, FCC 18-30 at para. 42 (citing Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, Appx. B, § VI (Collocation NPA)); see also 47 CFR § 1.1306(c)(1) (excluding certain wireless facilities from NEPA review).

\textsuperscript{310} 2009 Declaratory Ruling, 24 FCC Rcd at 14012, para. 46.

\textsuperscript{311} DESHPO Comments at 2 (“opposes the application of separate time limits for review of facility deployments not covered by the Spectrum Act, as it would lead to confusion within the process for all parties involved (Applicants/Carrier, Consultants, SHPO”).
no reason to apply different time periods (60 vs. 90 days) to what is essentially the same review: modification of an existing structure to accommodate new equipment.\textsuperscript{132} Finally, adopting a 60-day shot clock will encourage service providers to collocate rather than opting to build new siting structures which has numerous advantages.\textsuperscript{313}

109. Some municipalities argue that smaller facilities are neither objectively “small” nor less obtrusive than larger facilities.\textsuperscript{314} Others contend that shorter shot clocks for a broad category of “smaller” facilities are too restrictive,\textsuperscript{315} and would fail to take into account the varied and unique climate, historic architecture, infrastructure, and volume of siting applications that municipalities face.\textsuperscript{316} We take those considerations into account by clearly defining the category of “Small Wireless Facility” in our rules and allowing siting agencies to rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances they face. For similar reasons, we disagree that establishing shorter shot clocks for smaller facilities would impair states’ and localities’ authority to regulate local rights of way.\textsuperscript{317}

110. While some commenters argue that additional shot clock classifications would make the siting process needlessly more complex without any proven benefits,\textsuperscript{318} any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.\textsuperscript{319} We

\textsuperscript{312}CTIA Aug. 30, 2018 \textit{Ex Parte} Letter at 6.

\textsuperscript{313}Letter from Richard Rossi, Senior Vice President, General Counsel, American Tower, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (filed Aug. 10, 2018) (“The reason to encourage collocation is straightforward, it is faster, cheaper, more environmentally sound, and less disruptive than building new structures.”).

\textsuperscript{314}League of Az Cities and Towns Comments at 13, 29 (arguing that many small cells or micro cells can be taller and more visually intrusive than macro cells).

\textsuperscript{315}See, e.g., Letter from Geoffrey C. Beckwith, Executive Director & CEO, Mass. Municipal. Assoc., Boston, MA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, (filed Sept. 11, 2018) (Geoffrey C. Beckwith Sept. 11, 2018 \textit{Ex Parte} Letter); Mike Posey Sept. 11, 2018 \textit{Ex Parte} Letter; Letter from John A. Barbish, Mayor, City of Wickliffe, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 13, 2018); Letter from Pauline Russo Cutter, Mayor, City of San Leandro, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 12, 2018); Letter from Ed Waage, Mayor, City of Pismo Beach, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Scott A. Hancock, Executive Director, MML, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 18, 2018); Letter from Leon Towarnicki, City Manager, Martinsville, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Thomas Aujero Small, Mayor, City of Culver City, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018).

\textsuperscript{316}Philadelphia Comments at 4-5 (arguing that shorter shot clocks should not be implemented because “cities are already resource constrained and any further attempt to further limit the current time periods for review of applications will seriously and adversely affect public safety as well as diminish the proper role, under our federalist system, of state and local governments in regulating local rights of way”); Smart Communities Comments, Docket 16-421, at 13 (filed Mar. 8, 2017) (included by reference by Austin’s Comments); Alaska Dept. of Trans. Comments at 2. \textit{See, e.g.,} TX Hist. Comm. Comments at 2 (current shot clocks are appropriate and that further shortening these shot clocks is not warranted); Arlington, TX Comments at 2; Letter from William Tomko, Mayor of Chagrin Falls, OH, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 1-2 (filed Sept. 17, 2018); Nina Beety Sept. 17, 2018 \textit{Ex Parte} Letter; Georgia Municipal Association Sept. 17, 2018 \textit{Ex Parte} Letter at 4.

\textsuperscript{317}League of Az Cities and Towns \textit{et al.} Comments at 26-27, 29-35; Cities of San Antonio \textit{et al.} Comments at 8; Philadelphia Comments at 4.

\textsuperscript{318}T-Mobile Comments at 22; Florida Coalition Comments at 9 (creating new shot clocks would result in “too many ‘shot clocks’ and both the industry and local governments would be confused as to which shot clock applied to what application”).

\textsuperscript{319}While several parties proposed additional shot clock categories, we believe that the any benefit from a closer tailoring of categories to circumstances is not outweighed by the administrative burden on siting authorities and
also reject the assertion that revising the period of time to review siting decisions would amount to a nationwide land use code for wireless siting. Our approach is consistent with the Model Code for Municipalities that recognizes that the shot clocks that we are adopting for the review of Small Wireless Facility deployment applications correctly balance the needs of local siting agencies and wireless service providers. Our balance of the relevant considerations is informed by our experience with the previously adopted shot clocks, the record in this proceeding, and our predictive judgment about the effectiveness of actions taken here to promote the provision of personal wireless services.

111. For similar reasons as set forth above, we also find it reasonable to establish a new 90 day Section 332 shot clock for new construction of Small Wireless Facilities. Ninety days is a presumptively reasonable period of time for localities to review such siting applications. Small Wireless Facilities have far less visual and other impact than the facilities we considered in 2009, and should accordingly require less time to review. Indeed, some state and local governments have already adopted 60-day maximum reasonable periods of time for review of all small cell siting applications, and, even in the absence of such maximum requirements, several are already reviewing and approving small-cell siting applications within 60 days or less after filing. Numerous industry commenters advocated a 90-day shot clock for all non-collocation deployments. Based on this record, we find it reasonable to conclude that review of an application to deploy a Small Wireless Facility using a new structure warrants more review time than a mere collocation, but less than the construction of a macro tower. For the reasons explained below, we

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providers to manage these categories. See TX Hist. Comm. Comments at 2 (stating that it “could support a shorter review period for new structures less than fifty (50) feet tall, or where structures are located within or adjacent to existing utility rights-of-way (but not transportation rights-of-way) with existing utility structures taller than the proposed telecommunications structure’); Georgia Dept. of Trans. Comments at 2 (stating that time frames based on the zoning area are reasonable).

320 Cities of San Antonio et. al Comments, Exh. A at 17-18. In the same vein, the Florida Department of Transportation contends that “[p]ermit review times should comply with state statutes,” especially if the industry insists on being treated similarly as other utilities. AASHTO Comments, Attach. at 13 (Florida Dept. of Trans. Comments); see also Alaska Dept. of Trans. Comments at 2; TX Dept. of Trans. Comments at 2 (explaining that variations in topography, weather, government interests, and state and local political structure counsel against standardized nationwide shot clocks). The Maryland Department of Transportation is concerned about the shortened shot clocks proposed because they would conflict with a Maryland law that requires a 90-day comment period in considering wireless siting applications and because certain applications can be complex and necessitate longer review periods. AASHTO Comments, Attach. at 40 (MD Dept. of Trans. Comments).

321 BDAC Model Municipal Code at § 3.2a(i)(B).

322 CTIA Comments, Attach. 1 at 38.

323 T-Mobile Comments at 19-20 (stating that some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks); Incompas Reply at 9 (stating that there is no basis for differing time-periods for similarly-situated small cell installation requests, and the lack of harmonization could discourage the use of a more efficient infrastructure); CCA Comments at 14 n.52 (citing CCA Streamlining Reply at 7-8 that in Houston, Texas, the review process for small cell deployments “usually takes 2 weeks, but no more than 30 days to process and complete the site review. In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days”).

324 CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities); CTIA Comments at 11-12 (asserting that the existing 150-day review period for new wireless sites should be shortened to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); ExteNet Comments at 8 (asserting that the Commission should accelerate the shot clock for all other non-collocation applications, including those for new DNS poles, from 150 days to 90 days); WIA Reply at 2.

325 CCUA argues that the new shot clocks would force siting authorities to deny applications when they find that applications are incomplete. Letter from Kenneth S. Fellman, Counsel, CCUA, to Marlene H. Dortch, Secretary,
also specify today a provision that will initially reset these two new shot clocks in the event that a locality receives a materially incomplete application.

112. Finally, we note that our 60- and 90-day approach is similar to that in pending legislation that has bipartisan congressional support, and is consistent with the Model Code for Municipalities. Specifically, the draft STREAMLINE Small Cell Deployment Act, would apply a 60-day shot clock to collocation of small personal wireless service facilities and a 90-day shot clock to any other action relating to small personal wireless service facilities. Further, the Model Code for Municipalities recommended by the FCC’s Broadband Deployment Advisory Committee also utilizes this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures.

2. Batched Applications for Small Wireless Facilities

113. Given the way in which Small Wireless Facilities are likely to be deployed, in large numbers as part of a system meant to cover a particular area, we anticipate that some applicants will submit “batched” applications: multiple separate applications filed at the same time, each for one or more sites or a single application covering multiple sites. In the Wireless Infrastructure NPRM/NOI, the Commission asked whether batched applications should be subject to either longer or shorter shot clocks than would apply if each component of the batch were submitted separately. Industry commenters contend that the shot clock applicable to a batch or a class of applications should be no longer than that applicable to an individual application of the same class. On the other hand, several commenters, contend that batched applications have often been proposed in historic districts and historic buildings (areas that require a more complex review process), and given the complexities associated with reviews of that type, they urge the Commission not to apply shorter shot clocks to batched applications. Some localities also argue that a single, national shot clock for batched applications would fail to account for unique local circumstances.

114. We see no reason why the shot clocks for batched applications to deploy Small Wireless Facilities should be longer than those that apply to individual applications because, in many cases, the batching of such applications has advantages in terms of administrative efficiency that could actually

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We disagree that this would be the outcome in such an instance because, as explained below, siting authorities can toll the shot clocks upon a finding of incompleteness.


BDAC Model Municipal Code at § 3.2a(i)(B).

We define either scenario as “batching” for the purpose of our discussion here.

Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3338, para. 18; see also Mobilitie PN, 31 FCC Rcd at 13371.

See, e.g., Extenet Comments at 10-11 (“The Commission should not adopt a longer shot clock for batches of multiple DNS applications.”); Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); CCA Comments at 16 (“The FCC also should ensure that batch applications are not saddled with a longer shot clock than those afforded to individual siting applications . . . .”); Verizon Comments at 42 (“The same 60-day shot clock should apply to applications proposing multiple facilities—so called ‘batch applications.’”); Crown Castle Comments at 30 (“Crown Castle also does not support altering the deadline for ‘batches’ of requests.”); T-Mobile Comments at 22-23 (“An application that batches together similar numbers of small cells of like character and in proximity to one another should also be able to be reviewed within the same time frame . . . .”); CTIA Comments at 17 (“There is, however, no need for the Commission to establish different shot clocks for batch processing of similar facilities . . . .”).

San Antonio Comments, Exh. A at 17, 19-20; see also Smart Communities Comments, Docket No. 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin’s Comments).

Cities of San Antonio et al. Comments, Exh. A at 17, 19-20; see also Smart Communities Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin’s Comments).
make review easier. Our decision flows from our current Section 332 shot clock policy. Under our two existing Section 332 shot clocks, if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting agency. These multiple siting applications are equivalent to a batched application and therefore the shot clocks for batching should follow the same rules as if the applications were filed separately. Accordingly, when applications to deploy Small Wireless Facilities are filed in batches, the shot clock that applies to the batch is the same one that would apply had the applicant submitted individual applications. Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

115. We recognize the concerns raised by parties arguing for a longer time period for at least some batched applications, but conclude that a separate rule is not necessary to address these concerns. Under our approach, in extraordinary cases, a siting authority, as discussed below, can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority’s resources. Thus, contrary to some localities’ arguments, our approach provides for a certain degree of flexibility to account for exceptional circumstances. In addition, consistent with, and for the same reasons as our conclusion below that Section 332 does not permit states and localities to prohibit applicants from requesting multiple types of approvals simultaneously, we find that Section 332(c)(7)(B)(ii) similarly does not allow states and localities to refuse to accept batches of applications to deploy Small Wireless Facilities.

B. New Remedy for Violations of the Small Wireless Facilities Shot Clocks

116. In adopting these new shot clocks for Small Wireless Facility applications, we also provide an additional remedy that we expect will substantially reduce the likelihood that applicants will need to pursue additional and costly relief in court at the expiration of those time periods.

117. At the outset, and for the reasons the Commission articulated when it adopted the 2009 shot clocks, we determine that the failure of a state or local government to issue a decision on a Small Wireless Facility siting application within the presumptively reasonable time periods above will constitute a “failure to act” within the meaning of Section 332(c)(7)(B)(v). Therefore, a provider is, at a minimum, entitled to the same process and remedies available for a failure to act within the new Small Wireless Facility shot clocks as they have been under the FCC’s 2009 shot clocks. But we also add an additional remedy for our new Small Wireless Facility shot clocks.

118. State or local inaction by the end of the Small Wireless Facility shot clock will function not only as a Section 332(c)(7)(B)(v) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II). Accordingly, we would expect the state or local government to issue all necessary permits without further delay. In cases where such action is not taken, we assume, for the reasons discussed below, that the applicant...
would have a straightforward case for obtaining expedited relief in court.\textsuperscript{338}

119. As discussed in the Declaratory Ruling, a regulation under Section 332(c)(7)(B)(i)(II) constitutes an effective prohibition if it materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.\textsuperscript{339} Missing shot clock deadlines would thus presumptively have the effect of unlawfully prohibiting service in that such failure to act can be expected to materially limit or inhibit the introduction of new services or the improvement of existing services.\textsuperscript{340} Thus, when a siting authority misses the applicable shot clock deadline, the applicant may commence suit in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II), in addition to a violation of Section 332(c)(7)(B)(ii), as discussed above. The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services.

120. Given the seriousness of failure to act within a reasonable period of time, we expect, as noted above, siting authorities to issue without any further delay all necessary authorizations when notified by the applicant that they have missed the shot clock deadline, absent extraordinary circumstances. Where the siting authority nevertheless fails to issue all necessary authorizations and litigation is commenced based on violations of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii), we expect that applicants and other aggrieved parties will likely pursue equitable judicial remedies.\textsuperscript{341} Given the relatively low burden on state and local authorities of simply acting—one way or the other—within the Small Wireless Facility shot clocks, we think that applicants would have a relatively low hurdle to clear in establishing a right to expedited judicial relief. Indeed, for violations of Section 332(c)(7)(B), courts commonly have based the decision whether to award preliminary and permanent injunctive relief on several factors. As courts have concluded, preliminary and permanent injunctions fulfill Congressional intent that action on applications be timely and that courts consider violations of Section 332(c)(7)(B) on an expedited basis.\textsuperscript{342} In addition, courts have observed that “[a]lthough Congress in the Telecommunications Act left intact some of local zoning boards’ authority under state law,” they should not be owed deference on issues relating to Section 332(c)(7)(B)(ii), meaning that “in the majority of cases the proper remedy for a zoning board decision that violates the Act will be an order. . . instructing the board to authorize construction.”\textsuperscript{343} Such relief also is supported where few or no issues remain to be decided, and those that remain can be addressed by a court.\textsuperscript{344}

121. Consistent with those sensible considerations reflected in prior precedent, we expect that

\textsuperscript{338} Where we discuss litigation here, we refer, for convenience, to “the applicant” or the like, since that is normally the party that pursues such litigation. But we reiterate that under the Act, “[a]ny person adversely affected by” the siting authority’s failure to act could pursue such litigation. 47 U.S.C. § 332(c)(7)(B)(v).

\textsuperscript{339} See supra paras. 34-42.

\textsuperscript{340} Id.

\textsuperscript{341} See, e.g., 2014 Wireless Infrastructure Corp., 29 FCC Rcd at 12978, para. 284.


\textsuperscript{343} See, e.g., Nat’l Tower, 297 F.3d at 21-22; AT&T Mobility, 127 F. Supp. 3d at 1176.

\textsuperscript{344} See, e.g., Green Mountain Realty, 750 F.3d at 41-42; Nat’l Tower, 297 F.3d at 24-25; Cellular Tel. Co., 166 F.3d at 497; Bell Atl. Mobile, 848 F. Supp. 2d at 403; New Cingular Wireless PCS, 2014 WL 79932, *8.
courts will typically find expedited and preliminary and permanent injunctive relief warranted for violations of Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii) of the Act when addressing the circumstances discussed in this Order. Prior findings that preliminary and permanent injunctive relief best advances Congress’s intent in assuring speedy resolution of issues encompassed by Section 332(c)(7)(B) appear equally true in the case of deployments of Small Wireless Facilities covered by our interpretation of Section 332(c)(7)(B)(ii) in this Third Report and Order. Although some courts, in deciding whether an injunction is the appropriate form of relief, have considered whether a siting authority’s delay resulted from bad faith or involved other abusive conduct, we do not read the trend in court precedent overall to treat such considerations as more than relevant (as opposed to indispensable) to an injunction. We believe that this approach is sensible because guarding against barriers to the deployment of personal wireless facilities not only advances the goal of Section 332(c)(7)(B) but also policies set out elsewhere in the Communications Act and 1996 Act, as the Commission recently has recognized in the case of Small Wireless Facilities. This is so whether or not these barriers stem from bad faith. Nor do we anticipate that there would be unresolved issues implicating the siting authority’s expertise and therefore requiring remand in most instances.

122. In light of the more detailed interpretations that we adopt here regarding reasonable time frames for siting authority action on specific categories of requests—including guidance regarding circumstances in which longer time frames nonetheless can be reasonable—we expect that litigation generally will involve issues that can be resolved entirely by the relevant court. Thus, as the Commission has stated in the past, “in the case of a failure to act within the reasonable time frames set forth in our rules, and absent some compelling need for additional time to review the application, we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief.” We therefore caution those involved in potential future disputes in this area against placing too much weight on the Commission’s recognition that a siting authority’s failure to act within the associated timeline might not always result in a preliminary or permanent injunction under the Section 332(c)(7)(B) framework while placing too little weight on the Commission’s recognition that policies established by federal communications laws are advanced by streamlining the process for deploying wireless facilities.

123. We anticipate that the traditional requirements for awarding preliminary or permanent injunctive relief would likely be satisfied in most cases and in most jurisdictions where a violation of 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is found. Typically, courts require movants to establish the following elements of preliminary or permanent injunctive relief: (1) actual success on the merits for permanent injunctive relief and likelihood of success on the merits for preliminary injunctive relief, (2) continuing irreparable injury, (3) the absence of an adequate remedy at law, (4) the injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (5) award of injunctive relief would not be adverse to the public interest. Actual success on the merits would be

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345 See Green Mountain Realty Corp., 750 F.3d at 41 (reasoning that remand to the siting authority “would not be in accordance with the text or spirit of the Telecommunications Act); Cellular Tel. Co., 166 F.3d at 497 (noting “that injunctive relief best serves the TCA’s stated goal of expediting resolution” of cases brought under 47 U.S.C. § 332(c)(7)(B)(v)).


347 See, e.g., Wireless Infrastructure Second R&O, FCC 18-30 at para. 62; Wireless Infrastructure NPRM/NoI, 32 FCC Rcd at 3332, para. 5.


demonstrated when an applicant prevails in its failure-to-act or effective prohibition case; likelihood of success would be demonstrated because, as discussed, missing the shot clocks, depending on the type of deployment, presumptively prohibits the provision of personal wireless services and/or violates Section 332(c)(7)(B)(ii)’s requirement to act within a reasonable period of time.\textsuperscript{350} Continuing irreparable injury likely would be found because remand to the siting authority “would serve no useful purpose” and would further delay the applicant’s ability to provide personal wireless service to the public in the area where deployment is proposed, as some courts have previously determined.\textsuperscript{351} There also would be no adequate remedy at law because applicants “have a federal statutory right to participate in a local [personal wireless services] market free from municipally-imposed barriers to entry,” and money damages cannot directly substitute for this right.\textsuperscript{352} The public interest and the balance of harms also would likely favor the award of a preliminary or permanent injunction because the purpose of Section 332(c)(7) is to encourage the rapid deployment of personal wireless facilities while preserving, within bounds, the authority of states and localities to regulate the deployment of such facilities, and the public would benefit if further delays in the deployment of such facilities—which a remand would certainly cause—are prevented.\textsuperscript{353} We also expect that the harm to the siting authority would be minimal because the only right of which it would be deprived by a preliminary or permanent injunction is the right to act on the siting application beyond a reasonable time period,\textsuperscript{354} a right that “is not legally cognizable, because under [Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii)], the [siting authority] has no right to exercise this power.”\textsuperscript{355} Thus, in the context of Small Wireless Facilities, we expect that the most appropriate remedy in typical cases involving a violation of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is the award of injunctive relief in the form of an order to issue all necessary authorizations.\textsuperscript{356}

124. Our approach advances Section 332(c)(7)(B)(v)’s provision that certain siting disputes, including those involving a siting authority’s failure to act, shall be heard and decided by a court of competent jurisdiction on an expedited basis. The framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts’ domain.\textsuperscript{357} This accords with the Fifth Circuit’s recognition in \textit{City of Arlington} (Continued from previous page) 

Note that the standards for permanent injunctive relief differ in some respects among the circuits and the states. For example, “most courts do not consider the public interest element in deciding whether to issue a permanent injunction, though the Third Circuit has held otherwise.” \textit{Klay}, 376 F.3d at 1097. Courts in the Second Circuit consider only irreparable harm and success on the merits. \textit{Omnipoint Commc’ns, Inc. v. Vill. of Tarrytown Planning Bd.}, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004). The Third and Fifth Circuits have precedents holding that irreparable harm is not an essential element of a permanent injunction. \textit{See Roe v. Operation Rescue}, 919 F.2d 857, 873 n. 8 (3d Cir. 1990); \textit{Lewis v. S. S. Baune}, 534 F.2d 1115, 1123–24 (5th Cir. 1976). For the sake of completeness, our analysis discusses all of the elements that have been used in decided cases.

\textsuperscript{350} \textit{See New Jersey Payphone}, 130 F. Supp. 2d at 640.


\textsuperscript{352} \textit{New Jersey Payphone}, 130 F. Supp. 2d at 641.

\textsuperscript{353} \textit{City of Arlington}, 668 F.3d at 234.

\textsuperscript{354} \textit{Contra 47 U.S.C. 332(c)(7)(B)(ii).}

\textsuperscript{355} \textit{New Jersey Payphone}, 130 F. Supp. 2d at 641.

\textsuperscript{356} \textit{See Cellular Tel. Co}, 166 F.3d at 496. While our discussion here focused on cases that apply the permanent injunction standard, we have the same view regarding relief under the preliminary injunction standard when a locality fails to act within the applicable shot clock periods. \textit{See, e.g., Winter v. Natural Res. Def. Council, Inc.}, 555 U.S. 7, 22 (2008) (discussing the standard for preliminary injunctive relief).

\textsuperscript{357} Several commenters support this position, urging the Commission to reaffirm that adversely affected applicants must seek redress from the courts. \textit{See, e.g., League of Ar Cities and Towns et al. Comments at 14-21; Philadelphia
that the Act could be read “as establishing a framework in which a wireless service provider must seek a remedy for a state or local government’s unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts’ determinations of disputes under that provision.”

125. The guidance provided here should reduce the need for, and complexity of, case-by-case litigation and reduce the likelihood of vastly different timing across various jurisdictions for the same type of deployment. This clarification, along with the other actions we take in this Third Report and Order, should streamline the courts’ decision-making process and reduce the possibility of inconsistent rulings. Consequently, we believe that our approach helps facilitate courts’ ability to “hear and decide such [lawsuits] on an expedited basis,” as the statute requires.

126. Reducing the likelihood of litigation and expediting litigation where it cannot be avoided should significantly reduce the costs associated with wireless infrastructure deployment. For instance, WIA states that if one of its members were to challenge every shot clock violation it has encountered, it would be mired in lawsuits with forty-six localities. And this issue is likely to be compounded given the expected densification of wireless networks. Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026. If, for example, 30 percent (based on T-Mobile’s experience) of these expected deployments are not acted upon within the applicable shot clock

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Comments at 2; Philadelphia Reply at 4-6; City of San Antonio et al. Comments, Exh. B at 14-15; San Francisco Comments at 16-17; Colorado Munis Comments at 7; CWA Reply at 5; Fairfax County Comments at 12-15; AASHTO Comments at 20-21, 23 (ID Dept. of Trans. Comments); NATOA Comments, Attach. 3 at 53-55; NLC Comments at 3-4; Smart Communities Comments at 39-43. Our interpretation thus preserves a meaningful role for courts under Section 332(c)(7)(B)(v), contrary to the concern some commenters expressed with particular focus on alternative proposals we do not adopt, such as a deemed granted remedy. See, e.g., Colorado Comm. and Utility All. et al. Comments at 6-7; League of Az Cities and Towns et al. Comments at 14-23; Philadelphia Comments at 2; Baltimore Reply at 11; City of San Antonio et al. Reply at 2; San Francisco Reply at 6; League of Az Cities and Towns et al. Reply at 2-3. In addition, our interpretation of Section 332(c)(7)(B)(ii) does not result in a regime in which the Commission could be seen as implicitly issuing local land use permits, a concern that states and localities raised regarding an absolute deemed granted remedy, because applicants are still required to petition a court for relief, which may include an injunction directing sitting authorities to grant the application. See Alexandria Comments at 2; Baltimore Reply at 10; Philadelphia Reply at 8; Smart Cities Coal Comments at ii, 4, 39.

358 City of Arlington, 668 F.3d at 250.

359 The likelihood of non-uniform or inconsistent rulings on what time frames are reasonable or what circumstances could rebut the presumptive reasonableness of the shot clock periods stems from the intrinsic ambiguity of the phrase “reasonable period of time,” which makes it susceptible of varying constructions. See City of Arlington, 668 F.3d at 255 (noting “that the phrase ‘a reasonable period of time,’ as it is used in § 332(c)(7)(B)(ii), is inherently ambiguous”); Capital Network System, Inc. v. FCC, 28 F.3d 201, 204 (D.C. Cir. 1994) (“Because ‘just,’ ‘unjust,’ ‘reasonable,’ and ‘unreasonable’ are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.”). See also Lightower Comments at 3 (“The lack of consistent guidance regarding statutory interpretation is creating uncertainty at the state and local level, with many local jurisdictions seeming to simply make it up as they go. Differences in the federal courts are only exacerbating the patchwork of interpretations at the state and local level.”).


361 WIA Comments at 16.


363 T-Mobile Comments at 8.
period, that would translate to 45,000 violations in 2018 and 240,000 violations in 2026. These sheer numbers would render it practically impossible to commence Section 332(c)(7)(B)(v) cases for all violations, and litigation costs for such cases likely would be prohibitive and could virtually bar providers from deploying wireless facilities.

127. Our updated interpretation of Section 332(c)(7) for Small Wireless Facilities effectively balances the interest of wireless service providers to have siting applications granted in a timely and streamlined manner and the interest of localities to protect public safety and welfare and preserve their authority over the permitting process. Our specialized deployment categories, in conjunction with the acknowledgement that in rare instances, it may legitimately take longer to act, recognize that the siting process is complex and handled in many different ways under various states’ and localities’ long-established codes. Further, our approach tempers localities’ concerns about the inflexibility of the Wireless Infrastructure NPRM/NOI’s deemed granted proposal because the new remedy we adopt here accounts for the breadth of potentially unforeseen circumstances that individual localities may face and the possibility that additional review time may be needed in truly exceptional circumstances. We further find that our interpretive framework will not be unduly burdensome on localities because a number of states have already adopted even more stringent deemed granted remedies.

128. At the same time, there may be merit in the argument made by some commenters that the FCC has the authority to adopt a deemed granted remedy. Nonetheless, we do not find it necessary to decide that issue today, as we are confident that the rules and interpretations adopted here will provide substantial relief, effectively avert unnecessary litigation, allow for expeditious resolution of siting applications, and strike the appropriate balance between relevant policy considerations and statutory

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364 These numbers would escalate under WIA’s estimate that 70 percent of small cell deployment applications exceed the applicable shot clock. WIA Comments at 7.

365 See CTIA Comments at 9 (explaining that, “[p]articularly for small cells, the expense of litigation can rarely be justified); WIA Comments at 16 (quoting and discussing Lightower’s Comments in 2016 Streamlining Public Notice); T-Mobile Comment, Attach. A at 8.

366 See, e.g., AT&T Comments at 26; CCA Comments at 7, 9, 11-12; CCA Reply at 5-6, 8; Cityscape Consultants Comments at 1; CompTIA Comments at 3; CIC Comments at 17-18; Crown Castle Comments at 23-28; Crown Castle Reply at 3; CTIA Comments at 7-9, Attach. 1 at 5, 39-43, Attach. 2 at 3, 23-24; GCI Comments at 5-9; Lightower Comments at 7, 18-19; Samsung Comments at 6; T-Mobile Comments at 13, 16, Attach. A at 25; WIA Comments at 15-17.

367 See, e.g., Arizona Munis Comments at 23; Arizona Munis Reply at 8-9; Baltimore Reply at 10; Lansing Comments at 2; Philadelphia Reply at 9-12; Torrance Comments at 1-2; CPUC Comments at 14; CWA Reply at 5; Minnesota Munis Comments at 9; but see CTIA Reply at 9.

368 See, e.g., Chicago Comments at 2 (contending that wireless facilities siting entails fact-specific scenarios); AASHTO Comments, Attach. at 40 (MD Dept. of Trans. SHA Comments) (describing the complexity of reviewing proposed deployments on rights-of-way); AASHTO Comments, Attach. at 51 (Wyoming DOT Comments); Baltimore Reply at 11; Philadelphia Comments at 4; Alexandria Comments at 6; Mukilteo Comments at 1; Alaska Dept. of Trans. Comments at 2; Alaska SHPO Reply at 1.


370 See, e.g., CTIA Comments at 10-11; T-Mobile Comments at 15-18, Verizon Comments at 37, 39-41, WIA Comments at 17-20.
objectives\textsuperscript{371} guiding our analysis.\textsuperscript{372}

129. We expect that our decision here will result in localities addressing applications within the applicable shot clocks in a far greater number of cases. Moreover, we expect that the limited instances in which a locality does not issue a decision within that time period will result in an increase in cases where the locality then issues all needed permits. In what we expect would then be only a few cases where litigation commences, our decision makes clear the burden that localities would need to clear in those circumstances.\textsuperscript{373} Our updated interpretation of Section 332 for Small Wireless Facilities will help courts to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions.\textsuperscript{374} Placing this burden on the siting authority should address the concerns raised by supporters of a deemed granted remedy—that filing suit in court to resolve a siting dispute is burdensome and expensive on applicants, the judicial system, and citizens—because our interpretations should expedite the courts’

\textsuperscript{371} City of Arlington, 668 F.3d at 234 (noting that the purpose of Section 332(c)(7) is to balance the competing interests to preserve the traditional role of state and local governments in land use and zoning regulation and the rapid development of new telecommunications technologies).

\textsuperscript{372} See supra paras. 119-20 (explaining how the remedy strikes the proper balance between competing interests). Because our approach to shot clocks involves our interpretation of Section 332(c)(7)(B)(ii) and the consequences that flow from that—and does not rely on Section 253 of the Act—we need not, and thus do not, resolve disputes about the potential use of Section 253 in this specific context, such as whether it could serve as authority for a deemed granted or similar remedy. See, e.g., San Francisco Comments at 9-10; CPUC Comments at 10; Smart Communities Comments at 4-11, 21; Smart Communities Reply at 78-79; League of Az Cities and Towns \textit{et al.} Reply at 4; Alexandria Comments at 5; Irvine Comments at 5; Minnesota Cities Comments at 11-13; Philadelphia Reply at 2, 7; Fairfax County Comments at 17; Greenlining Reply at 4; NRUC Reply at 3-5; NATOA June 21, 2018 \textit{Ex Parte} Letter. To the extent that commenters raise arguments regarding the proper interpretation of “prohibit or have the effect of prohibiting” under Section 253 or the scope of Section 253, these issues are discussed in the Declaratory Ruling, see supra paras. 34-42.

\textsuperscript{373} See App Association Comments at 9; CCI Comments at 6-8; Conterra Comments at 14-17; ExteNet Comments at 13; T-Mobile Comments at 17; Quintillion Reply at 6; Verizon Comments at 8-18; WIA Comments at 9-10. WIA contends that adoption of a deemed granted remedy is needed because various courts faced with shot clock claims have failed to provide meaningful remedies, citing as an example a case in which the court held that the town failed to act within the shot clock period but then declined to issue an injunction directing the siting agency to grant the application. WIA Comments at 16-17. However, a number of cases involving violations of the “reasonable period of time” requirement of Section 332(c)(7)(B)(ii)—decided either before or after the promulgation of the Commission’s Section 332(c)(7)(B)(ii) shot clocks—have concluded with an award of injunctive relief. See, e.g., \textit{Upstate Cellular Network}, 257 F. Supp. 3d at 318 (concluding that the siting authority’s failure to act within the 150-day shot clock was unreasonable and awarding a permanent injunction in favor of the applicant); \textit{Am. Towers, Inc. v. Wilson County}, No. 3:10-CV-1196, 2014 WL 28953, at *13–14 (M.D. Tenn. Jan. 2, 2014) (finding that the county failed to act within a reasonable period of time, as required under Section 332(c)(7)(B)(ii), and granting an injunction directing the county to approve the applications and issue all necessary authorizations for the applicant to build and operate the proposed tower); \textit{Cincinnati Bell Wireless, LLC v. Brown County}, Ohio, No. 1:04-CV-733, 2005 WL 1629824, at *4–5 (S.D. Ohio July 6, 2005) (finding that the county failed to act within a reasonable period of time under Section 332(c)(7)(B)(ii) and awarding injunctive relief). But see \textit{Up State Tower Co. v. Town of Kiantone}, 718 Fed. Appx. 29 (2d Cir. 2017) (declining to reverse district court’s refusal to issue injunction compelling immediate grant of application). Courts have also held “that injunctive relief best serves the TCA’s stated goal of expediting resolution of” cases brought under Section 332(c)(7)(B)(v). \textit{Cellular Tel. Co.}, 166 F.3d at 497; \textit{Brehmer v. Planning Bd. of Town of Wellfleet}, 238 F.3d 117, 121 (1st Cir. 2001). Under these circumstances, we do not agree with WIA that courts have failed to provide meaningful remedies to such an extent as would require the adoption of a deemed granted remedy.

\textsuperscript{374} Zoning Bd. of Adjustment of the Borough of Paramus, N.J., 21 F. Supp. 3d at 383, 387 (more than four-and-a-half years for Sprint to prevail in court), \textit{aff'd}, 606 F. App’x 69 [3d Cir. 2015]; \textit{Vill. of Corrales}, 127 F. Supp. 3d 1169 (nineteen months from complaint to grant of summary judgment); \textit{Orange County–Poughkeepsie Ltd. P’ship v. Town of E. Fishkill}, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), \textit{aff’d sub nom., Orange County–County Poughkeepsie Ltd. P’ship v. Town of E. Fishkill}, 632 F. App’x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).
decision-making process.

130. We find that the more specific deployment categories and shot clocks, which presumptively represent the reasonable period within which to act, will prevent the outcome proponents of a deemed granted remedy seek to avoid: that siting agencies would be forced to reject applications because they would be unable to review the applications within the prescribed shot clock period. Because the more specific deployment categories and shot clocks inherently account for the nature and scope of a variety of deployment applications, our new approach should ensure that siting agencies have adequate time to process and decide applications and will minimize the risk that localities will fail to act within the established shot clock periods. Further, in cases where a siting authority misses the deadline, the opportunity to demonstrate exceptional circumstances provides an effective and flexible way for siting agencies to justify their inaction if genuinely warranted. Our overall framework, therefore, should prevent situations in which a siting authority would feel compelled to summarily deny an application instead of evaluating its merits within the applicable shot clock period. We also note that if the approach we take in this Order proves insufficient in addressing the issues it is intended to resolve, we may again consider adopting a deemed granted remedy in the future.

131. Some commenters also recommend that the Commission issue a list of “Best Practices” or “Recommended Practices.” The joint comments filed by NATOA and other government associations suggest the “development of an informal dispute resolution process to remove parties from an adversarial relationship to a partnership process designed to bring about the best result for all involved” and the development of “a mediation program which could help facilitate negotiations for deployments for parties who seem to have reached a point of intractability.” Although we do not at this time adopt these proposals, we note that the steps taken in this order are intended to facilitate cooperation between parties to reach mutually agreed upon solutions. For example, as explained below, mutual agreement between the parties will toll the running of the shot clock period, thereby allowing parties to resolve disagreements in a collaborative, instead of an adversarial, setting.

C. Clarification of Issues Related to All Section 332 Shot Clocks

1. Authorizations Subject to the “Reasonable Period of Time” Provision of Section 332(c)(7)(B)(ii)

132. As indicated above, Section 332(c)(7)(B)(ii) requires state and local governments to act “within a reasonable period of time” on “any request for authorization to place, construct, or modify personal wireless service facilities.” Neither the 2009 Declaratory Ruling nor the 2014 Wireless Infrastructure Order addressed the specific types of authorizations subject to this requirement. Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment. Local siting authorities, on the other hand, argue that a broad application of Section 332 will harm public safety and welfare by not

375 Baltimore Reply at 12; Mukilteo Comments at 1; Cities of San Antonio et al. Reply at 10; Washington Munis Comments, Attach. 1 at 8-9; but see CTIA Reply at 9.

376 We also note that a summary denial of a deployment application is not permitted under Section 332(c)(7)(B)(iii), which requires the siting authority to base denials on “substantial evidence contained in a written record.”


378 See infra paras. 145-46.


381 See, e.g., CTIA Comments at 15; CTIA Reply at 10; Mobilitie Comments at 6-7; WIA Comments at 24; WIA Reply at 13; T-Mobile Comments at 21-22; CCA Reply at 9; Sprint June 18 Ex Parte at 3.
giving them enough time to evaluate whether a proposed deployment endangers the public.\textsuperscript{382} They assert that building and encroachment permits should not be subsumed within the shot clocks because these permits incorporate essential health and safety reviews.\textsuperscript{383} After carefully considering these arguments, we find that “any request for authorization to place, construct, or modify personal wireless service facilities” under Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. This interpretation finds support in the record and is consistent with the courts’ interpretation of this provision and the text and purpose of the Act.

133. The starting point for statutory interpretation is the text of the statute,\textsuperscript{384} and here, the statute is written broadly, applying to “any” request for authorization to place, construct, or modify personal wireless service facilities. The expansive modifier “any” typically has been interpreted to mean “one or some indiscriminately of whatever kind,” unless Congress “add[ed] any language limiting the breadth of that word.”\textsuperscript{385} The title of Section 332(c)(7) (“Preservation of local zoning authority”) does not restrict the applicability of this section to zoning permits in light of the clear text of Section 332(c)(7)(B)(ii).\textsuperscript{386} The text encompasses not only requests for authorization to place personal wireless service facilities, e.g., zoning requests, but also requests for authorization to construct or modify personal wireless service facilities. These activities typically require more than just zoning permits. For example, in many instances, localities require building permits, road closure permits, and the like to make construction or modification possible.\textsuperscript{387} Accordingly, the fact that the title standing alone could be read

\textsuperscript{382} League of Az Cities and Towns et al. Reply at 21-22. See also Arlington County, Sept. 18 Ex Parte Letter at 1-2 (asserting that it is infeasible to have the shot clock encompass all steps related the small cell siting process because there is no single application to get ROW access, public notice, lease negotiations, road closures, etc.; because these are separate processes involving different departments; and because the timeline in some instances will depend on the applicant, or the required information may interrelate in a manner that makes doing them all at once infeasible); Letter from Robert McBain, Mayor, Piedmont, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 3 (filed Sept. 18, 2018).

\textsuperscript{383} League of Az Cities and Towns et al. Reply at 21-22.


\textsuperscript{386} See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528–29 (1947) (“[H]eadings and titles are not meant to take the place of the detailed provisions of the text.”). Our conclusion is also consistent with our interpretation that Sections 253 and 332(c)(7) apply to fees for all applications related to a Small Wireless Facility. See supra para. 50.

\textsuperscript{387} See, e.g., Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Cities Coal. Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).
to limit Section 332(c)(7) to zoning decisions does not overcome the specific language of Section 332(c)(7)(B)(ii), which explicitly applies to a variety of authorizations.\footnote{See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528-29 (1947). If the title of Section 332(c)(7) were to control the interpretation of the text, it would render superfluous the provision of Section 332(c)(7)(B)(ii) that applies to “authorization to . . . construct, or modify personal wireless service facilities” and give effect only to the provision that applies to “authorization to place . . . personal wireless service facilities.” This result would “flout[] the rule that ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.’” Clark v. Rameker, 134 S. Ct. 2242, 2248 (2014) (quoting Corley v. United States, 556 U.S. 303, 314 (2009)).}

134. The purpose of the statute also supports a broad interpretation. As noted above, the Supreme Court has stated that the 1996 Act was enacted “to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies” by, inter alia, reducing “the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.”\footnote{City of Rancho Palos Verdes v. Abrams, 544 U.S. at 115 (internal quotation marks and citations omitted).} A narrow reading of the scope of Section 332 would frustrate that purpose by allowing local governments to erect impediments to the deployment of personal wireless services facilities by using or creating other forms of authorizations outside of the scope of Section 332(c)(7)(B)(ii).\footnote{For example, if we were to interpret Section 332(c)(7)(B)(ii) to cover only zoning permits, states and localities could delay their consideration of other permits (e.g., building, electrical, road closure or other permits) to thwart the proposed deployment.} This is especially true in jurisdictions requiring multi-departmental siting review or multiple authorizations.\footnote{See, e.g., Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; Smart Communities Comments at 33-34; CTIA Comments at 15 (stating that some jurisdictions “impose multiple, sequential stages of review”); WIA Comments at 24 (noting that “[m]any jurisdictions grant the application within the shot clock period only to stall on issuing the building permit”); Verizon Comments at 6 (stating that “[a] large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way”); Sprint June 18 Ex Parte at 3 (noting that “after a land-use permit or attachment permit is received, many localities still require electric permits, road closure permits, aesthetic approval, and other types of reviews that can extend the time required for final permission well beyond just the initial approval.”).}

135. In addition, our interpretation remains faithful to the purpose of Section 332(c)(7) to balance Congress’s competing desires to preserve the traditional role of state and local governments in regulating land use and zoning, while encouraging the rapid development of new telecommunications technologies.\footnote{City of Arlington, 668 F.3d at 234.} Under our interpretation, states and localities retain their authority over personal wireless facilities deployment. At the same time, deployment will be kept on track by ensuring that the entire approval process necessary for deployment is completed within a reasonable period of time, as defined by the shot clocks addressed in this Third Report and Order.

136. A number of courts have either explicitly or implicitly adopted the same view, that all necessary permits are subject to Section 332. For example, in Cox Communications PCS, L.P. v. San Marcos, the court considered an excavation permit application as falling within the parameters of Section 332.\footnote{Cox Commc’ns PCS, L.P. v. San Marcos, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).} In USCOC of Greater Missouri, LLC v. County of Franklin, the Eighth Circuit reasoned that “[t]he issuance of the requisite building permits” for the construction of a personal wireless services facility arises under Section 332(c)(7).\footnote{USCOC of Greater Mo., LLC v. County of Franklin, 636 F.3d 927, 931-32 (8th Cir. 2011).} In Ogden Fire Co. No. 1 v. Upper Chichester Township, the Third Circuit affirmed the district court’s order compelling the township to issue a building permit for the...
construction of a wireless facility after finding that the township had violated Section 332(c)(7). In *Upstate Cellular Network v. Auburn*, the court directed the city to approve the application, including site plan approval by the planning board, granting a variance by the zoning authority, and “any other municipal approval or permission required by the City of Auburn and its boards or officers, including but not limited to, a building permit.” And in *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, the court ordered that the locality grant “any and all permits necessary for the construction of the proposed wireless facility.” Our interpretation is also consistent with judicial precedents involving challenges under Section 332(c)(7)(B) to denials by a wide variety of governmental entities, many of which involved variances, special use/conditional use permits, land disturbing activity and excavation permits, and a state department of education permit to install an antenna at a high school. Notably, a lot of cases have involved local agencies that are separate and distinct from the local zoning authority, confirming that Section 332(c)(7)(B) is not limited in application to decisions of zoning authorities. Our interpretation also reflects the examples in the record where providers are required to obtain other types of authorizations besides zoning permits before they can “place, construct, or modify personal wireless service facilities.”

We reject the argument that this interpretation of Section 332 will harm the public because it would “mean that building and safety officials would have potentially only a few days to

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395 *Ogden Fire Co. No. 1 v. Upper Chichester TP.*, 504 F.3d 370, 395-96 (3d Cir. 2007).

396 *Upstate Cellular Network*, 257 F. Supp. 3d at 319.


399 See, e.g., *Virginia Metronet, Inc. v. Bd. of Sup’rs of James City County*, 984 F. Supp. 966, 968 (E.D. Va. 1998); *Cellular Tel. Co.*, 166 F.3d at 491; *T-Mobile Cent., LLC v. Unified Gov’t of Wyandotte County*, 546 F.3d 1299, 1303 (10th Cir. 2008); *City of Anacortes*, 572 F.3d at 989; *Helcher*, 595 F.3d at 713-14; *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 120 F. Supp. 2d 1148, 1152 (S.D. Cal. 2003); *PrimeCo Pers. Commc’ns L.P. v. City of Mequon*, 204 F. Supp. 2d at 567, 570 (E.D. Wis.), aff’d, 352 F.3d 1147 (7th Cir. 2003); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1212 (11th Cir. 2002).


401 See, e.g., *Upstate Cellular Network*, 257 F. Supp. 3d at 319; *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395-96 (3rd Cir. 2007).


404 See, e.g., Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Communities Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).
evaluate whether a proposed deployment endangers the public." Building and safety officials will be subject to the same applicable shot clock as all other siting authorities involved in processing the siting application, with the amount of time allowed varying in the rare case where officials are unable to meet the shot clock because of exceptional circumstances.

2. Codification of Section 332 Shot Clocks

138. In addition to establishing two new Section 332 shot clocks for Small Wireless Facilities, we take this opportunity to codify our two existing Section 332 shot clocks for siting applications that do not involve Small Wireless Facilities. In the 2009 Declaratory Ruling, the Commission found that 90 days is a reasonable time frame for processing collocation applications and 150 days is a reasonable time frame to process applications other than collocations. Since these Section 332 shot clocks were adopted as part of a declaratory ruling, they were not codified in our rules. In the Wireless Infrastructure NPRM/NOI, the Commission sought comment on whether to modify these shot clocks. We find no need to modify them here and will continue to use these shot clocks for processing Section 332 siting applications that do not involve Small Wireless Facilities. We do, though, codify these two existing shot clocks in our rules alongside the two newly-adopted shot clocks so that all interested parties can readily find the shot clock requirements in one place.

139. While some commenters argue for a 60-day shot clock for all collocation categories, we conclude that we should retain the existing 90-day shot clock for collocations not involving Small Wireless Facilities. Collocations that do not involve Small Wireless Facilities include deployments of

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405 League of Az Cities and Towns et al. Reply at 21-22.


407 Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3332-33, 3334, 3337-38, paras. 6, 9, 17-19.

408 Chicago Comments at 2 (supporting maintaining existing shot clocks); Bellevue et al. Comments at 13-14 (supporting maintaining existing shot clocks).

409 We also adopt a non-substantive modification to our existing rules. We redesignate the rule adopted in 2014 to codify the Commission’s implementation of the 2012 Spectrum Act, formerly designated as section 1.40001, as section 1.6100, and we move the text of that rule from Part 1, Subpart CC, to the same Subpart as the new rules promulgated in this Third Report and Order (Part 1, Subpart U). This recognizes that both sets of requirements pertain to “State and local government regulation of the placement, construction, and modification of personal wireless service facilities” (the caption of new Subpart U). The reference in paragraph (a) of that preexisting rule to 47 U.S.C. § 1455 has been consolidated with new rule section 1.6001 to reflect that all rules in Subpart U, collectively, implement both § 332(c)(7) and § 1455. With those non-substantive exceptions, the text of the 2014 rule has not been changed in any way. Contrary to the suggestion submitted by the Washington Joint Counties, see Letter from W. Scott Snyder et al., Counsel for the Washington Cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 6-7 (filed June 19, 2018), this change is not substantive and does not require advance notice. We find that “we have good cause to reorganize and renumber our rules in this fashion without expressly seeking comment on this change, and we conclude that public comment is unnecessary because no substantive changes are being made. Moreover, the delay engendered by a round of comment would be contrary to the public interest.” See 2017 Pole Replacement Order, 32 FCC Rcd at 9770, para. 26; see also 5 U.S.C. §553(b)(B) (notice not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

410 CCIA Comments at 10; CCA Comments at 13-14; CCA Reply at 6 (arguing for 30-day shot clock for collocations and a 60-to-75-day shot clock for all other siting applications); WIA Reply at 21. See also Letter from Jill Canfield, NTCA Vice President Legal & Industry and Assistant General Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 19, 2018) (stating that NTCA supports a revised interpretation of the phrase “reasonable period of time” as found in Section 332(c) (7)(B)(ii) of the Communications Act as applicable to small cell facilities and that sixty days for collocations and 90 days for all other small cell siting applications should provide local officials sufficient time for review of requests to install small cell facilities in public rights-of-way).
larger antennas and other equipment that may require additional time for localities to review and process.\textsuperscript{411} For similar reasons, we maintain the existing 150-day shot clock for new construction applications that are not for Small Wireless Facilities. While some industry commenters such as WIA, Samsung, and Crown Castle argue for a 90-day shot clock for macro cells and small cells alike, we agree with commenters such as the City of New Orleans that there is a significant difference between the review of applications for a single 175-foot tower versus the review of a Small Wireless Facility with much smaller dimensions.\textsuperscript{412}

3. **Collocations on Structures Not Previously Zoned for Wireless Use**

140. Wireless industry commenters assert that they should be able to take advantage of the Section 332 collocation shot clock even when collocating on structures that have not previously been approved for wireless use.\textsuperscript{413} Siting agencies respond that the wireless industry is effectively seeking to have both the collocation definition and a reduced shot clock apply to sites that have never been approved by the local government as suitable for wireless facility deployment.\textsuperscript{414} We take this opportunity to clarify that for purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities. As the Commission stated in the 2009 Declaratory Ruling, “an application is a request for collocation if it does not involve a ‘substantial increase in the size of a tower’ as defined in the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas.”\textsuperscript{415} The definition of “[c]ollocation” in the NPA provides for the “mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, whether or not there is an existing antenna on the structure.”\textsuperscript{416} The NPA’s definition of collocation explicitly encompasses collocations on structures and buildings that have not yet been zoned for wireless use. To interpret the NPA any other way would be unduly narrow and there is no persuasive reason to accept a narrower interpretation. This is particularly true given that the NPA definition of collocation stands in direct contrast with the definition of collocation in the

\textsuperscript{411} Wireless Infrastructure Second R&O, FCC 18-30 at paras. 74-76.

\textsuperscript{412} New Orleans Comments at 2-3; Samsung Comments at 4-5 (arguing that the Commission should reduce the shot clock applicable to new construction from 150 days to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); TX Hist. Comm. Comments at 2 (arguing that the reasonable periods of time that the FCC proposed in 2009, 90 days for collocation applications and 150 days for other applications appear to be appropriate); WIA Comments at 20-23; WIA Reply at 11 (arguing for a 90-day shot clock for applications involving substantial modifications, including tower extensions; and a 120-day shot clock for applications for all other facilities, including new macro sites); CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities).

\textsuperscript{413} AT&T Comments at 10; AT&T Reply at 9; Verizon Reply at 32; WIA Comments at 22; ExteNet Comments at 9.

\textsuperscript{414} Bellevue \textit{et al.} Reply at 6-7 (arguing that the Commission has rejected this argument twice and instead determined that a collocation occurs when a wireless facility is attached to an existing infrastructure that houses wireless communications facilities; San Francisco Reply at 7-8 (arguing that under Commission definitions, a utility pole is neither an existing base station nor a tower; thus, the Commission simply cannot find that adding wireless facilities to utility pole that has not previously been used for wireless facilities is an eligible facilities request). \textit{See, e.g.}, Letter from Bonnie Michael, City Council President, Worthington, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018); Letter from Jill Boudreau, Mayor, Mount Vernon, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018).

\textsuperscript{415} 2009 Declaratory Ruling, 24 FCC Rcd at 14012, para 46.

Spectrum Act, pursuant to which facilities only fall within the scope of an “eligible facilities request” if they are attached to towers or base stations that have already been zoned for wireless use.\(^{417}\)

4. When Shot Clocks Start and Incomplete Applications

141. In the 2014 Wireless Infrastructure Order, the Commission clarified, among other things, that a shot clock begins to run when an application is first submitted, not when the application is deemed complete.\(^{418}\) The clock can be paused, however, if the locality notifies the applicant within 30 days that the application is incomplete.\(^{419}\) The locality may pause the clock again if it provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.\(^{420}\) In the Wireless Infrastructure NPRM/NOI, the Commission sought comment on these determinations.\(^{421}\) Localities contend that the shot clock period should not begin until the application is deemed complete.\(^{422}\) Industry commenters argue that the review period for incompleteness should be decreased from 30 days to 15 days.\(^{423}\)

142. With the limited exception described in the next paragraph, we find no cause or basis in the record to alter the Commission’s prior determinations, and we now codify them in our rules. Codified rules, easily accessible to applicants and localities alike, should provide helpful clarity. The complaints by states and localities about the sufficiency of some of the applications they receive are adequately addressed by our current policy, particularly as amended below, which preserves the states’ and localities’ ability to pause review when they find an application to be incomplete.\(^{424}\) We do not find it necessary at this point to shorten our 30-day initial review period for completeness because, as was the case when this review period was adopted in the 2009 Declaratory Ruling, it remains consistent with review periods for completeness under existing state wireless infrastructure deployment statutes\(^{425}\) and still “gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants

\(^{417}\)See 47 CFR § 1.40001(b)(3), (4), (5) (definitions of eligible facilities request, eligible support structure, and existing). Each of these definitions refers to facilities that have already been approved under local zoning or siting processes.


\(^{419}\)2009 Declaratory Ruling, 24 FCC Rcd at 14014, paras. 52-53 (providing that the “timeframes do not include the time that applicants take to respond to State and local governments’ requests for additional information”).


\(^{421}\)Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3338, para. 20.

\(^{422}\)See, e.g., Maine DOT Comments at 2-3; Philadelphia Comments at 6; League of Az Cities and Towns et al. at 4, 8-9; Letter from Barbara Coler, Chair, Marin Telecommunications Agency, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 4, 2018) (Barbara Coler Sept. 4, 2018 Ex Parte Letter); Letter from Sam Liccardo, Mayor, San Jose, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 5 (filed Sept. 18, 2018).

\(^{423}\)Verizon Comments at 43. See Sprint June 18 Ex Parte at 2 (asserting that the shot clocks should begin to run when the application is complete and that a sitting authority should review the application for completeness within the first 15 days of receipt or it would waive the right to object on that basis).

\(^{424}\)See, e.g., Barbara Coler Sept. 4, 2018 Ex Parte Letter at 2 (the pace of installation may be affected by incomplete applications); Kenneth S. Fellman Sept. 18, 2018 Ex Parte Letter at 3 (not uncommon to find documents not properly prepared and not in compliance with relevant regulations).

from a last minute decision that an application should be denied as incomplete.”

143. However, for applications to deploy Small Wireless Facilities, we implement a modified tolling system designed to help ensure that providers are submitting complete applications on day one. This step accounts for the fact that the shot clocks applicable to such applications are shorter than those established in the 2009 Declaratory Ruling and, because of which, there may instances where the prevailing tolling rules would further shorten the shot clocks to such an extent that it might be impossible for siting authorities to act on the application. For Small Wireless Facilities applications, the siting authority has 10 days from the submission of the application to determine whether the application is incomplete. The shot clock then resets once the applicant submits the supplemental information requested by the siting authority. Thus, for example, for an application to collocate Small Wireless Facilities, once the applicant submits the supplemental information in response to a siting authority’s timely request, the shot clock resets, effectively giving the siting authority an additional 60 days to act on the Small Wireless Facilities collocation application. For subsequent determinations of incompleteness, the tolling rules that apply to non-Small Wireless Facilities would apply—that is, the shot clock would toll if the siting authority provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.

144. As noted above, multiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities. All of these permits are subject to Section 332’s requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here.

145. We also find that mandatory pre-application procedures and requirements do not toll the shot clocks. Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock. Localities counter that in many instances, applicants submit applications that are incomplete in material respects, that pre-application interactions smooth the application process, and that many of their pre-application requirements go to important health and safety matters. We conclude that the ability to toll a shot clock when an application is found incomplete or by


427 See, e.g., Geoffrey C. Beckwith Sept. 11, 2018 Ex Parte Letter at 1; Letter from Brad Cole, Executive Director, Illinois Municipal League, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al. at 1 (filed Sept. 14, 2018); Ronny Berdugo Sept. 18, 2018 Ex Parte Letter at 2.

428 See Sprint June 18 Ex Parte at 3; cf. Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; CTIA Comments at 15 (“The Commission should declare that the shot clocks apply to the entire local review process.”).

429 Wireless Infrastructure NPRM/NOI, 32 FCC Rcd at 3338, para. 20.

430 See, e.g., CCA Reply at 7 (noting also that some localities unreasonably request additional information after submission that is either already provided or of unreasonable scope); GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteneNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

431 See, e.g., Philadelphia Reply at 9 (arguing that shot clocks should not run until a complete application with a full set of engineering drawings showing the placement, size and weight of the equipment, and a fully detailed structural analysis is submitted, to assess the safety of proposed installations); Philadelphia Comments at 6; League of Az Cities and Towns et al. Comments at 4 (arguing that the shot clock should not begin until after an application has been “duly filed,” because “some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate their submittal may be”); Colorado Comm. and Utility All. et al. Comments at 14 (explaining that the pre-application meetings are intended “to give prospective applicants an opportunity to discuss code and regulatory provisions with local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision”); Smart
mutual agreement by the applicant and the siting authority should be adequate to address these concerns. Much like a requirement to file applications one after another, requiring pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their start date. An application is not ruled on within “a reasonable period of time after the request is duly filed” if the state or locality takes the full ordinary review period after having delayed the filing in the first instance due to required pre-application review. Indeed, requiring a pre-application review before an application may be filed is similar to imposing a moratorium, which the Commission has made clear does not stop the shot clocks from running. Therefore, we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered. In other words, the request is “duly filed” at that time, notwithstanding the locality’s refusal to accept it.

146. That said, we encourage voluntary pre-application discussions, which may well be useful to both parties. The record indicates that such meetings can clarify key aspects of the application review process, especially with respect to large submissions or applicants new to a particular locality’s processes, and may speed the pace of review. To the extent that an applicant voluntarily engages in a pre-application review to smooth the way for its filing, the shot clock will begin when an application is filed, presumably after the pre-application review has concluded.

147. We also reiterate, consistent with the 2009 Declaratory Ruling, that the remedies granted under Section 332(c)(7)(B)(v) are independent of, and in addition to, any remedies that may be available under state or local law. Thus, where a state or locality has established its own shot clocks, an applicant may pursue any remedies granted under state or local law in cases where the siting authority fails to act within those shot clocks. However, the applicant must wait until the Commission shot clock period has expired to bring suit for a “failure to act” under Section 332(c)(7)(B)(v).

V. PROCEDURAL MATTERS

148. Final Regulatory Flexibility Analysis. With respect to this Third Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of the

(Continued from previous page)

Communities Comments at 15, 35 (pre-application procedures “may translate into faster consideration of individual applications over the longer term, as providers and communities alike, gain a better understanding of what is required of them, and providers submit applications that are tailored to community requirements”); UT Dept. of Trans. Comments at 5 (“The purpose of the pre-application access meeting is to help the entity or person with the application and provide information concerning the requirements contained in the rule.”); CCUA et al. Reply at 6 (“[Pre-application meetings] provide an opportunity for informal discussion between prospective applicants and the local jurisdiction. Pre-application meetings serve to educate, answer questions, clarify process issues, and ultimately result in a more efficient process from application filing to final action.”); AASHTO Comments, Attach. at 3 (GA Dept. of Trans. contending that pre-application procedures “should be encouraged and separated from an ‘official’ “application submittal”); League of Az Cities and Towns et al. Comments at 5-7 (providing examples of incomplete applications).

433 See, e.g., CCA Reply at 7; GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.
435 See CCUA et al. Comments at 14; Smart Communities Comments at 15, 35; UT Dept. of Trans. Comments at 5; CCUA et al. Reply at 6; Mukilteo Reply, Docket No. WC 17-84, at 1 (filed July 10, 2017).
436 2009 Declaratory Ruling, 24 FCC Rcd at 14013-14, para. 50.
437 2009 Declaratory Ruling, 24 FCC Rcd at 14013-14, para. 50.
the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Third Report and Order. The Commission will send a copy of the Third Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

149. *Paperwork Reduction Act.* This Third Report and Order does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.


VI. ORDERING CLAUSES

151. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), 7, 201, 253, 301, 303, 309, 319, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 157, 201, 253, 301, 303, 309, 319, 332, that this Declaratory Ruling and Third Report and Order in WT Docket No. 17-79 IS hereby ADOPTED.

152. IT IS FURTHER ORDERED that Part 1 of the Commission’s Rules is AMENDED as set forth in Appendix A, and that these changes SHALL BE EFFECTIVE 90 days after publication in the Federal Register.

153. IT IS FURTHER ORDERED that this Third Report and Order SHALL BE effective 90 days after its publication in the Federal Register. The Declaratory Ruling and the obligations set forth therein ARE EFFECTIVE on the same day that this Third Report and Order becomes effective. It is our intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

154. IT IS FURTHER ORDERED that, pursuant to 47 CFR § 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review of this Declaratory Ruling and Third Report and Order will commence on the date that a summary of this Declaratory Ruling and Third Report and Order is published in the Federal Register.

155. IT IS FURTHER ORDERED that the Commission’s Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Declaratory Ruling and Third Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

156. IT IS FURTHER ORDERED that this Declaratory Ruling and Third Report and Order SHALL BE sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary
APPENDIX A

Final Rules

Streamlining State and Local Review of Wireless Facility Siting Applications

Part 1—Practice and Procedure

1. Add subpart U to Part 1 of Title 47 to read as follows:

Subpart U—State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Service Facilities

§ 1.6001 Purpose.

This subpart implements 47 U.S.C. 332(c)(7) and 1455.

§ 1.6002 Definitions.

Terms used in this subpart have the following meanings:

(a) Action or to act on a siting application means a siting authority’s grant of a siting application or issuance of a written decision denying a siting application.

(b) Antenna, consistent with section 1.1320(d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this title.

(c) Antenna equipment, consistent with section 1.1320(d), means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

(d) Antenna facility means an antenna and associated antenna equipment.

(e) Applicant means a person or entity that submits a siting application and the agents, employees, and contractors of such person or entity.

(f) Authorization means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.

(g) Collocation, consistent with section 1.1320(d) and the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas, Appendix B of this part, section I.B, means—

(1) Mounting or installing an antenna facility on a pre-existing structure, and/or

(2) Modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

(3) The definition of “collocation” in paragraph (b)(2) of section 1.6100 applies to the term as used in that section.
(h) Deployment means placement, construction, or modification of a personal wireless service facility.

(i) Facility or personal wireless service facility means an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services.

(j) Siting application or application means a written submission to a siting authority requesting authorization for the deployment of a personal wireless service facility at a specified location.

(k) Siting authority means a State government, local government, or instrumentality of a State government or local government, including any official or organizational unit thereof, whose authorization is necessary prior to the deployment of personal wireless service facilities.

(l) Small wireless facilities, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:

1. The facilities—
   (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
   (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
   (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

2. Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

3. All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

4. The facilities do not require antenna structure registration under part 17 of this chapter;

5. The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

6. The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

(m) Structure means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or commingled with other types of services).

Terms not specifically defined in this section or elsewhere in this subpart have the meanings defined in Part 1 of Title 47 and the Communications Act of 1934, 47 U.S.C. 151 et seq.
§ 1.6003 Reasonable periods of time to act on siting applications

(a) Timely action required. A siting authority that fails to act on a siting application on or before the shot clock date for the application, as defined in paragraph (e) of this section, is presumed not to have acted within a reasonable period of time.

(b) Shot clock period. The shot clock period for a siting application is the sum of—

   (1) the number of days of the presumptively reasonable period of time for the pertinent type of application, pursuant to paragraph (c) of this section, plus

   (2) the number of days of the tolling period, if any, pursuant to paragraph (d) of this section.

(c) Presumptively reasonable periods of time.

   (1) The following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments in the categories set forth below:

      (i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.

      (ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.

      (iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days.

      (iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.

   (2) Batching.

      (i) If a single application seeks authorization for multiple deployments, all of which fall within a category set forth in either paragraph (c)(1)(i) or paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is equal to that for a single deployment within that category.

      (ii) If a single application seeks authorization for multiple deployments, the components of which are a mix of deployments that fall within paragraph (c)(1)(i) and deployments that fall within paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is 90 days.

      (iii) Siting authorities may not refuse to accept applications under paragraphs (c)(2)(i) and (c)(2)(ii).

(d) Tolling period. Unless a written agreement between the applicant and the siting authority provides otherwise, the tolling period for an application (if any) is as set forth below.

   (1) For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information, the shot clock date calculation shall restart at zero on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete.
(2) For all other initial applications, the tolling period shall be the number of days from –

(i) The day after the date when the siting authority notifies the applicant in writing that the application is materially incomplete and clearly and specifically identifies the missing documents or information that the applicant must submit to render the application complete and the specific rule or regulation creating this obligation, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(2)(i) is effectuated on or before the 30th day after the date when the application was submitted; or

(3) For resubmitted applications following a notice of deficiency, the tolling period shall be the number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the applicant’s supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority’s original request under paragraph (d)(1) or paragraph (d)(2) of this section, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(3)(i) is effectuated on or before the 10th day after the date when the applicant makes a supplemental submission in response to the siting authority’s request under paragraph (d)(1) or paragraph (d)(2) of this section.

(e) Shot clock date. The shot clock date for a siting application is determined by counting forward, beginning on the day after the date when the application was submitted, by the number of calendar days of the shot clock period identified pursuant to paragraph (b) of this section and including any pre-application period asserted by the siting authority; provided, that if the date calculated in this manner is a “holiday” as defined in section 1.4(e)(1) or a legal holiday within the relevant State or local jurisdiction, the shot clock date is the next business day after such date. The term “business day” means any day as defined in section 1.4(e)(2) and any day that is not a legal holiday as defined by the State or local jurisdiction.

3. Redesignate § 1.40001 as § 1.6100, remove and reserve paragraph (a) of newly redesignated § 1.6100, and revise paragraph (b)(7)(vi) of newly redesignated § 1.6100 by changing “1.40001(b)(7)(i)(iv)” to “1.6100(b)(7)(i)-(iv).”

4. Remove subpart CC.
APPENDIX B

Comments and Reply Comments

Comments
5G Americas
Aaron Rosenzweig
ACT | The App Association
Advisory Council on Historic Preservation
Advisors to the International EMF Scientist Appeal
African American Mayors Association
Agua Caliente Band of Cahuilla Indians Tribal Historic Preservation Office
Alaska Department of Transportation & Public Facilities
Alaska Native Health Board
Alaska Office of History and Archaeology
Alexandra Ansell
American Association of State Highway and Transportation Officials
American Bird Conservancy
American Cable Association
American Petroleum Institute
American Public Power Association
Angela Fox
Arctic Slope Regional Corporation
Arizona State Parks & Trails, State Historic Preservation Office
Arkansas SHPO
Arnold A. McMahon
Association of American Railroads
AT&T
B. Golomb
Bad River Band of Lake Superior Tribe of Chippewa Indians
Benjamin L. Yousef
BioInitiative Working Group
Blue Lake Rancheria
Board of County Road Commissioners of the County of Oakland
Bristol Bay Area Health Corporation
Cahuilla Band of Indians
California Office of Historic Preservation, Department of Parks and Recreation
California Public Utilities Commission
Cape Cod Bird Club, Inc.
Catawba Indian Nation Tribal Historic Preservation Office
Charter Communications, Inc.
Cheyenne River Sioux Tribe Cultural Preservation Office
Chickasaw Nation
Chippewa Cree Tribe
Choctaw Nation of Oklahoma
Chuck Matzker
Cindy Li
Cindy Russell
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
Citizen Potawatomi Nation
Citizens Against Government Waste
City and County of San Francisco
City of Alexandria, Virginia; Arlington County, Virginia; and Henrico County, Virginia
City of Arlington, Texas
City of Austin, Texas
City of Bellevue, City of Bothell, City of Burien, City of Ellensburg, City of Gig Harbor, City of Kirkland, City of Mountlake Terrace, City of Mukilteo, City of Normandy Park, City of Puyallup, City of Redmond, and City of Walla Walla
City of Chicago
City of Claremont (Tony Ramos, City Manager)
City of Eden Prairie, MN
City of Houston
City of Irvine, California
City of Kenmore, Washington, and David Baker, Vice-Chair, National League of Cities Information Technology and Communications Committee
City of Lansing, Michigan
City of Mukilteo
City of New Orleans, Louisiana
City of New York
City of Philadelphia
City of Springfield, Oregon
Cityscape Consultants, Inc.
Coalition for American Heritage, Society for American Archaeology, American Cultural Resources Association, Society for Historical Archaeology, and American Anthropological Association
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Colorado River Indian Tribes
Colorado State Historic Preservation Office
Comcast Corporation
Commissioner Sal Pace, Pueblo Board of County Commissioners
Community Associations Institute
Competitive Carriers Association
CompTIA (The Computing Technology Industry Association)
Computer & Communications Industry Association (CCIA)
Confederated Tribes of the Colville Reservation
Confederated Tribes of the Umatilla Indian Reservation Cultural Resources Protection Program
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group, Inc.
Critical Infrastructure Coalition
Crow Creek Sioux Tribe
Crown Castle
CTIA
CTIA and Wireless Infrastructure Association
David Roetman, Minnehaha County GOP Chairman
Defenders of Wildlife
Department of Arkansas Heritage (Arkansas Historic Preservation Program)
DuPage Mayors and Managers Conference
East Bay Municipal Utility District
Eastern Shawnee Tribe of Oklahoma
Edward Czelada
Elijah Mondy
Elizabeth Doonan
Ellen Marks
EMF Safety Network, Ecological Options Network
Environmental Health Trust
ExteNet Systems, Inc.
Fairfax County, Virginia
FibAire Communications, LLC d/b/a AireBeam
Florida Coalition of Local Governments
Fond du Lac Band of Lake Superior Chippewa
Forest County Potawatomi Community of Wisconsin
Fort Belknap Indian Community
Free State Foundation
General Communication, Inc.
Georgia Department of Transportation
Georgia Historic Preservation Division
Georgia Municipal Association, Inc.
Gila River Indian Community
Greywale Advisors
History Colorado (Colorado State Historic Preservation Office)
Hongwei Dong
Hualapai Department of Cultural Resources
Illinois Department of Transportation
Illinois Municipal League
INCOMPAS
Information Technology and Innovation Foundation
International Telecommunications Users Group
Jack Li
Jackie Cale
Jerry Day
Joel M. Moskowitz, Ph.D.
Jonathan Mirin
Joyce Barrett
Karen Li
Karen Spencer
Karon Gubbrud
Kate Kheel
Kaw Nation
Kevin Mottus
Keweenaw Bay Indian Community
Kialegee Tribal Town
League of Minnesota Cities
Leo Cashman
Lower Brule Sioux Tribe
Li Sun
Lightower Fiber Networks
Lisbeth Britt
Lower Brule Sioux Tribe
Maine Department of Transportation
Marty Feffer
Mary Whisenand, Iowa Governor’s Commission on Community Action Agencies
Mashantucket (Western) Pequot Tribe
Mashpee Wampanoag Tribe
Matthew Goulet
Mayor Patrick Furey, City of Torrance, California
McLean Citizens Association
Miami Tribe of Oklahoma
Missouri State Historic Preservation Office
Mobile Future
Mobilitie, LLC
Mohegan Tribe of Indians of Connecticut
Montana State Historic Preservation Office
Monte R. Lee and Company
Muckleshoot Indian Tribe
Muscogee (Creek) Nation
National Association of Tower Erectors (NATE)
National Association of Tribal Historic Preservation Officers
National Black Caucus of State Legislators
National Conference of State Historic Preservation Officers
National Congress of American Indians
National Congress of American Indians, National Association of Tribal Historic Preservation Officers, and United South and Eastern Tribes Sovereignty Protection Fund
National Congress of American Indians and United South and Eastern Tribes Sovereignty Protection Fund
National League of Cities
National Tribal Telecommunications Association
National Trust for Historic Preservation
Native Public Media
NATOA
Natural Resources Defense Council
Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
Naveen Albert
NCTA—The Internet & Television Association
nepsa solutions LLC
New Mexico Department of Cultural Affairs, Historic Preservation Division
Nez Perce Tribe
Nina Beety
Nokia
North Carolina State Historic Preservation Office
Northern Cheyenne Tribal Historic Preservation Office
NTCA—The Rural Broadband Association
Office of Historic Preservation for the Mashantucket Pequot Tribal Nation of Connecticut
Ohio State Historic Preservation Office
Oklahoma History Center State Historic Preservation Office
Olemara Peters
Omaha Tribe of Nebraska
ONE Media, LLC
Oregon State Historic Preservation Office
Osage Nation
Otoe-Missouria Tribe
Pala Band of Mission Indians
Patrick Wronkiewicz
Pechanga Band of Luiseno Indians
Pennsylvania State Historic Preservation Office
Prairie Island Indian Community
PTA-FLA, Inc.
Pueblo of Laguna
Pueblo of Pojoaque
Pueblo of Tesuque
Puerto Rico State Historic Preservation Office
Quad Cities Cable Communications Commission
Quapaw Tribe of Oklahoma
R Street Institute
Rebecca Carol Smith
Red Cliff Band of Lake Superior Chippewa
Representative Tom Sloan, State of Kansas House of Representatives
Representatives Anna G. Eshoo, Frank Pallone, Jr., and Raul Ruiz, U.S. House of Representatives
Rhode Island Historical Preservation and Heritage Commission
Rosebud Sioux Tribe Tribal Historic Preservation Cultural Resource Management Office
Ronald M. Powell, Ph.D.
S. Quick
Sacred Wind Communications, Inc.
Samsung Electronics America, Inc.
Santa Clara Pueblo
Sault Ste. Marie Tribe of Chippewa Indians
SCAN NATOA, Inc.
Seminole Nation of Oklahoma
Seminole Tribe of Florida
Senator Duane Ankney, Montana State Senate
Shawnee Tribe
Sisseton Wahpeton Oyate
Skokomish Indian Tribe Tribal Historic Preservation Office
Skull Valley Band of Goshute
Smart Communities and Special Districts Coalition
Soul Culver
Sprint
Standing Rock Sioux Tribe
Starry, Inc.
State of Washington Department of Archaeology & Historic Preservation
Sue Present
Swinomish Indian Tribal Community
Table Mountain Rancheria Tribal Government Office
Tanana Chiefs Conference
Telecommunications Industry Association
Texas Department of Transportation
Texas Historical Commission
Thlopthlocco Tribal Town
T-Mobile USA, Inc.
Tonkawa Tribe of Oklahoma
Triangle Communication System, Inc.
Twenty-Nine Palms Band of Mission Indians
United Keetoowah Band of Cherokee Indians In Oklahoma
Utah Department of Transportation
Reply Comments

Alaska State Historic Preservation Office
American Cable Association
American Public Power Association
Association of American Railroads
California Public Utilities Commission
Catherine Kleiber
Chippewa Cree Tribe
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
City of Baltimore, Maryland
City of New York
City of Philadelphia
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Comcast Corporation
Communications Workers of America
Competitive Carriers Association
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group Inc.
Critical Infrastructure Coalition
CTIA
Dan Kleiber
Enterprise Wireless Alliance
Environmental Health Trust
ExteNet Systems, Inc.
Florida Coalition of Local Governments
Confederated Tribes of Grand Ronde Community of Oregon Historic Preservation Department
INCOMPAS
Irregulators
National Association of Regulatory Utility Commissioners
National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Towns and Townships, National Association of Regional Councils, United States Conference of Mayors, and Government Finance Officers Association
National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers
National Organization of Black Elected Legislative (NOBEL) Women
National Rural Electric Cooperative Association
Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
NCTA—The Internet & Television Association
Pueblo of Acoma
Puerto Rico Telephone Company, Inc., d/b/a Claro
Quintillion Networks, LLC, and Quintillion Subsea Operations, LLC
Rebecca Carol Smith
SDN Communications
Skyway Towers, LLC
SmallCellSite.Com
Smart Communities and Special Districts Coalition
Sue Present
The Greenlining Institute
T-Mobile USA, Inc.
Triangle Communication System, Inc.
United States Conference of Mayors
Verizon
Washington, D.C. Office of the Chief Technology Officer
Wireless Internet Service Providers Association
Xcel Energy Services Inc.
APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)\(^1\) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM), released in April 2017.\(^2\) The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The comments received are addressed below in Section B. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.\(^3\)

A. Need for and Objectives of the Rules

2. In the Third Report and Order, the Commission continues its efforts to promote the timely buildout of wireless infrastructure across the country by eliminating regulatory impediments that unnecessarily delay bringing personal wireless services to consumers. The record shows that lengthy delays in approving siting applications by siting agencies has been a persistent problem.\(^4\) With this in mind, the Third Report and Order establishes and codifies specific rules concerning the amount of time siting agencies may take to review and approve certain categories of wireless infrastructure siting applications. More specifically, the Commission addresses its Section 332 shot clock rules for infrastructure applications which will be presumed reasonable under the Communications Act. As an initial matter, the Commission establishes two new shot clocks for Small Wireless Facilities applications. For collocation of Small Wireless Facilities on preexisting structures, the Commission adopts a 60-day shot clock which applies to both individual and batched applications. For applications associated with Small Wireless Facilities new construction we adopt a 90-day shot clock for both individual and batched applications.\(^5\) The Commission also codifies two existing Section 332 shot clocks for all other Non-Small Wireless Facilities that were established in the 2009 Declaratory Ruling without codification.\(^6\) These existing shot clocks require 90-days for processing of all other Non-Small Wireless Facilities collocation applications, and 150-days for processing of all other Non-Small Wireless Facilities applications other than collocations.

3. The Third Report and Order addresses other issues related to both the existing and new shot clocks. In particular we address the specific types of authorizations subject to the “Reasonable Period of Time” provisions of Section 332(c)(7)(B)(ii), finding that “any request for authorization to place, construct, or modify personal wireless service facilities” under Section 332(c)(7)(B)(ii) means all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment of personal wireless services infrastructure.\(^7\) The Commission also addresses collocation on structures not previously zoned for wireless use,\(^8\) when the four Section 332 shot clocks begin to run,\(^9\)

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\(^{3}\) See 5 U.S.C. § 604.

\(^{4}\) See supra paras. 23-9.

\(^{5}\) See supra paras. 111-12.

\(^{6}\) See supra paras. 138-39; 2009 Declaratory Ruling.

\(^{7}\) See supra paras. 132-37.

\(^{8}\) See supra para. 140.
the impact of incomplete applications on our Section 332 shot clocks,\textsuperscript{10} and how state imposed shot clocks remedies effect the Commission’s Section 332 shot clocks remedies.\textsuperscript{11}

4. The Commission discusses the appropriate judicial remedy that applicants may pursue in cases where a siting authority fails to act within the applicable shot clock period.\textsuperscript{12} In those situations, applicants may commence an action in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(ii)(II) and seek injunctive relief granting the application. Notwithstanding the availability of a judicial remedy if a shot clock deadline is missed, the Commission recognizes that the Section 332 time frames might not be met in exceptional circumstances and has refined its interpretation of the circumstances when a period of time longer than the relevant shot clock would nonetheless be a reasonable period of time for action by a siting agency.\textsuperscript{13} In addition, a siting authority that is subject to a court action for missing an applicable shot clock deadline has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services thereby rebutting the effective prohibition presumption.

5. The rules adopted in the Third Report and Order will accelerate the deployment of wireless infrastructure needed for the mobile wireless services of the future, while preserving the fundamental role of localities in this process. Under the Commission’s new rules, localities will maintain control over the placement, construction and modification of personal wireless facilities, while at the same time the Commission’s new process will streamline the review of wireless siting applications.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. Only one party—the Smart Communities and Special Districts Coalition—filed comments specifically addressing the rules and policies proposed in the IRFA. They argue that any shortening or alteration of the Commission’s existing shot clocks or the adoption of a deemed granted remedy will adversely affect small local governments, special districts, property owners, small developers, and others by placing their siting applications behind wireless provider siting applications.\textsuperscript{14} Subsequently, NATOA filed comments concerning the draft FRFA.\textsuperscript{15} NATOA argues that the new shot clocks impose burdens on local governments and particularly those with limited resources. NATOA asserts that the new shot clocks will spur more deployment applications than localities currently process.

7. These arguments, however, fail to acknowledge that Section 332 shot clocks have been in place for years and reflect Congressional intent as seen in the statutory language of Section 332. The record in this proceeding demonstrates the need for, and reasonableness of, expediting the siting review of certain facility deployments.\textsuperscript{16} More streamlined procedures are both reasonable and necessary to provide greater predictability. The current shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the original shot clocks were adopted nine years ago. Localities have gained significant experience processing wireless siting applications and several jurisdictions already have in place laws that require

\textsuperscript{9} See supra paras. 141-46.
\textsuperscript{10} Id.
\textsuperscript{11} See supra para. 147.
\textsuperscript{12} See supra paras. Error! Reference source not found.-131.
\textsuperscript{13} See supra para. 127.
\textsuperscript{14} Smart Communities Comments at 81; see also Letter from Gerard Lavery Lederer, Counsel, Smart Communities, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Ex Parte Submission at 33 (filed Sept. 19, 2018).
\textsuperscript{15} Letter from Nancy Werner, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 4-5 (filed Sept. 19, 2018).
\textsuperscript{16} See supra para. 106.
applications to be processed in less time than the Commission’s new shot clocks. With the passage of
time, sitting agencies have become more efficient in processing siting applications and this, in turn,
should reduce any economic burden the Commission’s new shot clock provisions have on them.

8. The Commission has carefully considered the impact of its new shot clocks on siting
authorities and has established shot clocks that take into consideration the nature and scope of siting
requests by establishing shot clocks of different lengths of time that depend on the nature of the siting
request at issue. The length of these shot clocks is based in part on the need to ensure that local
governments have ample time to take any steps needed to protect public safety and welfare and to process
other pending utility applications. Since local siting authorities have gained experience in processing
siting requests in an expedited fashion, they should be able to comply with the Commission’s new shot
clocks.

9. The Commission has taken into consideration the concerns of the Smart Communities
and Special Districts Coalition and NATOA. It has established shot clocks that will not favor wireless
providers over other applicants with pending siting applications. Further, instead of adopting a deemed
granted remedy that would grant a siting application when a shot clock lapses without a decision on the
merits, the Commission provides guidance as to the appropriate judicial remedy that applicants may
pursue and examples of exceptional circumstance where a siting authority may be justified in needing
additional time to review a siting application then the applicable shot clock allows. Under this
approach, the applicant may seek injunctive relief as long as several minimum requirements are met. The
siting authority, however, can rebut the presumptive reasonableness of the applicable shot clock under
certain circumstances. The circumstances under which a sitting authority might have to do this will be
rare. Under this carefully crafted approach, the interests of siting applicants, siting authorities, and
citizens are protected.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business
Administration

10. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the
Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the
Small Business Administration (SBA), and to provide a detailed statement of any change made to the
proposed rules as a result of those comments.

11. The Chief Counsel did not file any comments in response to the proposed rules in this
proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will
Apply

12. The RFA directs agencies to provide a description of, and where feasible, an estimate of
the number of small entities that may be affected by the rules adopted herein. The RFA generally
defines the term “small entity” as having the same meaning as the terms “small business,” “small
organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the
same meaning as the term “small business concern” under the Small Business Act. A “small business

17 See supra paras. 105-112.
18 Id.
19 See supra paras. 116-131.
23 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business
concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.\textsuperscript{24}

13. **Small Businesses, Small Organizations, Small Governmental Jurisdictions.** Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.\textsuperscript{25} First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.\textsuperscript{26} These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.\textsuperscript{27}

14. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”\textsuperscript{28} Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).\textsuperscript{29}

15. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”\textsuperscript{30} U.S. Census Bureau data from the 2012 Census of Governments\textsuperscript{31} indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.\textsuperscript{32} Of this number there were

(Continued from previous page)
37, 132 General purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000. Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”

16. **Wireless Telecommunications Carriers (except Satellite).** This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless Internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers are small.

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33 *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01. There were 2,114 county governments with populations less than 50,000.

34 *See* U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.


37 *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States-States - https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38,266 special district governments have populations of less than 50,000.

38 *Id.*


40 13 CFR § 121.201, NAICS Code 517210.


42 *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
carriers (except satellite) are small entities.

17. The Commission’s own data—available in its Universal Licensing System—indicate that, as of May 17, 2018, there are 264 Cellular licensees that will be affected by our actions.\textsuperscript{43} The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.\textsuperscript{44} Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.\textsuperscript{45} Thus, using available data, we estimate that the majority of wireless firms can be considered small.

18. \textbf{Personal Radio Services}. Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our rules.\textsuperscript{46} These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.\textsuperscript{47} There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA’s small entity size standard is defined as those entities employing 1,500 or fewer persons.\textsuperscript{48} For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.\textsuperscript{49} Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.\textsuperscript{50} Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. We note however that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

19. \textbf{Public Safety Radio Licensees}. Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency

\textsuperscript{43} See http://wireless.fcc.gov/uls. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.


\textsuperscript{45} See id.

\textsuperscript{46} 47 CFR Part 90.


\textsuperscript{48} 13 CFR § 121.201, NAICS Code 517312.


\textsuperscript{50} Id. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
medical services.\(^{51}\) Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.\(^{52}\) For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.\(^{53}\) Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.\(^{54}\) Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.\(^{55}\) There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.\(^{56}\) We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

20. **Private Land Mobile Radio Licensees.** Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications.\(^{57}\) The appropriate size standard for this category under SBA rules is that such a business

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\(^{51}\) See subparts A and B of Part 90 of the Commission’s Rules, 47 CFR §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

\(^{52}\) See 13 CFR § 121.201, NAICS Code 517210.


\(^{54}\) Id. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

\(^{55}\) This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

\(^{56}\) Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA—Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

is small if it has 1,500 or fewer employees.\textsuperscript{58} For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.\textsuperscript{59} Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.\textsuperscript{60} Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

21. According to the Commission’s records, a total of approximately 400,622 licenses comprise PLMR users.\textsuperscript{61} Of this number there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by the Third Report and Order.\textsuperscript{62} The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

22. \textit{Multiple Address Systems}. Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define “small entity” for MAS licensees as an entity that has average annual gross revenues of less than $15 million over the three previous calendar years.\textsuperscript{63} A “Very small business” is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than $3 million over the preceding three calendar years.\textsuperscript{64} The SBA has approved these definitions.\textsuperscript{65} The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications.

23. The Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission’s licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission’s licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS

\textsuperscript{58} See 13 CFR § 121.201, NAICS Code 517210.


\textsuperscript{60} Id. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

\textsuperscript{61} This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.

\textsuperscript{62} This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.


\textsuperscript{64} Id.

\textsuperscript{65} See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).
licenses in 176 EAs was conducted.\textsuperscript{66} Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

24. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission’s definition. The closest applicable definition of a small entity is the “Wireless Telecommunications Carriers (except Satellite)” definition under the SBA rules.\textsuperscript{67} The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.\textsuperscript{68} For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.\textsuperscript{69} Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1,000 employees or more.\textsuperscript{70} Thus under this category and the associated small business size standard, the Commission estimates that the majority of firms that may be affected by our action can be considered small.

25. \textit{Broadband Radio Service and Educational Broadband Service}. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high-speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).\textsuperscript{71}

26. \textit{BRS} - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.\textsuperscript{72} The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent

\textsuperscript{67} 13 CFR § 121.201, NAICS Code 517210.
\textsuperscript{68} Id.
\textsuperscript{70} Id. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
\textsuperscript{71} Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).
\textsuperscript{72} 47 CFR § 21.961(b)(1).
BRS licensees do not meet the small business size standard). After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules.

27. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

28. EBS - The Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA’s small business size standard for this category is all such firms having 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census Bureau data, the Commission’s Universal Licensing System indicates that as of October 2014, there are 2,206 active EBS licenses. The Commission estimates that of these 2,206 licenses, the majority are held by non-profit educational institutions.

73 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.


75 Id. at 8296 para. 73.


80 Id.
institutions and school districts, which are by statute defined as small businesses.\textsuperscript{81}

29. \textit{Location and Monitoring Service (LMS)}. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $15 million.\textsuperscript{82} A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $3 million.\textsuperscript{83} These definitions have been approved by the SBA.\textsuperscript{84} An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

30. \textit{Television Broadcasting}. This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”\textsuperscript{85} These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.\textsuperscript{86} These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.\textsuperscript{87} The 2012 Economic Census reports that 751 firms in this category operated in that year.\textsuperscript{88} Of that number, 656 had annual receipts of $25,000,000 or less, 25 had annual receipts between $25,000,000 and $49,999,999 and 70 had annual receipts of $50,000,000 or more.\textsuperscript{89} Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

31. The Commission has estimated the number of licensed commercial television stations to be 1,377.\textsuperscript{90} Of this total, 1,258 stations (or about 91 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384.\textsuperscript{91} Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how
many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations. Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

32. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations must be included. Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

33. Radio Stations. This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.” The SBA has established a small business size standard for this category as firms having $38.5 million or less in annual receipts. Economic Census data for 2012 show that 2,849 radio station firms operated during that year. Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more. Therefore, based on the SBA’s size standard the majority of such entities are small entities.

34. According to Commission staff review of the BIA/Kelsey, LLC’s Publications, Inc. Media Access Pro Radio Database (BIA) as of January 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of $38.5 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed commercial AM radio stations to be 4,633 stations and the number of commercial FM radio stations to be 6,738, for a total number of 11,371. We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128. Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

92 Id.
93 See 13 CFR § 21.103(a)(1) “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.”
95 13 CFR § 121.201, NAICS Code 515112.
97 Id.
100 Id.
35. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.\textsuperscript{101} The Commission’s estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a “small business,” an entity may not be dominant in its field of operation.\textsuperscript{102} We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

36. \textit{FM Translator Stations and Low Power FM Stations.} FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.\textsuperscript{103} This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.\textsuperscript{104} Programming may originate in their own studio, from an affiliated network, or from external sources.\textsuperscript{105} The SBA has established a small business size standard which consists of all radio stations whose annual receipts are $38.5 million dollars or less.\textsuperscript{106} U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.\textsuperscript{107} Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.\textsuperscript{108} Therefore, based on the SBA’s size standard, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

37. \textit{Multichannel Video Distribution and Data Service (MVDDS).} MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.\textsuperscript{109} These definitions were approved by the SBA.\textsuperscript{110} On January 27, 2004, the Commission

\textsuperscript{101} 13 CFR § 121.103(a)(1). “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both.”

\textsuperscript{102} 13 CFR § 121.102(b).


\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} 13 CFR § 121.201, NAICS code 515112.


\textsuperscript{108} Id.

\textsuperscript{109} Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers,
completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses. Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.

38. **Satellite Telecommunications.** This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.” Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules. For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than $25 million. Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

39. **All Other Telecommunications.** The “All Other Telecommunications” category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, U.S. Census data for 2012 show that there

(Continued from previous page)
were 1,442 firms that operated for the entire year.\textsuperscript{121} Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 42 firms had annual receipts of $25 million to $49,999,999.\textsuperscript{122} Thus, a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

40. \textit{Fixed Microwave Services}. Microwave services include common carrier,\textsuperscript{123} private-operational fixed,\textsuperscript{124} and broadcast auxiliary radio services.\textsuperscript{125} They also include the Local Multipoint Distribution Service (LMDS),\textsuperscript{126} the Digital Electronic Message Service (DEMS),\textsuperscript{127} the 39 GHz Service (39 GHz),\textsuperscript{128} the 24 GHz Service,\textsuperscript{129} and the Millimeter Wave Service\textsuperscript{130} where licensees can choose between common carrier and non-common carrier status.\textsuperscript{131} At present, there are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.\textsuperscript{132} The Commission has not yet defined a small business size standard for microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.\textsuperscript{133} U.S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year.\textsuperscript{134} Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

41. The Commission notes that the number of firms does not necessarily track the number of

\begin{itemize}
\item \textsuperscript{122} \textit{Id}.
\item \textsuperscript{123} See 47 CFR Part 101, Subpart I.
\item \textsuperscript{124} Persons eligible under parts 80 and 90 of the Commission’s rules can use Private-Operational Fixed Microwave services. See 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.
\item \textsuperscript{125} See 47 CFR Parts 74, 78 (governing Auxiliary Microwave Service) Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.
\item \textsuperscript{126} See 47 CFR §§ 101, 1001-101, 1017.
\item \textsuperscript{128} See 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).
\item \textsuperscript{129} See \textit{id}.
\item \textsuperscript{130} See 47 CFR §§ 101, 101.1501-101.1527.
\item \textsuperscript{131} See 47 CFR §§ 101.533, 101.1017.
\item \textsuperscript{132} These statistics are based on a review of the Universal Licensing System on September 22, 2015.
\item \textsuperscript{133} 13 CFR § 121.201.
\end{itemize}
licensees. The Commission also notes that it does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. The Commission estimates however, that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

42. Non-Licensee Owners of Towers and Other Infrastructure. Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission’s rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission’s Antenna Structure Registration (“ASR”) system and comply with applicable rules regarding review for impact on the environment and historic properties.

43. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a “Constructed” status and 13,987 registration records reflecting a “Granted, Not Constructed” status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.\footnote{We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.} Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category “Tower Owners.” Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

44. The closest applicable SBA category is All Other Telecommunications, and the appropriate size standard consists of all such firms with gross annual receipts of $32.5 million or less.\footnote{13 CFR § 121.201, NAICS Code 517919.} For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.\footnote{U.S. Census Bureau, 2012 Economic Census of the United States, Table EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012, NAICS code 517919, \url{https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~517919}.} Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 15 firms had annual receipts of $25 million to $49,999,999.\footnote{Id.} Thus, under this SBA size standard a majority of the firms potentially affected by our action can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

45. The \textit{Third Report and Order} does not establish any reporting, recordkeeping, or other
compliance requirements for companies involved in wireless infrastructure deployment. In addition to not adopting any reporting, recordkeeping or other compliance requirements, the Commission takes significant steps to reduce regulatory impediments to infrastructure deployment and, therefore, to spur the growth of personal wireless services. Under the Commission’s approach, small entities as well as large companies will be assured that their deployment requests will be acted upon within a reasonable period of time and, if their applications are not addressed within the established time frames, applicants may seek injunctive relief granting their siting applications. The Commission, therefore, has taken concrete steps to relieve companies of all sizes of uncertainly and has eliminated unnecessary delays.

46. The Third Report and Order also does not impose any reporting or recordkeeping requirements on state and local governments. While some commenters argue that additional shot clock classifications would make the siting process needlessly complex without any proven benefits, the Commission concludes that any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process. The Commission’s actions are consistent with the statutory language of Section 332 and therefore reflect Congressional intent. Further, siting agencies have become more efficient in processing siting applications and will be able to take advantage of these efficiencies in meeting the new shot clocks. As a result, the additional shot clocks that the Commission adopts will foster the deployment of the latest wireless technology and serve consumer interests.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

47. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”

48. The steps taken by the Commission in the Third Report and Order eliminate regulatory burdens for small entities as well as large companies that are involved with the deployment of person wireless services infrastructure. By establishing shot clocks and guidance on injunctive relief for personal wireless services infrastructure deployments, the Commission has standardized and streamlined the permitting process. These changes will significantly minimize the economic burden of the siting process on all entities, including small entities, involved in deploying personal wireless services infrastructure. The record shows that permitting delays imposes significant economic and financial burdens on companies with pending wireless infrastructure permits. Eliminating permitting delays will remove the associated cost burdens and enabling significant public interest benefits by speeding up the deployment of personal wireless services and infrastructure. In addition, siting agencies will be able to utilize the efficiencies that they have gained over the years processing siting applications to minimize financial impacts.

49. The Commission considered but did not adopt proposals by commenters to issue “Best Practices” or “Recommended Practices,” and to develop an informal dispute resolution process and

\[139 \text{ See supra para. 144.} \]
\[140 \text{ See supra para. 110.} \]
\[141 5 \text{ U.S.C. § 603(c)(1)-(4).} \]
\[142 \text{ KS Rep. Sloan Comments at 2; Nokia Comments at 10.} \]
mediation program,\textsuperscript{143} noting that the steps taken in the \textit{Third Report and Order} address the concerns underlying these proposals to facilitate cooperation between parties to reach mutually agreed upon solutions.\textsuperscript{144} The Commission anticipates that the changes it has made to the permitting process will provide significant efficiencies in the deployment of personal wireless services facilities and this in turn will benefit all companies, but particularly small entities, that may not have the resources and economies of scale of larger entities to navigate the permitting process. By adopting these changes, the Commission will continue to fulfill its statutory responsibilities, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of personal wireless services facilities and infrastructure across the country.

\textbf{Report to Congress}

\textsuperscript{50} The Commission will send a copy of the \textit{Third Report and Order}, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.\textsuperscript{145} In addition, the Commission will send a copy of the \textit{Third Report and Order}, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the \textit{Third Report and Order} and FRFA (or summaries thereof) also will be published in the \textit{Federal Register}.\textsuperscript{146}

\textsuperscript{143} NATOA \textit{et al.} Comments at 16-17.

\textsuperscript{144} See \textit{supra} para. 131.


\textsuperscript{146} 5 U.S.C. § 604(b).
STATEMENT OF
CHAIRMAN AJIT PAI

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

Perhaps the defining characteristic of the communications sector over the past decade is that the world is going wireless. The smartphone’s introduction in 2007 may have seemed an interesting novelty to some at the time, but it was a precursor of a transformative change in how consumers access and use the Internet. 4G LTE was a key driver in that change.

Today, a new transition is at hand as we enter the era of 5G. At the FCC, we’re working hard to ensure that the United States leads the world in developing this next generation of wireless connectivity so that American consumers and our nation’s economy enjoy the immense benefits that 5G will bring.

Spectrum policy of course features prominently in our 5G strategy. We’re pushing a lot more spectrum into the commercial marketplace. On November 14, for example, our 28 GHz band spectrum auction will begin, and after it ends, our 24 GHz band spectrum auction will start. And in 2019, we plan to auction off three additional spectrum bands.

But all the spectrum in the world won’t matter if we don’t have the infrastructure needed to carry 5G traffic. New physical infrastructure is vital for success here. That’s because 5G networks will depend less on a few large towers and more on numerous small cell deployments—deployments that for the most part don’t exist today.

But installing small cells isn’t easy, too often because of regulations. There are layers of (sometimes unnecessary and unreasonable) rules that can prevent widespread deployment. At the federal level, we acted earlier this year to modernize our regulations and make our own review process for wireless infrastructure 5G fast. And many states and localities have similarly taken positive steps to reform their own laws and increase the likelihood that their citizens will be able to benefit from 5G networks.

But as this Order makes clear, there are outliers that are unreasonably standing in the way of wireless infrastructure deployment. So today, we address regulatory barriers at the local level that are inconsistent with federal law. For instance, big-city taxes on 5G slow down deployment there and also jeopardize the construction of 5G networks in suburbs and rural America. So today, we find that all fees must be non-discriminatory and cost-based. And when a municipality fails to act promptly on applications, it can slow down deployment in many other localities. So we mandate shot clocks for local government review of small wireless infrastructure deployments.

I commend Commissioner Carr for his leadership in developing this Order. He worked closely with many state and local officials to understand their needs and to study the policies that have worked at the state and local level. It should therefore come as no surprise that this Order has won significant support from mayors, local officials, and state legislators.

To be sure, there are some local governments that don’t like this Order. They would like to continue extracting as much money as possible in fees from the private sector and forcing companies to navigate a maze of regulatory hurdles in order to deploy wireless infrastructure. But these actions are not only unlawful, they’re also short-sighted. They slow the construction of 5G networks and will delay if not prevent the benefits of 5G from reaching American consumers. And let’s also be clear about one thing: When you raise the cost of deploying wireless infrastructure, it is those who live in areas where the
investment case is the most marginal—rural areas or lower-income urban areas—who are most at risk of losing out. And I don’t want 5G to widen the digital divide; I want 5G to help close that divide.

In conclusion, I’d like to again thank Commissioner Carr for leading this effort and his staff for their diligent work. And I’m grateful to the hardworking staff across the agency who have put many hours into this Order. In particular, thanks to Jonathan Campbell, Stacy Ferraro, Garnet Hanly, Leon Jackler, Eli Johnson, Jonathan Lechter, Kate Matraves, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Dana Shaffer, Jiaming Shang, David Sieradzki, Michael Smith, Don Stockdale, Cecilia Sulhoff, Patrick Sun, Suzanne Tetreault, and Joseph Wyer from the Wireless Telecommunications Bureau; Matt Collins, Adam Copeland, Dan Kahn, Deborah Salons, and John Visclosky from the Wireline Competition Bureau; Chana Wilkerson from the Office of Communications Business Opportunities; and Ashley Boizelle, David Horowitz, Tom Johnson, Marcus Maher, Bill Richardson, and Anjali Singh from the Office of General Counsel.
STATEMENT OF
COMMISSIONER MICHAEL O’RIELLY

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

I enthusiastically support the intent of today’s item and the vast majority of its content, as it will lower the barriers that some localities place to infrastructure siting. By tackling exorbitant fees, ridiculous practices, and prolonged delays, we are taking the necessary steps to expedite deployment and make it more cost efficient. Collectively, these provisions will help facilitate the deployment of 5G and enable providers to expand services throughout our nation, with ultimate beneficiaries being the American people.

While this is a tremendous step in the right direction, there are some things that could have been done to improve the situation further. For instance, the agreement reached by all parties in the 1996 Telecommunications Act was that states and localities would have no role over radio frequency emission issues, could not regulate based on the aesthetics of towers and antennas, and were prohibited from imposing any moratoriums on processing wireless siting applications. State and localities did not honor this agreement and the courts have sadly enabled their efforts via harmful and wrongly decided cases. Accordingly, I would have preferred that the aesthetics related provisions in the item be deleted, but I will have to swallow it recognizing that I can’t get the rest without it. At the very least, I do appreciate that, at my request, it was clarified that the aesthetic requirements, which must be published in advance, must be objective.

I am also concerned that by setting application and recurring fees that are presumed to be reasonable, the Commission is inviting localities to adopt these rates, even if they are not cost based. Providers should be explicitly provided the right to challenge these rates if they believe they are not cost based. Even if not stated, I hope that providers will challenge unreasonable rates. I thank my colleagues for agreeing to my edits that the application fee presumption applies to all non-recurring costs, not just the application fee.

Further, I think there should be a process and standards in place if a locality decides that it needs more time to review batched applications. Objective criteria are needed regarding what are considered “exceptional circumstances” or “exceptional cases” warranting a longer review period for batch processing, when localities need to inform the applicant that they need more time, how this notification will occur, and how much time they will get. For instance, the item appears to excuse a locality that does not act within the shot clocks for any application if there are “extraordinary circumstances,” but there are no parameters on what circumstances we are envisioning. Is a lack of adequate staff or having processing rules or policies in place a sufficient excuse? Such things should be determined upfront, as opposed to allowing courts to decide such matters. Without further clarity, I fear that we may be creating unnecessary loopholes, resulting in further delay.

Finally, I would have liked today’s item to be broader and cover the remaining infrastructure issues in the record. First, the Commission’s new interpretation of sections 253 and 332 applies beyond small cells. While our focus has been on these newer technologies, there needs to be a recognition that macro towers will continue to play a crucial role in wireless networks. One tower provider states that “[m]acro cell sites will continue to be a central component of wireless infrastructure . . . ,” because 80 [percent] of the population lives in suburban or rural areas where “macro sites are the most efficient way
to transmit wireless signals.”¹ Further, many of the interpretations in today’s item apply not only to these macro towers, but also to other telecommunications services, including those provided by traditional wireline carriers and potentially cable companies.

Second, the Commission needs to close loopholes in section 6409 that some localities have been exploiting. While these rules pertaining to the modification of existing structures are clear, some localities are trying to undermine Congress’s intent and our actions. For instance, localities are refusing ancillary permissions, such as building or highway permits, to slow down or prevent siting; using the localities’ concealment and aesthetic additions to increase the size of the facility or requiring that poles be replaced with stealth infrastructure for the purpose of excluding facilities from section 6409; placing improper conditions on permits; and forcing providers to sign agreements that waive their rights under section 6409. And, I have been told that some are claiming that section 6409 does not apply to their siting processes. This must stop. I appreciate the Chairman’s firm commitment to my request for an additional item to address such matters, and I expect that it will be coming in the very near future.

Third, there is a need to harmonize our rules regarding compound expansion. Currently, an entity seeking to replace a structure is allowed to expand the facility’s footprint by 30 feet, but if the same entity seeks to expand the tower area to hold new equipment associated with a collocation, a new review is needed. It doesn’t make sense that these situations are treated differently. And while we are at it, the Commission should also harmonize its shot clocks and remedies. These issues should also be added to any future item.

Lastly, the Commission also must finish its review of the comments filed in response to the twilight towers notice, make the revisions to the program comment, and submit it to Advisory Council on Historic Preservation for their review and vote. These towers are eligible, yet not permitted, to hold an estimated 6,500 collocations that will be needed for next-generation services and FirstNet. It is time to bring this embarrassment, which started in 2001, to an end.

Not only do I thank the Chairman for agreeing to additional infrastructure items, but I also thank the Chairman and Commissioner Carr for implementing several of my edits to the item today. Besides those already mentioned, they include applying the aesthetic criteria, including that any requirements must be reasonable, objective, and published in advance, to undergrounding; stating that undergrounding requirements that apply to some, but not all facilities, will be considered an effective prohibition if they materially inhibit wireless service; and adding similar language to the minimum spacing section of the item. Further, the minimum spacing requirements will not apply to replacement facilities or prevent collocations on existing structures. Additionally, localities claiming that an application is incomplete will need to specifically state what rule requires the submission of the missing information.

With this, I approve.

STATEMENT OF COMMISSIONER BRENDAN CARR

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

The United States is on the cusp of a major upgrade in wireless technology to 5G. The WALL STREET JOURNAL has called it transformative from a technological and economic perspective. And they’re right. Winning the global race to 5G—seeing this new platform deployed in the U.S. first—is about economic leadership for the next decade. Those are the stakes, and here’s how we know it.

Think back ten years ago when we were on the cusp of upgrading from 3G to 4G. Think about the largest stocks and some of the biggest drivers of our economy. It was big banks and big oil. Fast forward to today: U.S.-based technology companies, from FAANG (Facebook, Apple, Amazon, Netflix, and Google) down to the latest startup, have transformed our economy and our lives.

Think about your own life. A decade ago, catching a ride across town involved calling a phone number, waiting 20 minutes for a cab to arrive, and paying rates that were inaccessible to many people. Today, we have Lyft, Uber, Via, and other options.

A decade ago, sending money meant going to a brick-and-mortar bank, standing in that rope line, getting frustrated when that pen leashed to the table was out of ink (again!), and ultimately conducting your transaction with a teller. Now, with Square, Venmo, and other apps you can send money or deposit checks from anywhere, 24 hours a day.

A decade ago, taking a road trip across the country meant walking into your local AAA office, telling them the stops along your way, and waiting for them to print out a TripTik booklet filled with maps that you would unfold as you drove down the highway. Now, with Google Maps and other apps you get real-time updates and directions right on your smartphone.

American companies led the way in developing these 4G innovations. But it’s not by chance or luck that the United States is the world’s tech and innovation hub. We have the strongest wireless economy in the world because we won the race to 4G. No country had faster 4G deployment and more intense investment than we did. Winning the race to 4G added $100 billion to our GDP. It led to $125 billion in revenue for U.S. companies that could have gone abroad. It grew wireless jobs in the U.S. by 84 percent. And our world-leading 4G networks now support today’s $950 billion app economy. That history should remind policymakers at all levels of government exactly what is at stake. 5G is about our leadership for the next decade.

And being first matters. It determines whether capital will flow here, whether innovators will start their new businesses here, and whether the economy that benefits is the one here. Or as Deloitte put it: “First-adopter countries . . . could sustain more than a decade of competitive advantage.”

We’re not the only country that wants to be first to 5G. One of our biggest competitors is China. They view 5G as a chance to flip the script. They want to lead the tech sector for the next decade. And they are moving aggressively to deploy the infrastructure needed for 5G.

Since 2015, China has deployed 350,000 cell sites. We’ve built fewer than 30,000. Right now, China is deploying 460 cell sites a day. That is twelve times our pace. We have to be honest about this infrastructure challenge. The time for empty statements about carrots and sticks is over. We need a concrete plan to close the gap with China and win the race to 5G.
We take this challenge seriously at the FCC. And we are getting the government out of the way, so that the private sector can invest and compete.

In March, we held that small cells should be treated differently than large, 200-foot towers. And we’re already seeing results. That decision cut $1.5 billion in red tape, and one provider reports that it is now clearing small cells for construction at six times the pace as before.

So we’re making progress in closing the infrastructure gap with China. But hurdles remain. We’ve heard from dozens of mayors, local officials, and state lawmakers who get what 5G means—they understand the economic opportunity that comes with it. But they worry that the billions in investment needed to deploy these networks will be consumed by the high fees and long delays imposed by big, “must-serve” cities. They worry that, without federal action, they may not see 5G. I’d like to read from a few of the many comments I’ve received over the last few months.

Duane Ankney is a retired coal miner from Montana with a handlebar mustache that would be the envy of nearly any hipster today. But more relevantly, he’s a Member of the Montana State Legislature and chairs its Energy and Telecommunications Committee. He writes: “Where I see the problem is, that most of investment capital is spent in the larger urban areas. This is primarily due to the high regulatory cost and the cost recovery [that] can be made in those areas. This leaves the rural areas out.”

Mary Whisenand, an Iowa commissioner, writes: “With 99 counties in Iowa, we understand the need to streamline the network buildout process so it’s not just the big cities that get 5G but also our small towns. If companies are tied up with delays and high fees, it’s going to take that much longer for each and every Iowan to see the next generation of connectivity.”

Ashton Hayward, the Mayor of Pensacola, Florida, writes: “[E]xcessive and arbitrary fees . . . result[,] in nothing more than telecom providers being required to spend limited investment dollars on fees as opposed to spending those limited resources on the type of high-speed infrastructure that is so important in our community.”

And the entire board of commissioners from a more rural area in Michigan writes: “Smaller communities such as those located in St. Clair County would benefit by having the [FCC] reduce the costly and unnecessary fees that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage. By making small cell deployment less expensive, the FCC will send a clear message that all communities, regardless of size, should share in the benefits of this crucial new technology.”

They’re right. When I think about success—when I think about winning the race to 5G—the finish line is not the moment we see next-gen deployments in New York or San Francisco. Success can only be achieved when all Americans, no matter where they live, have a fair shot at fast, affordable broadband.

So today, we build on the smart infrastructure policies championed by state and local leaders. We ensure that no city is subsidizing 5G. We prevent excessive fees that would threaten 5G deployment. And we update our shot clocks to account for new small cell deployments. I want to thank Commissioner Rosenworcel for improving the new shot clocks with edits that protect municipalities from providers that submit incomplete applications and provide localities with more time to adjust their operations. Her ideas improved this portion of the order.

More broadly, our decision today has benefited from the diverse views expressed by a range of stakeholders. On the local government side, I met with mayors, city planners, and other officials in their home communities and learned from their perspectives. They pushed back on the proposed “deemed
granted” remedy, on regulating rents on their property outside of rights-of-way, and on limits to reasonable aesthetic reviews. They reminded me that they’re the ones that get pulled aside at the grocery store when an unsightly small cell goes up. Their views carried the day on all of those points. And our approach respects the compromises reached in state legislatures around the country by not preempting nearly any of the provisions in the 20 state level small cells bills.

This is a balanced approach that will help speed the deployment of 5G. Right now, there is a cottage industry of consultants spurring lawsuits and disputes in courtrooms and city halls around the country over the scope of Sections 253 and 332. With this decision, we provide clear and updated guidance, which will eliminate the uncertainty inspiring much of that litigation.

Some have also argued that we unduly limit local aesthetic reviews. But allowing reasonable aesthetic reviews—and thus only preventing unreasonable ones—does not strike me as a claim worth lodging.

And some have asked whether this reform will make a real difference in speeding 5G deployment and closing the digital divide. The answer is yes. It will cut $2 billion in red tape. That’s about $8,000 in savings per small cell. Cutting these costs changes the prospects for communities that might otherwise get left behind. It will stimulate $2.4 billion in new small cell deployments. That will cover 1.8 million more homes and businesses—97% of which are in rural and suburban communities. That is more broadband for more Americans.

* * *

In closing, I want to thank my colleagues for working to put these ideas in place. I want to thank Chairman Pai for his leadership in removing these regulatory barriers. And I want to recognize the exceptionally hard-working team at the FCC that helped lead this effort, including, in the Wireless Telecommunications Bureau, Donald Stockdale, Suzanne Tetrault, Garnet Hanly, Jonathan Campbell, Stacy Ferraro, Leon Jackler, Eli Johnson, Jonathan Lechter, Marcus Maher, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Jiaming Shang, and David Sieradzki. I also want to thank the team in the Office of General Counsel, including Tom Johnson, Ashley Boizelle, Bill Richardson, and Anjali Singh.
STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART

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

A few years ago, in a speech at a University of Colorado event, I called on the Federal Communications Commission to start a proceeding on wireless infrastructure reform. I suggested that if we want broad economic growth and widespread mobile opportunity, we need to avoid unnecessary delays in the state and local approval process. That’s because they can slow deployment.

I believed that then. I still believe it now.

So when the FCC kicked off a rulemaking on wireless infrastructure last year, I had hopes. I hoped we could provide a way to encourage streamlined service deployment nationwide. I hoped we could acknowledge that we have a long tradition of local control in this country but also recognize more uniform policies across the country will help us in the global race to build the next generation of wireless service, known as 5G. Above all, I hoped we could speed infrastructure deployment by recognizing the best way to do so is to treat cities and states as our partners.

In one respect, today’s order is consistent with that vision. We shorten the time frames permitted under the law for state and local review of the deployment of small cells—an essential part of 5G networks. I think this is the right thing to do because the shot clocks we have now were designed in an earlier era for much bigger wireless facilities. At the same time, we retain the right of state and local authorities to pursue court remedies under Section 332 of the Communications Act. This strikes an appropriate balance. I appreciate that my colleagues were willing to work with me to ensure that localities have time to update their processes to accommodate these new deadlines and that they are not unfairly prejudiced by incomplete applications. I support this aspect of today’s order.

But in the remainder of this decision, my hopes did not pan out. Instead of working with our state and local partners to speed the way to 5G deployment, we cut them out. We tell them that going forward Washington will make choices for them—about which fees are permissible and which are not, about what aesthetic choices are viable and which are not, with complete disregard for the fact that these infrastructure decisions do not work the same in New York, New York and New York, Iowa. So it comes down to this: three unelected officials on this dais are telling state and local leaders all across the country what they can and cannot do in their own backyards. This is extraordinary federal overreach.

I do not believe the law permits Washington to run roughshod over state and local authority like this and I worry the litigation that follows will only slow our 5G future. For starters, the Tenth Amendment reserves powers to the states that are not expressly granted to the federal government. In other words, the constitution sets up a system of dual sovereignty that informs all of our laws. To this end, Section 253 balances the interests of state and local authorities with this agency’s responsibility to expand the reach of communications service. While Section 253(a) is concerned with state and local requirements that may prohibit or effectively prohibit service, Section 253(d) permits preemption only on a case-by-case basis after notice and comment. We do not do that here. Moreover, the assertion that fees above cost or local aesthetic requirements in a single city are tantamount to a service prohibition elsewhere stretches the statute beyond what Congress intended and legal precedent affords.

In addition, this decision irresponsibly interferes with existing agreements and ongoing deployment across the country. There are thousands of cities and towns with agreements for infrastructure deployment—including 5G wireless facilities—that were negotiated in good faith. So
many of them could be torn apart by our actions here. If we want to encourage investment, upending commitments made in binding contracts is a curious way to go.

Take San Jose, California. Earlier this year it entered into agreements with three providers for the largest small cell-driven broadband deployment of any city in the United States. These partnerships would lead to 4,000 small cells on city-owned light poles and more than $500 million of private sector investment. Or take Little Rock, Arkansas, where local reforms to the permitting process have put it on course to become one of the first cities to benefit from 5G service. Or take Troy, Ohio. This town of under 26,000 spent time and energy to develop streamlined procedures to govern the placement, installation, and maintenance of small cell facilities in the community. Or take Austin, Texas. It has been experimenting with smart city initiatives to improve transportation and housing availability. As part of this broader effort, it started a pilot project to deploy small cells and has secured agreements with multiple providers.

This declaratory ruling has the power to undermine these agreements—and countless more just like them. In fact, too many municipalities to count—from Omaha to Overland Park, Cincinnati to Chicago and Los Angeles to Louisville—have called on the FCC to halt this federal invasion of local authority. The National Governors Association and National Conference of State Legislatures have asked us to stop before doing this damage. This sentiment is shared by the United States Conference of Mayors, National League of Cities, National Association of Counties, and Government Finance Officers Association. In other words, every major state and municipal organization has expressed concern about how Washington is seeking to assert national control over local infrastructure choices and stripping local elected officials and the citizens they represent of a voice in the process.

Yet cities and states are told to not worry because with these national policies wireless providers will save as much as $2 billion in costs which will spur deployment in rural areas. But comb through the text of this decision. You will not find a single commitment made to providing more service in remote communities. Look for any statements made to Wall Street. Not one wireless carrier has said that this action will result in a change in its capital expenditures in rural areas. As Ronald Reagan famously said, “trust but verify.” You can try to find it here, but there is no verification. That’s because the hard economics of rural deployment do not change with this decision. Moreover, the asserted $2 billion in cost savings represents no more than 1 percent of investment needed for next-generation networks.

It didn’t have to be this way. So let me offer three ideas to consider going forward.

First, we need to acknowledge we have a history of local control in this country but also recognize that more uniform policies can help us be first to the future. Here’s an idea: Let’s flip the script and build a new framework. We can start with developing model codes for small cell and 5G deployment—but we need to make sure they are supported by a wide range of industry and state and local officials. Then we need to review every policy and program—from universal service to grants and low-cost loans at the Department of Commerce, Department of Agriculture, and Department of Transportation and build in incentives to use these models. In the process, we can create a more common set of practices nationwide. But to do so, we would use carrots instead of sticks.

Second, this agency needs to own up to the impact of our trade policies on 5G deployment. In this decision we go on at length about the cost of local review but are eerily silent when it comes to the consequences of new national tariffs on network deployment. As a result of our escalating trade war with China, by the end of this year we will have a 25 percent duty on antennas, switches, and routers—the essential network facilities needed for 5G deployment. That’s a real cost and there is no doubt it will diminish our ability to lead the world in the deployment of 5G.
Finally, in this decision the FCC treats the challenge of small cell deployment with a bias toward more regulation from Washington rather than more creative marketplace solutions. But what if instead we focused our efforts on correcting the market failure at issue? What if instead of micromanaging costs we fostered competition? One innovative way to do this involves dusting off our 20-year old over-the-air-reception-device rules, or OTARD rules.

Let me explain. The FCC’s OTARD rules were designed to protect homeowners and renters from laws that restricted their ability to set up television and broadcast antennas on private property. In most cases they accomplished this by providing a right to install equipment on property you control—and this equipment for video reception was roughly the size of a pizza box.

Today OTARD rules do not contemplate 5G deployment and small cells. But we could change that by clarifying our rules. If we did, a lot of benefits would follow. By creating more siting options for small cells, we would put competitive pressure on public rights-of-way, which could bring down fees through competition instead of the government ratemaking my colleagues offer here. Moreover, this approach would create more opportunities for rural deployment by giving providers more siting and backhaul options and creating new use cases for signal boosters. Add this up and you get more competitive, more ubiquitous, and less costly 5G deployment.

We don’t explore these market-based alternatives in today’s decision. We don’t say a thing about the real costs that tariffs impose on our efforts at 5G leadership. And we don’t consider creative incentive-based systems to foster deployment, especially in rural areas.

But above all we neglect the opportunity to recognize what is fundamental: if we want to speed the way for 5G service we need to work with cities and states across the country because they are our partners. For this reason, in critical part, I dissent.
Wireless Communication Facilities
Design Guidelines & Standards
April 15, 2019
Introduction

The wireless communication facilities design guidelines and standards are intended to clarify the aesthetic and public safety goals and standards as provided in Chapter 18.205 ‘Wireless Communication Facilities for New and Substantially Changed Wireless Facilities’ and Chapter 18.207 ‘Wireless Communication Facilities for Eligible Facilities Requests’ in the Concord Municipal Code. In addition to the development standards and requirements in the Municipal Code, all new wireless facilities and collocations, modifications, or other changes to existing wireless communication facilities that require City approval must conform to the design guidelines.

In order to avoid or remedy the public harm caused by unsightly or out-of-character wireless deployments in the City, these guidelines prescribe clear, reasonable, and predictable criteria to assess and process applications in a consistent and expeditious manner. The design guidelines also provide standards for a degree of uniformity and consistency to conceal and minimize the visual impacts of the wireless communication facilities throughout Concord to maintain the aesthetic quality of the site and the surrounding area, to the extent feasible. Applications shall be reviewed based on the best siting, design, equipment, and construction methods and the smallest and least intrusive antennas, components and other necessary equipment available.

Checklists and handouts prepared by staff to facilitate implementation shall be consistent with these requirements.
Freestanding Wireless Communication Facilities on Private Property

a. **Tower-Mounted Equipment.** All tower-mounted equipment must be mounted as close to the vertical support structure as possible to reduce its overall visual profile. Applicants must mount non-antenna, tower-mounted equipment (including, but not limited to, remote radio units/heads, surge suppressors and utility demarcation boxes) directly behind the antennas to the maximum extent feasible. All tower-mounted equipment, cables and hardware shall have a non-reflective finish and shall be painted or otherwise treated to minimize visual impacts and blend with the existing environment.

b. **Ground-Mounted Equipment; Shelters.** All ground-mounted equipment must be concealed underground or within an existing or new structure, opaque fences or other enclosures subject to the approval authority’s prior approval. The approval authority may require additional concealment elements as the approval authority finds necessary to blend the ground-mounted equipment and other improvements into the natural and/or built environment.

Building-Mounted Wireless Communication Facilities on Private Property

a. **Preferred Concealment Techniques.** All applicants should, to the extent feasible, propose new non-tower wireless facilities that are completely concealed and architecturally integrated into the existing facade or rooftop features with no visible impacts from any publicly accessible areas at ground level (examples include, but are not limited to, antennas behind existing parapet walls or facades replaced with RF-transparent material and finished to mimic the replaced materials). Alternatively, when integration with existing building features is not feasible, the applicant should propose completely concealed new structures or appurtenances designed to mimic the support structure’s original architecture and proportions. Facilities must be located behind existing parapet walls or other existing screening elements to the maximum extent feasible.
Facade-Mounted Equipment. When wireless communication facilities cannot be placed behind existing parapet walls or other existing screening elements, the approval authority may approve facade-mounted equipment in accordance with this guideline. All facade-mounted equipment must be concealed behind screen walls and mounted as flush to the facade as practicable. The approval authority may not approve “pop-out” screen boxes unless the design is architecturally consistent with the original building or support structure.

b. Rooftop-Mounted Equipment. All rooftop-mounted equipment must be screened from public view with concealment measures that match the underlying structure in proportion, quality, architectural style, and finish. The approval authority may approve unscreened rooftop equipment only when it expressly finds that such equipment is effectively concealed due to its low height and/or setback from the roofline.

c. Ground-Mounted Equipment; Shelters. All ground-mounted equipment must be concealed underground or within an existing or new structure, opaque fences, building interior equipment room, or other enclosures subject to the approval authority’s prior approval. The approval authority may require additional concealment elements as the approval authority finds necessary to blend the ground-mounted equipment and other improvements into the natural and/or built environment.
Right-of-Way Wireless Communication Facilities

a. **Existing Support Structures.** All wireless communication facilities in the public right-of-way must be installed on existing above-ground structures (such as light standards or utility poles) whenever possible.

1. **Traffic Signals.** The approval authority shall not approve any wireless facility proposed to be installed on a traffic control pole unless the Transportation Manager finds, in consultation with other City departments or divisions or outside agencies, that the traffic control pole has sufficient capacity to support the wireless facility.

2. **Decorative Poles.** Wireless communications facilities shall not be attached to or installed on decorative poles. Decorative poles may be replaced as provided in these guidelines.

b. **Replacement Support Structures.** Existing above-ground structures may be replaced with structurally hardened, fitted or reinforced support structures so long as the replacement structure is, in the approval authority’s discretion, substantially similar to the existing structure to be replaced.

c. **New Support Structures.** The approval authority shall not approve any new, non-replacement support structures unless: (i) the applicant demonstrates that above-ground support structures within the intended service area either do not exist or are not potentially available to the applicant; or (ii) the approval authority specifically finds that a new, non-replacement support structure would be more aesthetically desirable and consistent with the objectives in this section than installations on existing structures near the project site. The approval authority shall have the discretion to require that any new support structure must be a streetlight that conforms to the City’s streetlight standards and specifications, which the City shall maintain for street illumination and public safety purposes.

d. **Undergrounded Equipment.** To conceal the equipment to the maximum degree feasible, wireless providers must install all equipment (other than the antenna and any electric meter)
underground in any area in which the existing utilities are primarily located underground. In all other areas, applicants shall install all equipment (other than the antenna and any electric meter) underground when the approval authority finds that the above-ground equipment would unreasonably interfere with the public’s ability to use the right-of-way for uses that include without limitation travel, social, expressive and/or aesthetic uses. When making a determination on whether to require undergrounded equipment, the approval authority shall take into account the presence of existing above-ground utilities. Mere additional expense to install and maintain an underground equipment enclosure does not exempt an applicant from this requirement. If an applicant proposes to install a facility in an area in which the existing utilities are primarily located underground, the approval authority shall have the discretion to require that the applicant install a new streetlight that conforms to the City’s streetlight standards and specifications as the facility support structure.
e. **Pole-Mounted Equipment.** All pole-mounted equipment must be installed flush to the pole to minimize the overall visual profile. If any applicable health and safety regulations prohibit flush-mounted equipment, the maximum separation between the equipment and the pole shall be the minimum separation required by such regulations. All pole-mounted equipment and permitted signage must face toward the street or otherwise placed to minimize visibility from adjacent sidewalks and structures to the extent feasible. All cables, wires and other connectors must be routed through conduits within the pole whenever possible, and all conduit attachments, cables, wires and other connectors must be concealed from public view to the extent feasible. All pole-mounted equipment, cables and hardware shall have a non-reflective finish and shall be painted or otherwise treated to minimize visual impacts and blend with the existing environment.

f. **Ground-Mounted Equipment.** To the extent that the equipment cannot be placed underground as required, applicants may be permitted to install ground-mounted equipment in a location that does not obstruct pedestrian or vehicular traffic or access to the public rights-of-way. All ground-mounted equipment must be placed in the least conspicuous location available within a reasonable distance from the pole. The approval authority may impose conditions of approval on new or enhanced landscaping to conceal ground-mounted equipment. Any ground-mounted equipment, cables and hardware shall have a non-reflective finish and shall be painted or otherwise treated to minimize visual impacts and blend with the existing environment. The approval authority shall not approve a ground-mounted electric meter pedestal or other ground-mounted electric meter enclosure where the ability to underground is possible to the extent feasible.

g. **Antenna Volume.** Each antenna associated with a wireless facility in the public rights-of-way shall not exceed three (3) cubic feet in volume, and the cumulative volume for all antennas associated with a wireless facility in the public rights-of-way shall not exceed six (6) cubic feet in total volume. For the purposes in this Section D.3.g, “volume” shall include any shroud, radome, or other concealment device used in connection with the antenna.

h. **Accessory Equipment Volume.** The cumulative volume for all non-antenna accessory equipment associated with a wireless
communication facility in the public rights-of-way shall not exceed nine and one-half (9.5) cubic feet. For the purposes in this Section D.3.h, “volume” shall include any shroud, cabinet, housing or other concealment device used in connection with the accessory equipment, but shall not include any equipment or other improvements installed below ground level or any cables or connectors placed within the pole or other support structure.

i. **Illustrative Examples.** The following photographs depict wireless communication facility designs that the City may deem appropriate in preferred locations. These examples are illustrative only, and may not be appropriate in all cases.
Small cell equipment