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

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| IN THE MATTER OF | ) | |
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| Implementation of State and Local Governments | ) | WT Docket No. 19-250 |
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| Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | RM-11849 |
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**JOINT COMMENTS OF CITY OF SAN DIEGO, CAL.; CITY OF BEAVERTON, OR.; CITY OF CARLSBAD, CAL.; CITY OF CERRITOS, CAL.; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; CITY OF CORONADO, CAL.; TOWN OF DANVILLE, CAL.; CITY OF ENCINITAS, CAL.; CITY OF GLENDORA, CAL.; CITY OF LA MESA, CAL.; CITY OF LAWNDALE, CAL.; LEAGUE OF OREGON CITIES; LEAGUE OF CALIFORNIA CITIES; CITY OF NAPA, CAL.; CITY OF OXNARD, CAL.; CITY OF PLEASANTON, CAL.; CITY OF RANCHO PALOS VERDES, CAL.; CITY OF RICHMOND, CAL.; TOWN OF SAN ANSELMO, CAL.; CITY OF SAN MARCOS, CAL.; CITY OF SAN RAMON, CAL.; CITY OF SANTA CRUZ, CAL.; CITY OF SANTA MONICA, CAL.; CITY OF SOLANA BEACH CAL.; CITY OF SOUTH LAKE TAHOE, CAL.; CITY OF THOUSAND OAKS, CAL.; CITY OF TUMWATER, WASH.**

**Comment Date: July 22, 2020**

## TABLE OF CONTENTS

## INTRODUCTION AND SUMMARY

Ambiguous proposals and even more vague alternatives in the Notice of Proposed Rulemaking[1] underscore the degree to which the Commission's approach to Section 6409 appears to have lost the forest for the trees. Zealous focus on accelerated infrastructure deployment (a worthy pursuit in the abstract) seems to have separated the Commission's goals from the plain language in the statute (an objectively bad outcome).

Section 6409 concerns changes that add, remove or replace transmission equipment on "an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[2] Nothing in the statute remotely suggests that Congress contemplated a right to change or expand anything other than the transmission equipment on the tower or base station itself. Yet this is the NPRM's core subject matter—tweaks and tinkers to the Commission's rules intended to create new ground space that is not "existing" within the meaning of the statute.[3]

Western Communities Coalition respectfully offers these comments, limited as they may be by the opacities in the proposed rule changes and unusually short comment cycle, in response to the NPRM. In short:

- The Commission should not adopt the proposed changes or the alternatives because such changes are not needed, not justified by the statute or both.

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[1] *In re Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling and Notice of Proposed Rulemaking, WT Docket No. 19-250 and RM-11849, FCC 20-75 (released Jun. 10, 2020) [hereinafter "NPRM"].
[2] 47 U.S.C. §§ 1455(a)(1)-(2).
[3] *See* NPRM at ¶ 54.

- If the Commission nevertheless desires to pursue these or similar changes, it should issue a more focused and concrete proposal to provide the public with fair notice about its intended changes.

- Finally, if the Commission elects to act without fair notice to the public, it should incorporate the clarifications and limitations listed in these comments to avoid unintended conflicts with law and other bad outcomes.

Our members appreciate the opportunity to provide the Commission with these comments. Collocations not only provide carriers with a platform from which to provide their services but also play an important role in local efforts to preserve community aesthetics. Western Communities Coalition looks forward to further opportunities to provide insights from a state and local government perspective on the Commission's efforts to evaluate its Section 6409 rules.

## COMMENTS

### I. THE NPRM FAILS TO PROVIDE THE PUBLIC WITH FAIR NOTICE ABOUT THE COMMISSION'S INTENDED ACTION OR ACTIONS

As a threshold matter, these comments will be limited because the NPRM contains no proposed text amendments and further fails to explain which wireless facilities would be covered by the proposed rule change or its alternatives.[4]

> Notice of the agency's intention is crucial to "ensure that agency regulations are tested via exposure to diverse public comment, . . . to ensure fairness to affected parties, and . . . to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[5]

Failure to provide fair notice is fatal to the final rule.

Here, the Commission's NPRM fails to provide fair notice because it explains which, but not how, rules or their impacts on different facility classifications might be altered. To be sure, the NPRM manifests intent to change Sections 1.6100(b)(6) and (b)(7)(iv).[6] Yet reference to these sections cannot provide fair notice because they each have applicability to "towers outside the public rights-of-way" and "other eligible support structures".[7] The NPRM offers neither any proposed text amendments to these regulations nor clearly explains whether these changes would impact solely "towers outside the public rights-of-way" or also extend to "other eligible support structures".

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[4] *See* 5 U.S.C. 706.
[5] *Int'l Union, United Mine Workers v. Mine Safety and Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010) (quoting *Int'l Union, United Mine Workers v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)).
[6] *See* NPRM at ¶ 54.
[7] *See* 47 C.F.R. §§ 1.6100(b)(6), (b)(7)(iv).

Similarly, the NPRM appears to authorize expansions up to 30 feet from the current "site" but it does not explain whether this change would be limited to the facilities impacted by the change in Section 1.6100(b)(6).[8] Whereas WIA's proposal refers to "leased or owned property surrounding the *tower*," the NPRM merely refers to Section 1.6100(b)(7)(iv), which applies to both towers outside the public rights-of-way and other eligible support structures.[9]

The reference to "macro tower compounds" within the NPRM does not resolve the ambiguities.[10] Neither the Commission's rules nor the NPRM define this phrase and, as explained in Part II.A, the phrase "macro tower compound" does not necessarily restrict itself to towers outside the public rights-of-way. Moreover, the NPRM uses this phrase to describe *WIA's* requested rule change and not in the *Commission's* proposed rule change.[11] Thus, even if the public knew what the Commission understood this phrase to mean, the NPRM does not use this phrase in a manner helpful to understand whether it affects the proposed rules or alternatives.

Alternatives to the primary proposal also do not provide the public with a fair opportunity to know what the Commission intends. Alternatives to this proposal borrow ambiguity from the Commission's proposed rule change in some respects and compound the problem with additional uncertainties in others.

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[8] *See* NPRM at ¶ 54.
[9] *Compare id.* at ¶ 53, *with id.* at ¶¶ 55-56.
[10] *See id.* at ¶ 53.
[11] *Compare id.* at ¶ 53, *with id.* at ¶ 55.

The first alternative inherits its ambiguity from the vagueness in the core proposal. The NPRM describes this alternative merely as a proposal "to revise the definition of site in Section 1.6100(b)(6), *as proposed above*, without making the proposed change to Section 1.6100(b)(7)(iv) . . . ."[12] Although the first alternative differs from the primary proposal, it does not resolve the ambiguity as to whether or how these changes would affect the various eligible support structure classifications. The first alternative is as ambiguous as the rule change "proposed above."

Under the second alternative, the NPRM suggests the Commission might fix the site boundaries by those "related to the site *as of the date an applicant submits a modification request*" but omits any reference to whether this would include or exclude "the proposed change to Section 1.6100(b)(7)(iv)" mentioned in the first alternative.[13] Based on the Commission's apparent interest in changes to Section 1.6100(b)(6) with or without changes to Section 1.6100(b)(7)(iv), the omission cannot be interpreted one way or the other.

The Commission's approach in this NPRM stands in stark contrast to its approach in the recent pole attachment proceeding.[14] There, the Commission proposed to adopt new make-ready procedures for utility pole attachments and provided the complete rules for notice and comment. This approach offered a

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[12] NPRM at ¶ 56 (emphasis added).
[13] *Id*.
[14] *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 FCC Rcd 3266, 3309 at Appendix A (Apr. 20, 2017) (providing the full text of amendments to the Commission's utility pole attachment and service discontinuance rules).

definitive rule statement in context with related make-ready regulations that clearly demonstrated the Commission's intention.

Publishing the full text for codified rules serves other important interpretive functions. Grammar and punctuation matter in codified rules, which carry the force of law and are often interpreted in accordance with the cannons of statutory interpretation. By depriving the public an opportunity to view the full text of the rule, the Commission effectively prohibits interested parties from providing insight on how stakeholders, lawyers and courts might interpret the rule in a dispute. Moreover, the Commission's rule changes involve important issues of federal preemption that warrant due consideration.

Notice defects imperil not only any final rule's validity, but also limit the Commission's ability to fully consider all the relevant issues. The unusually short comment and reply cycles only underscore the need for the Commission to clearly explain its intentions.[15] Accordingly, the Commission should not act until it resolves the ambiguities in the NPRM and provides the public with a fair opportunity to know the Commission's intention and contribute to the record.

## II. RESPONSES TO NPRM PROPOSALS, QUESTIONS AND RELATED ISSUES

Notwithstanding the NPRM's ambiguities, it does float a few conceptual proposals and poses some general questions. Although the NPRM does not reveal

[15] Western Communities Coalition does not intend this criticism to be taken as a request for an extension on the comment period. Such a request would be procedurally improper in these comments and likely fruitless because additional time would not make the ambiguities in the NPRM any clearer. However, Western Communities Coalition notes that this NPRM echoes the circumstances in *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011), where the court invalidated the final rules after Commission sought public comment on general questions about changes to its media cross-ownership rules under an irregular comment period.

how these concepts would be implemented, either alone or in combination with each other, this section responds to those individual proposals and questions, and comments on related issues.

### A. The Commission's Reference to "Macro Tower Compounds" Creates Confusion and Ambiguity

The NPRM appears to suggest that various rule changes might be limited to "macro tower compounds".[16] However, nothing in the NPRM or other Commission's other rules defines a "macro tower compound."[17] This section explains the ambiguity in this phrase and, to the extent that the Commission intends to use this phrase in its rules, offers a definition and disqualifying criteria.

The words themselves in the phrase *macro tower compound* may exclude base stations but do not limit the proposals to towers outside the public rights-of-way.[18] As illustrated in prior filings, some so-called "small cells" in the public rights-of-way can be 100 feet or taller and intended solely or primarily as support structures for Commission-licensed or authorized transmission equipment.[19]

Indeed, some coalition members need not look far to find large tower compounds within the public rights-of-way. Some examples include the stealth-

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[16] *See supra* Part I.
[17] NPRM at ¶¶ 2, 53, Appendix B at ¶ 43.
[18] *See* 47 C.F.R. § 1.6100(b)(1) (defining base station and noting that "[t]he term does not encompass a tower").
[19] *See* Joint Comments of League of Ariz. Cities and Towns, *et al.*, *In re Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices*, WT Docket No. 16-421 at 14-16, 20-21 (Mar. 8, 2017); Joint Reply Comments of League of Ariz. Cities and Towns, et al., *In re Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices*, WT Docket No. 16-421 at 3 n.9 (Apr. 7, 2017); Ernest Worthman, *Mini-cell Towers Shouldn't Be Passed as Small Cells*, AGL (Aug. 30, 2016), *available at*: http://www.aglmediagroup.com/mini-cell-towers-shouldnt-be-passed-as-small-cells/.

designed monopine behind a fenced compound within CalTrans rights-of-way between Interstates 10 and 405 in West Los Angeles.

**Figure 1:** "Macro tower compound" within CalTrans public rights-of-way near the Interstate 10 and 405 intersection. Dr. Jonathan L. Kramer, *Can a Faux Monopine Have a Faux Disease?*, CELLTOWERPHOTOS (last visited Jul. 11, 2020), http://celltowerphotos.com/displayimage.php?album=search&cat=0&pid=1152#top_display_media.

Or the stealth-designed monopalm with its ground equipment concealed behind a concrete wall and landscape features within the large median on CalTrans right-of-way near North Sepulveda Boulevard and Skirball Center Road.


**Figure 2:** "Macro tower compound" within CalTrans public rights-of-way near the North Sepulveda Boulevard and Skirball Center Road intersection. *See 4G99+83 Los Angeles, California*, GOOGLE MAPS (last visited Jul. 12, 2020).

These facilities in the public rights-of-way bear the hall marks normally associated with "macro tower compounds"—tall, freestanding structures within a fenced/walled enclosure. Yet the ambiguities in the NPRM make it impossible to know whether these facilities would be covered by the proposed rule change or its alternatives.

Based on the words in the phrase, Western Communities Coalition assumes that a "macro tower compound" means a large facility (rather than a small wireless facility) and a tower (rather than a base station) on private property. "Macro" means "large, thick, or exceptionally prominent."[20] "Macro" may also refer to the

[20] *Macro*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/macro (last visited Jul. 22, 2020); NEWTON'S TELECOM DICTIONARY 737 (27th ed. 2013) ("Macro means very big"); FRED HOPENGARTEN, ANTENNA ZONING 57 (2009) ("[W]hen people hear the word *tower*, they think a heavy steel cellular or microwave lattice tower . . . ." (emphasis in original)).

coverage area size, which is usually several hundred meters or more and associated with large equipment on tall towers.[21] As used in the Commission's other rules, "tower" means a structure primarily intended to support Commission-licensed or authorized transmission equipment.[22] With some exceptions, as noted above, large towers appear almost exclusively on private property.[23] "Compound" refers to "a fenced or walled-in area containing a group of buildings."[24] Taken together, the words in this phrase most naturally refer to large, freestanding wireless towers within a fenced/walled enclosure outside the public rights-of-way.

Accordingly, to the extent that the Commission intends to use this phrase in its Section 6409 regulations, the phrase "macro tower compound" should be limited to "towers outside the public rights-of-way" and exclude any (1) "small wireless facility" as defined by the Commission in 47 C.F.R. § 1.6002(l); (2) "base station" as defined by the Commission in 47 C.F.R. § 1.6100(b)(1); and (3) wireless facility located within the public rights-of-way.

### B. The "Current Site" Boundaries Should be Based on the Last Local Approval and Subject to Specific Limitations

Western Communities Coalition does not fundamentally oppose a definition for "site" that sets the boundaries by reference to the last regulatory approval

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[21] *See* PAUL BEDELL, WIRELESS CRASH COURSE 47 (2nd ed. 2005).
[22] *See* 47 C.F.R. § 1.6100(b)(9).
[23] *See, e.g.*, BEDELL, supra note 21 at 92 ("Towers are only deployed on *raw land* cell sites" (emphasis in original)); *id.* at 29 (defining "raw land sites" as those where "[w]ireless carriers purchase or lease new land, build a tower and install equipment, and then turn up the base station" and distinguishing them from rooftop sites or water tank sites); *Property Evaluation Guidelines*, SPRINT, https://www.sprintsitesusa.com/links/cellsite1 (last visited Jul. 22, 2020) (describing general criteria for "tower sites" on private property).
[24] *Compound*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/compound (last visited Jul. 22, 2020).

issued by the local government. That said, our members do not perceive any need to impose this definition as it captures the generally accepted practice.

If the Commission decides to issue further guidance on this point, Western Communities Coalition presumes that this proposal would be subject to the same interpretive limitations applied to other Section 6409 regulations through the *2014 Infrastructure Order*. For clarity, the following identifies some specific limitations that should be acknowledged if the Commission adopts this proposal:

- **The "local approval" must be the last discretionary approval, and not one compelled by federal law or regulations.** This proposal echoes the definition for "existing" under Section 1.6100(b)(7)(5) and the cumulative height limits under Section 1.6100(b)(7)(i)(A). As explained in the *2014 Infrastructure Order*, the Commission defined "existing" to include both a physical and legal/regulatory existence because Congress did not intend Section 6409 as a means to paper over illegal facilities deployed without the permits required by local law. Likewise, the *2014 Infrastructure Order* explained that the cumulative height limit should be defined with reference to the overall height that existed *before* the Spectrum Act because any other definition would potentially include height increases that reflected federal preemption rather than local values or consent.[25] At a minimum, the "local approval" cannot mean any approval deemed granted by Section 1.6100(c)(4), which both the Commission and the Fourth Circuit have recognized as a *federal* action rather than a local one.[26]

- **The "local approval" must be a regulatory one, and not one issued by the state or local government in its proprietary capacity as a property owner.** This would be consistent with the Commission's longstanding interpretation that Section 6409(a) does not apply to state or local government conduct in their proprietary capacities as real property owners.[27] Moreover, a contrary approach would create a disadvantage to competitive service

[25] *See In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12948 at ¶¶ 196-97 (Oct. 17, 2014) [hereinafter "*2014 Infrastructure Order*"].
[26] *See Montgomery Cnty. v. FCC*, 811 F.3d 121, 129 (4th Cir. 2015) (finding that, in a deemed granted situation, "if the permit 'grants' bear the imprimatur of any authority, it is federal, and not local"); Brief for the FCC at 55, *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015) (No. 15–1284) (arguing that in a deemed granted situation states and local governments "allow federal rules to fill the void").
[27] *See 2014 Infrastructure Order* at ¶¶ 237-40.

providers who did not lease or license property from the state or local government.

- **The "local approval" must have been issued by the local public agency that receives the eligible facilities request and has general land use authority.** Development projects in areas with environmental, historic and/or cultural significance often require approvals from more than one public agency that share jurisdiction over specialized aspects of a project.[28] Without a clear statement that local approval means the approval issued by the public agency with general land use authority, the "current site" boundaries may become disputed because the vague reference to local approval could be interpreted to apply to different approvals that occurred at different times. To mitigate potential confusion and close a potential loophole, the Commission should make clear that an approval issued by one local public agency will not bind a separate local public agency with concurrent jurisdiction over the same eligible facilities request.

### C. The "Current Site" Boundaries Must Not be Based on the Dimensions at the Time an Application is Submitted

Western Communities Coalition strongly oppose any rule or interpretation that would allow the applicant to define the "current site" boundaries or, more accurately, unilaterally *redefine* the "current site" after the original local approval. Such a rule would remove any reasonable limit on applications that mandate local approval and likely lead to disputes and delays.

This approach would break with the plain language in Section 6409 and the Commission's other substantial change thresholds without any obvious justification. Section 6409 applies to less-than-substantial changes to an "existing wireless tower or base station." Consistent with this statutory limitation, the Commission's existing rules authorize changes to existing facilities based on their dimensions as

[28] For example, projects in South Lake Tahoe require a permit from the city and the Tahoe Regional Planning Agency. Likewise, projects within California's coastal zone require both a permit from the city and a coastal development permit issued by California Coastal Commission.

approved by the local permitting authority. The prior local approval is both a prerequisite for an eligible facilities request and the benchmark by which to measure whether it may not be denied.

Defining the "current site" to mean the boundaries at the time the applicant files an application would eviscerate these key limitations in the statute and regulations. Section 6409's preemption would no longer be limited to "existing" facilities but would extend to space not previously approved for use as a wireless facility.[29] The proposed definition would also allow the applicant to unilaterally alter the benchmark set by the last discretionary approval.[30] To ignore the plain language in the statute as reflected by the Commission's own regulations would be patently "arbitrary, capricious [and] not in accordance with law" because it "relie[s] on factors which Congress had not intended it to consider . . . ."[31]

### D. Neither the Statute nor the Record Supports the Proposed Change to Section 1.6100(b)(7)(iv)

Like many other commenters in this docket, Western Communities Coalition strongly opposes any proposal that would authorize ground disturbance or deployment outside the locally approved site boundaries. As explained below, this proposal lacks a basis in the statute and a rational connection to the facts in the

[29] At its logical extreme, to allow the applicant to define the site by its ability to lease or purchase real property could result in situations where the "current site" boundaries are not even contiguous with the site as originally approved.

[30] Especially when considered in connection with the Commission's other proposal to allow up to 30-foot expansions from the current site boundaries, the proposed alternative definition carves a loophole so large that it swallows any limitation set by the rule. If, for some reason, an applicant needed more than a 30-foot expansion, it could simply acquire an expanded leasehold before it submits its application.

[31] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also* 5 U.S.C. § 706(2)(A).

record. However, should the Commission decide to adopt the proposed change to Section 1.6100(b)(7)(iv), this section also offers the Commission some common-sense limitations on any expansion rights.

### 1. The Proposal Lacks a Basis in the Statute Because Section 6409 Does Not Authorize Changes to Anything Other Than the Transmission Equipment on an Existing Tower or Base Station

The Commission cannot adopt a legislative rule that is "manifestly contrary to the statute."[32] Section 6409 explicitly concerns less-than-substantial changes to equipment on existing towers and base stations. Yet the proposed change to Section 1.6100(b)(7)(iv) would authorize not only a substantial change by any measure, but a change to the area around the tower or base station rather than the support structure itself. The plain language in the statute makes clear that Congress never could have intended such changes, and the Commission should reject such proposals.

### 2. The Record Does Not Reflect Any Reason Why 30 Feet is an Appropriate Threshold for Eligible Facilities Requests

No matter how the Commission defines the current site boundaries, a 30-foot expansion in any direction would be a substantial change. The proposed allowance bears no relationship to the actual size of a typical site and that may be required for a compound expansion. Moreover, the 30-foot expansion derives from an unrelated context involving tower replacements and the current record lacks an independent justification to support a rule change.

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[32] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Unsurprisingly, arguments in support for a massive expansion that significantly deviates from the existing standards run thin. Rather than explain why a 30-foot expansion would not be a substantial change, the arguments rely on misplaced analogies to the 2004 Nationwide Programmatic Agreement ("NPA") and unsupported claims about how much easier collocations would be with the extra space.

First, analogies to the NPA are misplaced because its 30-foot threshold for ground disturbance served an entirely difference purpose. The NPA addressed tower *replacements* rather than expansions.[33] Tower replacements almost always involve a separate tower on a new foundation with new transmission equipment, which mitigates service disruptions. After the replacement tower goes on air, the old tower comes down. Moreover, since the provider no longer needs the ground space under the old tower, the relocation also reforms the leased premises to reflect the

[33] Western Communities Coalition notes that the Commission recently announced an amendment to the Collocation Agreement that includes a 30-foot expansion provision like the one in the NPA. *See Wireless Telecommunications Bureau Announces Execution of Second Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, DA 20-759 (Jul. 20, 2020). This change does not automatically resolve the issue. The amended Collocation Agreement says nothing about why 30 feet is an appropriate threshold for a less-than-substantial change. The Collocation Agreement also includes other protections that would disqualify a proposal from the categorical exclusion not included in the Commission's rules for eligible facilities requests. For example, whereas the Collocation Agreement does not apply to facilities on National Landmarks or unconcealed facilities visible within historic districts, no such protections apply for eligible facilities requests. *Compare* 47 C.F.R. § 1, Appendix B, *with* 47 C.F.R. 1.6100. Moreover, the Commission recently abrogated any comparable protections for concealment within Section 1.6100(b)(7)(v). *See Implementation of State and Local Government' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling, WT Docket No. 19-250, FCC 20-75 at ¶¶ 34–40 (Jun. 10, 2020).

roughly the same site area in a different location.[34] Thus, any additional space required for the replacement is merely temporary.

Nothing about the NPA impliedly justifies 30 feet as a reasonable threshold for ground disturbance outside the site boundaries in connection with an eligible facilities request. The NPA allows ground disturbance up to 30 feet from the site boundaries because the record before the Commission showed that a tower replacement would reasonably require such space for the new foundation and related construction work.[35] Given that eligible facilities requests *cannot* involve support structure replacements, the NPA threshold for tower replacements lacks a logical connection to site expansions for collocations without tower replacement.

Second, comments by WIA and its industry allies likewise fail to explain the connection between 30 feet and collocations for 5G deployment. American Tower, Crown Castle, CTIA and WIA claim that additional providers require additional ground-mounted equipment but does not explain how much space is needed for additional equipment.[36] Rather, these comments argue that 30 feet would be useful

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[34] *See, e.g.*, *City of Palm Springs Amended and Restated Wireless Commc'ns Facilities Site Lease*, Section 7.6.C, *available at*: https://www.palmspringsca.gov/home/showdocument?id=51148 (providing that the relocated leased premises replace the original leased premises).

[35] *See In re Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd. 1073, ¶¶ 43, 45 (Oct. 5, 2004).

[36] *See* Comments of Am. Tower Corp., *In re Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 at 5-8 (Oct. 29, 2019); Comments of Crown Castle Int'l Corp., *In re Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 at 30-32 (Oct. 29, 2019); Comments of CTIA, *In re Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 at 15-16 (Oct. 29, 2019); Comments of the Wireless Infrastructure Ass'n, *In re Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 at 7 (Oct. 29, 2019).

and consistent with the NPA exclusion criteria. These arguments fail to address the relevant question under Section 6409—whether such an expansion would be a substantial change. Congress sought to streamline certain collocations and modifications to existing facilities, but legislatures do not pursue their goal at all costs.[37]

### 3. Even if the Commission Could Adopt the Proposed Change to Section 1.6100(b)(7)(iv), Significant Limitations on Expansion Rights Would be Needed

As explained above, the Commission lacks both the statutory authority and a basis in the record to adopt the proposed change to Section 1.6100(b)(7)(iv). If the Commission decides to adopt the proposed change—which it cannot and should not—any such right to expand beyond the original site boundaries must be subject to the following limitations:

- **By-right expansions should not be permitted where the existing macro tower compound can accommodate the proposed eligible facilities request.** As a first principle, the carriers should seek to economize the existing site and expand only when, and only to the extent, necessary.

- **Any wireless facility within the public rights-of-way should be exempt from by-right site expansions.** The record includes extensive comments opposed to by-right site expansions and new ground disturbance within the public rights-of-way. Expansions at wireless facilities in the public rights-of-way would be difficult to measure and verify as the proximity between ground-mounted and pole-mounted equipment associated with these facilities vary widely. Especially for DAS and strand-mounted facilities, ground-mounted equipment can often be several hundred feet or more from the antenna support structure. Moreover, original site dimensions in the right of way are often much smaller or contain no ground-mounted equipment at all. For common streetlight and utility pole foundations, a 30-foot expansion would dwarf the

[37] *Cf. T-Mobile W. LLC v. City and Cnty. of San Francisco*, 438 P.3d 239, 248 (2019).

original site.[38] Most importantly, the Commission cannot allow expansions to override public health and safety codes.

- **Small wireless facilities should be exempt from by-right site expansions.** The Commission justified its recent preemptive rules in the *Small Cell Order* in part on the notion that small wireless facilities are small and less likely to have a significant impact on the surrounding area. Although the D.C. Circuit recently rejected this characterization as applied to attempted environmental deregulation,[39] and many state and local governments continue to dispute this characterization, no one can seriously contend that these "small wireless facilities" would continue to be small if permitted to expand up to 30 feet in any direction.

- **Base stations should be exempt from by-right site expansions.** The substantial change thresholds treat modifications to these different types of facilities differently because they have different real-world impacts. Moreover, the industry's NPA justification is limited to tower sites and their compounds. The proposals do not suggest, and the NPA does not provide, a rationale that would apply with equal force to base stations that often use very different support structures and equipment configurations.[40]

- **By-right site expansions must be subject to a cumulative limit.** Like height extensions, site expansions present a serious concern that successive changes may result in more than substantial changes overtime.[41] No matter how large or small a right to expand the site may be, a cumulative limit is the only way to ensure that "a series of permissible small changes [does not] result in an overall change that significantly exceeds [the Commission's] adopted standards."[42]

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[38] A streetlight or utility pole collocation in the right-of-way involves an area often no larger than the size of the pole foundation. *See, e.g.*, *Procedures for the Preparation of Streetlight Plans by Private Developer*, County of Los Angeles Department of Public Works at 23-26 (Mar. 7, 2017), *available at*: https://pw.lacounty.gov/tnl/streetlights/docs/guidelines.pdf (providing the standards for streetlight pole foundations).

[39] *See United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 740–41 (D.C. Cir. 2019) (finding the Commission's deregulation for small wireless facilities was not "logical or rational" in part because the facilities and their related structures were not, in fact, small).

[40] For example, base stations include any non-tower structure such as (but not limited to) buildings, water tanks, electric transmission towers, smokestacks, billboards, utility poles, kiosks and bus shelters. Even within the category of building-mounted base stations, the site could involve rooftop equipment, ground equipment and/or equipment located in the building interior. The variety of support structures that could be used as base stations and the different equipment configurations involve unique considerations that do not support a uniform compound expansion rule.

[41] *2014 Infrastructure Order* at ¶ 196.

[42] *Id.* at ¶ 196. To be clear, Western Communities Coalition does not consider any expansion beyond the original site to be a "permissible small change".

- **A cumulative limit on expansions should be measured from the *original* site boundaries that came into existence with the initial deployment.** Industry commenters argue that this change is intended to address collocations on towers designed for a single carrier and/or the need to install standby power generators.[43] However, many existing sites have already been modified and/or expanded to accommodate additional carriers and equipment such as standby generators. These discretionary expansions should be credited against the cumulative limit. To the extent that an expansion is needed at these sites at all, the cumulative limit on expansion should be measured from the original site boundaries. Otherwise, the Commission's proposed rule would punish state and local governments for approving past expansions that the Commission now seeks to compel.

- **By-right site expansions must be subject to compliance with generally applicable setback requirements.** In many instances, the support structure and associated ground-mounted equipment have been intentionally placed to meet generally applicable setback requirements. Setbacks serve many purposes, from providing adequate light and air to properties to ensuring necessary access for emergency services. These purposes fall within the exception for eligible facilities requests that violate generally applicable health and safety regulations. Any right to expand the site area should be subject to compliance with the same limitations as any other land use.

To be clear, Western Communities Coalition does not offer these limitations as suggestions to make an unreasonable interpretation for Section 6409 acceptable. Any by-right expansion to the "site" would not be supported by the statute. Rather, these limitations illustrate how the proposed revision to Section 1.6100(b)(7)(iv) would result in other conflicts with law and/or obviously bad outcomes.

## CONCLUSION

The NPRM raises serious procedural and substantive concerns. To the extent that the public can fairly understand what the Commission intends, the proposed changes appear to be either in conflict with law or significantly underdeveloped.

[43] *See* NPRM at ¶ 52.

Western Communities Coalition respectfully urges the Commission not to adopt the proposals in the NPRM, or to at least defer action on these subject matters until a sufficiently clear proposal can provide the public with fair notice and an opportunity to better inform the Commission about potential issues.

July 22, 2020

Respectfully submitted,

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California; and City of Thousand Oaks,
California.

**EXHIBIT A**

**Western Communities Coalition Comments**

[appears behind this coversheet]

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
| | ) | |
| | ) | |
| 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 |
| | ) | |

**JOINT COMMENTS OF CITY OF SAN DIEGO, CAL.; CITY OF BEAVERTON, OR.; CITY OF BOULDER, COLO.; TOWN OF BRECKENRIDGE, COLO.; CITY OF CARLSBAD, CAL.; CITY OF CERRITOS, CAL.; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; CITY OF CORONADO, CAL.; TOWN OF DANVILLE, CAL.; CITY OF ENCINITAS, CAL.; City of Glendora, Cal.; KING COUNTY, WASH.; CITY OF LACEY, WASH.; CITY OF LA MESA, CAL.; CITY OF LAWNDALE, CAL.; LEAGUE OF OREGON CITIES; LEAGUE OF CALIFORNIA CITIES; CITY OF NAPA, CAL.; CITY OF OLYMPIA, WASH.; CITY OF OXNARD, CAL.; CITY OF PLEASANTON, CAL.; CITY OF RANCHO PALOS VERDES, CAL.; CITY OF RICHMOND, CAL.; TOWN OF SAN ANSELMO, CAL.; CITY OF SAN MARCOS, CAL.; CITY OF SAN RAMON, CAL.; CITY OF SANTA CRUZ, CAL.; CITY OF SANTA MONICA, CAL.; CITY OF SOLANA BEACH CAL.; CITY OF SOUTH LAKE TAHOE, CAL.; CITY OF TACOMA, WASH.; CITY OF THOUSAND OAKS, CAL.; THURSTON COUNTY, WASH.; CITY OF TUMWATER, WASH.**

**Comment Date:** October 29, 2019

## TABLE OF CONTENTS

## INTRODUCTION AND SUMMARY

The joint commenters (collectively, the "Western Communities Coalition") respectfully submit these comments in response to the Commission's public notice[1] seeking comments on the petitions for declaratory rulings and petition for rulemaking submitted by the Wireless Infrastructure Association ("WIA") and the Cellular Telephone Industry Association ("CTIA").[2] The Wester Communities Coalition positions on these issues are summarized as follows:

***Due Process Concerns.*** The numerous vague and unsubstantiated allegations against local governments upon which Petitioners rely to support their proposed changes to the rules raise significant due process concerns because they fail to provide sufficient notice and opportunity for maligned communities to respond. In light of the demonstrated inaccuracy of some of the allegations against named communities, the lack of an opportunity to respond to allegations against unnamed communities is an even more significant due process problem. This defect also runs counter to Commission preferred procedure for how to introduce competent evidence into the record. The Commission should not rely on these unsupported anecdotes in its pursuit of reasoned rulemaking.

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[1] *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CITA Petition for Declaratory Ruling*, DA 19-913 (Sep. 13, 2019) [hereinafter "Public Notice"].

[2] In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WIA Petition for Declaratory Rulemaking, WT Docket No. 17-79 (Aug. 27, 2019) [hereinafter "WIA Decl. R. Petition"]; In the Matter of Petition for Rulemaking to Accelerate Wireless Broadband Deployment by Amending the Rules Implementing Section 6409 of the Spectrum Act, RM-11849 (Aug. 27, 2019) [hereinafter "WIA RM Petition"]; In re Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment, CTIA Petition for Declaratory Rulemaking, WT Docket No. 17-79, WC Docket No. 17-84 (Sep. 6, 2019) [hereinafter "CTIA Petition"].

***Shot Clock Rules, Procedures and Remedies.*** Clear and sensible shot clock rules are important to streamline modification applications consistent with the statute and local resources. Unfortunately, the Petitions proposed clarifications miss the mark.

The current 60-day shot clock and submittal rules already accomplish the goals embodied in Section 6409(a). Modifications are already being approved within the current timeframes and WIA's and CTIA's proposals would introduce more subjectivity and ambiguity that will confuse applicants and permit authorities alike. WIA also asks the Commission to impose a written findings requirement under Section 6409(a) that is more burdensome than that required under Section 332(c)(7)(B) and to preempt the open-meeting processes in which some local governments choose to conduct their business. Most importantly, both Petitioners advocate for a remedy so extreme that no public health and safety official would recognize as sound policy.

The Commission should find that there is no basis in the law or record to justify these misguided proposals. The proposed shot clock rules would make the process more confusing and threaten local ability to enforce longstanding public health and safety standards.

***Substantial Change Issues.***

Concealment. Petitioners advance arguments to narrow the scope of the concealment elements of the rules. However, the term "concealment elements" refers to the particularized steps the parties take to mitigate the aesthetics harms

of a facility not simply a facility's overall appearance. The Petitioners' proposed rules would expand the scope of eligible facilities requests by ignoring that changes in size and scale can undermine and therefore defeat concealment of the structure. This interpretation runs counter to both the rule's plain language and congressional intent. These significant changes to the rule would expose parties who have deployed camouflaged sites in reliance on the current rules and raise significant questions over the retroactive effects of the proposal.

The rules adopted in the *2014 Infrastructure Order* balanced the legitimate interests in both accelerated deployments and community aesthetics. Because the proposed changes to the rules would inject uncertainty into whether initially concealed facilities will remain concealed, particularly in sensitive areas, the changes proposed by Petitioners would jeopardize deployment, not facilitate it.

Equipment Cabinets. CTIA suggests that the Commission ignore its own tested rules regarding the number of equipment cabinets, gut the current and clear number of cabinets that do not trigger a substantial change, and replace it with an entirely new, untested and unlimited number. This proposal defies the commonly understood definition for an "equipment cabinet". The practical impact of CTIA's proposal is to entirely eliminate the current numerical value set without offering any reasonable substitute other than its intended result that no limit is a good limit.

Permit Compliance. The Commission should also reject WIA's request to limit the permit compliance substantial change factor to modifications that *cause* non-

compliance with prior conditions. This proposal and rationale runs contrary to good governance and would put public health and safety at risk. Modification plans that show permit violations would plainly "not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment," and approving sealed plans with knowing inaccuracies would violate professional licensing standards. Accordingly, the Commission should reinforce its commitment to preserving State and local authority to require compliance with prior permit conditions and other applicable rules as a precondition to approving an eligible facilities request.

Antenna Height Separation. WIA requests a clarification to the antenna separation rule that would not resolve the existing ambiguity: that the Commission re-promulgate the same rule from 2014. To the extent that applicants and permitting agencies have adopted different interpretations over the intervening years, the prudent action would be to amend the rule for consistency with the height limitation for towers in the public rights-of-way and base stations. This approach already has support in the *2014 Infrastructure Order* and in common sense. Given that a fixed minimum best serves Congressional intent, and that there is no record evidence that the fixed standard for towers outside the public rights-of-way and base stations has caused similar confusion, applicants and local governments would be well-served to simplify the rule for towers on private property to mirror the rule other eligible support structures.

Compound Expansions. WIA's proposal to create an un-rebuttable presumption approving 30-foot compound expansions appears to be anticipating a problem for which it has no evidence exists in the context of Section 6409(a). The current rule already restricts new transmission equipment to the space "leased or owned" by the site operator at the time it requests approval. WIA cites industry sources that fail to show whether any local government actually denied or delayed compound expansion, whether the compound expansions even implicated questions that Section 6409(a) was intended to resolve, or whether the 30-foot proposal is consistent with the examples of compound expansions it provides. In addition to recognizing these factual deficiencies, the Commission should reject the proposal because it already considered these issues in prior proceedings and the nature of tower modifications and compound expansions has not changed to justify a policy reversal.

Backup Power. The Commission should find no reason to clarify rules related to backup power supplies. There is no evidence to suggest that WIA's allegation that the existing Section 6409(a) rules are insufficient to address collocations of emergency generators. Generators are already included in the definition of transmission equipment and the existing rules provide sufficient remedies so long as the equipment complies with the substantial change criteria.

***Compliance with Objective Public Health and Safety Requirements.*** Commission action to preempt local setbacks based on sweeping generalizations from WIA has no basis in fact or law. Local setbacks could serve a variety of

purposes depending on the context. Broad claims that they do not relate to public safety are hardly persuasive and contrary to Supreme Court precedent and land use and building codes. Where a local regulation lives in a municipal code does not necessarily limit its purpose. Organizational structure often reflects the local government's judgement as to which department should administer the regulations and at what stage in the development process compliance should be assessed. Commission preemption here would represent a significant shift in its stated policy that Section 6409(a) does not preempt objective health and safety regulations. Whether a setback or fall zone requirement existed before or after the initial deployment, the record does not support preemption to the extent such requirement is objective and rationally relates to public health and safety.

***Conditional Approvals.*** Conditional approvals are not, as the Petitions suggest, tantamount to a denial. Section 6409(a) does not require local governments to *unconditionally* approve EFRs, and the Commission should reject proposals to preempt conditional approvals. Moreover, WIA falsely or misleadingly maligns communities for behavior that is consistent with the *2014 Infrastructure Order*, such as separating regulatory from proprietary functions and requiring continued compliance with generally applicable laws related to public health and safety. The Commission should reject this request.

***Application Requirements.*** The Commission should reject proposals by WIA to further restrict application materials required to process eligible facilities requests and related permits and approvals. The deployment process involves more

than merely a determination as to whether an application tendered as an eligible facilities request involves a collocated, modified or replaced transmission equipment on an existing wireless tower or base station without a substantial change in its physical dimensions. After that initial determination, local officials must still check for compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes. The *2014 Infrastructure Order* correctly recognized that an eligible facilities request may require more than one permit or approval before construction may commence. Any restrictions on certain application requirements must not prohibit documentation needed to demonstrate compliance with all applicable codes that govern the application.

***Compliance with RF Exposure Guidelines.*** The Commission should reject any insinuation by WIA that state and local governments cannot evaluate a proposed modification to an existing wireless tower or base station for compliance with the Commission's guidelines for RF exposure. Neither the plain language in the Communications Act nor the Commission's precedents so much as suggest that local public agencies may not question whether a proposed or existing personal wireless service facility complies with applicable RF exposure standards. Concerns raised about "local approval" are really nothing more than a local requirement demonstrating compliance with federal standards—something the Commission has previously recognized is within the authority of local governments to consider. Accordingly, the Commission should decline to reverse its prior decisions and

continue to require that eligible facilities requests demonstrate actual compliance with the Commission's own RF exposure guidelines.

***Cost-Based Fees.*** State law already requires local governments to process permit applications using cost-based fees. The comments in the prior infrastructure proceedings related to regulatory fees for permit applications are equally applicable in this context.

## INTERESTS OF THE COMMENTERS

***City of Beaverton, Oregon,*** was incorporated in 1893. Beaverton has always been a city that prides itself on being a pioneer. As an early adopter of automobiles, airplanes, and film, Beaverton welcomes wireless utilities improvements. However, the City must be able to review eligible facilities requests for compliance.

***City of Boulder, Colorado,*** is a home rule municipal corporation organized under the laws of the State of Colorado. Boulder is located approximately 25 miles northwest of Denver at the base of the foothills of the Rocky Mountains and encompasses 25 square miles. As of 2018, the population of the City was estimated to be approximately 108,507 persons. The City has a diverse economy and is home to many high-tech companies, federal research laboratories, and the University of Colorado.

***Town of Breckenridge, Colorado,*** is a home rule municipality located in Summit County, Colorado approximately 80 miles west of Denver. Breckenridge is the county seat and the most populous municipality in the county with a population of 4,540. The town sits at the base of the Rocky Mountains' Tenmile Range and is known for its world class ski resort, year-round alpine activities, and Gold Rush history.

***City of Carlsbad, California,*** home of the Legoland and the first modern skatepark, Carlsbad was incorporated in 1952. With an estimated population of 115,000, Carlsbad has four distinct quadrants, each with their own unique

neighborhoods. As home to many information technology companies, Carlsbad knows the importance of wireless facilities. Yet, to maintain Carlsbad's unique neighborhoods and ensure public safety, the City must be allowed to review all eligible facilities requests for compliance.

***City of Cerritos, California,*** was incorporated in 1956. Originally master planned as a park-like community, with 3.2 acres of park land per 1,000 residents, Cerritos residents and business owners alike take pride in maintaining the aesthetic quality of the City. Located in the heart of the Los Angeles/Orange County metro center, Cerritos has become one of Southern California's premier commercial crossroads and has been awarded the Most Business-Friendly City Award by the Los Angeles County Economic Development Corporation. The City continuously partners with private industry to facilitate new developments that meet business objectives while maintaining the City's high-quality community character. Accordingly, the City partnered with wireless industry representatives during the last major update of its wireless facility ordinance to set forth smart, results-oriented policies and practices. The ability to review eligible facilities requests for compliance is mandatory for protecting the City's vibrant, carefully planned environment.

***Colorado Communications and Utility Alliance ("CCUA"),*** was formed as a Colorado non-profit corporation in 2012 and is the successor entity to the Greater Metro Telecommunications Consortium. Its members are municipalities, counties, school districts, regional government organizations and a state agency

currently totaling 65 entities and representing most of Colorado's population, and have been working together since 1992 to protect the interests of their communities in all matters related to local telecommunications issues. The CCUA undertakes education and advocacy in areas such as siting of wireless communications facilities, cable franchising and regulation, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

***City of Coronado, California,*** was incorporated in 1890, with the intention of being a resort community. The City of Coronado is a small coastal city with occupies approximately 7.7 square miles of land area. The city is entirely within the Coastal Zone and are subject the Coastal Act. The Coastal Act requires protections and preservation of view corridors. Thus, camouflaging and unobtrusive design for any facility is integral. Every addition to the city's infrastructure impacts the aesthetic. Keeping Coronado's beaches and views unmarred is integral to the economy of the city. It is paramount that Coronado retains the ability to review eligible facilities requests for that reason.

***Town of Danville, California,*** voted the safest city in California, Danville was incorporated in 1982. Danville boasts 14 parks as well as the Eugene O'Neill National Historic Site. Preserving the quality of these points of interest as well as

maintaining the standard of safety mandates that the town must be able to review all eligible facilities requests.

***City of Encinitas, California,*** incorporated in 1986, Encinitas encompasses the communities of Historic Encinitas, New Encinitas, Leucadia, Cardiff-by-the-Sea, and Olivenhain. With an estimated population of 63,000, Encinitas still retains the personality and charm of its various communities. Maintaining the unique character of these communities is integral to Encinitas, both economically and aesthetically. While the City acknowledges the importance of wireless facilities, the City has a vested interest in reviewing all eligible facility requests to insure they comply with FCC guidelines.

***King County, Washington,*** is located on Puget Sound in Washington State, and covers 2,134 square miles, making it nearly twice as large as the average county in the United States. With more than 2 million people, it also ranks as the 14th most populous county in the nation.

***City of La Mesa, California,*** founded in 1869 but not incorporated until 1912, La Mesa's civic motto is "the Jewel of the Hills." With approximately 200,000 people attending La Mesa's annual Oktoberfest event, La Mesa understands and appreciates the value of wireless facilities. However, it is integral for the City to be able to review eligible facilities requests to maintain the efforts put into already existing concealment.

***City of Lacey, Washington,*** recently named to Money Magazine's "100 Best Places to Live in America" list, with a population of 51,170, Lacey is the largest city

in Thurston County. Home to historic St. Martin's University, Lacey was one of the first "Tree City USAs" in the state of Washington, and one of the first EPA "Green Power Communities" in the entire nation. Known for its natural wooded environment, nearly 20 percent of the city has been set aside for parks, natural areas, and open space.

***The League of Oregon Cities*** originally founded in 1925, is an intergovernmental entity consisting of all Oregon's 241 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

***The League of California Cities*** is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League of California Cities is a nonprofit corporation which does not issue stock, and which has no parent corporation, nor is it owned in any part by any publicly held corporation.

***City of Lawndale, California,*** was incorporated in 1959 and has an estimated population of 32,750. With a total area of only 1.97 square miles, the City is very cognizant of any changes. Lawndale must retain the right to review eligible facilities requests to protect the efforts the City has made in concealments and public safety.

***City of Napa, California,*** is a municipality founded over 170 years ago. Located north of the San Francisco Bay, Napa spans over 18 square miles of land,

has a population of about 80,000 residents, and hosts over 3 million tourists from around the world who visit the world-renowned wineries, farms, and ranches along with other regional attractions. The City of Napa participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Napa is a municipal corporation organized under the laws of the State of California.

***City of Olympia, Washington,*** located at the southern tip of the Puget Sound, Olympia is Washington State's capital city. It is both the heart of state government and the cultural center of the southern Puget Sound Region. With a population of more than 52,400 residents, Olympia prides itself on its quirky, smart, artistic vibe.

***City of Oxnard, California,*** is a municipality founded over 120 years ago. Located along the Pacific Ocean between Los Angeles and Santa Barbara, incorporated Oxnard exceeds 39 square miles of land, has a population of about 210,000 residents. Oxnard is famous for its renowned wineries, farms, and ranches along with other regional attractions. The City of Oxnard participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Oxnard is a municipal corporation organized under the laws of the State of California.

***City of Pleasanton, California,*** is a municipality founded about 145 years ago. Located in Alameda County, Pleasanton exceeds 24 square miles of land, has a population of over 80,000 residents. Pleasanton is a community that lies along the

route of the first Transcontinental Railroad. The City of Pleasanton participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Pleasanton is a municipal corporation organized under the laws of the State of California.

***City of Rancho Palos Verdes, California,*** is a municipality founded in 1973. Located in Los Angeles County with vistas of the Pacific Ocean, Rancho Palos Verdes contains about 13½ square miles of land and has a population of over 41,000 residents. Rancho Palos Verdes is known as a quiet residential community sitting on a bluff above cliffs connecting the bluff to the Pacific Ocean. The City of Rancho Palos Verdes participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of Rancho Palos Verdes is a municipal corporation organized under the laws of the State of California.

***City of Richmond, California,*** is a municipal corporation chartered in 1909. Located on the shore of the San Francisco Bay, Richmond spans approximately 55 square miles of land and has a population of approximately 119,000 residents. It is one of the cities negatively identified by WIA because that city charges its full cost to process wireless siting applications and issue permits, including EFR applications, and the fee exceeds the Commission's safe harbor per-application and permit issuance fee. The City of Richmond participates in this comment process to address and rebut WIA's allegations, and to provide a correct record.

***Town of San Anselmo, California,*** is a municipal township founded over 110 years ago. The Town of San Anselmo is a small community of just 2.68 square miles cross by three main roads. The Town of San Anselmo participates in this comment process to refute and rebut various WIA and CTIA allegations; to recognize that communities and their character can be disrupted by a proliferation of EFR applications, and to help provide a more complete and correct record for the Commission to consider. The Town of San Anselmo is a municipal corporation organized under the laws of the State of California.

***City of San Diego, California,*** established in 1769, San Diego has been called "the birthplace of California." As the second largest city in California, with an estimated population of 1.4 million people, San Diego represents a significant share of California's wireless subscribers. The City has been at the forefront of wireless policy and design since the late 1980s, and City experts assigned to the discipline understand the value of wireless utilities. One of San Diego's largest economic sectors is defense, which requires cutting edge wireless capabilities. However, another major industry in San Diego is tourism. From beaches to Balboa Park, the tourism industry provides jobs for more than 160,000 people. It is crucial that San Diego retain the right to review eligible facility requests to prevent any damage to their tourism industry.

Wireless devices have become an essential part of our lives, and San Diego recognizes that the wireless industry provides an important public service that necessitates the ability to respond quickly to consumer demand. Therefore, San

Diego considers it essential to act on eligible facilities requests within the established shot-clock. San Diego has approved approximately 470 applications for eligible facilities requests since April 8, 2015, and is currently in the process of reviewing 99 additional applications. Despite this proven track record of Spectrum Act compliance, San Diego is one of the cities negatively identified by WIA because San Diego does not accord EFR treatment to sites that have been modified by the carrier without proper city authorization; and also for requiring RF compliance reports for EFR applications where RF emissions will change; and for maintaining an orderly and manageable permit process. San Diego is participating in this comment process to ensure that any decisions made by the Commission are based on an accurate record and not inaccurate statements of San Diego's policies and procedures.

***City of San Marcos, California,*** was incorporated in 1963, and chartered in 1994. San Marcos is a city with many diverse industry groups and educational institutions. As such, San Marcos understands the value of reliable wireless utilities. It has a population exceeding 96,000 residents. It is one of the cities negatively identified by WIA because San Marcos requires RF compliance reports for EFR applications where the RF emissions will change. The City of San Marcos participates in this comment process to address and rebut WIA's allegations, and to provide a correct record.

***City of San Ramon, California,*** was incorporated in 1983 and has an estimated population of 76,000 within its approximately 18½ square-mile

boundaries. San Ramon prides itself in its forward thinking and planning, as exemplified by Bishop Ranch office park and city center. The City of San Ramon participates in this comment process to refute and rebut various WIA's and CTIA allegations, to preserve local control over issues that concern its citizens and its infrastructure, and to help provide a correct record for the Commission to consider.

***City of Santa Cruz, California,*** is a municipality founded over 150 years ago. Santa Cruz contains nearly 16 square miles, has a population of about 65,000 residents. It is a seaside community famous for its boardwalk, its arts community, and for its tourism. Equally important is that it is a major university community and scientific research center. Santa Cruz participates in this comment process to refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. Reviewing eligible facility requests allows Santa Cruz to maintain its interest in protecting the health, safety, and welfare of its citizens and the general public.

***City of Santa Monica, California,*** incorporated in 1886, and located on the shore of the Pacific Ocean in Los Angeles County, Santa Monica contains over 8.4 square miles of land, has a population exceeding 92,000 residents, and hosts over 8 million tourists from around the world each year who visit the famous Santa Monica Pier and other regional attractions. The Santa Monica Looff Hippodrome, located on the iconic Santa Monica Pier, is a National Historic Landmark. The Downtown District is home to a vibrant, pedestrian-only shopping area that goes on for three blocks. The City of Santa Monica participates in this comment process to

refute and rebut various WIA and CTIA allegations, and to help provide a correct record for the Commission to consider. Santa Monica must be able to review eligible facility requests so that the City may maintain its cultural landmarks and economic resources.

***City of Solana Beach, California,*** was incorporated in 1986 and is a city with an area of 3.62 miles and has a population exceeding 13,000 residents. The city is entirely within the Coastal Zone and are subject the Coastal Act. The Coastal Act requires protections and preservation of view corridors. Thus, camouflaging and unobtrusive design for any facility is integral. Every addition to the city's infrastructure impacts the aesthetic. It is one of the cities negatively identified by WIA for requiring RF compliance reports for EFR applications where RF emissions will change. The city has devoted substantial resources to maintaining the beauty of the city and its beaches. It is imperative that the city be able to review eligible facility requests to ensure the investment in concealment is protected.

***City of South Lake Tahoe, California,*** is a municipality incorporated in 1965. Located at an elevation of 6,200 feet in the Sierra Nevada mountains on the south shore of Lake Tahoe, South Lake Tahoe spans over 16 square miles of land and has a population of over 20,000 residents, and annually hosts millions tourists from around the world who visit Lake Tahoe and the region. The City of South Lake Tahoe participates in this comment process to refute and rebut various WIA's and CTIA allegations, and to help provide a correct record for the Commission to consider. The City of South Lake Tahoe recognizes the need for wireless facilities to

serve its residents, tourists, and public safety communication systems, but needs to be able to review eligible facility requests to ensure they do not impact the city's unique scenic and environmental resources.

***City of Tacoma, Washington,*** is located on the south end of Puget Sound, and is home to the sixth largest container port in North America. Named one of America's most livable communities, Tacoma is comprised of approximately 49 square miles and has a population of over 200,000 people.

***City of Thousand Oaks, California,*** is a municipal corporation founded in October 1964. Located in the Conejo Valley portion of Ventura County in Southern California, Thousand Oaks spans approximately 55 square miles of land and has a population of approximately 129,000 residents. It is one of the cities negatively identified by WIA because that city carefully follows both the words and intent set out in Section 1.6100(b)(7)(iii). The City of Thousand Oaks participates in this comment process to refute and rebut WIA's allegations, and to provide a correct record.

***Thurston County, Washington,*** is home to more than 282,000 residents, and is home to the Washington State's capitol city, Olympia. It is the eighth most populated county among Washington State's 39 counties. Thurston County is located at the southern end of Puget Sound in the Pacific Northwest and is 727 square miles in area. Thurston County is 60 miles south of Seattle, Washington and is 100 miles north of Portland, Oregon.

***City of Tumwater, Washington,*** is the oldest American settlement on Puget Sound, founded in 1845, and incorporated in 1869. Tumwater is nearly 18 square miles and with a population of about 23,830 residents is the 44th largest in the state. More than a dozen state office buildings are located in Tumwater, employing over 15,000 people. Founded in an area chosen for its many natural resources, rivers, prairies, forests and beaches, Tumwater is rich in history, community and opportunity, and continues to be a desirable location to work and live.

## COMMENTS

## I. DUE PROCESS CONCERNS

The Petitioners lob numerous, unsupported—and often demonstrably false—claims against local governments. Many anecdotes lack even the most basic information needed to identify which community allegedly engaged in misconduct. Where the Petitioners deign to name the communities they accuse, those entities have the opportunity to respond and in most cases, demonstrate the falsity of the allegations.[3] This highlights the problem with the Commission's reliance on the many unsupported claims Petitioners use to substantiate the arguments advanced in their filings. Without the opportunity to verify these claims and allow local governments to respond to the allegations, the fundamental fairness of the proceeding is compromised and real concerns over the lack of due process afforded the participants are raised.[4]

In their petition, WIA accuses "some localities"[5] of a laundry list of violations and provides as their only support citations to previously submitted *ex parte*

[3] For example, WIA claims that the City of SeaWorld, California is frustrating the goals of Section 6409(a). *See* WIA Decl. R. Petition at 10 (citing Letter from Kenneth J. Simon, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Aug. 10, 2018) ("2018 Crown Castle *Ex Parte* Letter"). However, Western Communities Coalition can find no record that such a city even exists, which raises questions whether WIA believes that a non-governmental corporate entity is a "State or local government" within the meaning of the statute. See 47 U.S.C. § 1455(a)(1). The League of California Cities, which keeps a registrar with all California cities, also has no record that such a city exists. *See Alphabetical List of California Cities*, League of California Cites (Aug. 22, 2011), https://www.cacities.org/Resources/Learn-About-Cities/Alphabetical-List-of-Cities.aspx (omitting "SeaWorld" from the comprehensive list).

[4] *See Pickus v. U.S. Bd. of Parole*, 543 F.2d 240, 243 (D.C. Cir. 1976) ("Although informal rulemaking does not necessarily inflict 'grievous loss' on individuals, its results do sufficiently impinge on their lives and rights to require some conformance with notions of due process.");*see also id.* at 243 n.10.

[5] WIA Decl. R. Petition at 3–5, 8, 10, 13–20, 22.

filings,[6] which also fail to describe with specificity and concreteness the basis for the allegations. CTIA similarly accuses "some localities" of various acts without adequate support.[7] These broad, vague, and unsupported conclusory accusations provide no meaningful opportunity for local governments to respond to these claims because they lack key details. Importantly, they are inconsistent with the Commission's prior announcements for notifying jurisdictions whose laws, regulations or practices are allegedly prohibiting the ability to provide service.

In the past, the Commission advised commenters in advance that allegations involving unnamed parties are not helpful. For example, the Commission noted:

> In the case of comments that name any state or local government or Tribal or federal entity as an example of barriers to broadband deployment, we strongly encourage the party submitting the comments to name the specific government entity it is referring to, and describe the actions that are specifically cited as an example of a barrier to broadband deployment, as this is the best way to ensure that all affected parties—the relevant governmental entity, citizens and consumer groups, and other private parties that have sought access in the area—are able to respond to specific examples or criticisms. Identifying with specificity particular examples or concerns will ensure that the Commission has a complete understanding of the practices and can obtain additional background if appropriate.[8]

Petitioners' allegations fail to rise to this level of specificity.

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[6] WIA Decl. R. Petition at nn.9–10, 12–13, 17–18, 26, 33, 44, 46, 52, 59, 61.
[7] CTIA Petition at 3, 7–11, 13, 15, 17-19; *id.* At nn.16, 22–24, 29, 39–41.
[8] *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, WC Docket No. 11-59 at ¶ 9 (Apr. 7, 2011); *see also Suggested Guidelines for Petitions for Declaratory Ruling under Section 253 of the Communications Act*, 13 FCC Rcd. 22970 (Nov. 17, 1998) (providing guidance to petitioners for declaratory rulings under 47 U.S.C. § 253 to provide specific, factual information). The due process concerns should apply equally here.

Where WIA does provide some level of information on the actions of localities, it often structures its claims as: a locality in "X" state . . .,[9] which puts the onus on all localities within that state to try to reverse engineer whether their interactions with a wireless carrier are being referenced and discussed fairly. Similarly, CTIA structures its accusation as: a "X" state locality . . .,[10] which unfairly shifts the burden to local governments to try and identify the basis for the claims.

Basic due process requires more than this. Due process requires at a minimum notice and an opportunity to be heard.[11] This standard has not been satisfied by the allegations advanced by Petitioners in their filings. By failing to name with specificity the parties against whom they advance their claims, Petitioners have deprived the communities they accuse of fair notice and prevented them from being able to substantively respond. The Commission must accord little or no weight to these baseless assertions.[12]

## II. SHOT CLOCK ISSUES

Clear and sensible shot clock rules are important to streamline modification applications consistent with the statute and local resources. Unfortunately, the Petitions' proposed clarifications miss the mark.

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[9] WIA Decl. R. Petition at 10–11, 13.
[10] CTIA Petition at 11,14, 18.
[11] *See, e.g.*, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).
[12] *See, e.g.*, Public Notice (inviting interested parties to submit factual data and economic analysis); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, 32 FCC Rcd. 3330, 3333, ¶ 7 n.9 (Apr. 21, 2017); *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, WT Docket No. 16-421 (Dec. 22, 2016) (stating that the Commission "will accord greater weight to systematic data than merely anecdotal evidence.").

The current 60-day shot clock and submittal rules already accomplish the goals embodied in Section 6409(a). Modifications are already being approved within the current timeframes and WIA's proposal would introduce more subjectivity and ambiguity that will confuse applicants and permit authorities alike. Most importantly, both Petitioners advocate for a remedy so extreme that no public health and safety official would recognize it as sound policy.

The Commission should find that there is no basis in the record to justify these misguided proposals. The proposed shot clock rules would make the process more confusing and threaten local ability to enforce longstanding public health and safety standards.

### A. The Petitions Seek to Solve an Unreasonable-Delay Problem that Does Not Appear to Exist

WIA and CTIA attempt to paint state and local governments as obstacles to deployment that game the shot clock in order to frustrate infrastructure investment. This gross misrepresentation and overgeneralization lacks a basis in fact, and data collected by Western Communities Coalition shows that delays in the deployment process are overwhelmingly due to the acts or omissions by applicants.[13]

The most common delays in the process occur either when applicants fail to submit complete permit applications or fail to timely pull their approved permits.

[13] In response to the Public Notice, data was collected from Beaverton, Oregon, Thurston County, Washington, Tumwater, Washington, Cerritos, California, Danville, California, San Marcos, California, San Diego, California, and Pleasanton, California. The information covers all eligible facilities requests processed by the cities since January 1, 2014.

More than 70% of applications require at least two incomplete notices before the applicant provides all the information needed to act on the request, which adds an average of 29 additional calendar days to the process. Approximately 20% of all applications require a third incomplete notice and approximately 5% require a *fourth* incomplete notice, which typically results in, respectively, approximately 31 and 40 additional calendar days to the review process. Given that most cities act within approximately 60 shot-clock days from the initial submittal, applicants could improve their time-to-approval by 50% just by providing a complete application in the first instance.

Likewise, the cities report that applicants take approximately *three* times as long to pick up their approved permits as it takes cities to approve them. In the City of San Diego, which has reviewed more than 650 eligible facilities requests, an approved permit is typically ready for the applicant to pick up for approximately 129 days and, as of this filing, 8% of all permits for eligible facilities requests approved by the City are still waiting to be picked up. One permit sat ready to issue for more than 500 days.

Simply put, the data shows local governments are not responsible for delays in Section 6409(a) collocations and modifications.[14] The Commission should reject any proposed rule changes that are based on the false premise in the Petitions that local governments are the bottleneck in the deployment process.

[14] Although some industry members may rightly point out that delays after an approval can arise from conflicts in scheduling utilities and contractors, this does not explain why those same industry members file petitions with the Commission to preempt local review processes.

### B. WIA's Proposed Shot Clock Commencement Rule is Confusing, Inconsistent with the Act and Incentivizes Applicant Misconduct

WIA proposes two new standards by which to judge whether an application has been deemed to commence the shot clock.[15] Both standards needlessly add layers of subjective determinations to the shot clock rules that the record and the statute do not support. Rather than combat alleged refusals to accept applications, WIA's rule would arm applicants with more reasons to subvert reasonable application procedures. Would the Commission seriously consider amending its own rules regarding how one files a petition for declaratory ruling or an application for a license, and accept any filing that was a "good faith attempt" to comply with the Commission's filing requirements? The Commission should reject WIA's ambiguous "clarification" and reiterate its support for local flexibility to establish application procedures.[16]

#### 1. The Commission Should Not Preempt Reasonable Application Intake Procedures to Manage Multiple Eligible Facilities Requests for the Same Tower or Base Station

Wireless communication facilities are iterative projects that change over time. Sites also change property owners, managers and carriers through lease sales and assignments. These dynamics complicate the state and local review process. Local officials often find it impracticable to establish a baseline site condition from

[15] WIA Decl. R. Petition at 8 (requesting that the Commission clarify that a "good faith attempt to seek the necessary government approvals" by "any reasonable process" starts the shot clock).
[16] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 30 FCC Rcd. 31 at ¶ 221 (Oct. 17, 2014) [hereinafter "*2014 Infrastructure Order*"].

which to review multiple purported eligible facilities requests related to the same site, at the same time, but by different applicants.

For example, how could a local official know that a proposed increase in height by one carrier on a shared monopine would not exceed the cumulative height limit if submitted while another carrier on the same monopine sought a similar modification? Likewise, the inability to establish a baseline condition may result in multiple conflicting approvals.

Accordingly, the Commission should decline to act on any proposal that would require local governments to accept applications by the applicant's method of choice. This approach would be consistent with the Commission's policy choices in the *2014 Infrastructure Order* that stressed cities should have "flexibility . . . to exercise their rights and responsibilities" regarding procedures for review of applications under Section 6409(a).[17]

2. WIA's Proposal to Commence the Shot Clock After a "Good Faith Attempt" Lacks a Basis in the Act, the Record and Common Sense

To support its rule change, the Commission must construe ambiguities in a manner the statute permits.[18] However, neither Section 6409(a), Section 332(c)(7), WIA's unverified allegations, nor the downstream implications of WIA's proposal justify a clarification. The Commission should therefore reject the proposed "good faith attempt" and "any reasonable process" standards.[19]

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[17] *2014 Infrastructure Order* at ¶ 221.
[18] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).
[19] Many arguments raised by certain Western Communities Coalition members in the Commission's *Small Cell Order* proceeding are applicable to this issue. *See* In the Matter of Accelerating Wireless

a. *The Proposed "Good Faith Attempt" Standard Conflicts with the Plain Language in Section 332(c)(7)(B)(ii)*

WIA's proposed "good faith attempt" and "any reasonable process" standards conflict with the plain text in the shot clock's underlying statute. Section 332(c)(7)(B)(ii) states in full:

> 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.[20]

The statute requires more than a mere "good faith attempt" to file by "any reasonable process" determined by the applicant. By the ordinary definitions, the phrase "duly filed" literally means to properly initiate a judicial or administrative proceeding by submitting the proper documents or following proper procedure.[21] Any interpretation to mean an event less than *actual submittal* through the *proper local procedures* would directly conflict with the statute.

b. *The Proposed Rule Would Reverse the 2014 Infrastructure Order Based on Vague and Unverified Anecdotes in the Petitions*

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Broadband Deployment by Removing Barriers to Infrastructure Investment, Comments of the League of Arizona Cities and Towns *et al.*, WT Docket No. 17-79 at 14–25 (Jun. 15, 2017). Rather than restate them here, the Western Communities Coalition attaches those comments as **Exhibit F** and incorporates them herein by this reference.

[20] 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

[21] *See Duly*, Merriam-Webster, https://www.merriam-webster.com/dictionary/duly ("properly"); *File*, Merriam-Webster, https://www.merriam-webster.com/dictionary/filed (last visited Oct. 10, 2019) ("to submit (a legal document) to the proper office (as the office of a clerk of court) for keeping on file among the records especially as a procedural step in a legal transaction or proceeding").

Despite the Commission's request for factual data, WIA maligns unnamed communities with vague and unverified anecdotes.[22] These "bad actor" stories are legally insufficient evidence upon which to support a rule change that will impact thousands of localities. Rather, WIA's practice of leaving local governments guessing whether a factual basis to its stories exist can only be viewed as an attempt to evade scrutiny. Even if there is any truth to the allegations, which is impossible to determine from the current record, the existing deemed granted remedy is sufficient to combat isolated incidents of a local refusal to process a Section 6409(a) request.

As the Commission properly recognized in the *2014 Infrastructure Order*, "the prospect of a deemed grant will create significant incentives for States and municipalities to act in a timely fashion."[23] WIA's selective storytelling does not indicate whether its members even attempted to leverage a deemed grant, or whether other factors involved in the application absolve the maligned localities. Regrettably, and perhaps by design, WIA provides no opportunity to refute, correct or verify these and similar allegations.

Accordingly, the Commission should afford these allegations no weight and reject WIA's proposed rule change. Considering the factual data and

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[22] *Compare* Public Notice (inviting interested parties to submit factual data and economic analysis), *with* WIA Decl. R. Petition at 8 (providing no support for its claim that (1) some "localities" have no EFR procedures and claim they cannot process such applications until the procedures are established; (2) "jurisdictions claim that additional information not required by local codes must be provided before it will accept an EFR; (3) "some localities simply refuse to acknowledge or accept EFRs and thus claim that the shot clock has not been triggered."; and (4) "some local governments will bounce an EFR between departments or processes and then disregard the shot clock or argue that the shot clock has not started.").

[23] *2014 Infrastructure Order* at ¶ 233.

counterevidence the Western Communities Coalition provides throughout these comments, accepting WIA's position at face value would be arbitrary, capricious and constitute reversible error.

c. *Ambiguities in the Proposed Rule Would Exacerbate Applicant Misconduct*

The records in recent proceedings show that many local public agencies initially adopted submittal procedures for wireless applications in response to misconduct by applicants. For example:

- In Hillsborough, California, Crown Castle "submitted" 13 applications for small cells by leaving them on the counter at town hall one Friday afternoon. Crown Castle later sent a letter to inform the town that the shot clock had commenced.

- In Thousand Oaks, California, Mobilitie submitted plans as the "California Utility Pole Authority" in an apparent attempt to pass itself off as a quasi-governmental agency to claim preemption over local standards and procedures.[24]

- In Clayton, California, Mobilitie inquired about permitting and licensing procedures, subsequently ended contact with city staff, reappeared several months later under the pseudonym "CA Transmission Network, LLC" to inquire with a different city department. As the "CA Transmission Network, LLC", the applicant falsely claimed that the entity was a state regulated public utility. After all this, staff soon discovered that Mobilitie's permit requests were for a location not located within the city's jurisdiction.[25]

- In Concord, California and Richmond, California, ExteNet ignored the published procedures in the municipal code that required applications to be submitted to the planning office for review because it believed that applications should only be processed through ministerial departments.[26]

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[24] *See In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices*, WT Docket No. 16-421, Joint Comments of the League of Ariz. Cities and Towns, *et al.* at 12-13 (Mar. 8, 2017) [hereinafter "Joint Comments In re Mobilitie Petition"]. Mobilitie's deceptive practices were not limited to California. *See id.* at 14 (describing similar controversies in Minnesota, Florida, Connecticut and Virginia).

[25] *See id.* at 14.

[26] *See id.* at 19.

- In Greenwood Village, Colorado, Crown Castle complained about alleged delays due to requirements for public notice and public input, claiming that the requirements violated the shot clock. However, Crown Castle neglected to inform the Commission that it was referring to older applications, where they were provided alternative locations for siting in rural residential areas, and were in a community that was addressing upcoming changes in state law that required compliance with a shot clock.[27] After the filing of the Reply Comments noted here, which debunked Crown Castle's allegations, Crown Castle subsequently made the same allegations, falsely accusing Greenwood Village of the same delays, without even acknowledging that its claims had previously been shown to be inaccurate.[28]

- The Commission's own Intergovernmental Advisory Committee noted in its Advisory Recommendation No. 2018-01 that, more often than not, problems with applications moving forward resulted from defective applications filed by the wireless providers or their consultant companies acting on their behalf.[29]

To be sure, the Western Communities Coalition does not mean to paint with too broad a brush because not all applicants conduct themselves in the manner illustrated above. However, the actions described above contributed to the local need to more closely manage the application submittal and review process.[30]

Indeed, local application submittal procedures serve several legitimate interests. For instance, pre-application procedures enable efficient use of limited

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[27] *See id.* at 5–6.

[28] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Reply Comments of the Colorado Communications and Utility Alliance, *et al.* at 3–4 (July 17, 2017).

[29] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC Intergovernmental Advisory Committee, Advisory Recommendation No. 2018-01 at § IV (Mar. 21, 2018).

[30] As noted by certain Western Communities Coalition members in prior Commission proceedings, the increasingly strict regulatory environment also contributes to a perceived need to adopt a defensive strategy. *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Joint Comments of the League of Arizona Cities and Towns *et al.* at 1–14 (Jun. 15, 2017) [hereinafter "Joint Comments In re *Small Cell Order*"]. And, as the Commission's regulations provide ever-shorter timelines with increasingly harsh penalties for untimely action by state and local governments, bad experiences in one jurisdiction inform how others should protect themselves against similar gamesmanship.

resources. Applications with defects or with information that demonstrates the proposed changes are substantial and do not qualify for Section 6409(a) approval can be identified earlier, which allows the applicant to reform the application or submit through the proper regulatory framework. In-person submittal requirements temper the ability of applicants to submit applications outside of business days and after business hours when staff is unable to begin reviewing an application or route it to the correct department. Submittal appointments or "open window" hours are common practices to promote reasonable management of application intake and workflow. Submittal requirements and local review practices are not procedural requirements applicable only to the wireless industry – they apply to all development in order to create order and efficiency to the development review process.

Moreover, forcing cities to adopt drastically different procedures for wireless applications than for all other development applications foments internal confusion. Under WIA's proposed rule, it should come as no surprise that local officials will elect to retain *ad hoc* legal or consultant services just to address basic questions about when an application is deemed submitted.

To make matters worse, WIA and CTIA propose new shot clock remedies that parlay confusion about the commencement date into greater risks to public health and safety. "Good faith attempts" to submit an application under "any reasonable process" are facially ambiguous concepts that will inevitably invite disputes. Under the existing regime, the rules correctly err on the side of caution such that a failure

to act does not presumptively authorize unpermitted construction. However, the proposed rule changes increase incentives for applicants to game the shot clock by relying on an uncertain commencement date as cover for unpermitted builds. The Western Communities Coalition expects that the Commission will fully consider the outgrowths these proposed rules would have on public health and safety.

### C. Petitioners' Expanded Deemed Granted Remedy is Unlawful, Misguided, Dangerous and Reverses Prior Commission Policy

WIA asks the Commission to authorize construction if a state or local government fails to seek judicial review within 30 days after an applicant sends a deemed granted notice.[31] CTIA suggests that Section 6409(a) authorizes at-risk builds without construction permits.[32] Building permits are public safety oriented. They require inspections to demonstrate compliance with a variety of structural, electrical and other construction concerns. They help ensure that the correct easements for utilities and ingress and egress are utilized, so the construction does not inadvertently end up as a trespass on unauthorized property. Both the WIA and CTIA approaches lack a statutory hook and adopting them would reinforce that the Commission has no authority or expertise in local zoning issues and construction practices. Taken together, this policy reversal would threaten public safety and spur more litigation in states and local governments around the country that will not accept unauthorized construction to proceed unabated.

#### 1. There is No Statutory Basis for any Limitations Period on State or Local Government Responses to Deemed Granted Notices

[31] WIA Decl. R. Petition at 7.
[32] *See* CTIA Petition at 20.

The Act imposes no limitations period on challenges by state or local governments against applicants for wireless facilities authorizations. Statutory silence does not license the Commission to spin extreme remedies from whole cloth. A side-by-side comparison of the relevant statutes illuminates the textual holes in WIA's proposal.

Section 6409(a) contains no limitations period whatsoever, let alone any remedies.[33] In contrast, Section 332(c)(7)(B)(v) creates a 30-day limitations period for "[a]ny person adversely affected by any final action or failure to act by a State or local government."[34] The "person adversely affected" is the applicant, not the state or local government.[35] Even if a state or local government could be "adversely affected" by a deemed granted notice, the adverse effect would flow from action by the applicant rather than "any final action or failure to act by a State or local government."[36] Construed in the Act's entirety, Section 6409(a) provides no limitations period at all and Section 332(c)(7)(B)(v) simply cannot be read as a limitations period on challenges brought by state or local governments against an applicant.

Indeed, local public agencies may have *no interest* in litigating a deemed-granted notice until the applicant makes the dangerous decision to proceed with unauthorized construction. Even then, a local government's grievance arises not

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[33] *See* 47 U.S.C. § 1455(a).
[34] 47 U.S.C. § 332(c)(7)(B)(v).
[35] *See id.* This same provision also authorizes "[a]ny person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief." *Id.*
[36] *See id.*

from its own failure to act but in the applicant's unauthorized construction and disregard for public health and safety.

2. The Commission Has No Authority or Expertise in Zoning or Construction Practices

For decades, Congress recognized that the Commission lacks broad authority or expertise in zoning or construction.[37] More recently in the *2014 Infrastructure Order*, the Commission expressly "agree[d] with municipalities that the Commission does not have any particular expertise in resolving local zoning disputes."[38] By expressly discouraging the Commission's role in construction and by the Commission's own admission, adopting a rule that replaces local expertise with a Commission mandate would not be entitled to deference.[39] Moreover, the rule would require a substantial justification that weighs the public harms that flow from hundreds of thousands of modifications to existing wireless facilities that would inevitably occur as 5G networks roll out.

3. Construction Authorized by a Deemed Approval Notice Raises Serious Tenth Amendment Concerns

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[37] *See* 47 U.S.C. § 319(d); *see also United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728 (D.C. Cir. 2019) ("The Commission generally does not require construction permits before private parties can build wireless facilities. Congress largely eliminated the FCC's site-specific construction permits in 1982, and the Commission has since required construction permits only where it finds that the public interest would be served by such permitting. *See* Pub. L. 97-259, 96 Stat. 1087, § 119 (1982) (codified at 47 U.S.C. § 319(d)).").

[38] *2014 Infrastructure Order* at ¶ 235.

[39] *See Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

Under the proposed rule, applicants could commence construction without any express approval from any federal, state or local legislative, judicial or administrative authority. The Commission would effectively approve *sub silentio* applications submitted to state or local governments.

Without a federal order, the approval flows from local rather than federal authority.[40] Moreover, if the Commission assumed responsibility for construction permits, it would amount to a significant reversal in longstanding policies. In the *2014 Infrastructure Order*, the Commission expressly disclaimed its role in dispute resolution over applications deemed granted by its rule.[41] The Commission cannot disregard its own reasons in the *2014 Infrastructure Order* that supported this disclaimer.[42]

4. The Existing Deemed Granted Remedy is Adequate to Provide Relief and Petitioners' Proposal Will Spur Unregulated Construction and More Litigation

Petitioners allege that failing to act on a Section 6409(a) application warrants subverting the obligation to obtain local construction permits but propose different

[40] *See Montgomery Cnty. v. FCC*, 811 F.3d 121, 129 (4th Cir. 2015) (finding that applications filed with local governments but deemed approved and upheld by a declaratory judgment action are authorized by federal rather than local authority).

[41] *2014 Infrastructure Order* at ¶ 20 ("Provide that parties may bring disputes—including disputes related to application denials and deemed grants—in any court of competent jurisdiction. The Commission will not entertain such disputes."); *id.* ¶ 234 (finding "that the most appropriate course for a party aggrieved by operation of Section 6409(a) is to seek relief from a court of competent jurisdiction"); *id.* ¶ 236 ("The enforcement of such claims is a matter appropriately left to such courts of competent jurisdiction.").

[42] *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). Ultimately, the Commission still has neither the expertise in this subject matter nor the resources to address the issues that may arise in each local jurisdiction. The proposed deemed granted rule may even suggest that local government officials could be required to travel to or retain local counsel in Washington, DC to contest Commission-authorized construction.

procedures necessary to obtain this extreme remedy.[43] WIA argues that a deemed granted notice should trigger a 30-day limitations period for the locality to challenge the deemed grant in court.[44] CTIA goes even further and argues that a deemed granted notice to the permitting authority, by itself, should lawfully authorize the applicant to modify the facility.[45] Both proposed rules are misguided, but CTIA's proposal is particularly dangerous.

State and local governments require construction permits to verify compliance with minimum standards that mitigate risks of harm to people and property. State and local officials are subject matter experts in ensuring compliance with the applicable standards that exist in their jurisdictions. Building and safety codes are not identical and not all engineers and contractors are as intimately familiar with the local rules as the officials tasked with enforcing them. Petitioners' proposed deemed granted remedy threatens this balance. Removing the role state and local officials play, especially for the mere failure to act within 60 days, is so antithetical to public health and safety that Congress could not have intended Section 6409(a) to be construed this way.

WIA's reasons that "[a]bsent [the 30-day limitations period], expensive and time-consuming litigation may be required—which is inconsistent with the objective of Section 6409(a)."[46] Curiously, CTIA finds that the Commission's ruling in the *Small Cell Order* supports the proposition that the deemed granted remedy should

[43] *See* CTIA Petition at 19; WIA Decl. R. Petition at 7.
[44] *See* WIA Decl. R. Petition at 7.
[45] *See* CTIA Petition at 19.
[46] *See* WIA Decl. R. Petition at 7.

apply to all siting authorizations necessary for the deployment, including construction, traffic control and encroachment permits.[47] Neither rationale carries water.

First, the proposed rule will spur *more* litigation, not less. In the *2014 Infrastructure Order*, the Commission correctly predicted "deemed grants to be the exception rather than the rule."[48] WIA presents no evidence that the current rule results in significant litigation. Under WIA's proposed rule, in situations where a genuine dispute arises, state and local governments will have a strategic incentive to reflexively deny applications to avoid the need to bring a lawsuit.[49] Alternatively, rather than letting unpermitted construction proceed unabated, applicants should expect state and local officials to enforce their codes, which may provide for summary removal of unpermitted obstructions in the public rights-of-way.[50] How WIA interprets these outcomes as likely to reduce litigation is a mystery.

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[47] *See* CTIA Petition at 19 (citing *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, 33 FCC Rcd. 9088 at ¶ 144 (Sep. 27, 2018) [hereinafter "*Small Cell Order*"], and contending that if the Section 332 shot clocks and their attendant injunctive remedies apply to all siting necessary siting authorizations, so too should the Section 6409 shot clock and the deemed granted remedy).

[48] *2014 Infrastructure Order* at ¶ 233.

[49] *See id.* at ¶ 236.

[50] *See, e.g.*, SAN DIEGO, CAL. MUN. CODE § 121.0310; CARLSBAD, CAL., CODE § 6.16.150 (stating that the city manager may summarily abate a public nuisance without a public hearing to preserve or protect the public health and safety and charge the responsible party the full cost of the investigation and abatement of the nuisance); See ENCINITAS, CAL., CODE § 1.08.070(D) (stating a code enforcement officer may abate a nuisance without prior notice); See RICHMOND, CAL., CODE § 9.50.150 (noting that the Director of Public Works may summarily abate without notice or a hearing if the condition of the premises is immediately dangerous to the public health, safety or welfare that would subject the public to potential harm of a serious nature and the City may charge the responsible party the full cost of the abatement). .

Second, CTIA's position is an apples-to-oranges comparison considering the harms that flow from unregulated construction and undermines the rationale for its proposed remedy. Nowhere does the *Small Cell Order* suggest that the legal and equitable remedies for a failure to act would remove state and local roles in reviewing applications for compliance with building and safety codes. Rather, to the extent a court issued an injunction to approve a facility for a failure to act under the *Small Cell Order*, the permitting agency would be entitled to a reasonable amount of time to issue required construction permits. Under CTIA's "Wild West" approach, applicants would self-police and coordinate their own activities, shut down traffic lanes as they please, clean up construction materials in the streets and on public and private property if they felt like it, construct facilities that may not meet structural support standards, the National Electric Safety Code requirements, wind and ice load standards and otherwise pose hazards to public safety.[51]

### D. Section 6409(a) Contains No Requirement for a Written Decision and Any Requirement Invented by the Commission Should Be No Broader than as Required under Section 332(c)(7)(B)(iii)

[51] In Baltimore, Maryland, Mobilitie erected a new utility pole atop a large concrete base without permits that directly obstructed access to an ADA sidewalk ramp. *See* Joint Comments In re Mobilitie Petition, supra note 12 at 20. This was not an isolated incident. Mobilitie was later fined $1.6 million by the Commission for repeatedly violating local siting practices and federal environmental and historic preservation review procedures. *See In the Matter of Mobilitie, LLC*, Order and Consent Decree, File No. EB-SED-17-00024244 (Apr. 10, 2018). In Vallejo, California, Verizon constructed an unpermitted small cell on a utility pole and after staff discovered the issue, Verizon subsequently threatened legal action if the city did not issue the permit within a week. *See* Joint Comments In re Mobilitie Petition, supra note 12 at 21.

WIA requests that the Commission invent a new three part written decision requirement that has no basis in the Spectrum Act.[52] Section 6409(a) does not require any written decision—much less any written reasons—to deny an eligible facilities request.[53] Congress' decision not to impose special written decision requirements for eligible facilities requests is clear from the text and structure in the Spectrum Act.

First, Congress directed the Commission to "implement and enforce [Section 6409(a)] as if [Section 6409(a)] is a part of the Communications Act of 1934 . . . ."[54] Section 332(c)(7)(B)(iii) was added to the Communications Act by the Telecommunications Act.[55] Section 6409(a) must be construed within this entire statutory framework.[56] Congress' silence does not automatically create gaps for the Commission to fill.[57]

Second, the detailed requirements for written denials in Section 6409(b), which concerns requests to use federal lands for communication facilities, amplifies the silence in Section 6409(a). Congress clearly knows how to impose a writing

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[52] *See* WIA Decl. R. Petition at 7 (asking the Commission to clarify that a denial "must (i) be in writing, (ii) clearly and specifically make an express determination that the request is not covered by Section 6409(a), and (iii) include a clear explanation of the reason(s) for the denial to be effective.").
[53] 47 U.S.C. § 1455(a).
[54] 47 U.S.C. § 1403(a).
[55] Telecommunications Act, Pub. L. 104-104, 110 Stat. 56 § 704 (Feb. 8, 1996).
[56] *See, e.g.*, *FCC v. AT&T Inc.*, 562 U.S. 397, 407–08 (2011) (considering meaning of "personal privacy" in light of its use in a distinct but similar exemption within the same statute); *Holder v. Hall*, 512 U.S. 874, 883 (1994) (comparing the functioning of two sections within the Voting Rights Act of 1965 that "differ in structure, purpose, and application").
[57] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1255–70 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (reviewing "post-enactment aids to interpretation," including legislative silence).

requirement when it wants one.[58] In the same statute, adopted at the same time, Congress found it necessary to expressly require executive agencies to provide a written notice that "includ[es] a clear statement of the reasons for the denial."[59]

Even if the Commission could interpret Section 6409(a) to require a written decision, which it cannot, the Commission could not exceed the statutory grant in Section 332.

Section 332(c)(7)(B)(iii) requires that:

> Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.[60]

In *T-Mobile South, LLC v. City of Roswell*, 574 U.S. 293 (2015), the U.S. Supreme Court held that:

> the statutory text and structure, and the concepts that Congress imported into the statutory framework, all point clearly toward the conclusion that localities must provide reasons when they deny cell phone tower siting applications. We stress, however, that these reasons need not be elaborate or even sophisticated, but rather, as discussed below, simply clear enough to enable judicial review.[61]

This interpretation leaves no gap for the Commission to fill. As the Supreme Court explained, the phrase "substantial evidence" refers to a term of art to describe

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[58] *Cf. T-Mobile South, LLC v. City of Roswell*, 135 S.Ct. 808, 820–21 (2015) (ROBERTS, C.J., dissenting) (collecting writing-requirement examples from the Act)
[59] 47 U.S.C. §§ 1455(b)(3)(A)–(B).
[60] 47 U.S.C. § 332(c)(7)(B)(iii).
[61] *City of Roswell*, 135 S.Ct. at 815.

how courts review administrative decisions, and "[t]here is no reason discernible from the text of the Act to think that Congress meant to use the phrase in a different way."[62]

Despite lacking a basis in Section 6409(a), Section 332(c)(7) or *Roswell*, WIA proposes that local agencies that fail to provide "clear explanations" and "clear and specific" express determinations cause the shot clock to continue running. Contrary to WIA's assertion, the proposed rules would cause *more* confusion as to whether the shot clock expired. Under the current regime, at the time the local agency denies a covered request within 60 days, the shot clock definitively ends and the limitations period for the applicant's right to challenge the denial begins.[63] The applicant has an unambiguous and immediate remedy.

Under WIA's suggested morass, the applicant could assert that the local decision lacked sufficient clarity and the shot clock continues to run. One might expect the local government to reject the applicant's claim, asserting that it issued a proper determination. At this point, a dispute materializes over the clarity of the decision with the applicant deeming the project granted and the local government claiming otherwise. Or the applicant might *not* intentionally initially assert that the decision lacked sufficient clarity, wait for the expiration of 60 days, and then claim

[62] *Id.* Although three justices dissented from the majority opinion, a principal concern among them was that the majority's decision incorrectly presumed that wireless carriers needed protection from local zoning officials. *Id.* at 822–23 ("the local zoning board or town council is not the Star Chamber, and a telecommunications company is no babe in the legal woods.")
[63] *See* 47 U.S.C. § 332(c)(7)(B)(v); *see also 2014 Infrastructure Order* at ¶ 236.

a shot clock violation. How these scenarios avoid confusion and establish a clear end date for the 60-day period is a mystery.

Complex rules for eligible facilities requests would only confuse the review process. The Commission acknowledged that whether the request is covered must be determined "on a non-discretionary and objective basis".[64] Under these conditions, determinations of a covered request are apparent on their face. If for some reason they are not, the *2014 Infrastructure Order* established a closed universe of non-discretionary and objective factors for the reviewing court to evaluate denials. Whether an application qualifies as an eligible facilities request that causes a substantial change are questions of law over which courts do not owe deference to the local decision. The same cannot be said for traditional zoning decisions that may involve subjective decisions governed under the substantial evidence standard that justify a writing requirement to enable judicial review.[65]

Additionally, a negative determination does not mean the project will be denied; rather, it only means that the project is not an eligible facilities request subject to mandatory approval as a matter of law. Non-covered requests are still routinely approved under the subjective factors embodied in local codes that Congress preserved under Section 332(c)(7).

### E. The Commission Should Not Preempt Public Notice and Hearing Requirements

[64] *See 2014 Infrastructure Order* at ¶ 232.
[65] *See City of Roswell*, 135 S.Ct. 808 at 815.

Neither Section 6409(a) nor the *2014 Infrastructure Order* mandate a particular process by which state or local governments must review applications tendered as eligible facilities requests.[66] Nevertheless, the Petitioners ask the Commission to preempt public hearings some state and local public agencies use to review and evaluate these applications.[67] The Commission declined to grant similar requests in the *2014 Infrastructure Order* and should do so again.[68]

1. Public Hearings Serve a Legitimate Function Reasonably Related to Whether a Proposed Modification Qualifies as an Eligible Facilities Request

All humans, including applicants and local officials, are fallible. Even under objective review criteria, errors in math and perception can occur, which may result in decisions that erroneously approved or denied eligible facilities requests. The public hearing process affords an equal opportunity to hash out the facts and ensure that the local public agency reaches the correct result.

Whether to grant an alleged eligible facilities request is not always as cut-and-dried as the Petitions assume. For example:

- ***Concealment:*** A collocation or modification causes a substantial change when it would "defeat the concealment elements of the support structure."[69] As discussed in Part III, *infra*, this analysis requires the local public agency to carefully consider not only the concealment elements that may be impacted by the proposed modification, but also potentially how the

[66] *See* 47 U.S.C. § 1455(a); *2014 Infrastructure Order* at ¶¶ 220–21.
[67] WIA Decl. R. Petition at 9.
[68] *See 2014 Infrastructure Order* at ¶ 221.
[69] *See* 47 C.F.R. § 1.6100(b)(7)(v).

modification affects the site in context with its surroundings. Persons most directly impacted by a potential change in concealment are best positioned to weigh in on whether such a change is consistent with (*i.e.*, does not defeat) the existing concealment.

A public hearing (or the option to hold one on appeal) may also be an efficient forum to consider alternative concealment when the proposed equipment cannot be concealed in the same manner as the existing equipment, which frequently occurs when an applicant proposes upgrades to "slimline" monopoles or mono-flagpoles.[70] The photo simulation in **Figure 1**, below, shows an existing Sprint site on a flagpole proposed to be significantly expanded with alternative concealment.

[70] *See generally Board of County Commissioners for Douglas County v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109 (D. Colo. Sep. 9, 2019).


**Figure 1**

The proposed modification, while technically concealed, fundamentally alters the existing concealment associated with the mono flagpole on the rooftop. This structure is also within a historic district and the proposed faux chimney conflicts with the overall aesthetic. Although it would be physically impossible to maintain the same concealment given the significantly expanded equipment proposed, the city worked with the applicant to identify alternative concealment with a different size, scale and finish that comported with the historic design features (see **Figure 2**). The applicant also worked with the city to place the new structure in a location where it could not be seen from street level along Main Street (see **Figure 3**).


**Figure 2**

**Figure 3**

- ***Cumulative Height Limit:*** The height limit is a *cumulative* limit.[71] For towers, the cumulative limit is measured from the overall height that existed on the date Congress enacted Section 6409(a) (*i.e.*, February 22, 2012) because the equipment will be vertically separated.[72] For almost all base stations, the cumulative limit is measured from the original structure height because the equipment will be horizontally separated.[73] This threshold presents an opportunity for inadvertent error as the overall height that existed on the date Congress enacted Section 6409(a) may be difficult to discern. Especially when the structure involves a legacy monopole subject to multiple modifications over several decades, a public hearing (or the option to hold on appeal) may be an efficient way to produce the best evidence as to the overall height at a specific point in time.
- ***Site Expansions within the Public Rights-of-Way:*** A collocation or modification causes a substantial change to a base station when it involves excavation or deployments outside the "site" or "area in proximity to the structure and to other transmission equipment already deployed on the ground."[74] The FCC defines "site" as the leased or owned areas and associated easements for access and utilities, but does not define "proximity" for this purpose.[75] Ground-mounted equipment, particularly in downtown

[71] *See* 47 C.F.R. § 1.6100 (b)(7)(i)(A); *see also Infrastructure Order* at ¶ 196.
[72] *See* 47 C.F.R. § 1.6100 (b)(7)(i)(A); *see also Infrastructure Order* at ¶ 197.
[73] *See* 47 C.F.R. § 1.6100 (b)(7)(i)(A); *see also Infrastructure Order* at ¶ 197.
[74] *See* 47 C.F.R. § 1.6100 (b)(7)(iv), (b)(6); *see also Infrastructure Order* at ¶ 198–99.
[75] *See* 47 C.F.R. § 1.6100 (b)(6).

areas, can interfere with other uses that may also be in "proximity to the structure and to other transmission equipment already deployed on the ground". For example, new cabinets can encroach upon door swings, block window displays or impede foot traffic for local vendors. A public hearing (or the option to hold one on appeal) may be the most efficient way to determine how to navigate this shared space.

Public hearings provide the local governments with the opportunity to perform their work in an open setting and with the best information available from all interested parties. The Commission should not prohibit state and local governments that wish to use this procedure to determine whether an application tendered as an eligible facilities request should be granted.

2. Public Hearings Do Not Harm Applicants or Hinder Deployment

Neither Petition offers any concrete injury from the mere fact that a local public agency decided to hold a public hearing. WIA complains that these hearings result in needless delay[76] but, at bottom, the applicant suffers no harm by a process that either results in a valid approval or denial.

If the application is not covered by Section 6409(a), then the additional process does not violate the basic requirement in the shot clock to act within a reasonable time. Indeed, if the application presented a close question, the additional process would be reasonable "taking into account the nature and scope of such request."[77] If the application is covered by Section 6409(a), then the additional

[76] *See* WIA Decl. R. Petition at 8–9.
[77] *See* 47 U.S.C. § 332(c)(7)(B)(ii).

process will almost always take less time than the average delay between the time a city has permits ready to issue and the time such permits are pulled by the applicant.[78] In any event, any additional time for a public hearing does not contribute to unreasonable delay.

Moreover, all interested parties—including the applicant—are better served by additional administrative process as a prophylactic against unnecessary judicial review. Without the option to appeal an administrative denial, the applicant can usually seek only judicial remedies.[79] Likewise, in a judicial challenge to an approval not subject to any administrative appeal, any competent plaintiff's counsel would seek a temporary injunction against the deployment.[80] In either case, the unavailable administrative appeal would not only delay the deployment but result in the very litigation the Commission seeks to avoid.

The public hearing process, whether available in the first instance or on administrative appeal, mitigates the likelihood that the local public agency would mistakenly approve or deny an eligible facilities request. Accordingly, the Commission should reject proposals by the industry to curtail such processes, especially when these hearings can be conducted within the shot clock timeframe.

## III. SUBSTANTIAL CHANGE ISSUES

### A. The Commission Should Not Adopt Petitioners' Significant Rewrite of the Concealment Requirements of the Rule

[78] *See* Part II.A, *supra*.
[79] *See* 47 U.S.C. § 332(c)(7)(B)(v) (authorizing judicial remedies except in limited circumstances).
[80] FED. R. CIV. P. 65(b).

Despite Petitioners arguments to the contrary, "concealment elements" refers to the particularized steps the parties take to mitigate the aesthetic harms of a facility, not a facility's overall appearance. The Petitioners' arguments attempt to expand the scope of eligible facilities requests by narrowing the definition of concealment elements. However, changes in size and scale can defeat concealment elements by undermining the concealment of the structure. The significant changes to the rule advanced by Petitioners if implemented by the Commission would unfairly impact localities and threaten to hinder, not advance deployment.

1. "Concealment Elements" Refer to Particularized Steps to Mitigate Aesthetic Harms, Not a Facility's Overall Appearance

In a recent case, a federal district court turned to the dictionary definitions for each word in the phrase and held that:

> "concealment elements" as used in [47 C.F.R. § 1.6100(b)(7)] include those specific, objective conditions or requirements placed on a facility in order to help it blend in with surroundings or otherwise appear to be something other than a wireless transmission facility.
>
> . . .
>
> "Concealment elements" then does not include the overall appearance of the structure, or what it is meant to "look like," but only the particularized conditions or steps that were imposed in order to attempt to achieve "concealment." This definition is not only consistent with the plain meaning of the text but also the regulatory structure and the FCC's justification for the [*2014 Infrastructure Order*].[81]

[81] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, *8–9 (D. Colo. Sep. 9, 2019).

In fact, though CTIA accuses Douglas County[82] of failing to act on an EFR because of concerns about the expansion of the shroud, CTIA fails to mention that opinions from both a federal magistrate judge and an Article III judge have upheld Douglas County's denial.[83]

This interpretation finds support in both the dictionary and in the *2014 Infrastructure Order*. Concealment refers to "[t]he action of hiding something *or* preventing it from being known."[84] "Element" means "a part or aspect of something abstract, especially one that is essential or characteristic."[85] Taken together, and contrary to Petitioners' proposed interpretation, whether a modification defeats the concealment elements must properly address individual aspects of concealment in addition to the concealment context as a whole. For example, no reasonable person would suggest that installing new equipment painted or finished a different color from all the existing equipment of a uniform color would defeat concealment. Even if the all the equipment was exposed to public view, that the facility was previously painted consistently evidences local intent to conceal the facility to some degree.

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[82] CTIA at 11 n.24. CTIA describes "a Colorado locality" citing an *ex parte* letter from Crown Castle containing identical allegations against Douglas County. From this we infer the "Colorado" locality CTIA means is Douglas County. We are particularly concerned with this tactic given that Douglas County has already submitted documentation in WT Docket No. 17-79 demonstrating the falsity of these allegations. Letter from Douglas J. DeBord, County Manager, Douglas County, Colorado, to Marlene H. Dortch, Secretary, FCC (Aug. 21, 2018) (attached as **Exhibit O**). CTIA's filing did not acknowledge this factual refutation or the associated court orders.

[83] *Bd. of Cty. Comm'ns for Douglas Cty. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, (D. Colo. Sep. 9, 2019); *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, No. 17-CV-03171-RM-NRN, 2019 WL 1044572, at *1 (D. Colo. Mar. 4, 2019).

[84] *Concealment*, LEXICO BY OXFORD (last visited Oct. 18, 2019), https://www.lexico.com/en/definition/concealment (emphasis added).

[85] *Element*, LEXICO BY OXFORD (last visited Oct. 18, 2019), https://www.lexico.com/en/definition/element.

Not all circumstances warrant "invisible" or "stealth" infrastructure and communities must be able to reasonably decide for themselves the level of concealment appropriate for initial deployment that carries over to future modifications. Counter interpretations offered by the Petitioners unduly limit the scope of the rule adopted in the *2014 Infrastructure Order* and subsequent judicial application of that rule.

2. Section 6409(a) Does Not Cover Collocations or Modifications that Defeat Existing Concealment Elements

The Commission's regulations provide that "[a] modification substantially changes the physical dimensions of an eligible support structure if it meets *any* of the following criteria . . . ."[86] Among the "criteria" for a substantial change is a modification that:

> (v) . . . would defeat the concealment elements of the eligible support structure; *or*
>
> (vi) . . . does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.[6100](b)(7)(i) through (iv).[87]

This disjunctive rule clearly sets out independent and separate criteria for a substantial change. Failure to comply with all criteria is fatal. As the recent federal case discussed above discussed, the rule's plain language recognizes that an eligible

[86] 47 C.F.R. § 1.6100(b)(7) (emphasis added).
[87] *Id.* §§ 1.6100(b)(7)(v)–(vi) (emphasis added).

facilities request must comply with both the size requirements and the requirement not to defeat the concealment elements.[88]

3. Changes in Size and Scale Can Defeat Concealment Elements

Arguments in the Petitions that maintaining the *status quo* would render Section 6409(a) a dead letter are demonstrably false.[89] Not all wireless facilities are concealed and the limitation on modifications that "defeat the existing concealment elements" would therefore have no impact on these facilities whatsoever.[90]

Even among concealed facilities, not all concealment elements depend on size or scale and so the ability to define concealment in those terms would likewise not impact those facilities. Only a specific subset of facilities falls within the ambit of these requirements. The only facilities affected by the rule would be in a narrow class where concealment depends on contextual factors.

Further, as the *2014 Infrastructure Order* acknowledges, the Commission included physical dimensions as part of the criteria that could undermine a concealment element. Specifically the Commission said that it expects that "failures to meet these criteria will generally relate to changes in physical dimensions, and taking into account the support in the record for including these criteria, we find it appropriate to include them as criteria of the substantial change test."[91] Because to

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[88] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, *10 (D. Colo. Sep. 9, 2019) ("As explained above, the Rule's plain language requires compliance with both provisions.").
[89] WIA Decl. R. Petition at 10–13; CTIA Petition at 9–13.
[90] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, ___ F. Supp. 3d ___, 2019 WL 4257109, *10 (D. Colo. Sep. 9, 2019).
[91] *2014 Infrastructure Order* at ¶ 213 n.543.

do so would be counter to congressional intent, the proposed change to narrow the application of the rule should be rejected.[92]

4. Petitioners Urge the Commission to Adopt an Unduly Narrow Interpretation of the Rule Which Would Unfairly Impact Localities and Threaten to Hinder Deployment

Petitioners request that the Commission narrowly reinterpret the rule such that the definition of "concealment elements are limited to equipment and materials used specifically to conceal the visual impact of a wireless facility pursuant to concealment conditions imposed during the initial siting process."[93] Petitioners further request that size requirements may not be considered concealment requirements, and that permit or general requirements are generally not concealment requirements.[94]

These limited interpretations would unduly limit the scope of the rule adopted in the *2014 Infrastructure Order*, which does not support the restrictive conception of concealment advanced by Petitioners. Specifically, "a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting façade or artificial tree branches, should be considered substantial under Section 6409(a)."[95] Petitioners now argue that by including examples in a subordinate clause the Commission limited the scope of the rule to only those modifications.

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[92] *Id.*
[93] WIA Decl. R. Petition at 12; *see also* CTIA Petition at 12.
[94] *See* WIA Decl. R. Petition at 12-13; CTIA at 12.
[95] *2014 Infrastructure Order* at ¶ 200.

The rule adopted by the Commission is that a substantial change occurs where a modification undermines the concealment of concealed *or* stealth-designed facilities. The Commission expressly recognized a distinction between concealed facilities and stealth facilities. The latter category consists of "facilities designed to look like some other feature other than a wireless tower or base station", whereas the former category is broader and involves concealment elements as basic as, but not limited to, uniform paint choices.[96] A surface-level reading of the relevant paragraph makes this distinction clear: painting equipment to match the support structure, which the Commission expressly recognizes is a concealment element,[97] does not make the equipment look like something other than wireless equipment. Rather, uniform paint incrementally reduces the visibility of equipment at first glance and/or blends the equipment against its background. Because paint does not make the facility "look like some other feature other than a wireless tower or base station", paint is commonly required to create a "concealed" facility but does not necessarily bear on whether the facility is "stealth." The Commission correctly determined in 2014 that concealment elements are broad enough to incorporate more than faux trees, faux structural features and other creative design techniques that truly hide equipment from view of the casual observer.

[96] *2014 Infrastructure Order* at ¶ 200.
[97] *See 2014 Infrastructure Order* at ¶ 200 n.543 ("For example, a replacement of exactly the same dimensions could still violate concealment elements if it does not have the same camouflaging paint as the replaced facility."). Nowhere does the Commission suggest that painting equipment is always used or intended to make the facility look like something other than a wireless tower or base station.

Furthermore, as the Commission describes, this interpretation is consistent with congressional intent to allow localities to continue to require compliance with concealment requirements.[98] The narrow interpretation now advanced by Petitioners is not supported by the *2014 Infrastructure Order* and runs counter to congressional intent and the Commission's goal of advancing deployment in a manner that respects State and local interests.

a. *Retroactive Limitations on Concealment Unjustifiably Punish Careful Efforts to Conceal New Facilities Taken by Communities in Reliance on the Commission's Existing Rules*

The *2014 Infrastructure Order* preserved local authority to continue to regulate aesthetics of deployments.[99] In reliance on these rules, local governments have reviewed and permitted new concealed facilities in their communities, concomitant with their obligation to protect the aesthetic value of their communities. As the deployment of new facilities has shifted to the right-of-way, localities have grappled with integrating these facilities into the character of their communities. In recognition of the fundamental role that rights-of-way play in a community as "the visual fabric from which neighborhoods are made,"[100] local governments have exercised their traditional police powers to fulfill their obligation

[98] *Id.* ("Further, we find that, as with building codes, Congress did not intend to exempt covered modifications from compliance with such elements and conditions or to undermine such conditions, whether or not they affect the physical dimensions of the wireless tower or base station, and that Section 6409(a) in any case permits States and localities to condition a covered request on compliance with such criteria or otherwise require a covered request to meet these criteria.").
[99] *See id.* at ¶ 200 ("This approach, we find, properly preserves municipal authority to determine which structures are appropriate for wireless use and under what conditions, and reflects one of the three key priorities identified by the [Intergovernmental Advisory Committee] in assessing substantial change.").
[100] *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 724 (9th Cir. 2009).

to protect the aesthetics of their communities. The Commission previously recognized the potential for deployment in the rights-of-way to have to significant and different impact from standalone facilities on private property.[101]

As a federal court recently pointed out when considering the application of these rules, there was no reason for parties to label any particular element of a facility as a concealment element prior to the passage of the Spectrum Act and adoption of the rules, and even now there remains no specific requirement to do so.[102] For the Commission to now impose a rule premised upon such non-existent designations would unfairly and retroactively punish both communities and providers who had no notice, and therefore no reason to expect that regulation would be premised upon such a requirement. This is problematic from both an implementation perspective and as a matter of law.[103]

As far as the retroactivity of the rules, the Supreme Court has already explained that: "A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past

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[101] *2014 Infrastructure Order* at ¶ 195 ("To ensure consistent treatment of structures in the public rights-of-way, and because of the heightened potential for impact from extensions in such locations, we provide that structures qualifying as towers that are deployed in public rights-of-way will be subject to the same height and width criteria as non-tower structures.").

[102] *Bd. of Cty. Comm'ns for Douglas Cty., Colo. v. Crown Castle USA, Inc.*, No. 17-CV-03171-DDD-NRN, 2019 WL 4257109, at *10 (D. Colo. Sept. 9, 2019).

[103] As far as implementation, how would the Commission anticipate that parties should treat facilities that were permitted and constructed prior to any imposed requirement to designate elements as concealment versus non-concealment for the purpose of an eligible facility request? At minimum, parties should be given a reasonable opportunity to prospectively evaluate currently permitted facilities and designate which elements are concealment elements. Though this would impose a substantial burden on localities with limited resources, it would nevertheless be preferable and more equitable than refusing to recognize the concealment elements of facilities unless they have been previously designated as such.

investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious,' . . . and thus invalid."[104] At minimum, where the secondary retroactivity effects of proposed rules will upset settled expectations and preexisting interests, the Commission is obligated to address these harms.[105]

The proposals advanced by Petitioners would punish the investment localities have made in reliance on the current rules and raises concerns about the retroactivity of the proposals.

b. *Proposed Requirements Threaten to Impede Future Deployments*

Furthermore, the proposed changes advanced by Petitioners threaten to impede, not advance future deployments by incenting State and local denials. As discussed above, local communities have both the opportunity and the obligation to regulate to protect the aesthetic interests of their community, a legal right recognized by the Telecommunications Act.[106]

Under the current rules, a locality may permit a camouflaged site or deny a facility based upon the particularized concerns on the facility's aesthetic impact on, for example, a historic district or a scenic ridgeline. That locality can conditionally grant the deployment with appropriate camouflage requirements secure in the knowledge that over time the facility will remain generally consistent with the original aesthetic conditions.

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[104] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (SCALIA, J., concurring) (internal citation omitted).
[105] *NCTA v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).
[106] *See* 47 U.S.C. § 332(c)(7)(A) (preserving local zoning authority subject to limited enumerated exceptions).

Under Petitioners' proposed rules proposed, the locality's options will be materially altered. Now it must decide whether to approve the facility with the cold comfort that the concealment elements agreed to at the time of the deployment may be later disregarded or deny the application. As noted in *ex parte* meetings at the Commission on July 17, 2014,[107] many creative camouflaged sites in difficult to site areas would never have been approved if the local government knew that regardless of its efforts to conceal the wireless facilities, a subsequent request that would make the equipment more visible would be required to be approved under federal law. Given this uncertainty, the locality may rationally decide to deny the original facility. Thus, the proposed rule change undermines the advantages of collocation recognized by the Commission if local governments become reluctant to permit facilities in the first instance out of the reasonable concern that the applicant would later seek federally-mandated modifications that bear little resemblance to the original conditions.[108] Rational local reluctance in the face of overbearing federal regulations could slow initial deployments, resulting in more siting litigation rather than timely approvals through the standard local procedures. Given the Commission's interest in accelerating the deployment of next-generation wireless facilities,[109] these proposals should not be adopted because of their potential to impede rather than ameliorate siting and deployment.

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[107] Letter from Kenneth S. Fellman, Partner, Kissinger & Fellman PC, to Marlene H. Dortch, Secretary, FCC (Jul. 17, 2014) (attached as **Exhibit M**).
[108] *See, e.g., 2014 Infrastructure Order* at ¶ 142 ("As the Commission noted in the Infrastructure NPRM, collocation on existing structures is often the most efficient and economical solution for mobile wireless service providers that need new cell sites to expand their existing coverage area, increase their capacity, or deploy new advanced services.").
[109] *See, e.g., Small Cell Order* at ¶ 1.

### B. The Commission Already Adopted Reasonable Limitations on Equipment Cabinets and Properly Recognized a Distinction Between Ground-Mounted Cabinets and Structure-Mounted Cabinets

CTIA petitions the Commission to "clarify" that the term "equipment cabinet" be limited to those that are "placed on the ground or elsewhere on the premises, and does not include equipment attached to the structure itself, which is covered by other parts of the rule."[110] Without any targeted reason that local governments' determination of equipment cabinets "cannot be correct",[111] CTIA suggests that the Commission ignore its own tested rules regarding the number of equipment cabinets.[112] Rather, CTIA asks the Commission to entirely gut the current and clear number of cabinets that do not trigger a substantial change in Section 1.6100(b)(7)(iii), and replace it with an entirely new and untested meaning that there be no limitation to the number of cabinets affixed to a tower or base station.[113]

This proposal defies the commonly understood definition for an "equipment cabinet". Virtually all terrestrial communication networks require equipment placed in the field. In a wireline network, a "telecom cabinet" generally referred to a Service Area Interface (or "SAI") between the local loop and nearest central office in the public switched telephone network. Carriers placed the SAI typically in the

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[110] CTIA Petition at ii.
[111] CTIA Petition at 14.
[112] *See* 47 C.F.R. § 1.6100(b)(7)(iii) ("For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure . . . .").
[113] CTIA Petition at 14.

public rights-of-way and it usually contained twisted copper pairs. Rack cabinets housed similar telecom equipment placed indoors. Wireless networks also include "base station cabinets" which typically looked like the wireline SAI cabinets but contained transmitters, receivers, power supplies and control equipment rather than twisted pairs. Also, like SAI cabinets, base station cabinets connected the communications signals from users to the mobile switch. Outdoor cabinets consist of a weatherproofed outer shell and internal electrical components.[114]

Newton's Telecom Dictionary defines a "cabinet" as:

> 1. A container that may enclose connection devices, terminations, apparatus, wiring, and equipment. 2. In telecommunications, an enclosure used for terminating telecommunications cables, wiring, and connection devices that has a hinged cover, usually flush mounted in the wall.[115]

Although the second part indicates that Newton envisioned a case specifically for wireline telephone connections, the first part provides a useful generalization from which to begin. At the most basic level, an "equipment cabinet" means a "container" for transmission equipment. It has nothing to do with *where* it is placed.

CTIA's proposal also defies common sense. There would be no basic limit on cabinets that could cause a substantial change, especially in the context of the public right-of-way with greater space limitations and likelihood that new, larger cabinets will substantially change the original approved facility. CTIA's proposal

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[114] *See* Telecordia Technologies, Inc. *GR-487: Generic Requirements for Electronic Equipment Cabinets*, Issue No. 4 (Feb. 2013).
[115] HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 242 (27th ed. 2013).

would allow an unlimited number of cabinets of unlimited sizes and volumes to evade a substantial change.

CTIA's proposal that the height and width substantial change limits are sufficient to address structure-mounted cabinets is misplaced.[116] There is no logical or practical connection between structure height and width and the number of cabinets affixed to it. Consider a typical pole-mounted facility in the public right-of-way with an equipment cabinet that holds the ancillary transmission equipment: permitting *by federal right* an additional equipment cabinet that protrudes *six feet* from the support structure illustrates the absurdity of CTIA's position. The Commission reasonably established a numerical limit to structure-mounted equipment cabinets because it correctly understood that structures and deployment conditions vary by location.[117] CTIA's contorted interpretation fails to overcome the clear and unambiguous separation of the number of cabinets as the first clause on Section 1.6100(b)(7)(iii) completely made distinct from changes in tower heights and ground cabinets set out in the remaining clause of the same section.[118]

There is no doubt that a ground-mounted equipment cabinet contains transmission equipment. Those cabinets can include radio frequency transmission and reception equipment; front-haul and back-haul communications links; signal processing equipment, and the like. Identically, remote radio units (sometimes also

[116] CTIA Petition at 14 (quoting *2014 Infrastructure Order* at ¶ 188).
[117] *See 2014 Infrastructure Order* at ¶ 194.
[118] *See* 47 C.F.R. § 1.6100(b)(7)(iii) (distinguishing between "equipment cabinets" and "ground cabinets" and showing that the Commission understood that equipment cabinets are often deployed on the support structure, not limited to wireless towers on private property).

called “remote radio heads”) can include radio frequency transmission and reception equipment, front-haul and back-haul communications links, signal processing equipment, and the like. CTIA suggests that the difference is the size and location of the equipment enclosure, not its function. To adopt the industry’s definition is nonsensical given that it is the function that controls, and locational visibility matters. The industry omits the fact that RRUs located near the antennas creates substantial visible bulk, as do RRUs and associated equipment above ground, and that bulk is more visible than ground mounted cabinets or for new cabinets installed existing enclosures.

The Commission’s long-standing four-cabinet rule for 6409(a) modifications has been a suitable and workable balance, but abandoning that rule as now sought by the wireless industry would create a loophole swallowing the underpinning principles of protecting against substantial increases in 6409(a) site modifications without any substantial protections for community aesthetics. Ultimately, the function of the cabinet must be the controlling factor, not its size especially where the industry asks for an unlimited number of far more visible equipment cabinets while ground mounted cabinets would be subject to the current rules thus creating two entirely different classes of rules for the same types of equipment cabinets.

The practical impact of CTIA’s proposal is to entirely eliminate the current numerical value set out in Section 1.6100(b)(7)(iii) and thereby remove one of the pillars of the *2014 Infrastructure Order* without offering any reasonable substitute other than its intended result that no limit is a good limit.

### C. Prohibiting Local Governments from Enforcing Prior Conditions before Approving an Eligible Facilities Request is Contrary to Public Policy

WIA requests that the Commission amend 47 C.F.R. § 1.6100(b)(7)(vi) to "appl[y] only if the proposed modification would cause non-compliance with prior conditions imposed on a structure or site."[119] WIA contends that local governments improperly hold up eligible facilities requests to ensure compliance with the underlying permit that originally authorized the wireless use.[120] WIA's proposal and rationale runs contrary to good governance and would put public health and safety at risk.

The existing rule provides that, subject to a limited exception, a modification causes a substantial change if "it does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment . . . ."[121] Limiting the application of this rule to changes that *cause* non-compliance with prior conditions fails to recognize important realities.

Modification requests require applicants to submit construction drawings that show the existing and proposed conditions at the property. To the extent the wireless facility has fallen out of compliance with existing conditions of approval, local agencies may properly opt to require that the applicant remedy the non-

[119] WIA Decl. R. Petition at 15.
[120] *See id.* at 14.
[121] 47 C.F.R. § 1.6100(b)(7)(vi) (". . .provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § [1.6100(b)(7)(i)-(iv)" related to height, width, equipment cabinets and excavation or deployment outside the current site).

compliance in order to approve the modification plans. Although WIA criticizes the City of San Diego, California for refusing to interpret the *2014 Infrastructure Order* to require approval of facilities in violation of their permits, the city's approach is consistent with the text of the rule and responsible governance. Approving plans that show permit violations on their face, or do not accurately reflect the conditions at the property, would require the local agency to authorize conditions it knows to be in violation of the law. Consistent with the existing rule, modification plans that show permit violations would plainly "not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment," and approving sealed plans with known inaccuracies would raise serious questions of professional licensing law.[122] The Commission properly recognized these concerns in the *2014 Infrastructure Order* and Congress would not have intended applicants to obtain benefits under Section 6409(a) without complying with generally applicable legal requirements.

State and local governments also operate on limited resources. Without around-the-clock monitoring, a reviewing authority commonly discovers code compliance issues when the property owner or tenant applies to modify the site. For all types of development applications, not just wireless applications, it is common practice for local governments to require that these issues be resolved *before* issuing modification permits. The reasons are straightforward. To the extent the non-compliance involves a building or safety issue, approving a modification could

[122] *See generally* CAL. BUS. AND PROFESSIONS CODE §§ 6700 *et seq*.

exacerbate unsafe conditions. Moreover, when the applicant fails to comply with prior aesthetic conditions of approval, the permit applicant is already in a position to remedy the violation such that a code enforcement action needlessly wastes time and resources.[123] Permit non-compliance converts the use or structure into *illegal* non-conforming status that would reverse prior Commission policy that limited preemption to legal non-conforming uses and structures.[124]

Accordingly, the Commission should reinforce its commitment to preserving State and local authority to require compliance with prior permit conditions and other applicable rules as a precondition to approving an eligible facilities request.

### D. WIA's Request to Clarify the Antenna Separation Rule for Towers to Mean the Same as Currently Provided Supports the Need for a Different Standard

WIA requests a clarification to the antenna separation rule that would not resolve the ambiguity.[125] To the extent that applicants and permitting agencies have adopted different interpretations, the prudent action would be to amend the rule for consistency with the height limitation for towers in the public rights-of-way and base stations.[126] This approach already has support in the *2014 Infrastructure Order* and in common sense.

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[123] Permit non-compliance must be resolved or permits can be revoked.
[124] *See 2014 Infrastructure Order* at ¶ 201.
[125] WIA Decl. R. Petition at 17.
[126] *See* 47 C.F.R. § 1.6100(b)(7)(i) (providing that a substantial change occurs when the modification "increases the height of the structure by more than 10% or *more than ten feet*, whichever is greater." (emphasis added)). Because the rule for towers outside the public rights-of-way and base stations avoids the messy calculations of separations from the nearest antenna, applicants and permitting agencies alike appear to have had little problem assessing compliance with this clearer standard.

First, the Commission found that "vertically collocated antennas often need 10 feet of separation" and that "a fixed minimum best serves the intention of Congress to advance broadband service by expediting the deployment of minor modifications of towers and base stations."[127] Neither the Petitions nor the record in the current infrastructure proceedings reveal that these findings have changed with respect to towers. Second, given that a fixed minimum best serves Congressional intent, and that there is no record evidence that the fixed standard for towers outside the public rights-of-way and base stations has caused similar confusion, applicants and local governments would be well-served to model the rule for towers on private property in the same vein.

### E. WIA Provides No Support to Justify Changing the Existing Site Expansion Rules in the *2014 Infrastructure Order*

WIA appears to be anticipating a problem for which it has no evidence exists in the context of Section 6409(a). The Commission's codified regulation defines the "site" as follows:

> For towers other than towers in the public rights-of-way, the *current boundaries* of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.[128]

[127] *2014 Infrastructure Order* at ¶ 193.
[128] 47 C.F.R. § 1.6100(b)(6) (emphasis added).

This rule clearly restricts new transmission equipment to the space "leased or owned" by the site operator at the time it requests approval.[129] In its favor, WIA cites several industry letters and provides site plans and photographs demonstrating the concept of a compound expansion. What these sources fail to show is whether any local government actually denied or delayed the expansion, whether the compound expansions even implicated questions that Section 6409(a) was intended to resolve, or whether the 30-foot proposal is even consistent with the types of compound expansions shown in the letters.[130] Despite these factual deficiencies, the Commission should reject the proposal because it already considered these issues in prior proceedings and the nature of tower modifications has largely remained the same.

1. The Commission Already Rejected WIA's Proposed Rule and Circumstances Have Not Changed to Justify a Policy Reversal

The Commission rejected an identical proposal by WIA (then known as "PCIA") in the *2014 Infrastructure Order*.[131] WIA urged the Commission to adopt the criteria for ground disturbance used in the Nationwide Programmatic

[129] *Id.*; *see also 2014 Infrastructure Order* at ¶ 198 (defining "the 'site' for towers outside of the public rights-of-way as the current boundaries of the leased or owned property surrounding the tower")
[130] *See* WIA RM Petition, Appendix (showing photographic examples of approved compound expansion, meaning that the compound was expanded with the benefit Section 6409(a) rule change); *id.* at 8 n.28 (citing a single example from a Crown Castle *ex parte* that a compound expansion implicated Section 106 review. The compound expansion was a 14-foot by 10-foot leasehold, 16 feet by 20 feet less than what WIA suggests, and Section 106 review does not implicate issues that Section 6409(a) can resolve); *id.* at 8 n.25 (citing an American Tower *ex parte* that alleges no misconduct from local governments and generally complains about historic preservation review with respect to compound expansions).
[131] *See 2014 Infrastructure Order* at ¶ 199 ("We also reject the PCIA and Sprint proposal to . . . allow applicants to excavate outside the leased or licensed premises.").

Agreement ("NPA") that would allow new expansions up to 30 feet *beyond* the existing leased or owned area.[132] But the Commission found the criteria in the NPA, which applies to replacement towers, inappropriate as a model for Section 6409(a), which applies only to replacement transmission equipment *on an existing* tower or base station.[133] Instead, the Commission found the approach in the Collocation Agreement, which applies to changes to existing facilities, more consistent with the limited statutory scope.[134]

In addition to the comparisons between Section 6409(a) and these programmatic agreements, the Commission cited with approval municipal comments that argued such expansions were both unnecessary and absurd.[135] The cited comments pointed out that substantiality "depends in large part on the specific circumstances where the change occurs" as demonstrated by variations in state legislation to implement Section 6409(a).[136] San Antonio's reply, also cited by the Commission, argued that:

> Additional construction or excavation over such a large area cannot in any sense be viewed as "insubstantial" under any circumstances. When coupled with industry's claim that utility or light poles and existing buildings should be viewed as "existing towers and base stations," PCIA's and Sprint's position becomes absurd. It would

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[132] *In the Matter of Accelerating Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Comments of PCIA at 37–38 (Feb. 4, 2014).
[133] *See 2014 Infrastructure Order* at ¶ 199 (citing 47 U.S.C. § 1455(a)(2)(C)).
[134] *See id.*
[135] *See id.* (citing *In the Matter of Accelerating Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, CA Local Government Reply Comments at 12 (Mar. 5, 2014) [hereinafter "CA Local Government Reply Comments"]; *In the Matter of Accelerating Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, San Antonio Reply Comments at 15 (Mar. 5, 2014) [hereinafter "San Antonio Reply Comments"]).
[136] CA Local Government Reply Comments at 12.

> give providers unfettered license to construct on or excavate entire sections of sidewalks and streets.[137]

Nothing has changed since the Commission first rejected WIA's proposal. First, the plain text in Section 6409(a) still applies only to changes in transmission equipment on existing wireless towers and base stations.[138] A 30-foot compound expansion is ground space, not transmission equipment such that its addition necessarily causes a substantial change that justifies State or local review, subject to limitations in Section 332(c)(7). Just as the Commission found in the *2014 Infrastructure Order* that full support structure replacement did not fall within Section 6409(a)'s limited applicability to "transmission equipment," it should again find that Section 6409(a) does not authorize added, modified or replacement ground space.[139]

Second, the Collocation Agreement still more closely resembles the changes contemplated in Section 6409(a) than those covered by the NPA.[140] Replacement towers involve considerations that are beyond Section 6409(a)'s scope such that differences between the NPA and modifications to existing facilities warrant different treatment. The Commission already recognized that Section 6409(a) does

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[137] San Antonio Reply Comments at 15 (footnotes omitted).
[138] 47 U.S.C. § 1455(a)(2); *see also 2014 Infrastructure Order* at ¶¶ 181, 199.
[139] *See 2014 Infrastructure Order* at ¶¶ 181, 199.
[140] *Compare* 2017 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Sep. 1, 2017) (limiting applicability to "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"), *with* NPA, 47 C.F.R. Part 1, Appendix C, § I (Mar. 7, 2005) (excluding modifications to existing facilities covered by the Collocation Agreement).

not encompass replacement structures.[141] WIA's request to harmonize the Section 6409(a) rules with the NPA would directly conflict with the Commission's well-reasoned prior interpretations.

Third, the Collocation Agreement still does not allow for ground disturbance outside the leased or owned areas.[142] Although the Commission based its analysis on the 2005 Collocation Agreement, the same restriction appears in versions as amended in 2016 and most recently in 2017.[143] And as the record in prior proceedings demonstrate, compound expansions are not a new phenomenon. The rationale supporting compound expansions has not changed, as every transition to the next generation of wireless technology requires incremental changes to existing equipment. Prospective 5G deployments are no different in this respect. That the Collocation Agreement was not amended to account for this, even with 5G on the horizon, further supports that WIA's proposal lacks merit.

Finally, the right to expand 30 feet beyond the current site boundaries is still plainly a substantial change by any measure.[144] A by-right 30-foot expansion

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[141] *See 2014 Infrastructure Order* at ¶¶ 181, 199.

[142] 2017 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Sep. 1, 2017) (defining a substantial change when collocation "would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site").

[143] *Compare* 2005 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.C.4. (Mar. 7, 2005) (defining a substantial change when collocation "would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site."), *with* 2016 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Aug. 29, 2016) (same), *with* 2017 Collocation Agreement, 47 C.F.R. Part 1, Appendix B, § I.E.4 (Sep. 1, 2017) (same).

[144] In sports, 30 feet is a first down in football, a three-point shot in basketball and the world record long jump. *Long Jump*, WIKIPEDIA (last visited Oct. 17, 2019), https://en.wikipedia.org/wiki/Long_jump.

appears to suggest that an additional 900 square feet would not be subject to local review in any context.[145] As an illustration, if the original compound is 12 feet by 12 feet, the applicant would be permitted to expand the site six times over without any local input. A fixed minimum, without variation in compound size and shape, especially when equipment compounds could be no larger than 100 square feet, would be arbitrary and capricious.

The rule adopted by the Commission in the *2014 Infrastructure Order* allowed for *no expansions* to tower sites on private property and only minimal expansions to base stations and sites in the public-rights-of-way.[146] As it did in 2014, the Commission should find that WIA offers no compelling justification to dramatically alter the Commission's established policy.

2. If the Commission Authorizes Large Compound Expansions, It Should Heed WIA's Suggestion and Refrain from Applying the Proposed Rule to Public Rights-of-Way

Although WIA limits the proposed rule change to "towers (other than towers in the public rights-of-way)," the Commission's public notice does not draw this same distinction.[147] To be clear, this proposal is even more absurd as applied to existing facilities within the public rights-of-way. For the reasons discussed below,

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[145] Even WIA's recent *ex parte* to the Commission shows that its proposed rule would allow for a 739.95-square-foot expansion to an average monopole site. *See* Letter from John A. Howes, Jr., Government Affairs Counsel, WIA, to Marlene H. Dortch, Secretary, FCC (Oct. 2, 2019) (showing a 49.33-foot by 15-foot compound expansion). The expansion area requested by WIA is roughly the size for an average apartment in most major United States cities. *See The Average Apartment Size of the Largest US Cities, Charted*, Digg (Jun. 26, 2019 9:37 PM), https://digg.com/2018/average-apartment-size-data-viz.

[146] *See* 47 C.F.R. § 1.6100(b)(6).

[147] *Compare* WIA RM Petition at 10 (requesting that the rule only apply to towers outside the public rights-of-way) *with* Public Notice at 1 (referencing the proposed rule only in the context of a "tower site").

the Commission should not apply it to towers or base stations in the public rights-of-way.

First, the Commission's existing regulations recognize that expansions to existing facilities in the public rights-of-way naturally present a "heightened potential for impact from extensions" to existing facilities, as well as "aesthetic, safety, and other issues . . . ."[148] Thus, the Commission adopted more restrictive substantial-change thresholds for facilities on utility structures and otherwise located in the public rights-of-way.[149] Thirty feet would be wider than most two-lane roads with parallel parking on both sides.[150] In many areas, this means that new ground-mounted cabinets and other transmission equipment could be placed across the street from the pole that supports the antenna. Such a rule would frustrate the careful efforts by communities to site new facilities closer to commercial uses when the street divides residential uses from non-residential uses, conceal equipment behind or within specific street features and contain the equipment within relative proximity to the support structure on which they are mounted.

Second, to the extent that the Commission does not heed WIA's suggestion to limit the applicability to private property towers, the Commission must reconfirm its commitment to preserving local authority to ensure compliance with right-of-way

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[148] *2014 Infrastructure Order* at ¶ 195.
[149] *See id.*; *see also* 47 C.F.R. § 1.6100(b)(7)(iii) (providing that a substantial change occurs in the right-of-way if the modification "involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure . . . .").
[150] *See Urban Street Design Guide: Lane Width*, NAT'L ASS'N OF CITY TRANSP. OFFICIALS (last visited Oct. 17, 2019), https://nacto.org/publication/urban-street-design-guide/street-design-elements/lane-width/.

management rules. The right-of-way is a narrow and dynamic space that cannot tolerate arbitrary site expansion rights.

### F. WIA's Allegations That Jurisdictions Impede Site Fortification with Backup Power Are Not Supported by Facts

WIA makes an unsupported allegation that some unnamed "jurisdictions claim that . . . any collocation proposal that includes a generator constitutes a substantial change."[151] There is no evidence to suggest this is true and, in any event, the Commission's existing regulations already clearly allow backup power equipment so long as it complies with the substantial change criteria.

To be sure, a proposal to add a backup power source is likely to raise several issues. A typical diesel-powered generator is so large and requires so much space that it is likely to exceed several substantial-change thresholds or violate generally applicable health and safety codes. For example, generators require on-site fuel storage that require ignition-source setbacks pursuant to fire codes; noise pollution and noxious fumes may violate prior non-preempted permit conditions unrelated to height, width, equipment cabinets and excavation; and natural gas-powered generators may require excavation outside the current site to run a new gas line to the leased premises. As the examples suggest, these impacts stem from the Commission's well-reasoned proviso that any change that violates generally applicable health and safety regulations falls outside Section 6409(a).

To be sure, the Western Communities Coalition does not fundamentally oppose backup generators or other standby power sources. Our communities know

[151] *See* WIA Decl. R. Petition at 3.

full well that a resilient communications network can be a life-or-death issue in emergencies. But standby power sources themselves often involve combustible or otherwise hazardous materials that require close regulation by federal, state and local authorities. The Commission's existing regulations prudently leave enough room for state and local authority to consider public health and safety issues without the unwarranted time pressure from a Section 6409(a) shot clock. Accordingly, the Commission should reject WIA's unsupported claim and recognize that its existing regulations already strike the appropriate balance.

## IV. COMPLIANCE WITH OBJECTIVE PUBLIC HEALTH AND SAFETY REQUIREMENTS

WIA makes sweeping generalizations regarding the purpose and practical function of local setbacks as public health and safety standards. Local development standards such as setbacks serve a variety of purposes depending on the context. Broad claims that setback and fall zone requirements do not relate to public safety are untethered to the facts and unpersuasive. WIA's generalizations cannot justify Commission action because they are not supported in fact or law.

### A. Local Land Use Regulations Often Contain Objective Public Health and Safety Requirements

WIA claims that setbacks "are not related to the structural safety of towers" because "[s]etbacks generally exist in land use codes . . . ."[152] This is plainly untrue, as land use codes routinely concern public health and safety.

[152] WIA Decl. R. Petition at 20 n.19.

Derived from local police powers, land use regulations promote and protect public health, safety and welfare.[153] As the U.S. Supreme Court recognized in *Ambler Realty Co.*:

> There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits . . . and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.

The U.S. Supreme Court also recognized that setbacks among or between certain land uses may serve to protect public health, safety and welfare. *See Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71 n.34 (1976) (finding that an intent to mitigate crime associated with adult theaters justified a setback requirement among and between them).

Other examples include:

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[153] *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *accord* CAL. CONST. Art. 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."); ENCINITAS, CAL., CODE § 9.70.010 ("regulations set forth in this chapter are adopted to serve, protect and promote the public health, safety and welfare"); *see also, e.g.*, DANVILLE, CAL. CODE § 32-1.1 (declaring the purpose of the zoning code, where its wireless facilities regulations are chaptered, is to "promote and protect the public health, safety, peace, comfort, and general welfare"); RICHMOND, CAL. CODE § 15.04.614.010 (providing that its wireless regulations, chaptered in the zoning code, are intended to reasonably regulated facilities "in a manner that promotes and protects public health, safety and welfare"); CERRITOS, CAL. CODE § 22.42.010 ("The regulations contained herein are designed to protected and promote public health, safety, community welfare and the aesthetic qualities of Cerritos as set forth in the goals and policies of the Cerritos general plan."); PLEASANTON, CAL. CODE § 18.110.005 ("The regulations contained herein are designed to protect and promote public safety and community welfare . . ."); TACOMA, WASH. CODE § 13.06.545 ("standards were developed to protect the public health, safety, and welfare"); SOUTH LAKE TAHOE, CAL., CODE § 6.55.010 (these "land use regulations are adopted to promote and protect the public health, safety, peace, comfort, convenience, general welfare and environment, natural and manmade").

- California Government Code § 65302(g) requires cities to develop a general plan that includes policies to keep local emergency communications facilities away from flood zones, high fire risk zones and other at-risk zones.

- California Government Code § 51182(a)(1) requires a minimum 100-foot setback between dry vegetation and any occupied structure in very high fire hazard severity zones.

- The San Anselmo Planning and Zoning Code requires building and fire safety officials to assess whether accessory dwelling units that encroach into certain setbacks leave space "sufficient for fire safety."[154]

- The Solana Beach Local Coastal Program, which implements the California Coastal Act's mandate to manage coastal conservation and development, requires structures and "new building improvements to be setback a safe distance from the bluff edge."[155] The city's General Plan also includes setback requirements from identified seismic fault lines.[156]

Accordingly, the Commission should reject the overbroad claim by WIA that land use regulations do not relate to public health and safety.

### B. Setback Requirements Often Appear in Both Land Use Codes and Building Codes

WIA incorrectly asserts that setbacks "do not exist in building codes . . . ."[157] Setbacks *do* exist in building codes. For example:

- The 2019 California Building Code, Title 24, Part 2, Volume 1, Section 705 requires minimum setbacks between exterior walls on separate buildings.

- The 2019 California Fire Code Section 4906 requires setbacks between occupied structures and combustible vegetation in certain high-fire risk areas.

- The Encinitas Municipal Code contains multiple setback requirements in its Building and Construction Code, which include setbacks for erosion control

[154] *See* SAN ANSELMO, CAL., CODE § 10-6.207(e).
[155] *See* Solana Beach General Plan, Land Use Element § III.B (adopted by Resolution No. 2014-141 (Nov. 19, 2014)).
[156] *See* Solana Beach General Plan, Safety Element § 2.1.2 (adopted by Resolution No. 2014-141 (Nov. 19, 2014)).
[157] WIA Decl. R. Petition at 20.

and additional clearance between buildings and traffic lanes along highways and major arterials.[158]

- The Town of San Anselmo Public Works Code contains setback requirements for private wells to prevent subsidence and provide lateral and subjacent support to other parcels.[159]

- The City of San Ramon, California, requires setbacks between graded slopes and property lines "to provide for safety of adjacent property . . . [and the] safety of pedestrians and vehicular traffic . . . ."[160]

- The Solana Beach Municipal Code contains setbacks in its Excavation and Grading Code for erosion and drainage control.[161]

- The Rancho Palos Verdes Municipal Code contains setbacks for any building or structure, located under or above ground, as measured from any respective street side, interior side, front or rear property line. Additionally, setbacks apply to hillsides with a grade of 25% or more and slopes between properties greater than 6' or more.

Setbacks also exist in codes concerned with various other subject matters. For example:

- The City of Encinitas, California, regulates wireless facility deployment through its Public Health, Safety and Welfare Code.[162] All wireless facilities must be compliant with all applicable setbacks.[163] However, "[t]he applicant may propose to locate any wireless communications facility component within a required setback if the proposed location would reduce visual impact, improve safety or otherwise exhibit superior design attributes."[164]

- San Anselmo's Public Safety Code includes a fire safety setback on public storage facilities.[165]

- The City of San Ramon, California, establishes within its Public Works and Flood Control Code certain setback requirements for permanent structures in

[158] *See* ENCINITAS, CAL., CODE §§ 23.24.470, 23.36.060.
[159] *See* SAN ANSELMO, CAL., CODE § 7-13.07(b)(7).
[160] *See* SAN RAMON, CAL., CODE § C7-48.
[161] *See* SOLANA BEACH, CAL., CODE § 15.40.140.
[162] *See* ENCINITAS, CAL., CODE §§ 9.70.010 *et seq.*
[163] *Id.* § 9.70.020.
[164] *Id.* § 9.70.080.B.3.e.
[165] *See* SAN ANSELMO, CAL., CODE § 3-3.810.

the public rights-of-way that "would make unnecessarily difficult or make impractical the retention or creation of thoroughfares, adequate in alignment, dimensions and vision clearance to serve the public needs, safety and welfare."[166]

- The City of South Lake Tahoe, California, establishes a snow removal area adjacent to the right-of-way where no permanent or temporary improvements are permitted unless setbacks and other requirements are met, in order to avoid impeding snow removal operations.[167]

A "setback" refers to a minimum distance between structures or boundaries. Within the land use context, setbacks "are designed to ensure that enough light and ventilation reach the property and to keep buildings from being erected too close to property lines."[168]

Where a local regulation lives in a municipal code does not necessarily limit its purpose. Organizational structure often reflects the local government's judgement as to which department should administer the regulations and at what stage in the development process compliance should be assessed. Applicants and local public agencies alike could waste significant resources if the process required or allowed applications for building and construction permits to be reviewed on projects that could never meet setback requirements.

The absurdity in WIA's argument is clear when one considers that the Petitioners would hardly be satisfied if the same setback requirement appeared in the local building code.

### C. The Petitions Offer No Evidence to Support Preemption for Any Setback Requirements

[166] *See* SAN RAMON, CAL., CODE § C6-111; *see also id.* § C6-113 (prohibiting building permits for permanent structures within the public right-of-way setback).
[167] *See* SOUTH LAKE TAHOE, CAL., CODE § 7.05.520.
[168] BLACK'S LAW DICTIONARY 1580 (10th ed. 2014).

Although WIA contends that local public agencies establish or adjust fall zones and setbacks to intentionally frustrate eligible facilities requests, the Petition fails to provide *a single concrete example*.

The case law on this issue does not bear out that generic claims about tower safety—like those advanced by WIA—are sufficient to overturn a denial based on noncompliance with a fall zone requirement. To be sure, some courts have overturned denials when the local public agency simply refuses to accept unrefuted evidence by qualified engineers.

Even if WIA could conjure a few bona fide examples to support its claim, isolated abuses are hardly a sufficient basis to preempt *all* fall zone and setback requirements. Such broad preemption would represent a significant shift in the Commission's stated policy that Section 6409(a) does not preempt objective health and safety regulations.[169] Whether a setback or fall zone requirement existed before or after the initial deployment, the record does not support preemption to the extent such requirement is objective and rationally relates to public health and safety.

## V. CONDITIONAL APPROVAL ISSUES

Conditional approvals are not, as the Petitions suggest, tantamount to a denial. Section 6409(a) does not require local governments to *unconditionally* approve EFRs, and the Commission should reject the proposals by WIA and CTIA.

### A. Regulatory Conditions on Permit Issuance

[169] *See 2014 Infrastructure Order* at ¶ 202; Brief for Respondent, *Montgomery Cty. v. FCC*, Nos. 15-1240 and 15-1284, Dkt. No. 60 at 42 (4th Cir. 2015).

WIA complains that local governments often condition permit issuance on escrow fees.[170] Local governments require escrow accounts from applicants due to their common experience with industry consultants who file applications, which cause local government staff to incur sometimes significant costs, only to later disappear and abandon the application. In plain terms, local governments require escrow accounts because applicants for wireless facilities have stiffed them on the bill.

Other examples cited in WIA's Petition for Declaratory Ruling lack a basis in law and/or fact. For example:

***Concord, California:*** WIA claims that the City of Concord, California, imposes "onerous" conditions "to adopt a specific site maintenance schedule".[171] However, these "site maintenance agreements" are a nondiscriminatory measure used to ensure that properties subject to development permits are "maintained in a manner that is not detrimental or injurious to the public health, safety and general welfare and that its aesthetic appearance is continuously preserved in compliance with conditions of approval imposed by the review authority."[172] This requirement also closely tracks the Commission's own requirements for an eligible facilities request; namely, that a collocation or other modification must "comply with conditions associated with the siting approval of the construction or modification of

[170] WIA Decl. R. Petition at 21.
[171] *See* WIA Decl. R. Petition at 20, 20 n.58.
[172] *See* CONCORD, CAL., CODE § 18.520.030.

the eligible support structure or base station equipment" and must not "defeat the concealment elements of the eligible support structure."[173]

***Beaverton, Oregon:*** WIA alleges that the City of Beaverton, Oregon, "attempts to condition approvals to require all conduit to be contained inside of existing poles."[174] However, the city's code allows new cables associated with collocations or modifications to be placed within *exterior* conduits.[175]

Although WIA does not provide any details that would allow the city to know precisely which member complained about which application, the city believes that this false allegation stems from a recent AT&T application in which the applicant proposed to place new cables risers within the pole as shown in **Figure 4**, below:

[173] *See* 47 C.F.R. §§ 1.6100(b)(7)(v)–(vi); *see also 2014 Infrastructure Order* at ¶ 214 n.595 ("State and local governments may continue to enforce and condition approval on compliance with non-discretionary codes reasonably related to health and safety . . . .").
[174] WIA Decl. R. Petition at 20 n.55.
[175] *See* BEAVERTON, OR., CODE § 60.70.35.19.M.2.

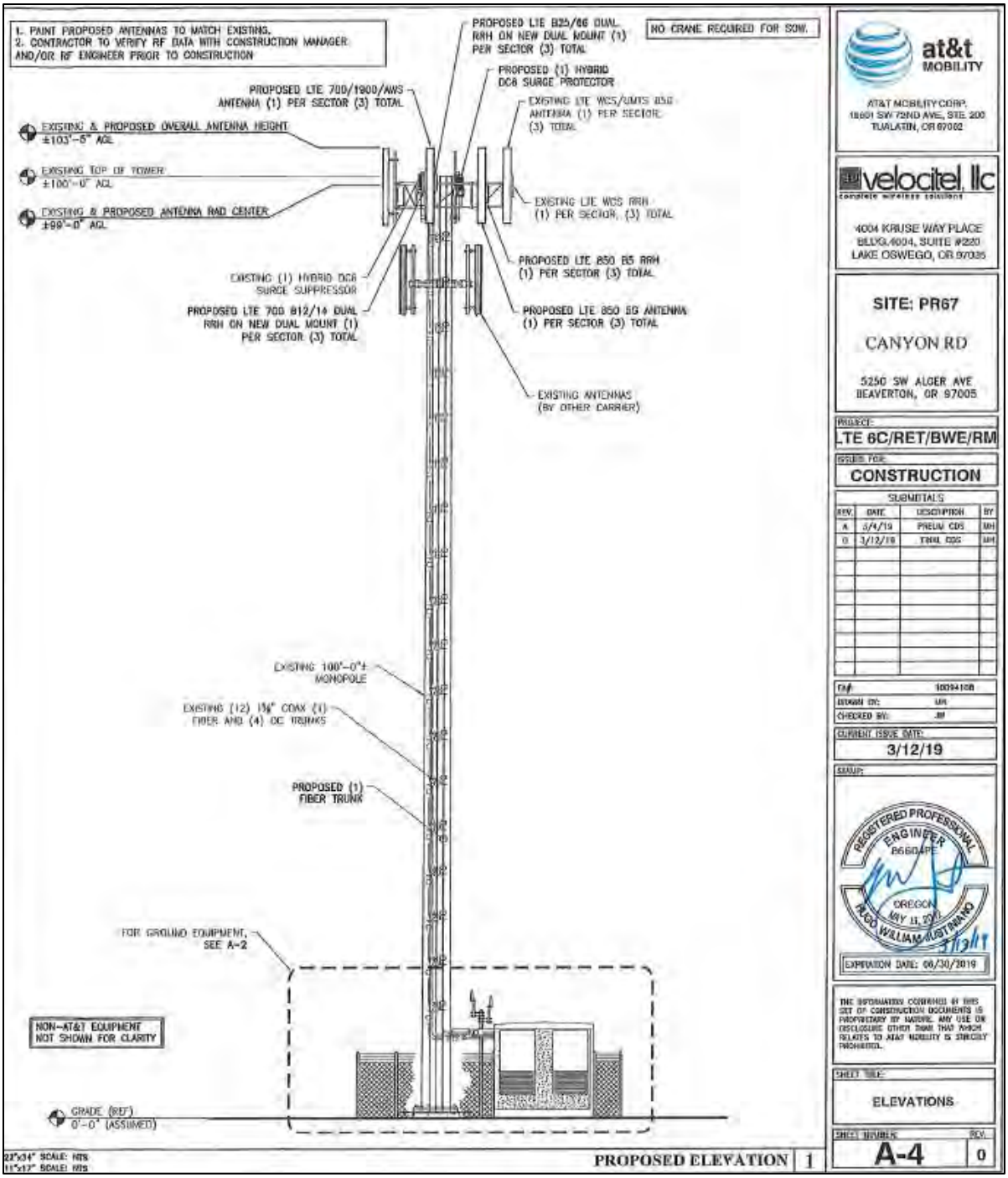


**Figure 4:** AT&T Modification Plans for Site PR67 (Mar. 12, 2019) depicting internal cable risers.

Based on the plans by AT&T to route the proposed cables through existing internal risers, the city included a reference to the internal cables as a condition on its approval letter. The applicant later requested that the city remove the condition and the city responded with information about how the applicant may formally

request a modification to the approval letter.[176] However, the applicant never filed the request or followed up with city staff on this issue.

### B. Terms and Conditions in Proprietary Lease Agreements

WIA asks the Commission to invalidate conditions in lease agreements between site operators and local public agencies that clarify Section 6409(a)'s non-application to requests for modifications tendered to the government in its proprietary capacity as the landlord.[177] This request misconstrues the lease condition and how it operates, and conflicts with the Commission's prior determination that Section 6409(a) does not reach into proprietary relationships. The Commission should reject this request.

Conditions like those described by WIA have nothing to do with the state's or local government's obligation to approve permit applications for eligible facilities requests. These conditions merely clarify that the lease from the government to the provider is a proprietary function and not a regulatory one. A typical lease provision reads as follows:

> **7.3. City's Proprietary Capacity.** City and Licensee acknowledge that City enters this Agreement in its proprietary capacity as the owner or controller of the Property and agree that *any federal or state statutes, regulations or other laws applicable to City in its governmental capacity as a land-use regulator shall not be applied to City in its proprietary capacity as the licensor under this Agreement*. Only the terms in this Agreement

[176] The approval letter in question appears in **Exhibit P**. The letter requires only that the "wiring and cabling" be installed within conduit risers inside the tower.
[177] *See* WIA Decl. R. Petition at 21 n.61.

> govern the criteria and timeframes for Licensee's requests for approvals submitted under this Agreement.[178]

Provisions like these comport with the Commission's *2014 Infrastructure Order*, which correctly found that "Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities."[179] Rather than force wireless tenants to sign away their rights under Section 6409(a), these provisions accurately reflect the distinction between regulatory and proprietary functions.

Moreover, these conditions help to avoid future confusion and unnecessary conflict as the parties administer their respective obligations under the agreement. Consider a scenario in which a carrier leases space on city hall for a wireless facility, with antennas on the facade and equipment cabinets mounted on the ground. If that carrier sought to add an additional antenna array on a parapet extension, the modification might be covered by Section 6409(a) but not authorized under the lease. A clear statement in the lease that the contract controls the landlord-tenant relationship between the parties avoids potential disputes that may arise from these situations.

WIA offers no justification to reverse the Commission's existing interpretation that Section 6409(a) does not preempt proprietary governmental conduct. Just as it did in the *2014 Infrastructure Order*, the Commission should

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[178] Wireless Communications License Agreement dated July 25, 2017, between the City of Concord, a California municipal corporation, and New Cingular Wireless PCS, LLC, a Delaware limited liability company (emphasis added).
[179] *2014 Infrastructure Order* at ¶ 239.

"decline at this time to further elaborate as to how this principle should apply to any particular circumstance in connection with Section 6409(a)."[180]

## VI. APPLICATION REQUIREMENT ISSUES

The Commission should reject proposals by WIA to further restrict application materials required to process eligible facilities requests and related permits and approvals.[181] As the Commission correctly found in the *2014 Infrastructure Order*:

> nothing in [Section 6409(a)] indicates that States or local governments must approve requests merely because applicants claim they are covered. Rather, under Section 6409(a), only requests that do in fact meet the provision's requirements are entitled to mandatory approval. Therefore, States and local governments *must have an opportunity to review applications to determine whether they are covered by Section 6409(a)*, and if not, whether they should in any case be granted.[182]

At the same time, the Commission found that:

> in connection with requests asserted to be covered by Section 6409(a), State and local governments may only require applicants to provide documentation that is *reasonably related to determining whether the request meets the requirements of* [*Section 6409(a)*].[183]

But the deployment process involves more than merely a determination as to whether an application tendered as an eligible facilities request involves a collocated, modified or replaced transmission equipment on an existing wireless tower or base station without a substantial change in its physical dimensions.

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[180] *2014 Infrastructure Order* at ¶ 240.
[181] *See* WIA Decl. R. Petition at 21–24.
[182] *2014 Infrastructure Order* at ¶ 211 (emphasis added).
[183] *Id.* at ¶ 214 (emphasis added).

After that initial determination, local officials must still check for "compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes."[184] These regulations often concern the structure itself and the other equipment or improvements already installed or constructed.

Moreover, the approvals often run with the land, which requires local officials to evaluate other issues such as whether the applicant has authority to bind the property and its owner to the terms and conditions associated with the permit. These approvals may also require public notice, which in turn requires the applicant to provide notice materials and take actions to effect those notices.

The Commission's *2014 Infrastructure Order* correctly recognized that an eligible facilities request may require more than one permit or approval before construction may commence.[185] These other permits and approvals include "the zoning process" as well as "compliance with non-discretionary . . . building and structural codes[,]" and the Commission made clear that its restrictions on certain application requirements "does not prohibit . . . documentation needed to demonstrate compliance with any such applicable codes."[186]

### A. Compliance with RF Exposure Guidelines

#### 1. Section 332(c)(7)(B)(iv) and the Commission's Precedents Recognize the Legitimate Local Interest in Compliance with the Commission's Guidelines for RF Exposure

[184] *Id.* at ¶ 214 n.595.
[185] *Id.*
[186] *Id.*

The Commission should reject any insinuation by WIA that state and local governments cannot evaluate a proposed modification to an existing wireless tower or base station for compliance with the Commission's guidelines for RF exposure. Neither the plain language in the Communications Act nor the Commission's precedents so much as suggest that local public agencies may not question whether a proposed or existing personal wireless service facility complies with applicable RF exposure standards.

Section 332(c)(7) makes clear that local public agencies may regulate personal wireless service facilities that violate applicable RF exposure standards. Section 332(c)(7)(B)(iv) provides that:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions *to the extent that such facilities comply with the Commission's regulations* concerning such emissions.[187]

"That language, by its own terms, requires compliance with federally-established RF emissions levels as a prerequisite to preemption."[188]

Congress' express proviso in the statutory text makes clear that local authority to regulate based on RF exposure begins where compliance with the Commission's guidelines end. Thus, Congress intended—at the bare minimum—to

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[187] 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).

[188] *Sprint Spectrum, L.P. v. Twp. of Warren Planning Bd.*, 737 A.2d 715, 722 (N.J. 1999). Section 332(c)(7)(A), which preserves all state and local zoning authority unless expressly preempted in Section 332(c)(7)(B), removes any doubt as to the narrow preemption in Section 332(c)(7)(B)(iv). *See* 47 U.S.C. § 332(c)(7)(A); *accord Warren Planning Bd.*, 737 A.2d at 722.

preserve local authority to require an applicant for any personal wireless service facility to demonstrate compliance with the Commission's exposure standards.[189]

State and local authority is equally clear in the Commission's precedents. In 2000, the Commission's *RF Procedures Order* expressly recognized local public agencies' "legitimate interest" in site operators' compliance with the Commission's exposure standards and explicitly declined to preempt local requirements to demonstrate such compliance.[190] Rather than broad preemption, the Commission found that case-by-case approach to consider whether "a particular requirement to demonstrate compliance violates Section 332(c)(7)" is more appropriate.[191]

With respect to eligible facilities requests, the Commission found that Section 6409(a) does not cover proposed changes that would violate objective health and safety regulations. In particular, the Commission stated that:

> States and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety.[192]

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[189] *See Warren Planning Bd.*, 737 A.2d at 723 ("[An applicant] is not, by virtue of the Act, exempt from showing that it complies, it is merely exempt from a locally-imposed and more stringent emissions standard.").

[190] *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Report and Order, WT Docket No. 97-192, 15 FCC Rcd. 22821, ¶ 18 (Nov. 13, 2000) ("We recognize that State and local governments have a legitimate interest in ascertaining that facilities will comply with the RF exposure limits set forth in our rules.") [hereinafter "*RF Procedures Order*"].

[191] *Id.* at ¶ 18 (Nov. 13, 2000) ("[W]e do not believe any binding rule governing demonstrations of compliance is necessary. To the extent that any party may argue in a properly filed case that a particular requirement to demonstrate compliance violates Section 332(c)(7), we will consider the issue in that context.").

[192] *2014 Infrastructure Order* at ¶ 188; *see also id.* at ¶ 214 n.595 ("State and local governments may continue to enforce and condition approval on compliance with non-discretionary codes reasonably related to health and safety, including building and structural codes.").

And that:

> [M]any local jurisdictions have promulgated code provisions that encourage and promote collocations and replacements through a streamlined approval process, while ensuring that any new facilities comply with building and safety codes and applicable Federal and State regulations. Consistent with that approach on the local level, we find that Congress did not intend to exempt covered modifications from compliance with generally applicable laws related to public health and safety.[193]

The Commission found that these requirements addressed concerns raised by commenters that changes should not be permitted if they "violated . . . a federal law or regulation, including environmental law, historic preservation law, Commission *RF exposure standards* . . . ."[194]

Most recently in the *Small Cell Order*, although the Commission broadly preempted state and local authority over many issues related to small wireless facilities, it "note[d] that the Small Wireless Facilities . . . remain subject to the Commission's rules governing Radio Frequency (RF) emissions exposure."[195] This same proviso appears in the Commission's codified definition for a small wireless facility.[196]

Protecting public health and safety are among the most important functions local public agencies serve. Moreover, local public agencies are best situated to assess compliance with the Commission's standards. No other agency performs this function, nor has the capacity to, with respect to wireless facilities. Local

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[193] *Id.* at ¶ 202 (internal footnotes omitted).
[194] *See id.* at ¶ 204 n.556 (emphasis added).
[195] *Small Cell Order* at ¶ 33.
[196] 47 C.F.R. § 1.6002(*l*)(6).

governments are directly responsible for approving the permits that authorize construction and reviewing applications for compliance with all other applicable safety regulations. As a matter of administrative economy, it makes sense that the local public agency would also oversee the submittal of sufficient RF documentation that demonstrates compliance with the Commission's guidelines.

The Commission correctly recognized that it "is not a health and safety agency."[197] Nor is self-policing is a viable option as local agencies' experience reveals that compliance is not a mere formality.[198] Given that Commission staff cannot review all modification applications and applicants may prioritize other interests over strict compliance with RF safety rules, it makes common sense to continue to preserve State and local authority to play this critical role. Any other approach would be reverse longstanding Commission policy without any support in the Petitions that local review contravenes the Commission's guidelines or frustrates the implementation of Section 6409(a).

2. Allegations by WIA that Cities Require "RF Reports *for Local Approval*" are Demonstrably False

WIA misleadingly alleges that several coalition members impose their own local RF exposure requirements.[199] These local public agencies do not require

[197] *See* Letter from Julius Knapp, Federal Communications Commission, Office of Engineering and Technology, to Michael P. Flynn, U.S. Environmental Protection Agency, Office of Radiation and Indoor Air (Feb. 4, 2015), https://ecfsapi.fcc.gov/file/1081962319406/13-84D.pdf.
[198] *See e.g.*, Email from Vincent Voss, Professional Services Specialist, SAC Wireless, to Sean del Solar, Associate Planner, City of San Marcos, Cal. (Oct. 2, 2019) (confirming that plans submitted to the city for approval did not have EME requirements incorporated after Mr. del Solar noticed the discrepancy and inquired with the applicant).
[199] WIA Decl. R. Petition at 22.

applicants to meet *local* standards. Rather, applicants must demonstrate to these public agencies that the proposed facilities meet *the Commission's* standards.

For example:

***Carlsbad, California:*** WIA misleadingly alleges that the City of Carlsbad, California, requires applicants to submit "RF reports *for local approval*."[200] In fact, as plainly stated in the city's regulations, the city reviews the report for compliance with applicable ANSI/IEEE standards adopted by the Commission.[201] Moreover, this required review does not forestall deployment because it occurs "[w]ithin six (6) months *after the issuance of occupancy*" and only when applicant fails to show the personal wireless facility qualifies for a categorical exclusion under the Commission's RF exposure guidelines.[202] The preamble to the city's regulations also recognizes that "[i]f federal standards are met, cities may not deny permits on the grounds that radio frequency emissions (RF) are harmful to the environment or to the health of residents."[203] WIA's allegation is without merit.

***Encinitas, California:*** WIA misleadingly alleges that the City of Encinitas, California, requires applicants to submit "RF reports *for local approval*."[204] In fact, the city's municipal code requires only that the applicant demonstrate compliance "with all terms and conditions and emissions standards imposed by the Federal

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[200] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[201] *See* CARLSBAD, CAL., POLICY NO. 64 § D.5; *see also* Affidavit of Don Neu, City Planner, Carlsbad, California (Oct. 28, 2019).
[202] *See id.* §§ D.5 and E.1.d.
[203] *See id.* at 2 (describing federal restrictions on local authority).
[204] WIA Decl. R. Petition at 22 n.64 (emphasis in original).

Communications Commission."[205] Consistent with this requirement, the city's application checklist requires applicants to submit:

> a Radio Frequency Emission (RFE) report. A cumulative report is required if multiple carriers are present on the subject location).[206]

Once the city receives an RF compliance report, staff will check the report to ensure it pertains to the correct facility and concludes that the proposed modification complies with the Commission's guidelines.

***Escondido, California:*** WIA misleadingly alleges that the City of Escondido, California, requires applicants to submit "RF reports *for local approval*."[207] In fact, the city's municipal code requires that:

> Applicants shall submit a theoretical radiofrequency radiation study (prepared by a person qualified to prepare such studies) with the application which quantifies the proposed project's radiofrequency emissions, *demonstrating compliance of the proposed facility with applicable NCRP and ANSI/IEEE and FCC policies, standards, and guidelines* for maximum permissible exposure (MPE) to radiofrequency radiation emissions. The study shall also include a combined (cumulative) analysis of all the wireless operators/facilities located on and/or adjacent to the project site, identifying total exposure from all facilities and demonstrating compliance with FCC guidelines. An updated radiofrequency study shall be submitted for any modification to a facility.[208]

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[205] *See* ENCINITAS, CAL., CODE § 9.70.080.C.4.b.
[206] *Wireless Communication Facility Application Supplement*, Encinitas Development Service Dept. 4 (Nov. 11, 2017), https://www.cityofencinitas.org/Portals/0/City%20Documents/Documents/Development%20Services/Planning/Land%20Development/Wireless%20Communication%20Facility%20Application%20Supplement.pdf?ver=2017-11-27-114516-087.
[207] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[208] ESCONDIDO, CAL., CODE § 33-705(c).

Applicants must also explain who prepared the report and the preparer's qualifications.[209] Although the city "reserves the right to . . . verify compliance with the Federal Communication Commission's standards for [RF] emissions", this prudent step does not purport to allow the city to set the standards for RF exposure.[210]

***King County, Washington:*** WIA misleadingly alleges that King County, Washington, requires applicants to submit "RF reports *for local approval*." This is simply untrue. At the time WIA filed its petition, King County did not, and still does not, require any RF report of any kind as a precondition to approval. The county does require successful applicants agree to avoid causing interference by adhering to standards set by the Washington Cooperative Interference Committee, but even here no RF report is required.[211]

***La Mesa, California:*** WIA misleadingly alleges that the City of La Mesa, California, requires applicants to submit "RF reports *for local approval*."[212] However, the city requires only that the applicant demonstrate that the facility will not exceed "[t]he maximum output level *as allowed under FCC regulations*."[213] For macro facilities outside the public rights-of-way, the city's one-page supplement also

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[209] ESCONDIDO, CAL., CODE § 33-705(a)(2).
[210] *See id.* § 33-705(b). A separate provision in the city's code requires the applicant to demonstrate actual compliance after construction but does not mention any standard or requirement for city review or approval. *See id.* § 33-704(e).
[211] Affidavit of Michael Kulish, Real Property Supervisor for King County (Oct. 28, 2019) (attached as **Exhibit K**). *See, e.g.*, WWCIC Engineering Standard #6.
[212] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[213] *See* La Mesa City Council Resolution 2001-113, Exh. B, § D.2, http://www.cityoflamesa.com/DocumentCenter/View/12974/Design-Guidelines-for-Wireless-Communication-Facilities (emphasis added).

requires "an Electromagnetic (EME) Site Compliance Report" as a means to verify compliance with the Commission's regulations.[214] Nothing in the city's code, guidelines or application materials remotely suggests that the city sets its own standards for local approval.

***San Diego, California:*** WIA misleadingly alleges that the City of San Diego, California, requires applicants to submit "RF reports *for local approval*."[215] The city's published application requirements and detailed guidance expressly require only that the applicant demonstrate compliance with the *Commission's* RF exposure guidelines.

The city's application checklist requires that an applicant for an eligible facilities request submit an "RF Letter of Compliance/RF Compliance Report".[216] The city also publishes detailed guidance for applicants, which includes information about RF compliance demonstrations:

> RF emissions are regulated by the Federal Government. . . . W[ireless communication facilitie]s must comply with the FCC's standards for RF radiation. *The City collects a cumulative RF Report to demonstrate compliance with Federal regulations prior to permit approval.* A Letter of Compliance or RF report is required at the time of initial submittal. If a letter is initially submitted in lieu of an RF Report, the letter must be on wireless carrier company letterhead, acknowledge that a complete cumulative RF report is required prior to a project approval, and it must be signed by a licensed RF engineer. An RF Report is not

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[214] *See Wireless Communications Supplemental Questionnaire*, La Mesa Planning Division (last visited Oct. 21, 2019), http://www.cityoflamesa.com/DocumentCenter/View/12971/Wireless-Supplemental-Questionnaire.
[215] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[216] *Form DS-420: Wireless Communication Facilities Supplemental Application and Checklist*, San Diego Development Services Department (May 2019), https://www.sandiego.gov/sites/default/files/dsdds420.pdf.

> required for projects that are only adding a generator to an existing site, unless there is none on file for the original project.[217]

As clearly stated in the city's guidance, these requirements exist solely to ensure that applicants comply with federal—not local—RF exposure requirements.

These requirements are hardly burdensome.[218] Applicants may tender their applications without a full RF compliance report so long as they provide an appropriate letter from an engineer.[219] No report is needed for generator additions to sites previously demonstrated to be in compliance.[220] Once the city receives an RF compliance report, staff will check the report to ensure it pertains to the correct facility and concludes that the proposed modification complies with the Commission's guidelines.[221]

***San Marcos, California:*** WIA misleadingly alleges that the City of San Marcos, California, requires applicants to submit "RF reports *for local approval*."[222] San Marcos requires applicants to submit "a theoretical assessment of compliance with all applicable [Commission] radio frequency (RF) guidelines."[223] Although the

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[217] *Information Bulletin 536: Submittal Requirements and Procedures for Wireless Communication Facilities*, San Diego Development Services Department § III.G (Sep. 2019), https://www.sandiego.gov/sites/default/files/dsdib536.pdf (emphasis added).
[218] *See* WIA Decl. R. Petition at 23.
[219] *Information Bulletin 536: Submittal Requirements and Procedures for Wireless Communication Facilities*, San Diego Development Services Department § III.G (Sep. 2019).
[220] *Id.* § III.G.
[221] Affidavit of Karen Lynch, Development Project Manager III, City of San Diego, California (Oct. 24, 2019) (attached as **Exhibit Q**). Occasionally, when an RF compliance report recommends a physical barrier (such as plastic chains on a rooftop), the city will request that the applicant consult with their RF engineers to determine whether less visible mitigation steps (such as floor stripes) could be feasible. However, the city does not deny applications solely on the basis that the facility would require mitigations for compliance with the Commission's guidelines.
[222] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[223] *See* CARLSBAD, CAL., CODE § 20.465.060.A.7.

city would consider a plainly erroneous report as incomplete, nothing in its regulations purports to subject the report to "local approval" as alleged by WIA.

***Solana Beach, California:*** WIA misleadingly alleges that the City of Solana Beach, California, requires applicants to submit "RF reports *for local approval*."[224] In fact, as plainly stated in the city's regulations, the city reviews the report for compliance with applicable ANSI/IEEE standards adopted by the Commission.[225] Moreover, this required review does not forestall deployment because it occurs "[w]ithin six (6) months *after the issuance of occupancy*" and only when applicant fails to show the personal wireless facility qualifies for a categorical exclusion under the Commission's RF exposure guidelines.[226]

Solana Beach also takes significant steps to make clear that its regulations are intended only to ensure that deployments meet the Commission's standards. The city's regulations expressly state that its policies are:

> not intended to, nor shall it be interpreted or applied to: 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.[227]

A separate section recognizes that "[i]f federal standards are met, cities may not deny permits on the grounds that radio frequency emissions (RF) are harmful to

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[224] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[225] *See* SOLANA BEACH, CAL., POLICY NO. 64, Part I, § C.5; Affidavit of Joseph Lim, Director of Community Development, City of Solana Beach, California (Oct. 23, 2019).
[226] *See* SOLANA BEACH, CAL., POLICY NO. 64, Part II, § C.2.g.
[227] *See id.* at 2.

the environment or to the health of residents."[228] And a third section devoted entirely to "Health Concerns & Safeguards" explains that the Commission sets the applicable standard for human exposure to RF emissions.[229]

***Thurston County, Washington:*** WIA misleadingly alleges that the Thurston County, Washington, requires applicants to submit "RF reports *for local approval*."[230] However, the county code requires only that the applicant demonstrate compliance with the Commission's standards:

> The applicant shall submit for the proposed facility a . . . power density calculations expressed as micro-watts per square centimeter and other technical documentation, signed by a radio frequency engineer licensed in the state of Washington, as necessary to demonstrate the proposed facility's *compliance with FCC guidelines/standards* for radiofrequency electromagnetic field strength.[231]

Although the industry complains that local public agencies reserve the right to "approve" the applicant's RF compliance report, this modest reservation is a prudent response to the occasionally wrong information used by applicants or their vendors to evaluate compliance. Common errors include reports that evaluate "worst-case emissions" based on equipment that does not match the proposed construction plans and failures to consider cumulative emissions from collocated antennas.[232] These errors do not require an advanced physics degree to spot. Many

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[228] *See id.* at 3.
[229] *See id.* at 4.
[230] WIA Decl. R. Petition at 22 n.64 (emphasis in original).
[231] THURSTON CTY., WASH., CODE § 20.33.050.1.h (emphasis added); *see also* Affidavit of Robert Smith, Senior Planner, Thurston County (Oct. 25, 2019).
[232] *See* 47 C.F.R. § 1.1307(b)(3) ("[W]hen the guidelines specified in § 1.1310 are exceeded in an accessible area due to the emissions from multiple fixed transmitters, actions necessary to bring the area into compliance are the shared responsibility of all licensees whose transmitters produce, at the

may be innocent mistakes but still require correction. Moreover, these concerns raised about "local approval" are really nothing more than a local requirement demonstrating compliance with federal standards—something the Commission has previously recognized is within the authority of local governments to consider.

3. Network Densification Often Results in Cumulative Emissions from Multiple Emitters and Amplifies the Local Interest in Compliance with the Commission's RF Exposure Guidelines

Commission guidelines for RF exposure have long recognized the potential risks associated with multiple transmitter sites.[233] Network densification, whether by collocations under Section 6409(a) or newly deployed small wireless facilities,[234] results in an increase in multiple transmitter sites and/or accessible areas affected by multiple transmitters. Thus, the legitimate local interest in compliance with the Commission's RF exposure guidelines is at least as strong—if not stronger—when a provider proposes to collocate additional transmitters through an eligible facilities request.

Importantly, the compliance evaluation in multiple transmitter environments encompasses more than just the additional transmitters. The evaluation must

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area in question, power density levels that exceed 5% of the power density exposure limit applicable to their particular transmitter or field strength levels . . . .").

[233] 47 C.F.R. § 1.1307(b)(3); *In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Second Memorandum Opinion and Order, WT Docket No. 97-192, 12 FCC Rcd. 13464, ¶¶ 58, 67–68 (Aug. 25, 1997).

[234] In the small cell context, service and infrastructure providers alike complain that they should not be required to perform a site-specific RF exposure compliance evaluation when all the small wireless facilities in its proposed deployment use the same equipment. To be sure, the fact that all such facilities would use the same antennas (with the same frequencies and gain) and the same radios (with the same output wattage) simplifies the review process. But this rationale ignores critical contextual factors in the Commission's own standards, such as proximity to general population members, time averaging and cumulative exposure levels caused by nearby transmitters.

account for "*all* significant contributors to the ambient RF environment".[235] Although the Commission defines significance as more than a 5% contribution towards the applicable exposure limit, each contributor must be independently evaluated to determine whether it meets this threshold.[236] Local practices to collect and evaluate the cumulative emissions from collocated facilities—like those adopted by San Diego—reflect this guidance by the Commission.[237]

Yet an RF compliance report based on predictive models may not always be reliable in multiple-transmitter environments. The Commission's guidance for compliance evaluations in multiple-transmitter environments suggests that on-site tests may be necessary:

> When there are multiple transmitters at a given site collection of pertinent technical information about them will be necessary to permit an analysis of the overall RF environment by calculation or computer modeling. However, if this is not practical *a direct measurement survey may prove to be more expedient for assessing compliance* . . . .[238]

The only feasible way to assess compliance in these circumstances is to authorize construction conditioned on a post-construction actual compliance demonstration.

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[235] OET Bulletin 65 (ed. 97-01) at 33, https://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet65/oet65.pdf (emphasis in original).
[236] *See id.* at 32.
[237] *Information Bulletin 563: Submittal Requirements and Procedures for Wireless Communication Facilities*, San Diego Development Services Department § III.G (Sep. 2019), https://www.sandiego.gov/sites/default/files/dsdib536.pdf
[238] OET Bulletin 65 (ed. 97-01) at 33 (emphasis added); *see also Local Official's Guide* at 13 ("A large number of variables . . . make the calculations more time consuming, and make it difficult to apply a simple rule-of-thumb test.").

Accordingly, the Commission should decline to reverse its prior decisions and preempt state and local authority to require applicants for eligible facilities requests to demonstrate actual compliance with the Commission's own RF exposure guidelines.

### B. Prior Permits, Approvals and Other Records

As a threshold matter, the Commission should note that this requirement is not more burdensome on wireless infrastructure than it would be for any development project. Many local governments require applicants to include past permit records whenever *any* applicant requests a modification to *any* structure.[239]

#### 1. These Requirements Reasonably Relate to Whether a Proposed Modification Qualifies as an Eligible Facilities Request

Application requirements that applicants provide the prior permits associated with the facility directly relate to whether a proposed modification qualifies as an eligible facilities request.

First, the requirement directly relates to whether the application proposes to alter an "existing" wireless tower or base station. Section 6409(a) applies only to requests to collocate, modify or replace transmission equipment on "an *existing* wireless tower or base station."[240] Per the Commission's own definition:

> A constructed tower or base station is existing for purposes of this section *if it has been reviewed and approved under the applicable zoning or siting process*, or under another State or local regulatory review process,

[239] *See, e.g.*, *Zoning Permit Instructions & Checklist*, Los Angeles County at 6 (2019), available at: http://planning.lacounty.gov/assets/upl/apps/zoning-permit-checklist.pdf (requiring building permit records for structures on the property).
[240] 47 U.S.C. § 1455(a)(1) (emphasis added).

> provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.[241]

In other words, the wireless tower or base station must have both a physical and legal existence for an alteration to qualify as an eligible facilities request.[242]

The most obvious and expeditious method to establish whether a physical tower or other support structure "has been reviewed and approved under the applicable zoning or siting process" is to simply produce the permits or other approvals. This is especially true for older facilities because the applicable zoning or siting process for the original approval may have changed by the time an applicant seeks a modification.

Second, the requirement also directly relates to whether the proposed alterations would cause a substantial change. Per the Commission's own definition:

> A modification substantially changes the physical dimensions of an eligible support structure if it . . . does not *comply with conditions associated with the siting approval* of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that

[241] 47 C.F.R. § 1.6100(b)(5) (emphasis added); *see also 2014 Infrastructure Order* at ¶ 174 ("[T]he term "existing" requires that wireless towers or base stations have been reviewed and approved under the applicable local zoning or siting process or that the deployment of existing transmission equipment on the structure received another form of affirmative State or local regulatory approval (*e.g.*, authorization from a State public utility commission).").

[242] *See 2014 Infrastructure Order* at ¶ 174. Sound public policy underpins this requirement. As the Commission noted in the *2014 Infrastructure Order*, this interpretation "ensures that a facility that was deployed unlawfully does not trigger a municipality's obligation to approve modification requests under Section 6409(a)." *Id.* Alongside this interpretation, the Commission quoted comments by Fairfax County that "[a] tower or structure illegally constructed is not sanitized by [Section] 6409(a)." *Id.* at 174 n.468.

> would not exceed the thresholds identified in § [1.6100](b)(7)(i) through (iv).[243]

Put differently, whether a proposed modification causes a substantial change depends on whether it violates certain conditions in the underlying approval—so long as those proposed modifications would not otherwise be consistent with the thresholds identified in Section [1.6100](b)(7)(i) through (iv).

Conditions routinely appear in the permit or other approval. Even if certain conditions are preempted by 47 C.F.R. §§ 1.6100(b)(7)(i) through (iv), the state or local government will need to review those conditions to make that determination. Thus, a requirement to submit the associated permits or other approvals directly relates to the evaluation under 47 C.F.R. § 1.6100(b)(7)(vi).

Courts have upheld similar record-keeping requirements imposed on providers by state or local governments. For example, the court in *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049 (D.Or. 2005), upheld the city's requirement that a franchisee maintain and produce records on gross revenues because "[i]t would be incongruent for the court to find that the fees were permissible under the [Act], but prohibit the City from any accounting . . . ."[244]

The same logic applies with equal force in this context. State and local governments cannot be expected to assess compliance with prior approvals and permit conditions within an extremely short timeframe if the Commission preempts their authority to require applicants to submit those prior approvals and permit

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[243] 47 C.F.R. § 1.6100(b)(7).
[244] *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1063 (D.Or. 2005).

conditions with their initial applications.[245] To the extent the Commission preempts local authority to include permit records as an application requirement, the shot clock would run during this investigative period and applicants would have little incentive to agree to tolling if the failure to produce such evidence would lead to a denial. Rather, as the industry's proposed deemed granted remedy suggests, their members would rather the shot clock run to claim mandatory approval.

2. Applicants Are in the Best Position to Provide Prior Permits, Approvals and Other Records

First, as the beneficiary under the Commission's regulations, the applicant properly bears the burden to show that its modification meets all the criteria for an eligible facilities request.[246] Although applicants often complain that local governments should just have these records on file, what they are really requesting are special privileges, afforded to no other entities that do business in a community, demanding that the local government perform the applicant's record keeping obligations. Any business receiving any kind of federal, state or local government regulatory approval has obligations to maintain documentation to demonstrate that approval. A local government should not be required to produce records to support an applicant's request any more than the SEC should be required to produce records to support a public company's annual filing, or USAC should be required to produce previous years' records to support modifications of universal service reporting.

[245] *See* 47 C.F.R. § 1.6003(d).
[246] *See 2014 Infrastructure Order* at ¶ 211 ("Further, nothing in this provision indicates that States or local governments must approve requests merely because applicants claim they are covered.").

In addition, some records may not be available to the local government because a different public agency was responsible for the site in the past, such as when the property shifts between county and city control through incorporation, annexation or disincorporation. Likewise, some local governments contract with other public agencies to perform building and encroachment permit functions, and the records associated with those permits may not be transmitted to the lead agency.[247]

Some records may have been destroyed in casualty events. Even digitized records are susceptible to corruption or encryption through malware and ransomware attacks.[248]

Some records may have been destroyed in accordance with the local government's file retention policy (which often follow a state archivist's law or regulations). Such policies often contain exceptions when records may be need needed later, especially as it relates to a potential legal dispute. But the local government would not have reason the retain them because, prior to the *2014 Infrastructure Order*, neither the provisions in the Communications Act related to

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[247] For example, the City of Lakewood, California contracts with the Los Angeles County Department of Public Works for building plan check and permit issuance services. *See Building Plan Check*, City of Lakewood, Cal. (last visited Oct. 29, 2019), https://www.lakewoodcity.org/services/planning/check.asp.

[248] *See e.g.*, Chloe Demrovsky, *Why Ransomware Attacks on Local Governments Matter*, FORBES (Aug. 27, 2019), https://www.forbes.com/sites/chloedemrovsky/2019/08/27/why-ransomware-attacks-on-local-government-matter/#799d4a825de0; Manny Fernandez *et al.*, *Ransomware Attacks Are Testing Resolve of Cities Across America*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/22/us/ransomware-attacks-hacking.html; Cynthia Brumfield, *Why local governments are a hot target for cyberattacks*, CSO ONLINE (May 1. 2019), https://www.csoonline.com/article/3391589/why-local-governments-are-a-hot-target-for-cyberattacks.html; Tod Newcombe, *Small Towns Confront Big Cyber-Risks*, GOV'T TECH., (Oct./Nov. 2017), https://www.govtech.com/security/GT-OctoberNovember-2017-Small-Towns-Confront-Big-Cyber-Risks.html.

personal wireless service facilities nor the Commission's related regulations required local governments to maintain permit records.

Second, unlike state and local governments, applicants do not operate under a shot clock and enjoy the luxury of unlimited time to research archived records for missing permits.

### C. Equipment Inventories

Requirements to provide current equipment inventories with the application for an eligible facilities request reasonably relate to whether Section 6409(a) applies.[249] As noted above, whether a tower or base station "exists" for Section 6409(a) purposes depends on whether the support structure and transmission equipment were lawfully deployed.[250]

Unfortunately, and as the Commission already knows, service providers and infrastructure providers do not always follow the applicable zoning or siting process. Just last year, the Commission fined Sprint Corporation and Mobilitie LLC $11.6 million because these firms deployed facilities without the proper permits.[251] Comments throughout other Commission proceedings describe similar misconduct by various other entities (see, for example, **Exhibits A, B, F, G,** and **H** to these comments for examples).

While local officials can easily detect entirely new facilities deployed without proper permits, unauthorized modifications to existing facilities are much harder to

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[249] *See 2014 Infrastructure Order* at ¶ 217.
[250] 47 C.F.R. § 1.6100(b)(5); *see also 2014 Infrastructure Order* at ¶ 174.
[251] *See In the Matter of Sprint Corporation*, Order, DA 18-193 (Apr. 10, 2018); *In the Matter of Mobilitie, LLC*, Order, DA 18-194 (Apr. 10, 2018).

detect. Often the only effective method to assess compliance is to compare the currently deployed facilities to the most recent permit or approval for any inconsistencies. Accordingly, the Commission should decline to find that Section 6409(a) preempts state and local requirements to provide current equipment inventories.

### D. Property Owner Authorizations and Title Reports

Requirements to provide property owner authorization and a title report are reasonably necessary documentation needed to demonstrate compliance with many zoning regulations.[252] Again, these are requirements of general applicability, and to provide otherwise would be to grant special privileges to the wireless industry to which no other industry gets to access. Zoning permits typically create property rights that run with the land.[253] These permits may be recorded in official records, and any benefits and burdens associated with the permit bind the property owner and any successor-in-title.[254] Accordingly, local governments have a legitimate interest in ensuring that an applicant either owns the property or has express permission from the property owner.

Written authorization from the property owner is a reasonable requirement because applicants for wireless facility permits almost never own the underlying property.[255] A title report is also a reasonable requirement because it provides

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[252] *See 2014 Infrastructure Order* at ¶ 214 n.595.
[253] *See, e.g.*, *The Park at Cross Creek, LLC v. City of Malibu*, 220 Cal. Rptr. 3d 393, 405 (Ct. App. 2017) ("A CUP is not a personal interest. It does not attach to the permittee; rather, a CUP creates a right that runs with the land.").
[254] *See, e.g.*, *County of Imperial v. McDougal*, 564 P.2d 472, 476 (Cal. 1977).
[255] In instances where the applicant is the property owner, many jurisdictions provide flexible options to demonstrate ownership, such as the deed, a tax bill or other independent verification.

independent verification that the person who signed the authorization in fact owns the property.

WIA suggests that a written authorization should not be required when the site lease permits the modification, but state and local governments are not well-positioned to authoritatively interpret the rights and obligations between third parties to a contract. Aside from the fact that reasonable minds may disagree over what the contract says, other unknown circumstances (such as unrecorded amendments and uncured defaults) may negate even the clearest authorization. WIA essentially asks the local government to interpret the contract and declare the rights and obligations between the parties—a task clearly for the courts and not local planners or building officials.

WIA also suggests that state and local governments should accept "a valid power of attorney" to act on the property owner's behalf.[256] Even if the power of attorney could substitute for a written authorization by the property owner, it would not verify that that the principal identified in the power of attorney in fact owns the property. A title report or some similarly independent source would still be necessary.

## VII. LOCAL GOVERNMENTS ALREADY CHARGE COST-BASED FEES FOR ELIGIBLE FACILITIES REQUESTS

WIA petitions the Commission to adopt a rule to require all fees to be cost-based.[257] Western Communities Coalition oppose this proposal as unnecessary

[256] WIA Decl. R. Petition at 22.
[257] WIA RM Petition at 11–13.

because applicable state laws already limit fees to a cost-recovery basis. This includes fees allegedly not based on cost charged by Richmond, California, Beaverton, Oregon, and Thurston County, Washington.[258]

In Colorado for example, courts have interpreted Colorado law to require that all local fees must be based on actual costs. "The amount of a special fee must be reasonably related to the overall cost of the service."[259] Any other formulation is at risk of being held an unlawful tax that violates the Colorado Constitution.[260] Therefore the fees applicants are charged for permitting these facilities are already cost based. To the extent that the Petitioners demand a lowering of these fees then, such a proposal would require local governments (and their taxpayers) to subsidize the wireless industry. We disagree that this is what congress intended when it passed the Spectrum Act. The Commission has previously acknowledged local government arguments that "nothing in the statute requires local authorities to subsidize wireless service providers by internalizing administrative costs."[261]

Many arguments raised by certain Western Communities Coalition members in the Commission's *In re Mobilitie Petition*[262] and *Small Cell Order*[263] proceeding are also applicable to this issue. Rather than restate them here, the Western Communities Coalition attaches those comments as **Exhibit F**, **G** and **Exhibit H** and incorporates them herein by this reference.

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[258] *See id.* at 12–13.
[259] *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). *See also Bruce v. City of Colorado Springs,* 131 P.3d 1187, 1190 (Colo. App. 2005).
[260] *Bainbridge, Inc. v. Bd. of Cty. Comm'rs of Cty. of Douglas*, 964 P.2d 575, 577 (Colo. App. 1998).
[261] *2014 Infrastructure Order* at ¶ 209.
[262] *See generally* Joint Comments In re Mobilitie Petition, *supra* note 12.
[263] *See* Joint Comments In re *Small Cell Order*, *supra* note 30 at 2, 47–49.

## CONCLUSION

For all the reasons stated above, the Commission should reject the petitions for declaratory ruling filed by WIA and CTIA and the petition for rulemaking filed by WIA.

October 29, 2019

Respectfully submitted,


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**EXHIBIT A**

**Joint Comments Filed by the League of California Cities, the California State Association of Counties and SCAN NATOA Regarding the FCC's Notice of Proposed Rulemaking**

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238)

[appears behind this coversheet]

EXHIBIT A

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies | ) | WT Docket No. 13-238 |
| | ) | |
| Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting | ) | WC Docket No. 11-59 |
| | ) | |
| Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers | ) | RM-11688 (terminated) |
| | ) | |
| 2012 Biennial Review of Telecommunications Regulations | ) | WT Docket No. 13-32 |

**JOINT COMMENTS FILED BY THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND SCAN NATOA REGARDING THE FCC'S NOTICE OF PROPOSED RULEMAKING**

**Comment Date: February 3, 2014**


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*The California Local Governments acknowledge and thank Javan Rad, Esq., of the City of Pasadena, California and Robert C. May III, Esq. of Telecom Law Firm, P.C. for their work as lead drafters of these comments.*

EXHIBIT A

## SUMMARY

The League of California Cities, the California State Association of Counties and the States of California and Nevada Chapter of National Association of Telecommunications Officers and Advisors ("NATOA") offer these comments in response to the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking ("NPRM") adopted and released on September 26, 2013.[1]

The League of California Cities ("League") is an association of 470 California cities united in promoting the general welfare of cities and their citizens.

The California State Association of Counties ("CSAC") is a non-profit corporation whose membership consists of all of California's 58 counties. The mission of CSAC is to represent county government before the California Legislature, U.S. Congress, state and federal agencies and other entities, while educating the public about the value and need for county programs and services.

The States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors ("SCAN") is an association with a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California and Nevada. Accordingly, SCAN's members have a keen interest and stake in this proceeding and its outcome.

The League, CSAC and SCAN are collectively referred to in these comments as "California Local Governments."

***Section 6409(a).*** In its brief existence, Section 6409(a) appears to facilitate *de minimis* changes to legally established wireless facilities without much controversy. A diligent search revealed that only three cases even address the statute. The Commission should therefore find, at least at this early stage, that it should neither interpret the terms in Section 6409(a) nor adopt any related mandatory rules.

In the event that the Commission determines that it should exercise its regulatory authority with

[1] *See* In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Notice of Proposed Rulemaking*, 2013 WL 5405395 (F.C.C.), ¶ 102 (adopted Sep. 26, 2013) [hereinafter "NPRM"].

respect to Section 6409(a), California Local Governments counsels the Commission to (1) narrowly interpret the statutory terms to afford them the narrow and common definition that Congress intended; (2) affirm the primacy of local authorities to define a "substantial" change; (3) bear in mind that the statute mandates a specific result without any reference to any specific process; (4) acknowledge local courts as the most appropriate and efficient means to resolve wireless land use disputes; and (5) consider the federalism and Tenth Amendment limits on federal power over the States and their political subdivisions.

Additionally, although Section 6409(a) contains few words and virtually no legislative history, the Commission should not view it as a blank slate. Congress enacted Section 6409(a) within the context of the Telecommunications Act of 1996 ("Telecom Act"), and the Commission should interpret any new rules to govern Section 6409(a) in manner consistent with the policies, objectives, history, and well-developed case law connected with the Telecom Act. Section 6409(a) exists as a very narrow exception the rule of local authority explicitly reserved in the Telecom Act, and the Commission should not interpret the statute so broadly that the exception swallows the rule.

As a summary, California Local Governments recommends that the Commission should not adopt any rules at this point in time. However, if the Commission decides to act, it should:

1. refine its proposed interpretation of "transmission equipment" to (i) limit its scope to electronic components that actually transmit or receive communications signals and (ii) clarify that State and local governments retain their discretionary authority over "other" equipment that does not transmit or receive communication signals, such as backup power generators;

2. revise its proposed interpretation of "wireless tower or base station" to clearly distinguish between a "wireless tower" and a "base station";

3. interpret a "wireless tower" to mean a structure built solely or primarily to support antennas—not any structure that could hypothetically support wireless equipment;

4. interpret a "base station" to mean a system of fixed equipment that transmits and receives wireless signals;

5. interpret "collocation" so that it applies to only wireless towers or other structures that actually support or house *existing* wireless communication facilities;

6. affirm that local governments retain their traditional authority to determine whether a particular eligible facilities request will substantially change the physical dimensions of an existing wireless tower or base station;

7. interpret a "substantial change" to consider changes to *all* physical dimensions and the effect of those changes on public safety and generally applicable laws;

8. eliminate needless loopholes for "interference," "inclement weather," and "tower creep" in any proposed test for what constitutes a substantial change;

9. apply the same standards in the *2009 Declaratory Ruling* to permit requests under Section 6409(a);

10. reject any proposals for a deemed-granted remedy; and

11. affirm that the proper venue to resolve wireless land-use disputes lies in local courts.

***Section 332(c)(7)(B).*** The Commission also seeks comment on whether to modify its *2009 Declaratory Ruling* that interprets the term "reasonable time" as used in Section 332(c)(7)(B). For the most part, State and local governments adapted well to the *2009 Declaratory Ruling*, and no factual record before the Commission provides a basis for change. California Local Governments recommends that the Commission should not adopt any new rules.

In the event that the Commission determines that it should exercise its regulatory authority with respect to Section 332(c)(7)(B), California Local Governments advises the Commission carefully preserve local control over and flexibility in the permit process to encourage government, industry, and community stakeholders to cooperate towards creative wireless solutions. Any finally-adopted rules must preserve enough local authority to bring wireless applicants to the negotiating table.

As a summary, California Local Governments recommends that the Commission should not adopt any rules at this point in time. However, if the Commission decides to act, it should:

1. harmonize "collocation" with the recommended definition so that it applies to only wireless towers or other structures that actually support or house *existing* wireless communication facilities;

2. affirm local authority to define what constitutes a "complete" permit application;

3. affirm that the "reasonable time" for permit review under Section 332(c)(7)(B) does not run concurrently with a reasonable and nonprohibitory moratorium;

4. find that reasonable zoning distinctions between municipal and private property serve important purposes rationally related to public health and safety; and

5. reject a deemed-granted remedy, just as it did in the *2009 Declaratory Ruling* and for the same reasons

The Commission is well-intentioned in seeking to clarify various aspects of Section 6409(a) and Section 332(c)(7). California Local Governments endorse certain proposed rules, such as the proposal to find that Section 6409(a) does not affect the proprietary capacities of governments. However, in some respects the Commission proposes to define terms too broadly, and in many instances the Commission proposes to act when it need not. Most importantly, the Commission can avoid constitutionally-questionable issues if it adopts the appropriately narrow interpretations and exercises an appropriate degree of regulatory restraint. In those instances discussed below, the Commission should embrace the proposition that "less is more."[2]

[2] Robert Browning, Andrea del Sarto (called the "Faultless Painter") 2 The Poems & Plays of Robert Browning, 352, 353 (J.J. Dent & Sons Ltd. ed. 1932).

EXHIBIT A

**TABLE OF CONTENTS**

**Page(s)**

EXHIBIT A

**TABLE OF CONTENTS**

EXHIBIT A

**TABLE OF CONTENTS**

## I. INTERPRETATION AND IMPLEMENTATION OF SECTION 6409(A) ISSUES

The Commission seeks comment on a wide range of Section 6409(a)-related issues. California Local Governments offer this guidance on how the Commission should address those issues, and on whether the Commission should even act at this time.

In some instances, the Commission need not act at all because the facts about wireless deployment show that the industry does not require strong new federal regulatory intervention to flourish. The plain fact is that the Telecom Act, as it existed before Section 6409(a), facilitated an explosive growth in the number and reliability of wireless communication facilities.[1] For example, since Congress enacted the Telecom Act some eighteen years ago, the number of wireless communication facilities increased from fewer than 52,000 in 1997 to over 300,000 in 2013.[2] Such exponential growth argues against the need for strong federal regulatory intervention.

In adopting Section 6409(a), Congress's narrow intent was to facilitate *de minimis* changes to existing wireless towers or base stations. The Commission need not adopt any new legislative rules to accomplish that purpose. Should the Commission feel compelled to adopt new rules, however, it should afford the plain and common meanings to technical terms and preserve local authority to enforce generally applicable laws under valid police powers. The comments in this section address some of the critical issues related to Section 6409(a) raised in the NPRM.[3]

### A. An "Eligible Facilities Request" Means a Request to Place or Remove Equipment that Actually Transmits or Receives Communication Signals On or From a Structure that Currently Supports a Wireless Facility

The Commission should carefully consider what constitutes an "eligible facilities request"

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[1] *See* Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 293 (2011) (describing the success of the Telecom Act and the correspondingly successful growth of our national wireless infrastructure).

[2] *See Wireless Quick Facts*, CTIA: THE WIRELESS ASSOCIATION, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts (last visited Jan. 22, 2014).

[3] To the extent that the California Local Governments do not discuss specific questions raised in the NPRM, the Commission should not draw any inference of support or a lack of support. California Local Governments anticipate providing additional comments during the NPRM reply comment period.

because, as the NPRM noted, how it defines this term significantly impacts the scope and applicability of Section 6409(a).[4] The following subsections highlight several critical areas where the Commission should clarify the narrow meaning of specific terms.

### 1. "Transmission Equipment" Means an Electronic Component that Transmits or Receives Communication Signals

The Commission proposes to expansively define the phrase "transmission equipment" as "antennas and other equipment associated with and necessary to their operation, including, for example, power supply cables and a backup power generator."[5] California Local Governments believe the use of the word "transmission" signifies that the equipment must actually transmit and receive radio frequency communications, and does not not include nonessential equipment that does not actually transmit or receive communication signals. The Commission should refine its proposed interpretation to (1) limit its scope to electronic components that actually transmit or receive communications signals and (2) clarify that State and local governments retain their discretionary authority over "other" equipment that does not transmit or receive communication signals, such as backup power generators.

The term "transmission equipment" commonly refers to a component part of a base station, such as the antennas, radios, and connector cables. The capability to transmit a signal distinguishes "transmission equipment" from other equipment at the wireless communication facility.

The Commission proposes, however, to define "transmission equipment" to include objects that do not actually transmit or receive radio frequency signals.[6] A wireless facility does not necessarily require all the equipment that would fall under the proposed definition. For example, even though a wireless facility requires a primary power source, it does not necessarily require a backup power source. Standby power generators with their attendant fuel source, power transfer switching, fuel catch basins, and the like typically occupy hundreds of cubic feet, which virtually always results in a substantial change

[4] *See* NPRM, *supra* note 1, ¶ 102.

[5] *See* NPRM, *supra* note 1, ¶ 105.

[6] *See* NPRM, *supra* note 1, at ¶ 104.

to the physical dimensions of a wireless site. Backup power generators are non-transmission accessories rather than transmission equipment necessities.

Various types of backup power generators also raise environmental, safety, and zoning issues more properly suited to a discretionary review process. A diesel generator emits caustic noise, noxious fumes, and environmentally-toxic chemicals. A hydrogen fuel cell standby power generator requires zoning setbacks for fire safety purposes. A State or local government may legitimately seek to channel such generators to facilities into more appropriate areas, such as industrial zones, and encourage other cleaner and quieter power solutions in areas inappropriate for diesel generators, such as residential or open space zones.

The Commission should clarify its proposed definition of "transmission equipment" to include only those elements necessary to actually transmit and receive wireless services, and exclude those elements not required for those limited purposes.

### 2. The Commission Should Refine Its Proposed Comingled Definition of a "Wireless Tower or Base Station" Because Congress and Common Usage Distinguish Between a "Wireless Tower" and a "Base Station"

The Commission proposes to expansively define a "wireless tower or base station" to mean "structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if [those structures] were not built for the sole or primary purpose of providing such support."[7] This definition is ill-advised because it conflates two distinct statutory terms under one single test (*i.e.*, whether the structure supports or houses wireless equipment). In addition, a wireless tower is a structure—whereas a base station is a system of transmission equipment, and distinct from the structure that supports or houses it.

Contrary to the Commission's analysis, the proposed rule in the NPRM does not actually distinguish between a "wireless tower" and a "base station."[8] A "cardinal principal" of statutory interpretation requires that two different words in the same statute receive two different meanings "so that

[7] *See* NPRM, *supra* note 1, at ¶¶ 107–08.

[8] *See* NPRM, *supra* note 1, at ¶¶ 107–08.

no provision is rendered inoperative or superfluous, void or insignificant."[9] Yet the Commission's proposed test does not distinguish between the two terms. Instead, whether something qualifies as a "wireless tower or base station" under the proposed rule effectively depends on whether it supports or houses a piece of wireless equipment.[10] This singular view of a "wireless tower or base station" as anything that supports or houses wireless equipment impermissibly and confusingly lumps together two distinct statutory terms.

Congress intended the terms "wireless tower" and "base station" in Section 6409(a) to mean different things because it inserted the disjunctive "or" rather than the conjunctive "and" between them.[11] Accordingly, the Commission should not adopt the its proposed definition because it must afford the different words different meanings.[12]

### 3. Congress Intended "Wireless Tower" to Mean a Structure Solely or Primarily Built to Support Antennas, Just as the Commission and the Wireless Industry Already Defines That Term

Consistent with congressional intent, FCC rules, and common usage, the Commission should interpret a "wireless tower" to mean a structure built solely or primarily to support antennas—not any structure that could hypothetically support wireless equipment.[13]

First, Congress intended a "wireless tower" to narrowly refer to a structure specifically built to support wireless antennas because it chose a narrower statutory term than it adopted in other statutes.[14] In a different part of the Middle Class Tax Relief and Job Creation Act of 2012, Section 6206(c)(3) directs

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[9] *See Miller v. Clinton*, 687 F.3d 1332, 1347 (D.C. Cir. 2012) (citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

[10] *See* NPRM, *supra* note 1, at ¶ 108 (stating too broadly that Congress intended "to streamline the facilities application process" without acknowledging the explicit limits in the statute itself).

[11] *See* 47 U.S.C. § 1455(a).

[12] *See Miller*, 687 F.3d at 1347.

[13] *See* INTERGOVERNMENTAL ADVISORY COMM., ADVISORY RECOMMENDATION NO. 2013-13, RESPONSE TO NOTICE OF PROPOSED RULEMAKING ADOPTED AND RELEASED SEPTEMBER 26, 2013 at 5 (2013) [hereinafter "IAC NO. 13"] ("The Commission must define ["wireless tower"] in a way that makes clear that a wireless tower is a structure built *for the primary purpose* of attaching antennas and other ancillary wireless equipment." (emphasis in original)).

[14] *See id.* at 5 ("The Congressional use of the term "wireless towers" does not suggest that the Commission should interpret a Congressional intent to define the term any way other than a vertical tower structure built for the primary purpose of housing wireless communications facilities.").

FirstNet to utilize "existing . . . commercial or other communications infrastructure . . . and . . . Federal, State, tribal, or local infrastructure" to build, deploy, and operate a nationwide public safety broadband network.[15] This language refers to a much broader class of structures than the language in Section 6409(a). The word "communications" is broader than "wireless," and "infrastructure" is broader than "tower."[16] Just as Congress understood the difference between "wireless" services and "personal wireless services" in two different statutes enacted nearly a decade apart, Congress differentiated between generalized commercial, communication, and government infrastructure and specific wireless towers described in the same public law.[17]

Second, the proposed definition conflicts with how the Commission defines a wireless tower in nearly every other context. Both the Nationwide Programmatic Agreement and the Collocation Agreement define a tower as one built solely or primarily to support antennas.[18] Although the NPRM suggests that Congress intended a broader term, the comparative analysis above shows that Congress intended the narrower definition consistent with the Nationwide Programmatic Agreement and the Collocation Agreement approach.[19] The Commission should continue to define a "wireless tower" to mean a structure built solely or primarily to support wireless antennas, as Congress intended.

Lastly, the Commission's proposed definition conflicts with the common use of the term. The word "tower" is defined in the dictionary as follows: "a building or structure typically higher than its diameter and high relative to its surroundings that may stand apart (as a campanile) or be attached (as a church belfry) to a larger structure and that may be fully walled in or of skeleton framework (as an

[15] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6206(c)(3), 126 Stat. 156; *see also id.* § 6206(b).

[16] *Compare id.* § 6207(c)(3), *with* 47 U.S.C. § 1455(a).

[17] Compare 47 U.S.C. § 6409(a), *with* 47 U.S.C. § 332(c)(7)(C)(i).

[18] *See* 47 C.F.R. Part 1, App. C § II.A.14 [hereinafter "Nationwide Programmatic Agreement"]; FCC, NATIONWIDE PROGRAMMATIC AGREEMENT FOR THE COLLOCATION OF WIRELESS ANTENNAS (2001) [hereinafter "Collocation Agreement"].

[19] *See supra*, notes 14–16, and accompanying text.

observation or transmission tower."[20] That dictionary definition clearly distinguishes the word "tower" from "base station." Furthermore, in a letter written to T-Mobile by its legal counsel—and subsequently provided to a local government as part of a permit application packet and made part of the public record—the Channel Law Group stated that:

> Although questions may arise regarding some of the terms or concepts employed in [Section 6409(a)], in fact *their meaning is well established*. The Federal Communications Commission ("FCC") has relied for years on these same terms or concepts in connection with the regulation of wireless broadcasts and communications. . . . In the Collocation NPA, the FCC has defined the term 'tower' as 'any structure built for the *sole or primary purpose* of supporting FCC-licensed antennas and their associated facilities."[21]

This analysis demonstrates that even members of the wireless industry who would benefit from such an overly broad standard proposed by the Commission do not believe that Section 6409(a) applies to structures not built solely or primarily to support wireless antennas.[22] Thus, the clarity of the definition in the Nationwide Programmatic Agreement and the Collocation Agreement reflects actual usage among significant members of the wireless industry, and align with the traditional usage by local governments.

Although many structures *may be able* to support wireless equipment, a structure does not become a "tower" merely because it supports an antenna. For example, a commercial office building does not somehow morph into a wireless tower simply because a wireless carrier has affixed antennas to that building. That illogical result would change the way safety codes apply to structures, and even open the door to building owners wanting to add height to a building for office space purposes to claim that they are subject to the non-substantial change element of Section 6409(a). Congress could not have intended this result. The Commission should continue to define a "wireless tower" as a structure built solely or primarily to support antennas.

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[20] *See* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/tower (last visited Jan. 28, 2014). Courts will often look to the dictionary to interpret an undefined statutory term. *See, e.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct.1997, 2003–04 (2012) (surveying various dictionaries published in the effective year of a statute to find the commonly understood meaning of a term at the time).

[21] *See* Letter from Robert Jystad, Channel Law Group, LLC, to Joseph Thompson, T-Mobile (Oct. 5, 2012) (attached as Exhibit _ to these comments) (emphasis added).

[22] *See id.*

### 4. A "Base Station" Means a Discrete System of Transmission Equipment in a Fixed Location, but It Does Not Mean the Location Itself

A base station generally refers to a system of fixed equipment that transmits and receives wireless signals.[23] This equipment includes the transmission equipment (*i.e.*, transmitters and receivers, mobile telephone switching center interfaces, and the cables that interconnect them). Equipment also optionally found at base stations, but not necessary for transmission and reception of wireless signals, includes work lights, backup power systems, and environmental control equipment. Just as wireless providers customize wireless towers to fit within the spatial limits and aesthetic character of the site, they also customize base stations to the particular circumstances of the site. Common places to find base stations include mechanical penthouses, outdoor equipment shelters, underground vaults, exposed concrete pads, and building equipment rooms. Wireless providers also typically install a security fence or wall around exposed outdoor base stations.

A base station is a unified system of component parts because one base station corresponds to one wireless communication facility. This concept becomes critically important in circumstances where the particular features of the site require the wireless provider to distribute the base station equipment in different areas of the same physical location.

The definition of a base station must also be distinguished from the structure that supports or houses it. Although the base station consists of equipment at a particular place or in a particular structure, like the discussion, *supra*, a non-purpose built place or structure does not become a base station merely because it subsequently supports or houses one.[24]

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[23] *See, e.g.*, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Wireless Services, *Fifteenth Report*, 26 FCC Rcd. 9664, 9841, ¶ 308 (adopted June 24, 2011) ("A base station generally consists of radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics. These base stations are generally placed atop a purpose-built communications tower, or on a tall building, water tower, or other structure providing sufficient height above the surrounding area."); INTERGOVERNMENTAL ADVISORY COMM., ADVISORY RECOMMENDATION NO. 2013-9, RESPONSE TO THE WIRELESS TELECOMMUNICATIONS BUREAU'S GUIDANCE ON INTERPRETATION OF SECTION 6409(A) OF THE MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT OF 2012 at 3 (2013) [hereinafter "IAC NO. 9"] ("A base station by the Commission's own definition is a set of equipment components that collectively provides a system for transmission and reception of personal wireless services).

[24] *See* IAC NO. 9, *supra* note 23, at 3 ("A mere equipment or power supply box, for example, is not in and of itself a base station, nor is a structure that supports or houses such boxes.").

A few examples will help illustrate the point: Consider first a five-story building that hosts a wireless communication facility, which consists of an equipment room with radio equipment on the third floor connected to antennas on the roof via cables that run through a duct system. The entire building is not a "wireless tower" because it was not built solely or primarily to support the antennas. Indeed, in this case, no tower exists. The "base station" consists of the equipment physically distributed throughout the equipment room, the duct system, and the rooftop, but the office building does not become a base station because it merely houses one.

In contrast, consider a monopine that supports antennas from two different wireless providers with a single equipment shelter adjacent to the monopine to house the radios and other equipment for each provider. In this case, the monopine constitutes the "wireless tower" because it was built solely to support wireless antennas. And in this case, although this site involves one tower and one equipment shelter, it hosts two base stations (one for each provider).

The examples above illustrate that a base station is not only distinct from the tower, but that it is distinct from the places that wireless carriers install them. A structure or building does not become a base station merely because it houses one, just as a structure or building would not become an air conditioner merely because it supports one on the rooftop. The Commission should interpret the term consistent with these practical realities.

Another troubling aspect of the Commission's proposed definition of the term "base station" is its proposal to consider the recommendation in the *Section 6409(a) PN* that it is reasonable to interpret a "base station" to include a structure that supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station under Section 6409(a).[25] The Commission proposes to interpret "'the term wireless tower or base station' . . . to encompass structures that support or house an antenna, transceiver, or other associated equipment that *constitutes part of a base station*, even if they

[25] *See* NPRM, *supra* note 1, at ¶ 109 (citing Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, *Public Notice*, 28 FCC Rcd. 1, at 3 (released Jan. 25, 2013) [hereinafter "*Section 6409(a) PN*"]).

were not built for the sole or primary purpose of providing such support."[26]

That such an odd construction of Section 6409(a) could lead to absurd results in the real world is currently on display in the Superior Court of the City and County of San Francisco. In a pending lawsuit that just completed a trial by the Court, plaintiffs T-Mobile, Crown Castle, and ExteNet challenged a city ordinance that requires city-issued permits to install wireless facilities on utility poles in the public rights-of-way.[27] The ordinance also requires a permit to modify facilities after they are initially permitted.

During a recent deposition connected with that trial, a senior T-Mobile engineer who was testifying as an expert witness for all of the plaintiffs testified that in his opinion the term "base station" means "any part of a base station." He then testified that, although a DAS node is not a base station unto itself, it is a "spatially separate" *part* of base station and therefore falls within the ambit of Section 6409(a). He further discussed how T-Mobile installs fiber optic lines on existing utility poles to connect its DAS nodes to the three T-Mobile hubs in San Francisco. According to the T-Mobile expert, a DAS node—miles away from the T-Mobile hub and physically interconnected only via a strand of fiber optic cable—constitutes part of the base station. For that reason, San Francisco would have to approve a request to install antennas or other equipment on each of those utility poles, provided the proposed equipment did not substantially change the physical dimensions of the structure.[28] At the logical extreme of T-Mobile's definition, any object that touches part of the telephone or electrical utility lines connected to a wireless facility would also constitute a base station that a wireless carrier could collocate on as a matter of right. The Commission must refine and narrow its proposed concept of a base station to prevent such absurd results, and needless litigation.

### B. "Collocation" for the Purposes of Section 6409(a) Only Applies to Towers that Actually—Not Merely Could—Support or House Wireless Facilities

The Commission should not define "collocation" for the purposes of Section 6409(a) as "the

[26] *See id.*

[27] A copy of Article 25 of the San Francisco Public Works Code is attached hereto as Exhibit __ to these comments.

[28] A copy of the relevant excerpts from the deposition of Mr. Daniel Paul taken on December 19, 2013 in *T-Mobile West Corp. v. City and County of San Francisco* is attached hereto as Exhibit __ to these comments.

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 communication purposes," as proposed in the NPRM.[29] Under this view, with errant support from Verizon Wireless, Section 6409(a) would require State and local governments to approve a permit request to place wireless transmission equipment in or on anything that *could* house or support any component of a base station.[30] Instead, the Commission should find, consistent with common usage and Congressional intent, that Section 6409(a) only applies to wireless towers or other structures that actually support or house *existing* wireless communication facilities.

The principal fact that distinguishes a new site from a collocated site is whether the structure currently hosts a wireless communication facilities. A wireless provider constructs a new site where no other provider currently operates, and it collocates its wireless equipment where one or more other providers already operate.

The Commission's proposed rule would eviscerate legitimate local land use authority preserved under Section 6409(a) because it will allow wireless providers to masquerade new sites as collocations. As the Commission noted, many structures offer convenient support for new antennas.[31] The proposed rule would sweep all new facilities on those structures within the ambit of Section 6409(a) and therefore outside the reach of a rational discretionary process that could allow for a more reasoned and thoughtful deployment of wireless facilities consistent with local zoning requirements.

Verizon also asserts that Section 6409(a) should somehow apply to any structure, regardless of whether it currently supports wireless equipment.[32] This argument ignores the limited sense in which the Commission presently defines a tower and, more importantly, Congressional intent that "wireless towers"

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[29] *See* NPRM, *supra* note 1, at ¶ 113.

[30] *See* IAC NO. 13, *supra* note 13, at 6; *see also* Letter from Tamara Preiss, Verizon Wireless, to Marlene H. Dortch, FCC (May 14, 2013) (on file with the FCC).

[31] *See* NPRM, *supra* note 1, at ¶ 113.

[32] *See* Letter from Tamara Preiss, Verizon Wireless, to Marlene H. Dortch, FCC (May 14, 2013) (on file with the FCC); *see also* NPRM, *supra* note 1, at ¶ 111.

mean a purpose-built structure that actually support wireless antennas.[33] Just how a structure without wireless equipment could constitute an "existing wireless tower or base station" escapes California Local Governments, but this impossibility should not escape the Commission.

## II. THE COMMISSION SHOULD CONFIRM LOCAL AUTHORITY TO DEFINE A SUBSTANTIAL CHANGE RATHER THAN ADOPT AN UNWORKABLE NATIONAL STANDARD

The Commission also seeks comments on whether to promulgate a standard for what constitutes a "substantial change" to a wireless tower or base station.[34] Any potential rules should allow local authorities to define what constitutes a substantial change in the context of their local communities, local needs, and local values.

### A. Local Governments Should Define Non-Prohibitory Standards for a Substantial Change Because the Issue Does Not Lend Itself to a National Standard

Local authorities should retain their traditional authority to determine whether a particular eligible facilities request will substantially change the physical dimensions of an existing wireless tower or base station. Whether a given carrier's collocation, removal, or replacement of transmission equipment amounts to a substantial change depends on the character and circumstances of a particular wireless tower or base station. The issue does not lend itself to a national standard or centralized control, and the Commission should therefore exercise regulatory restraint if it wants to avoid becoming the national zoning board.

The Telecom Act reflects the careful balance between policies to promote facilities-based infrastructure and equally important land-use and public-safety priorities. Although the Commission may be well-suited to address the needs of wireless services providers, it should recognize that it lacks the expertise and the resources to appropriately and adequately evaluate the unique and individual needs of more than 30,000 local communities that host these facilities. The Commission should allow local agencies to reasonably control the issues within their expertise, experience, and values.

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[33] *See supra*, Part I.A.3., and accompanying text.

[34] *See* NPRM, *supra* note 1, at ¶ 116.

Rational regulatory restraint in this matter will not leave catastrophic gaps in the wireless siting statutory scheme. Local authorities would continue to define what constitutes a substantial change in their communities. The same substantive limits on local authority would apply; the local authorities could not define a substantial change in a prohibitory, effectively prohibitory, or unreasonably discriminatory manner.[35] The same procedural limits on local tribunals would apply; permit denials would require a written decision based on substantial evidence in the record.[36] The same remedial checks on local authority would apply; aggrieved parties could still challenge local approaches on both substantive and procedural grounds.[37]

As a practical matter, the Commission should also bear in mind that how it defines a substantial change will indirectly affect the process to permit new wireless communication facilities.[38] Should the Commission eliminate local control over changes to existing wireless communication facilities, local communities will naturally grow more hostile towards new facilities that they will eventually lose control over. Elected local officials will be left to explain at public meetings that the federal government imposed a federal program for the local officials to implement and took their local decisionmaking out of their hands. In plain terms: the more draconian the federal rules, the more local communities will likely resist new wireless facilities.

### B. The Informal Guidance Test Entirely Fails to Consider Several Important Aspects of a Substantial Change in Physical Dimensions and Contains Loopholes that Undermine Any Actual Limits

The Commission seeks comment on whether it should adopt the test articulated by the Wireless Telecommunications Bureau ("Informal Guidance Test") and whether it should refine any of its aspects.[39] A federal agency must consider all the important aspects of a problem when it promulgates a legislative

[35] *See* 47 U.S.C. §§ 332(c)(7)(B)(i), 332(c)(7)(B)(iv).

[36] *See id.* §§ 332(c)(7)(B)(ii)–(iii).

[37] *See id.* § 332(c)(7)(B)(v).

[38] *See* IAC NO. 13, *supra* note 13, at 5 (describing "unintended consequences" of the proposed rules).

[39] *See* NPRM, *supra* note 1, at ¶ 119; *see also Section 6409(a) PN*, *supra* note 25 1 (released Jan. 25, 2013).

rule.[40] As an initial matter, Congress chose not to adopt the Informal Guidance Test when it chose not to incorporate its standards into Section 6409(a). Additionally, the Informal Guidance Test entirely fails to consider (1) physically small changes that produce legally substantial problems and (2) all the measures within the plain meaning of the term "physical dimensions." Additionally, the test includes several substantial loopholes and shortfalls that render any limits in the Commission's proposed rules merely illusory.

### 1. Congress Did Not Intend to Incorporate the Informal Guidance Test into Section 6409(a)

The significant textual differences in the Informal Guidance Test, when juxtaposed with Section 6409(a), indicates that Congress did not intend to adopt that test into that statute. The Informal Guidance Test uses the defined phrase "substantial increase in the *size* of the tower"—a phrase that does not exist in Section 6409(a).[41] Instead, Congress used "substantially change the *physical dimensions* of the tower or base station."[42] If Congress intended to incorporate the Informal Guidance Test into Section 6409(a), Congress could have done so either by quoting the definition found in the Informal Guidance Test or using the exact same defined phrase. Congress did not, and since it is presumed that Congress is aware of FCC regulations, the Commission should therefore conclude that Congress meant something different from the Informal Guidance Test.

### 2. The Informal Guidance Test Does Not Account for Circumstances When Physically Small Changes Produce Legally Substantial Problems Because They Violate Generally Applicable Laws

Even a relatively small change can constitute a substantial one when it threatens to harm public safety or otherwise violates a general law.[43] The Commission should not adopt the Informal Guidance Test because it does not account for circumstances in which the applicant proposes a relatively small

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[40] *See Motor Vehicle Manufactures' Ass'n of the U.S. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 44 (1983).

[41] *Compare* 47 U.S.C. § 1455(a) (emphasis added), *with Section 6409(a) PN*, *supra* note 25 (emphasis added).

[42] *See* 47 U.S.C. § 1455(a).

[43] *See* IAC NO. 13, *supra* note 13, at 5 ("Any change in physical dimensions that would (1) violate a building or safety code; (2) violate a federal law or regulation . . . ; or (3) violate the conditions of approval under which the site construction was initially authorized, should be considered a substantial change in the physical dimensions.").

change that could nevertheless cause a substantial impact.

General zoning and building codes exist not only to protect the aesthetics of a community, but to protect the lives and property of the public. In the context of wireless sites, overbuilt towers and pole attachments can cause severe damage, as happened in 2007 in California when a utility pole overloaded with wireless transmission equipment collapsed and started a fire that ravaged nearly 4,000 acres and caused millions of dollars in property damage.[44] The Informal Guidance Test would bind the hands of local officials to prevent such dangerous overbuilding construction.

Two hypothetical examples further illustrate this issue. First, consider a 50-foot-tall tower separated 55 feet from the nearest structure in a commercial zone with a 70-foot height limit and a required 110% fall zone setback. An increase in the height of the tower would not violate the Informal Guidance Test or the zone limit, but would encroach into the fall zone and violate a law designed to protect public safety. Next, consider a 50-foot-tall tower 200 feet from the nearest structure in a zone with no height limit for wireless towers. A wireless carrier requests a permit to collocate on the tower with additional antennas mounted at the same height as the current antennas, but the structural analysis of the tower indicates that the additional weight will violate wind-load standards in TIA-222 Revision G.[45]

In both of these examples, a permissible change under the Informal Guidance Test would significantly threaten public health and safety. The Commission should not adopt the Informal Guidance Test because it entirely fails to capture these kinds of substantial changes to the physical dimensions of a wireless tower or base station.

### 3. The Informal Guidance Test Does Not Reflect the Plain Words in Section 6409(a) Because It Does Not Account for All "Physical Dimensions"

In its current form, the Informal Guidance Test only considers changes in height, width, number

[44] *See* Melissa Caskey, *CPUC Approves $51.5-Million Malibu Canyon Fire Settlement*, MALIBU TIMES (Sep. 23, 2013), *available at* http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html.

[45] *See, e.g.*, *Cell Tower Near Ski Resort Collapses in High Winds*, SPOKESMAN-REVIEW (Jan. 13, 2014), *available at* http://www.spokesman.com/stories/2014/jan/13/in-brief-cell-tower-near-ski-resort-collapses-in/ (describing a cell tower that fell onto a nearby house in high winds).

of equipment cabinets, and footprint.[46] Congress expressly intended to capture more than this limited formula when it chose the expansive term, "physical dimensions," as the point of reference for a substantial change.[47] At a minimum, the Commission should afford the term its plain meaning and include (1) height, (2) width, (3) depth, (4) volume, (5) surface area, (6) weight, and (7) visual impact.[48]

#### 4. Loopholes for "Interference" and "Inclement Weather" Threaten to Eviscerate Any Practical Limits on a Substantial Change Under the Informal Guidance Test

In addition to an unreasonably narrow view of the terms "substantial" and "physical dimensions," the Informal Guidance Test also contains arbitrarily broad exceptions that would permit carriers to expand their facilities to heights and widths greater than the prescribed limits based on claims of interference or the need to protect their facilities from inclement weather.[49] The Commission should close these loopholes because (1) Congress explicitly limited the degree to which carriers could expand and (2) exceptions for interference and inclement weather threaten to eviscerate any practical limit on how much a carrier can expand their facilities.

Under the Informal Guidance Test, for example, the height and width limits do not apply when the carrier seeking to collocate its facilities identifies the need for additional space to avoid interference or shelter the antennas from inclement weather.[50] These issues pose technically complex and fact-intensive questions that many local governments cannot resolve without the aid of technical experts. Moreover, the facts that would support or refute these claims reside in the hands of the wireless applicants—the party that would benefit from groundless or even false claims of interference or risk of weather damages. A local government that cannot independently evaluate such claims, afford an advisor, or even retain one within the limited review period forecloses the opportunity to explore a smaller or less intrusive wireless

[46] *See Section 6409(a) PN*, *supra* note 25.

[47] *See* 47 U.S.C. § 1455(a).

[48] *See* IAC NO. 13, *supra* note 13, at 5 ("A change in physical dimensions, whether it is height, weight, bulk, or visual impact, must be considered.").

[49] *See* NPRM, *supra* note 1, at ¶ 118.

[50] *See id.* at ¶ 118.

facility.

### C. Any Rule Must Include a Cumulative Limit to Prevent a Series of Small Changes that Cumulatively Result in a Substantial Change the Tower or Base Station

The Informal Guidance Test also encourages "tower creep," a scenario where a wireless service provider could achieve whatever size facility it desires through a series of successive changes to its wireless tower or base station.[51] Any potential rule should include a cumulative limit because Congress expressly did not intend to limit local authority over substantial changes to a wireless tower or base station that could result from successive insubstantial changes.[52]

A cumulative limit should be placed as an invisible boundary on each and every dimension of the wireless tower or base station, but not necessarily as a limit on the number of changes a wireless service provider may request within that cumulative limit. This balance allows wireless service providers to modify and upgrade their wireless facilities as many times as they please so long as the changes do not expand the tower or base station beyond a rational limit.

## III. THE COMMISSION MUST NARROWLY INTERPRET THE PREEMPTIVE EFFECT ON LOCAL AUTHORITY

Tension between the Commission's obligations and local land use control lies at the heart of the Section 6409(a) debate. The Commission must narrowly interpret the preemptive effect of Section 6409(a) on other aspects of State and local governments' legitimate land use authority.

### A. The Commission Correctly Acknowledged that Section 6409(a) Does Not Regulate State or Local Governments Acting in a Proprietary Capacity

As the Commission proposed to correctly interpret, Section 6409(a) does not impair the property rights of State and local governments.[53] Congress intended to affect local land use policies, rather than to abrogate governmental property rights. Moreover, a statute that forces State and local governments to approve new or expanded tenancies on their real property would raise serious Fifth Amendment Takings

[51] *See id.* at ¶ 120 (recognizing at least the theoretical problem of tower creep).

[52] *See* 47 U.S.C. § 1455(a).

[53] *See* NPRM, *supra* note 1, at ¶ 129.

Clause issues.[54] California Local Governments also caution the Commission not to attempt to craft a rule that distinguishes regulatory and proprietary capacities because it should leave those difficult constitutional questions to the courts.[55]

### B. The Commission Need Not Wade into the Constitutionally Questionable Local Preemption Issues So Long as It Defines a Substantial Change to Include Changes that Violate Generally Applicable Laws

The Commission sought comment on the extent to which Section 6409(a) requires State and local government to approve a permit request that violates, for example, land use codes and other generally applicable laws related to public health and safety.[56] This question implicates serious constitutional questions best left to the courts, but which the Commission can handily avoid so long as it defines a substantial change to include any change that violates a generally applicable law.

Whether a federal agency may constitutionally adopt a rule that requires State and local governments to approve a permit for a wireless facility that endangers public safety raises serious federalism concerns. In order for the Commission to preempt local police powers, especially in the area of public health and safety, there must be "clear and manifest Congressional intent."[57] No such "clear and manifest congressional intent" exists in Section 6409(a). Moreover, the courts construe such preemptive intent as narrowly as possible.[58]

Although Section 6409(a) includes the words "[n]otwithstanding . . . any other provision or law," a rule that preempts all local authority to enforce all generally applicable laws under its traditional police powers would not be the narrowest possible construction.[59] Rather, the narrower and more appropriate construction would find that Congress intended Section 6409(a) to very narrowly preempt the local

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[54] *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (construing "private property" under the Fifth Amendment to include State and local government property when the federal government condemns it).

[55] *See* NPRM, *supra* note 1, at ¶ 129.

[56] *See id.* at ¶ 125.

[57] *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

[58] *See, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that some state damage claims were preempted and others were not).

[59] *See* 47 U.S.C. § 1455(a)(1).

authority to deny a permit to modify, remove, or collocate wireless equipment on a lawfully existing wireless tower or base station only when the proposed changes would result in a structurally and legally *de minimis* change.[60]

To avoid this quagmire altogether and promote rational wireless policies, the Commission should clarify that any proposed change that violates a generally applicable law constitutes a substantial change. As discussed above, even small physical changes can create substantial land use issues. If the Commission required State and local governments to approve unsafe and otherwise illegal wireless facilities, it would only exacerbate those local land use issues and the already problematic constitutional questions.

The Commission should interpret a substantial change to include whether the change would violate a law. This approach would narrowly construe the statute to avoid the constitutional questions and provide a clear path for wireless service providers to collocate, remove, or replace their transmission equipment in a safe, legal, and reasonable manner.

## IV. THE COMMISSION SHOULD NOT IMPOSE ANY PROCEDURAL RULES OR LIMITS ON PERMIT APPLICATIONS BECAUSE SECTION 6409(A) MANDATES A RESULT BUT NOT A PROCESS

As the Commission correctly recognized in the NPRM, the mandate to approve certain eligible facilities requests presupposes that the wireless provider would memorialize the request in a permit application.[61] The Commission should also acknowledge that the plain terms of Section 6409(a) mandate a particular result, but not any particular process to achieve that result.[62] Section 6409(a) on its face does not invite the Commission to impose rules on the permit application and review process.[63] The following subsections respond to some of the fundamental application and review process issues raised in the

[60] *See* NPRM, *supra* note 1, at ¶ 47; IAC NO. 13, *supra* note 13, at 4.

[61] *See* NPRM, *supra* note 1, at ¶ 131; [cite to informal guidance]; *see also McKay Brothers, LLC v. Zoning Bd. of Adjustment of Tp. of Randolph* (JLL), 13cv1383, 2013 WL 1621360, *3 (D.N.J. Apr. 12, 2013) (observing that Section 6409(a) placed the Zoning Board of Adjustment in an initial factfinder role).

[62] *See* 47 U.S.C. § 1455(a).

[63] *See* NPRM, *supra* note 1, at ¶ 132; *see also* IAC NO. 13, *supra* note 13, at 6.

NPRM.

### A. Section 6409(a) Does Not Require a Ministerial Permit Review Process

The NPRM sought comment on whether the Commission should limit permit review to administrative staff rather than an elected board or commission.[64] Not a single word in the statute requires a State or local government to enact a ministerial review process or, for that matter, any other process. No record before the Commission supports such a rule. Moreover, a mandatory ministerial review process would naturally limit public notice and opportunity to participate in municipal business. The Commission should not entertain any proposals to dictate how a State or local government processes a Section 6409(a) request.

### B. The Commission Should Not Limit the Content of Permit Applications Because Local Authorities Need Sufficiently Detailed Disclosures to Fulfill Their Initial Factfinder Role Under Federal Law

The Commission sought comment on whether Section 6409(a) requires local authorities to act as the initial factfinders and determine whether a permit request (1) qualifies as an eligible facilities request, (2) will substantially change the physical dimensions of the wireless tower or base station, and (3) implicates any environmental or historic concerns.[65] To determine these factual issues and evaluate whether the carriers comply with the local requirements, the local authorities often require wireless service providers to submit necessary disclosures designed to allow the local reviewers to evaluate the applicable legal requirements.

In general, the Commission tends to favor more flexible rules when the local authority must act as a factfinder. Just as a State or local government may require data to determine whether a proposed facility will comply with the FCC Rules, local authorities must require disclosures about the scope of the

[64] *See* NPRM, *supra* note 1, at ¶ 132.

[65] *See McKay Brothers, LLC v. Zoning Bd. of Adjustment of Tp. of Randolph*, 13cv1383 (JLL), 2013 WL 1621360, *3 (D.N.J. Apr. 12, 2013) (noting that "the [local authority] would have to determine whether the installation of the antennae would 'substantially change the physical dimensions' of the lattice tower in which Plaintiff seeks to install the antennae. *See* 47 U.S.C. § 1455(a).").

proposed project to determine whether it actually falls under Section 6409(a).[66] The Commission should reaffirm that State and local governments may legitimately seek information from the carriers to perform their factfinding duties and to confirm compliance with legal requirements in the wireless siting process.

### C. The Commission Should Not Limit Permit Review Fees Because Congress Intended to Streamline—Not Subsidize—Small Changes to Wireless Towers and Base Stations

The Commission seeks comment on whether Section 6409(a) warrants any new federal limits in wireless permit review fees. [67] The new review burdens that Section 6409(a) imposes on local authorities will necessarily create new review costs for State and local governments. Although Section 6409(a) may obviate some review costs, it does not eliminate them and nothing in the statute requires local authorities to internalize permit fees as an effective subsidy to wireless service providers. Moreover, any new limit that forces localities to expend more than they can recover from a wireless applicant would constitute an impermissible unfunded mandate to shift the costs of a federal program onto State and local governments.[68]

## V. TIME LIMITS ON 6409(A) REVIEW

### A. The *2009 Declaratory Ruling* Does Not Apply to All Covered Requests Because Presumptively Reasonable Review Periods Apply Only to Personal Wireless Services Facilities

As a threshold matter, the Commission should recognize that (1) it proposes to expand the scope of Section 6409(a) to wireless services beyond the reach of the *2009 Declaratory Ruling*, and (2) Section 6409(a) does not impose any limit on the time to review covered requests not related to personal wireless

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[66] *See, e.g.*, *New York SMSA Limited Partnership v. Town of Clarkstown*, 603 F. Supp. 2d 715, 730–31 (S.D.N.Y. 2009) (holding that a municipality may legislatively use radiofrequency data to determine whether a proposed facility will comply with the FCC Rules); *see also* 47 C.F.R. § 1.1307 *et seq.*; In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, *Report and Order*, 15 FCC Rcd. 22821, 22825–26, ¶ 11 (adopted Nov. 13, 2000) (declining to adopt a rigid standard to govern the kind and amount of data a State or local government may require to [hereinafter "*RF Procedures Order*"].

[67] *See* NPRM, *supra* note 1, at ¶ 131 (inquiring "whether . . . section 6409(a) permits and warrants Federal limits on applicable fees").

[68] *See generally* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48.

services.[69]

Section 332(c)(7) requires State and local governments to act within a "reasonable time" on permit requests related to only "personal wireless service" facilities.[70] However, the NPRM proposes to broaden the scope of Section 6409(a) to include facilities for all "wireless" services.[71] Thus, whether any presumptively reasonable time for review applies depends on whether the covered request seeks to provide personal wireless services or some other wireless service.

Alternatively, the Commission should find that Section 6409(a) applies only to personal wireless services as defined in Section 332(c)(7)(C)(i). This approach would harmonize the scope and intent of Section 6409(a) with Section 332(c)(7), and obviate the need for local governments to determine whether some presumptively reasonable review period applies to the proposed service.

### B. Covered Requests Require More Time for Review Because They Add a New and Different Layer of Analysis to the Permit Process

The Commission should not adopt a shorter presumptively reasonable time for review because (1) no fully developed factual record exists to show that Section 6409(a) review subjects applicants to unreasonable delays and (2) the plain terms of that statute require local governments to act as factfinders on complex and technical issues.

Section 6409(a) already imposes new burdens on State and local governments, and the Commission should not pile on additional hardships without a clear factual basis in a fully developed record. Unlike the factual record attached to the *2009 Declaratory Ruling*, no factual record exists to show any need for a federal rule in this instance. Moreover, in the nearly two years since Congress enacted Section 6409(a), only three known court decisions even address the statute and none found it dispositive.[72] Simply no real-world evidence supports the need for a shorter review period.

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[69] *See* NPRM, *supra* note 1, at ¶¶ 103–04 (proposing not to limit the term "wireless" to "personal wireless services" as defines in Section 332(c)(7)(C)(i) of the Telecom Act).

[70] *See* 47 U.S.C. § 332(c)(7)(B).

[71] *See* NPRM, *supra* note 1, at ¶¶ 103–04.

[72] *See New Cingular Wireless PCS, LLC v. City of West Haven*, No. 3:11cv1967 (MPS), 2013 WL 3458069, *8 (D. Conn. July 9, 2013) (noting in *dicta* that Section 6409(a) "buttressed" the order to grant a wireless permit, but did (continued….)

The Commission found in the *2009 Declaratory Ruling* that a State or local government could reasonably process a collocation request within ninety days.[73] However, Section 6409(a) requires additional time because it requires the permit authority to perform new factual inquiries not previously part of the permit review process, such as whether the applicant submitted an eligible facilities request and whether the proposed design will substantially change the physical dimensions of the wireless tower or base station.[74] Additionally, if the Commission adopts the proposed broader definition of "wireless," State and local governments will now likely require a process to distinguish more generic "wireless" providers from the more specific "personal wireless services" providers.

The necessary time for review becomes even longer under the proposed Informal Guidance Test because local governments will presumably need to evaluate complex technical claims that a wireless provider requires additional height or width to avoid interference or inclement weather.[75] In such a case, a shorter presumptively reasonable review period to complete a more difficult analysis would force State and local governments to afford preferential status to wireless permit requests—a result the Commission explicitly attempted to avoid in the *2009 Declaratory Ruling*.[76] The Commission should not adopt any shorter review periods than it established in the *2009 Declaratory Ruling*.

### C. The Rules Must Toll the Presumptively Reasonable Review Period When an Applicant Submits an Incomplete Application, the Parties Mutually Consent to Extend the Review Period, or the Municipality Enacts a Moratorium to Tailor its Process to New Federal Laws

Regardless of any procedural rules the Commission decides to adopt, to allow for a meaningful review, the rule must toll the presumptively reasonable review period when (1) an applicant submits an

(Continued from previous page)
not retroactively apply to the case); *Hempstead*, 2013 WL 1148898, at *6; *McKay Bros.*, 2013 WL 1621360, at *3 (holding that a cause of action under 6409(a) was not ripe for review because the plaintiff did not exhaust its administrative remedies).

[73] *See* In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposal as Requiring a Variance, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14012, ¶ 46 (adopted Nov. 18, 2009) [hereinafter "*2009 Declaratory Ruling*"].

[74] *See McKay Bros.*, 2013 WL 1621360, at *3.

[75] *See supra*, Part II.B.4, and accompanying text.

[76] *See 2009 Declaratory Ruling*, *supra* note 73, at 14010–11, ¶ 42.

incomplete application, (2) the parties mutually consent to extend the review period, or (3) the municipality enacts a temporary moratorium to amend or otherwise revise its permit review process, rules, and policies.

The Commission noted in its *2009 Declaratory Ruling* that wireless applicants must submit complete permit applications to allow the municipality a fair opportunity to review the request.[77] Similarly, the Commission cannot fairly expect municipalities to determine whether Section 6409(a) applies *and* conduct its normal review without a complete application. Any other rule would provide applicants with the perverse incentive to masquerade all its applications as Section 6409(a)-covered requests without any substantive facts to verify the claim and then simply wait for the clock to expire, especially when coupled with a potential deemed-granted remedy.[78] Such strong-but-perverse incentives frustrate the Commission's consistent goal to foster cooperative partnerships between governments and the wireless carriers.

To allow local authorities an opportunity to fulfill its role as the initial factfinder, and to discourage applicants who would game the process, the Commission should adopt a rule that tolls the review period when the municipality notifies the applicant within a reasonable time that it submitted an incomplete application.

California Local Governments also recognizes that the rules must protect applicants against "last minute" denials on the basis of incompleteness.[79] Consistent with the *2009 Declaratory Ruling*, the Commission should apply the thirty-day notice period for incomplete applications to Section 6409(a).[80]

At the same time, the Commission should adopt the rule from its *2009 Declaratory Ruling* that permits the parties to extend the time for review through mutual consent to foster cooperative partnerships

[77] *See id.* at 14014.

[78] *See* NPRM, *supra* note 1, at ¶ 137; *see also infra* VI (discussing the problems associated with the proposed "deemed granted" remedy).

[79] *See 2009 Declaratory Ruling*, *supra* note 73, at 14014–15, ¶¶ 52–53.

[80] *See id.* at 14015, ¶ 53.

between wireless applicants and local authorities.[81] In that order, the Commission acknowledged that the rules should allow the government and industry to mutually toll the review period because the facts and circumstances can vary greatly among each wireless permit request.[82] A rigid rule that forced governments and industry out of a cooperative and into an adversarial context would therefore harm the public interest and frustrate Congressional intent.[83]

Lastly, the Commission should toll the time for review when a municipality enacts a temporary moratorium to revise its permit process, rules, and policies because Section 6409(a) fundamentally changes the way local authorities must approach wireless siting.

## VI. THE COMMISSION SHOULD NOT IMPOSE A DEEMED-GRANTED REMEDY

### A. Section 332(c)(7)(v) of the Telecom Act Already Provides an Expedited Remedy

Section 6409(a) does not allow for a deemed-granted remedy. Any suggestion that it does directly conflicts with the express Congressional intent to allow federal courts to craft individualized remedies based on the unique facts and circumstances of each wireless-facilities dispute.[84]

A federal agency may interpret a statute only when (1) the statute contains some gap or ambiguity that Congress intended the agency to resolve and (2) the agency does not construe the statute arbitrarily, capriciously, or manifestly contrary to Congressional intent.[85] Although it appears that the rule proscribes agency authority to interpret a rule at all when no gap or ambiguity exists, the Supreme Court recently clarified in *City of Arlington v. FCC* that a court always reviews whether the agency went beyond what Congress permitted it to do.[86]

Congress already provided an adequate and efficient remedy for when a State or local

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[81] *See id.* at 14013, ¶ 49.

[82] *See id.* at 14009, ¶ 39.

[83] *See id.* at 14013, ¶ 49.

[84] *See* 47 U.S.C. § 332(c)(7)(B)(v); *2009 Declaratory Ruling*, *supra* note 73, at 14009, ¶ 39 (rejecting a deemed granted remedy for a failure to act because it would frustrate the "Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies").

[85] *See Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, at 842 (1984).

[86] *See City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1868–69 (2013).

government allegedly fails to act or improperly denies a permit request for a wireless facility.[87] Congress did not specify the remedy for a "failure to act" or an "impermissible denial" because the current remedy in Section 332(c)(7)(B)(v) already affords "expedited" relief.[88] Indeed, the one district court that already dealt with a Section 6409(a) claim disposed of the matter within 36 days.[89] Nothing in Section 6409(a) or the record before the Commission warrants a different remedy, and the Commission should not go beyond the already adequate and efficient judicial remedy.

### B. A Deemed Granted Remedy Exacerbates the Questionable Constitutionality of Section 6409(a) Under the Tenth Amendment

Even when Congress may constitutionally regulate a subject matter, a statute may violate the Tenth Amendment and principles of federalism.[90] A court will invalidate a law when it compels the States or their officials to enact or enforce a federal regulatory program.[91]

The Constitution generally contemplates that a representative form of government, not necessarily judicial review, protects the States' rights under the Tenth Amendment.[92] However, the Court must intervene when a federal statute (1) directly regulates the States or their officials rather than control through a generally applicable law and thus (2) allows the federal government to avoid political accountability.[93]

The Supreme Court of the United States in *Printz v. United States* and in *New York v. United States* struck down federal statutes that coerced state officials to facilitate a politically unpopular federal program under threat of a federal punishment because the laws violated State sovereignty.[94] The law in

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[87] *See* 47 U.S.C. § 332(c)(7)(B)(v).

[88] *See id.*.

[89] *See McKay Bros.*, 2013 WL 1621360, at *4.

[90] *See Printz v. United States*, 521 U.S. 898, 933–34 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992); *see also Reno v. Condon*, 528 U.S. 141, 149 (2000).

[91] *See New York*, 505 U.S. at 188.

[92] *See South Carolina v. Baker*, 485 U.S. 505, 512 (1988); *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 550–52, 556 (1985).

[93] *See New York*, 505 U.S. at 160, 168.

[94] *See Printz*, 521 U.S. at 933–34 (1997); *New York*, 505 U.S. at 188.

*Printz*, which obliged local law enforcement officials to perform background checks on handgun purchases, and the law in *New York*, which forced States to implement nuclear waste disposal programs, violated the Tenth Amendment because they both pressed States into federal service and blurred the lines of political accountability—undermining the structure of government to protect States' rights.

Here, Section 6409(a) mirrors the unconstitutionally coercive laws struck down in *Printz* and *New York* because it compels State and local officials to administer a federal wireless deployment program. Just as the federal law in *Printz* required State law enforcement officers to perform background checks and the law in *New York* required States to enact a nuclear waste disposal program, Section 6409(a) directly regulates the States because it compels State officials to approve covered requests.[95] Just as the federal laws in *Printz* and *New York* required local governments to administer or enact what may be politically unpopular programs, Section 6409(a) forces local governments to shepherd politically unpopular permits through the land use process. Thus, Section 6409(a) appears to fall on the unconstitutional side of the line drawn in *Printz* and *New York*.

The deemed-granted remedy considered in the NPRM pushes Section 6409(a) even farther to the unconstitutional side of the spectrum because it blurs the lines of political accountability between communities and their local government representatives.[96] Wireless land use permits can create substantial controversy in many instances and often force politically unpopular choices. Aggrieved local communities will not likely blame Congress or the Commission for their wireless woes; they will blame the local officials they believe approved the permit, or at least did not block the approval. The political accountability problem will become especially acute in the event the Commission requires mere ministerial review without a public notice or hearing.[97] Section 6409(a) will likely face a constitutional challenge in the courts, and a deemed granted remedy would only add fodder for the argument that the statute forces States and their instrumentalities to administer a federal program. The Commission should

[95] *See Printz*, 521 U.S. at 933–34 (1997); *New York*, 505 U.S. at 188.

[96] *See* John W. Pestle, *Section 6409(a) of the Middle Class Tax Relief Act is Unconstitutional*, MUNICIPAL LAWYER, Jan. 10, 2013, at 22.

[97] *See supra*, Part IV.A, and accompanying text.

not adopt a deemed granted remedy.

## VII. A DECLARATORY RELIEF PROCEDURE IS UNNECESSARY AND INAPPROPRIATE GIVEN THE AVAILABILITY OF MORE ACCESSIBLE COURTS

To enforce Section 6409(a), the Commission proposes to permit aggrieved applicants to petition for declaratory relief.[98] The Commission should not permit aggrieved applicant to petition for declaratory relief because (1) Congress already provided an expedited judicial remedy,[99] (2) the Commission lacks the local expertise to competently adjudicate local disputes, and (3) the proposed procedure places an unreasonable burden on State and local governments.

As discussed above, Congress already provided expedited judicial review for aggrieved applicants.[100] Unlike Section 332(c)(7), which grants a party the right to petition the Commission for denials allegedly based on RF emissions, Section 6409(a) does not contain any evidence that Congress intended to allow an aggrieved applicant to petition the Commission for declaratory relief from any alleged violation of Section 6409(a).[101] Thus, the proposed declaratory relief procedure conflicts with Congress' apparent intent to maintain the status quo for remedies.

Additionally, the Commission inherently lacks the institutional expertise to strike the appropriate balance between the federal interest in facilities deployment and the equally strong countervailing local interests. The current Congressionally-prescribed judicial remedy channels these disputes into the courts, which have the demonstrated ability to fairly evaluate these issues.[102] Moreover, the Commission should carefully consider the burden of its proposal to establish a declaratory ruling process to review Section 6409(a) complaints, and its slippery slope towards its role as a "national zoning board."[103]

Lastly, local governments should not bear the expense to obtain counsel in Washington, D.C. or

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[98] *See* NPRM, *supra* note 1, at ¶ 142.

[99] *See* 47 U.S.C. § 332(c)(7)(B)(v).

[100] *See id.*

[101] *See id.*

[102] *See* IAC NO. 13, *supra* note 13, at 2, 5, 8.

[103] *See* NPRM, *supra* note 1, at ¶ 142; *see also* IAC NO. 13, *supra* note 13, at 4–5.

travel long distances to defend a local land use dispute. These burdens are especially unreasonable given the lack of explicit Congressional intent and the availability of more appropriate and more accessible venues in the courts. For all these reasons, the Commission should not permit aggrieved applicants to petition for declaratory relief under Section 6409(a).

The Commission should look to the legislative history of the Telecom Act to understand Congressional intent because Congress enacted Section 6409(a) with virtually no legislative history or debate—much less the kind of legislative history that accompanied the Telecom Act. When the Senate debated Section 253 of the Telecom Act, which regulates the relationship between local governments and carriers in the public right-of-way, Senator Feinstein expressed deep concern over whether the Commission should preside over State-law preemption claims. She stated that:

> [C]ities [would have] to send delegations of city attorneys to Washington to go before a panel of telecommunications specialists at the FCC, on what may be [a] very broad question of state or local government rights. In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for states.[104]

Respecting Senator Feinstein's concern, Senator Groton offered an amendment—now law—designed to allow cities to defend preemption claims in local federal district courts. He stated that his amendment "retains not only the right of local communities to deal with their rights-of-way, but their right to meet any challenge on home ground in their local district courts."[105]

Senator Feinstein's concerns in 1995 over Commission authority to hear preemption claims mirror the same concerns in Section 6409(a). Without legislative history to Section 6409(a), there is good reason to apply Senator Feinstein's sound reasoning then to similar issues today. Without an express delegation, such as in Section 332(c)(7)(B)(v), or any supportive legislative history, the Commission should not entertain petitions for declaratory relief on Section 6409(a) claims.

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[104] *See Bell South Telecom., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190 (quoting 141 Cong. Rec. S8306 (June 14, 1995) (Statement of Sen. Groton)).

[105] *See Bell South Telecom.*, 252 F.3d at 1190 (quoting 141 Cong. Rec. S8170 (June 12, 1995) (Statement of Sen. Feinstein)).

### A. The Commission Should Allow an Adequate Grace Period to Allow State and Local Governments to Adjust to Any New Rules Through Reasonably Temporary Moratoria

The Commission sought public comment on whether it should provide a transition period to allow States and localities time to implement any finally-adopted rules.[106] The Commission should provide local governments with at least twelve months to adjust local land use ordinances, policies, and procedures to reflect any new rules adopted as a result of this NPRM. State and local governments require at least this much time to revise and enact new substantive rules, the Commission routinely provides a transition period, and at least one federal court recently found that any delay would not pose an immediate and substantial hardship to the wireless providers or the public.[107]

The Commission consistently provides State and local governments with a grace period to adjust to new federal rules.[108] In the *2009 Declaratory Ruling*, the Commission allowed a 60-day grace period that began after a wireless applicant notified the permit authority of a failure to act. The proposed rules in the NPRM would fundamentally impact many local ordinances and policies in a way far beyond the effect of the *2009 Declaratory Ruling*. The Commission should provide significantly more time for State and local government to implement such significantly different finally adopted rules.

Moreover, neither wireless providers nor the public will suffer an "immediate and significant hardship" that might justify a shorter grace period.[109] In *McKay Brothers, LLC v. Zoning Bd. of Adjustment of Tp. of Randolph*, a wireless provider sought to compel a township to grant a permit under Section 6409(a) a mere forty-one days after the township returned the application as incomplete. Thirty-eight days later, that federal court denied the complaint and noted that any interrupted deployment would not likely produce such hardship because the process to obtain a land use permit usually includes

[106] *See* NPRM, *supra* note 1, at ¶ 100.

[107] *See McKay Bros.*, 2013 WL 1621360, at *4.

[108] *See, e.g.*, *2009 Declaratory Ruling*, *supra* note 73, at 14014, ¶ 51.

[109] *See McKay Bros.*, 2013 WL 1621360, at *4.

delays.[110] Assuming the *2009 Declaratory Ruling* applied to that application, the township would receive an additional 90 days to process the permit request, and thus the judge effectively found no hardship when the wireless provider must wait at least 169 days for a permit.

In the interest of fairness and cooperation, and in light of the significant changes to local policies and the absence of any significant hardship to carriers, the Commission should provide State and local governments with at least twelve months to implement any requirements after adoption.

## VIII. IMPLEMENTATION OF SECTION 332(C)(7)

### A. The Commission Should Globally Interpret "Collocation," for Sections 332(c)(7) and 6409(a), as a Wireless Facility Shared with an Existing Wireless Tower or Wireless Structure

The Commission should read Sections 332(c)(7) and 6409(a) with a holistic, plain language approach, and define "collocation" as a wireless facility placed at a location shared with an existing wireless tower or other wireless structure. This is consistent with the Commission's 1999 interpretation of the term "collocation" as relating to "competitors' equipment" for the purpose of rules implementing local exchange carriers' statutory duty to provide physical or virtual collocation for competitors, through the "Collocation Order."[111] If there is no personal wireless service equipment already at a site, how could a new wireless facility be "collocated" there?

A common sense reading of the term "collocation" avoids conflicting interpretations for the related statutes. If the Commission were to impose conflicting interpretations, it may cause conflicting results between interpretations of what is "collocation of new transmission equipment" under, say, Section 6409(a), with a "collocation application" under the *2009 Declaratory Ruling*. The Commission should adopt a global reading, requiring existing wireless "equipment" at the site.

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[110] *See McKay Bros.*, 2013 WL 1621360, at *4 (citing *Trinity Resources v. Township of Delanco*, 842 F. Supp. 782, 800 (D.N.J. 1984)).

[111] *See* Deployment of Wireline Services Offering Advanced Telecom. Capability ("Collocation Order"), 14 FCC Rcd at 4761 (1999) (interpreting 47 U.S.C. § 251(c)(6) (requirement that incumbents allow collocation by competitors); *GTE Service Corp. v. F.C.C.*, 205 F.3d 416, 424-425 (D.C. Cir. 2000) (noting that "collocation" under Section 251 relates to "competitors' equipment").

### B. The Commission Should Confirm Traditional Local Authority to Determine the Completeness of a Wireless Facility Application

The Commission could clarify that an application is complete, for the purposes of the *2009 Declaratory Ruling*, when the State or local government receives an application containing information that is complete to the State's or local government's satisfaction. This would be similar to levels of discretion afforded governmental decisionmakers in, for example, land use applications to the City of Stockton, California,[112] Santa Cruz, California,[113] and National Pollutant Discharge Elimination System ("NPDES") permit applications to the EPA.[114] States and local governments are responsible for processing wireless facility applications, and they are best situated to use their discretion to confirm whether an application is complete.

A recent court decision cited by the Commission in the Notice of Proposed Rulemaking is also instructive in this regard. In *McKay Bros., LLC v. Township of Randolph*,[115] when a carrier was informed to contact a town staff person "for the necessary paperwork," the carrier filed suit in lieu of submitting the required paperwork.[116] 36 days after filing suit, the district court dismissed the carrier's lawsuit because the case was not ripe, and no immediate and significant hardship would result.[117] The court also noted that "[t]he Zoning Board of Adjustment should have the opportunity to consider Plaintiffs' application without premature judicial intervention."[118]

Since the *McKay Bros.* court found no hardship from dismissing the carrier's case before "the necessary paperwork" was submitted, the Commission should similarly avoid premature intervention by regulating municipalities' "necessary paperwork." Congress only imposed a remedy on a "final action or

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[112] Stockton Municipal Code § 16.84.050(A)(1) provides as follows: "The Director shall review the application material to determine if the application is complete."

[113] Santa Cruz Municipal Code § 24.04.052(1) provides as follows: "Staff shall determine whether an application for a development project is complete . . . "

[114] 40 C.F.R. 122.21(e) requires applications to the EPA Director to be "completed to his or her satisfaction."

[115] 2013 WL 1621360 (D. N.J. 2013).

[116] *Id.* at *1.

[117] *Id.* at *4.

[118] *Id.* at *2.

failure to act."[119] The Commission should similarly stay out of such premature intervention into municipalities' discretion to determine whether an application contains the "necessary paperwork."

The Commission should resist the temptation to obfuscate a simple issue that is best left in State and local decisionmakers' hands. The Commission should confirm that municipalities retain their discretion to decide what constitutes a "complete" application.

### C. The *2009 Declaratory Ruling* Should Not Run Concurrently with Moratoria Because the Two Principles Should Not be Comingled

The Commission should not apply its *2009 Declaratory Ruling* to run concurrently with moratoria. The relevant purpose of the *2009 Declaratory Ruling* (accelerating the process to decide the application of an individual carrier) is wholly different from the general purpose of moratoria (to study existing regulations and/or develop new regulations, to apply to all carriers). If the Commission erroneously went ahead as it proposes, it would undercut the purpose of moratoria, for the short-term benefit of a few carriers, but to the detriment of all other current and future carriers, and the community-at-large. Therefore, the time periods from the *2009 Declaratory Ruling* should not run during the pendency of moratoria.

Even prior to the *2009 Declaratory Ruling*, the courts, relying on case-specific facts, readily distinguish valid moratoria from invalid moratoria under the "reasonable time" requirement of the Telecommunications Act of 1996. Accordingly, the Commission should not (1) set limits on the length, or maximum cumulative time, of moratoria; nor (2) limit moratoria that were put in place prior to the submission of an application. "There is nothing to suggest that Congress, by requiring action 'within a reasonable period of time,' intended to force government procedures onto a rigid timetable where the circumstances call for study, deliberation, and decision-making among competing applicants."[120] In

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[119] 47 U.S.C. § 332(c)(7)(B)(v).

[120] *Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp. 1036, 1040 (W.D. Wash 1996) (denying motion for preliminary injunction, and upholding moratorium where city sought time "to deal with an expected flurry of applications")); *Sprint Spectrum, L.P. v. Jefferson County*, 968 F.Supp. 1457, 1466 (N.D. Ala. 1997) (granting petition for declaratory judgment and writ of mandamus, striking down moratorium where county failed to follow state procedural requirements, had already imposed two prior moratoria, and had "not offered a legitimate reason for not processing pending applications under existing regulations, while new amendments are being considered");
(continued….)

multiple instances, the courts have acted within only a few months (and as little as 22 days) from the filing of lawsuits challenging moratoria, by motions alone, without the need for a trial.[121]

The local interests served by moratoria include preserving the status quo to allow for the development of and implementation of a comprehensive plan, or a revision to the existing plan. These needs often arise after an unexpected increase in wireless facility applications, or a change in applicable rules. It would obviously frustrate the purpose of a moratorium if, during the interim period when the new plan is developed, the Commission allowed carriers to evade the new local regulations – and instead permitted carriers to install wireless facilities which might possibly defeat, in whole or in part, the ultimate execution or purpose of new wireless facility regulations.

Additionally, a State or local government's development of new regulations can often serve to clarify the process for all carriers to obtain permits, through a thorough and open discussion among industry, government, and community members. The carrier-specific rights to a speedy local decision on individual applications through the *2009 Declaratory Ruling* should not be confused with the carrier-wide interests (not a right) in seeking the lifting of a moratorium, which is traditionally accompanied by the study of amendments to (or a re-write of) existing regulations. The Commission should not combine these two principles.

At some point, the Commission's effort to clarify the five limitations on local authority of 47 U.S.C. § 332(c)(7)(B), including the "reasonable time" requirement, will only serve to confuse carriers, State and local governments, and members of the public. In 2009, the Commission defined a "reasonable time" by way of its 35-page *2009 Declaratory Ruling*. Following that, in 2013, the Wireless Telecommunications Bureau issued guidance on Section 6409(a) through its five-page *Section 6409(a)*

(Continued from previous page)
*Sprint Spectrum, L.P. v. Town of West Seneca*, 172 Misc.2d 287, 288, 659 N.Y.S.2d 687 (Sup. 1997) (granting application for preliminary injunction, striking down moratorium adopted "[f]or reasons that [were] not clear in the record. . . ").

[121] *See City of Medina*, 924 F.Supp. at 1039 (decided 22 days after filing of lawsuit); *Jefferson County*, 968 F.Supp. at 1463 (decided 51 days after filing of lawsuit) *Town of West Seneca*, 172 Misc.2d 287, 659 N.Y.S.2d 687 (decided five months after town's adoption of moratorium, lawsuit filing date not stated in the record).

*PN*. Now, in 2014, the Commission seeks to provide further guidance on these issues through this even larger Notice of Proposed Rulemaking.

Though the Commission is well-intentioned, its efforts may only serve to confuse, not clarify. Therefore, as applied here, the Commission should decline to wade into moratoria waters, instead leaving that as an issue for the courts. Courts have proven the ability to swiftly resolve disputes over moratoria, and on a case-by-case basis.

### D. Qualifying DAS Facilities Could be Subject to the *2009 Declaratory Ruling*, if the Commission Adopts the California Local Governments' Proposed Global Definition of "Collocation"

The Commission should harmonize its regulations in this rulemaking. To that end, it could treat qualifying DAS and small cell facilities as subject to the *2009 Declaratory Ruling*, provided that it adopts the California Local Governments' proposed definition of "collocation" for Sections 332(c)(7) and 6409(a), as described above.

Most DAS facilities are placed in the public right-of-way, and are installed on existing light, traffic, and electric poles. None of those poles, at the time of the first DAS installation, host any personal wireless service equipment.

However, under Verizon's misguided proposal, all of these new DAS facilities would qualify for the unreasonably short 90-day review period. On the other hand, under the California Local Governments' proposed global definition of "collocation," these DAS facilities would not be considered "collocated" under either Section 6409(a) or Section 332(c)(7). Applied to the *2009 Declaratory Ruling*, this even-handed approach would permit States and local governments the reasonably-necessary-150-day process for a new DAS facility application, just as they would need to process other new wireless facility applications.

### E. Municipal Property Preferences for Wireless Facilities are Reasonable and Necessary

The Commission should decline to act on ordinances establishing preferences for the placement of wireless facilities on municipal property. Such preferences are reasonable and necessary for several reasons.

First, there are many benefits to a municipal property preference, such as the possibility of less land use restrictions on the type of wireless facilities that could be installed, and swifter application and approval processes. In fact, even PCIA, which raised the concern that the Commission is now seeking comment upon, concedes that "the siting on municipal property generally can have many benefits,"[122] such as reducing the aesthetic impact of a facility in an area where it may otherwise be difficult to find a suitable location.

Second, a municipal property preference is not *per se* unreasonably discriminatory. PCIA's comments, raising concerns yet, at the same time, describing the "many benefits" of a municipal property preference, do not, somehow, amount to a *per se* "unreasonably discriminatory" finding by the Commission:

> Congress' command that local authorities "shall not" discriminate indicates that it wants local decisionmakers to consider how their zoning decisions affect the marketplace for communications services. Congress, however, has not placed competition above all local concerns as the Act nonetheless strikes a balance between local zoning power and promotion of free competition. The Act prohibits such local discrimination only if it is "unreasonable."[123]

Finally, where a carrier does claim unreasonable discrimination, the courts are well-equipped to act – on a case-by-case basis. For example, the Fourth Circuit dispensed with an unreasonable discrimination claim where the denial was based

> . . . on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. <u>If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result.</u>[124]

There is just no need for the Commission to weigh in here.

### F. The Commission Should Not Adopt a "Deemed Granted" Injunctive Relief Remedy for Violations of Section 332(c)(7)

The Commission should not adopt a "deemed granted" injunctive relief remedy for violations of Section 332(c)(7). In its *2009 Declaratory Ruling*, the Commission stated that "case law does not

[122] PCIA comments, WT Docket 11-59, at 35 (July 19, 2011).

[123] *Jefferson County*, 968 F.Supp. at 1468 n.16 (citation).

[124] *AT&T Wireless, PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423, 437 (4th Cir. 1998) (emphasis added).

establish that an injunction granting the application is always or presumptively appropriate when a 'failure to act' occurs."[125] Case law has not changed in that regard, and no compelling facts have come forward, even after the Commission solicited comments through a Notice of Inquiry in 2011,[126] that even suggests the Commission should change its approach here.

The courts are properly and solely suited to fashion remedies for violations of Section 332(c)(7), as the Commission noted in this Notice of Proposed Rulemaking. While the Commission adopted the "shot clock" through the *2009 Declaratory Ruling*, there is nothing more the Commission can do now, in its own shot clock parlance, to "move the ball forward."

## IX. CONCLUSION

To promote certainty and facilitate Congressional intent in Section 6409(a) to streamline the permit process for *de minimus* changes to a narrow class of existing purpose-built structures, the Commission should narrowly define the elements of an eligible facilities request as discussed above. Local communities should also retain their traditional land use authority to define a substantial change and develop procedures to flexibly respond to new technologies that will inevitably follow from Section 6409(a). After all, the most technologically neutral rule the Commission could adopt is no rule at all.

Moreover, the Commission should carry forward the current timeframes under Section 332(c)(7), as interpreted in the *2009 Declaratory Ruling*. The Commission should recognize that the wireless facility permitting process works with the "presumptively reasonable" times it established in 2009, with a far more complete record than the one before it through this proceeding.

[125] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012 para. 39.

[126] Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59, *Notice of Inquiry*, 26 FCC Rcd 5384 (2011).

Although the Commission should clarify some issues here, it should tread lightly. The Commission should limit its rulemaking to only those areas where it can balance a respect for local zoning authority with an interest in deploying wireless facilities.

Respectfully submitted,

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**EXHIBIT B**

**Joint Reply Comments Filed by the League of California Cities, the California State Association of Counties and SCAN NATOA**

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238)

[appears behind this coversheet]

EXHIBIT B

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies | ) | WT Docket No. 13-238 |
| | ) | |
| Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting | ) | WC Docket No. 11-59 |
| | ) | |
| Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers | ) | RM-11688 (terminated) |
| | ) | |
| 2012 Biennial Review of Telecommunications Regulations | ) | WT Docket No. 13-32 |
| | ) | |

**JOINT REPLY COMMENTS FILED BY THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA**

**Filed: March 5, 2014**


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*California Local Governments acknowledge and thank Javan Rad, Esq. of the City of Pasadena, California and Robert C. May III, Esq. of Telecom Law Firm, P.C. for their work as lead drafters of these reply comments.*

EXHIBIT B

## SUMMARY

The League of California Cities ("League"), the California State Association of Counties ("CSAC"), and the States of California and Nevada Chapter of National Association of Telecommunications Officers and Advisors ("SCAN NATOA") (collectively, "California Local Governments") offer these comments in response to the comments filed on February 5, 2014 in the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking ("NPRM") adopted and released on September 26, 2013.[1] California Local Governments appreciate the opportunity to participate in this important matter.

California Local Governments support the thorough and thoughtful comments filed by many municipal commenters, and specifically the comments from the City of Alexandria, Virginia; the City of Eugene, Oregon; the City of Mesa, Arizona; the Colorado Communications and Utility Alliance *et al.*; Fairfax County, Virginia; the National Association of Telecommunications Officers and Advisors ("NATOA") *et al.*; City of San Antonio, Texas; and the Town of Hillsborough, California.[2] In contrast, California Local Governments generally oppose the comments from AT&T; Crown Castle; CTIA; PCIA; Sprint Corporation; Towerstream Corporation; and Verizon.[3]

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[1] *See* In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Notice of Proposed Rulemaking*, 2013 WL 5405395 (F.C.C.), ¶ 102 (rel. Sep. 26, 2013) [hereinafter "NPRM"].

[2] *See* JOINT COMMENTS OF THE CITY OF ALEXANDRIA, VA. *ET AL.*, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); COMMENTS OF THE CITY OF EUGENE, OR., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); REPLY COMMENTS OF THE CITY OF MESA ARIZ., *Reply Comment*, WT Docket No. 13-238 (filed Feb. 26, 2014); COMMENTS OF THE COLO. COMMS. AND UTIL. ALLIANCE *ET AL.*, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); COMMENTS OF FAIRFAX CNTY., VA., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "FAIRFAX CNTY. COMMENTS"]; JOINT COMMENTS OF THE NAT'L ASS'N OF TELECOMS. OFFICERS & ADVISORS *ET AL.*, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "NATOA COMMENTS"]; COMMENTS OF THE CITY OF SAN ANTONIO, TEX., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "SAN ANTONIO COMMENTS"]; COMMENTS OF THE TOWN OF HILLSBOROUGH, CAL., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014).

[3] *See* COMMENTS OF AT&T, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "AT&T COMMENTS"]; COMMENTS OF CROWN CASTLE, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "CROWN CASTLE COMMENTS"]; COMMENTS OF CTIA—THE WIRELESS ASS'N, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); COMMENTS OF PCIA—THE WIRELESS INFRASTRUCTURE ASS'N & THE HETNET FORUM,

These reply comments address only selected issues—namely, the proposed (1) new rules to interpret Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (codified as 47 U.S.C. § 1455(a) (2013)); (2) PCIA definition of a distributed antenna system ("DAS") or small cell; and (3) revised rules to interpret Section 332(c)(7)(B) of the Telecommunications Act of 1996 ("Telecom Act").

* * *

***No Demonstrated Need for New or Revised Rules.*** The Commission should not now revise current rules or adopt new ones because no factual record exists to show a national problem for the Commission to redress. The initial comments generally show that the current rules work well, and that State and local governments implemented Section 6409(a) without much controversy.[4] Appendix A, attached to these comments, provides more detailed responses to the anecdotal (and often misleading) assertions provided in some wireless industry comments.

***Any Potential Rules Must Be Narrow.*** Should the Commission adopt new rules, it should recognize and reject the unworkable scheme proposed in the NPRM. Under the proposed rules, Section 6409(a) would require State and local governments to approve virtually all new wireless facilities within 45 days regardless of whether a bona fide inquiries exists about its status as an "eligible facilities request" or whether it will "substantially change" the host structure.[5] Moreover, the proposed rules would improperly substitute the Commission for the courts as the proper venue to resolve such inquiries.

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*Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "PCIA COMMENTS"]; COMMENTS OF SPRINT CORP., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "SPRINT COMMENTS"]; COMMENTS OF TOWERSTREAM CORP., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "TOWERSTREAM COMMENTS"]; COMMENTS OF VERIZON AND VERIZON WIRELESS, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "VERIZON COMMENTS"].

[4] *See infra*, notes 12–14, and accompanying text.

[5] *See infra*, Part I.C.

In the event that the Commission feels compelled to act now, it should adopt only the very most narrowly tailored possible. In particular, California Local Governments emphasize that:

- A "***wireless tower***" means a structure solely or primarily built to support wireless transmission equipment. This standard comports with the limited Congressional intent evidenced in the statutory scheme that includes Section 6409(a), current Commission rules, common usage among both wireless providers and local governments, and common sense.[6]
- Whether a proposal to install new wireless facilities constitutes a "***collocation***" must depend on whether a legally established wireless use already exists on the structure at the time the applicant submits the request. This standard provides a verifiable bright-line test that generally follows the logic in the *2009 Declaratory Ruling*.[7]
- The broad phrase "***substantially change the physical dimensions***" includes all physical changes—increases, decreases, and other aesthetic transformations. Any eligible facilities request that does not mimic and extend the camouflage on the existing wireless tower or base station causes a *per se* substantial change.[8]
- The phrases "***or any other provision of law***" and "***may not deny, and shall approve***" does not exempt wireless applicants from generally applicable laws. Nothing in Section 6409(a) supports such a proposed rule.[9]

***PCIA-Proposed DAS & Small Cell Standards.*** The Commission should reject the illusory standard that PCIA proposes for a distributed antenna system ("DAS") or small cell

[6] *See infra*, notes 25–31, and accompanying text.
[7] *See infra*, notes 32–34, and accompanying text.
[8] *See infra*, notes 35–43, and accompanying text.
[9] *See infra*, notes 47–59, and accompanying text.

because it would allow wireless providers to fill public spaces with an unlimited number of wireless equipment enclosures.[10]

***Deemed-Granted Remedy.*** The Commission should not impose an extraordinary and constitutionally questionable deemed-granted remedy on local governments that require additional time to review a permit request or find that a permit should not be issued. No factual record exists to justify a rule with such magnitude, and that would summarily reverse the entire wireless permit process.[11]

* * *

[10] *See infra*, Part II.
[11] *See infra*, Part III.E.

EXHIBIT B

## TABLE OF CONTENTS

EXHIBIT B

## I. THE COMMISSION SHOULD DECLINE TO ADOPT THE WIRELESS INDUSTRY'S UNNECESSARY, UNWORKABLE, & IRRATIONALLY DANGEROUS RULES

In response to the NPRM, comments from the wireless industry (1) offer little to no actual evidence of any national problem for the Commission to redress; (2) propose a series of rules that dismantles local land use authority piece by piece; and (3) urge the Commission to disregard generally applicable laws designed to protect people and property from overbuilt or poorly constructed facilities.

### A. No Factual Record Demonstrates a Present Need for New Rules

The Commission should not adopt new rules without a clear and fully developed factual record that shows a pervasive problem the Commission can redress.[12] This basic principal rings even more true when the Commission proposes rules that preempt local power over areas of traditionally local control, such as land use. With no factual record that demonstrates a national problem at this time, the Commission should not adopt any new rules at this time.

Although the industry comments provide a few anecdotal examples with limited (if any) factual context, the Commission could not infer a nationwide problem from a few isolated disputes. Indeed, the Commission should ignore anecdotal examples when the comments do not name the alleged bad actor, as when Verizon that asserted various unnamed communities in Georgia impose onerous permit requirements, because basic due process requires adequate notice and an opportunity to respond.[13]

In an attempt to drum up a record where none exists, several industry commenters offer the same factual record from the *2009 Declaratory Ruling* as evidence that the Commission

[12] *See* COMMENTS OF THE DISTRICT OF COLUMBIA at 5, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); FAIRFAX CNTY. COMMENTS, *supra* note 2, at 4; NATOA COMMENTS, *supra* note 2, at 7.
[13] *See* VERIZON COMMENTS, *supra* note 3, at 27.

should adopt more restrictive rules now.[14] The Commission should not consider such old evidence from the *2009 Declaratory Ruling*, which supported the current presumptively reasonable time, to now justify a materially shorter time under the same facts. Instead, the Commission should consider only the facts in the current record (or lack thereof) in the present NPRM.

### B. In the Event the Commission Decides to Adopt New Rules, It Should Adopt Narrow Rules that Comport with Congressional Intent, Common Sense, and Federalism Principles

In the event that the Commission decides to define certain terms in Section 6409(a) or revisit the *2009 Declaratory Ruling*, notwithstanding the absence of a reliable factual record that demonstrates any need, then the Commission should narrowly define the terms to comport with Congressional intent, common use, and common sense. California Local Governments, like many other municipal commenters, expansively discussed these issues in its initial comments and reiterate them now.[15]

The Commission should specifically decline to adopt preemptive rules that divest authority from local governments and channel local fact-intensive inquiries away from currently available venues, such as local administrative bodies and the courts best suited to address these questions. Such proposed rules flaunt bedrock federalism principals and would transform the Commission and its staff into the very "national zoning board" that it seeks to avoid.[16]

### C. The Proposed Rules Eviscerate Reasonable Local Control and Foster a Race to the Bottom Rather than Rational Wireless Policies

The industry commenters endorse a series of individual rules that, when strung together, would eviscerate local control over a vast number of wireless facilities. For example, the

[14] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 29; CTIA COMMENTS, *supra* note 3, at 18 n.64.
[15] *See* JOINT COMMENTS FILED BY THE LEAGUE OF CAL. CITIES *ET AL.* at 1–11, *Comment*, WT Docket No. 13-238 (filed Feb. 238) [hereinafter "CAL. LOCAL GOV'TS COMMENTS"]; NATOA COMMENTS, *supra* note 2, at 6–7.
[16] *See* NPRM, *supra* note 1, at ¶ 99.

proposed industry rules would classify *any* proposal to place wireless transmission facilities on *any* structure as a collocation subject to a 45-day shot clock and deemed-granted remedy. Under this industry scheme, virtually all wireless facilities on existing structures (new builds as well as collocations) would escape any discretionary review so long as the service provider did not substantially increase the height of that support structure.[17]

The proposed rules conflict with the basic policies inherent in both the Telecom Act and current Commission rules.[18] The scheme in these proposed rules (1) ignores the necessary balance between the public interest in wireless infrastructure and the public interest in safe and rational land uses, (2) encourages bad actors in the wireless industry to game the system, and (3) eliminates opportunities for cooperative solutions between industry and local government.

Wireless towers and base stations do not exist in some invisible abstract; these facilities operate in the shared space where we all live and work. Just as wireless facilities share space with other uses, these facilities must follow the same rules. The Commission may find some narrow "rules of the road" necessary to further these sometimes-conflicted public interests, but the Commission should not allow policies intended to accelerate wireless services to devolve into a race to the bottom, in which wireless providers attempt to preempt as many local laws as possible under the guise of Section 6409(a).

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[17] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 22, 24, 26; CTIA COMMENTS, *supra* note 3, at 12–13, 16–18; PCIA COMMENTS, *supra* note 3, at 31–32, 34–36, 48, 50; SPRINT COMMENTS, *supra* note 3, at 8–11; VERIZON COMMENTS, *supra* note 3, at 28, 31–32.

[18] *See* 47 U.S.C. § 332(c)(7) (2011) (preserving general local authority while preempting limited specific local prerogatives); In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, 24 FCC Rcd. 13994, 140013 ¶ 49 (rel. Nov. 18, 2009) (finding a strong public interest in cooperation and consensual resolutions between industry and communities) [hereinafter "*2009 Declaratory Ruling*"].

## II. THE COMMISSION SHOULD REJECT PCIA'S ILLUSORY STANDARD FOR DAS & SMALL CELLS BECAUSE THE EXPANSIVE & UNLIMITED NUMBER OF EQUIPMENT BOXES WILL LIKELY CAUSE A SIGNIFICANT ENVIRONMENTAL IMPACT

PCIA and several other industry commenters urge the Commission to adopt an inappropriately expansive standard to define a distributed antenna system ("DAS") node or small cell.[19] Specifically, PCIA proposes to define a DAS or small cell via reference to its volumetric size as follows:

> **(1) Equipment Volume.** An equipment enclosure shall be no larger than seventeen (17) cubic feet in volume.
>
> **(2) Antenna Volume.** Each antenna associated with the installation shall be in an antenna enclosure of no more than three (3) cubic feet in volume. Each antenna that has exposed elements shall fit within an imaginary enclosure of no more than three (3) cubic feet.
>
> **(3) Infrastructure Volume.** Associated electric meter, concealment, telecom demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch may be located outside the primary equipment enclosure(s), and are not included in the calculation of Equipment Volume.
>
> Volume is a measure of the exterior displacement, not the interior volume of the enclosures. Any equipment that is concealed from public view in or behind an otherwise approved structure or concealment, is not included in the volume calculations.[20]

These definitions do not clearly describe the PCIA proposal. To help the Commission evaluate the proposed standard, California Local Governments provides Figure 1, which depicts a few various possible examples that would qualify as a DAS node or small cell.

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[19] *See* PCIA COMMENTS, *supra* note 3, at 7–8; *see also* AT&T COMMENTS, *supra* note 3, at 14; SPRINT COMMENTS, *supra* note 3, at 6; CROWN CASTLE COMMENTS, *supra* note 3, at 5.
[20] *See* PCIA COMMENTS, *supra* note 3, at 7.

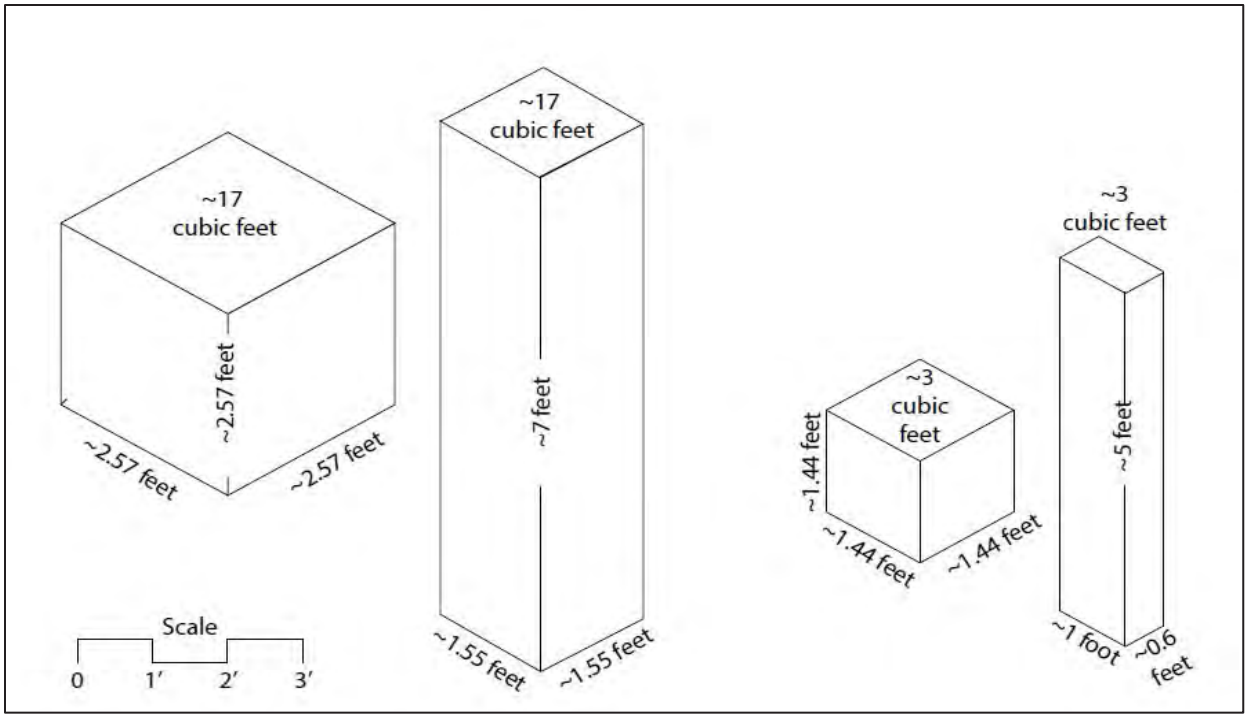


**FIGURE 1**: Isometric examples of various equipment and antenna configurations under the PCIA proposed standard for DAS and small cell facilities. (Source: Telecom Law Firm, P.C.)

The Commission should not adopt the proposed PCIA standard for DAS nodes and small cells because it comes riddled with carve-outs for large and intrusive equipment that completely eviscerate any actual limit on the permitted size. The Commission may categorically exclude certain projects only when it finds that the project will not likely cause a substantial impact on the environment. However, the Commission cannot determine the likelihood of a substantial environmental impact when it cannot determine the scope of the project itself.

PCIA not only proposes a rather large pole-mounted equipment volume at seventeen cubic feet, but also proposes to *exclude* "[a]ssociated electric meter, concealment, telecom demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch may be located outside the primary equipment enclosure(s)."[21] Under this proposal, a DAS or small cell operator could install an

[21] *See* PCIA COMMENTS, *supra* note 3, at 7.

unlimited number of ground-mounted equipment cabinets *in addition to* a pole-mounted equipment box larger than the average person.

The proposed standard similarly does not limit the number of three-cubic-foot antennas at each DAS node or small cell. Although PCIA deleted language from the second prong that expressly permitted an unlimited number of antennas, this change does not affirmatively limit the number of antenna enclosures associated with each DAS node or small cell.[22] The proposed standard still permits an unlimited number of antennas.

Moreover, the proposed standard exempts all equipment from the volumetric limits when concealed from public view, and excludes "concealment" from the basic infrastructure volume equation.[23] In other words, PCIA asks the Commission to exempt all equipment that the public cannot see and all the structures installed to prevent the public from seeing the equipment. This circular and overreaching carve-out should eliminate any doubt that the proposed standard would allow a limitless number of equipment elements at the DAS node or small cell site.

The Commission should reject this proposed standard as illusory because it does not actually limit the scope of a DAS node or small cell, and thus the Commission cannot actually determine whether such projects will likely cause a significant environmental impact.

## III. SECTION 6409(a) ISSUES

As many commenters discussed, Congress could not and did not intend Section 6409(a) to preempt all local land use control or to guarantee approval for every eligible facilities

[22] *Compare* NPRM, *supra* note 1, at ¶ 49 n.99 (including the words "[t]here is no limit to the number of antennas that can be installed by-right as part of a DAS or Small Cell installation"), *with* PCIA COMMENTS, *supra* note 3, at 7 (omitting the same).
[23] *See* PCIA COMMENTS, *supra* note 3, at 7.

request.[24] Although the Commission need not interpret Section 6409(a) at this time, any rules it might adopt should recognize the limits in the statute and not just its mandate to approve certain alleged *de minimis* wireless infrastructure changes.

### A. The Proposed Definition of an "Existing Wireless Tower or Base Station" Would Artificially Transform All New Wireless Facilities into Collocations

The Commission should reject the proposal from industry commenters to define "existing wireless tower or base station" to include structures that do not presently support any wireless equipment.[25] As explained in Part I.C above, this rule would artificially transform all new wireless facilities into collocations that a government "may not deny, and shall approve" because the applicant could technically request a permit to "collocate" wireless transmission equipment on an "existing wireless tower or base station." Section 6409(a) would then require local governments to approve all *new sites* that do not result in a substantial change.

In support of the proposed rule, CTIA attempts to argue that a *post hoc* written statement from Representative Fred Upton somehow shows Congress intended to streamline collocation of wireless transmission equipment in general rather than only those structures that currently support wireless facilities.[26] The Commission should reject this line of argument because (1) the comments appeared after Congress enacted the statute and (2) the statutory scheme in the Spectrum Act proves otherwise.[27]

First, one congressperson's after-the-fact statement, not offered for debate, does not shed any light on Congressional intent. To evidence Congressional intent, comments in the legislative

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[24] *See, e.g.*, CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 18; INTERGOVERNMENTAL ADVISORY COMM., ADVISORY RECOMMENDATION NO. 2013-13, RESPONSE TO NOTICE OF PROPOSED RULEMAKING ADOPTED AND RELEASED SEPTEMBER 26, 2013 at 4 (2013).
[25] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 22; CTIA COMMENTS, *supra* note 3, at 12; PCIA COMMENTS, *supra* note 3, at 32; SPRINT COMMENTS, *supra* note 3, at 9; VERIZON COMMENTS, *supra* note 3, at 28.
[26] *See* CTIA COMMENTS, *supra* note 3, at 11–12 (citing 158 CONG. REC. at E239 [(Feb. 17, 2012)] (Statement of Rep. Upton)) California Local Governments inserted the date that CTIA omitted.
[27] *See* 158 CONG. REC. E237, E239 (Feb. 17, 2012) (Statement of Rep. Upton).

history must at least appear before Congress votes.[28] The comment CTIA cites appear in the "Extension of Remarks" and thus Congress never actually considered them before it voted on the Middle Class Tax Relief and Job Creation Act of 2012. Although these remarks may represent the intent of one member Congress, the Commission should not consider them persuasive as to the intent of Congress as a whole.

Second, Congress intended a "wireless tower" to narrowly refer to a structure specifically built to support wireless antennas because it chose a more specific statutory term in Section 6409(a) than it adopted in Section 6206(c)(3) of the same act.[29] Section 6206(c)(3) directs FirstNet to leverage "existing . . . commercial or other communications infrastructure . . . and . . . Federal, State, tribal, or local infrastructure" for public safety networks whereas Section 6409(a) authorizes generally commercial carriers to collocate, remove, or replace wireless transmission equipment on "existing wireless tower or base station."[30] The difference between these statutes follows sound public policy because Congress would naturally intend to provide greater access to a governmental first-responder network like FirstNet than it would to private commercial entities like AT&T and Verizon.

Congress specifically chose the term "existing wireless towers" and no evidence on the face of the statute or in the utterly silent legislative history indicates that it intended that phrase to mean "structures similar to wireless . . . towers." Moreover, the words in the proposed rule do not actually provide any limit to the kind of structures covered under Section 6409(a) because many structures could hold wireless facilities and no principled means exists to distinguish

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[28] *See Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001) (quoting *Hagan v. Utah*, 510 U.S. 399, 420 (1994), for the proposition that "subsequent history is less illuminating than the contemporaneous evidence").
[29] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6206(c)(3), 126 Stat. 156 (codified as 47 U.S.C. § 1426(c)(3) (2013)); *see also* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 4–5.
[30] *See* 47 U.S.C. § 1426(c)(3) (2013).

structures that "typically hold wireless facilities" from other structures. The Commission should therefore reject Verizon's proposal to define "existing wireless tower or base station" as "structures similar to wireless antenna towers that typically hold wireless facilities" because it conflicts with the plain words and manifest intent in Section 6409(a) and Section 6206(c)(3).[31]

At bottom, the words "existing wireless tower or base station" effectively limits the places where Section 6409(a) applies, so any rule that expanded those places would run counter to manifest Congressional intent. Congress purposely chose the phrase "existing wireless tower or base station" even though it would not include as many structures as the industry commenters would like, and the Commission should faithfully implement that choice.

### B. Whether a Permit Request Constitutes a "Collocation" Should Depend on Whether a Legally Established Wireless Use Already Exists on the Structure

Some industry commenters erroneously urge the Commission to follow the *2009 Declaratory Ruling* and define a "collocation" as a request that does not result in substantial increase in size of a tower.[32] This proposal presents the hopelessly circular scenario in which (1) local governments must approve every collocation request that does not substantially change the physical dimensions of the existing wireless tower or base station but (2) a collocation necessarily means a request that does not substantially change the physical dimensions of the existing wireless tower or base station. The Commission suggested that definition years before Congress enacted Section 6409(a); it could not know that it would create this conundrum, and therefore should not define a "collocation" in under Section 6409(a) the same way it defines that term in the *2009 Declaratory Ruling*.

[31] *See* VERIZON COMMENTS, *supra* note 3, at 28.
[32] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 28.

Instead, the key to whether a proposal to install wireless transmission equipment constitutes a "collocation" depends on whether a legally established wireless use already exists on the structure at the time the applicant submits the request.[33] This criterion provides a verifiable bright-line rule to distinguish collocations from new sites—validly permitted wireless facilities either exist on the structure or they do not. This approach also generally follows the logic in the *2009 Declaratory Ruling*, which found that collocations do not implicate the same local effects as new builds.[34] The Commission should not adopt the collocation standard from the *2009 Declaratory Ruling* because the key to whether a permit request constitutes a collocation depends on the existence of a legally established wireless use on the structure.

### C. The Commission Should Not Define Substantial Change and Should Reject the Inappropriately Rigid Four-Part Collocation Agreement Test

California Local Governments emphasizes that the Commission should not attempt to define what constitutes a substantial change under Section 6409(a).[35] Congress intended the flexible "substantially change" standard to allow State and local governments the opportunity to accelerate infrastructure deployment consistent with their local values. The Commission should not take away that flexibility.

In the event that the Commission decides to define a substantial change, it should not adopt the inappropriately rigid four-part test from the Collocation Agreement ("Collocation Agreement Test").[36] Any final rule should (1) recognize that the phrase "substantially change" applies to all physical aspects—not just increases in size—and (2) allow communities to strike

[33] *See, e.g.*, 53 PA. STAT. ANN. § 11702.2 (West 2012) (defining "collocation" as "[t]he placement or installation of new wireless telecommunications facilities on previously approved and constructed wireless support structures . . ."); *see also* CROWN CASTLE COMMENTS, *supra* note 3, at 10.
[34] *See 2009 Declaratory Ruling*, *supra* note 18, at 14012 ¶ 46.
[35] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 11–12.
[36] *See* NPRM, *supra* note 1, at ¶ 119; *see also* Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, *Public Notice*, 28 FCC Rcd. 1, at 3 (rel. Jan. 25, 2013).

the right balance between the public interest in wireless infrastructure and the equally important public interests in well-planned and aesthetically consistent communities.

### 1. *The Phrase "Substantially Change" Encompasses All Articulable Measures*

Despite the broadly generic phrase "substantially change the physical dimensions" in Section 6409(a), the industry comments urge the Commission to adopt the Collocation Agreement Test, which narrowly and rigidly analyzes each eligible facilities request through only empirically measurable increases in only a limited few physical dimensions.[37] The Commission should reject the Collocation Agreement Test because the phrase "substantial change" encompasses all articulable measures. The plain term "change" in Section 6409(a) indicates that State and local governments retain discretionary power over substantial increases, decreases, and other physical differences not necessarily related to size.[38]

The other terms in Section 6409(a) do not limit the general term "change" to the more specific "increase" because the terms "remove" and "replace" in Section 6409(a)(2)(B) explicitly contemplates decreases in size and other changes not necessarily related to size.[39] On rare occasions, a court may invoke the canon *ejusdem generis* to "elucidate [Congress's] words and effectuate its intent," but not when it would "obscure or defeat [its] intent and purpose."[40] Congress included equipment removals and replacements within the term "eligible facilities request," and expressly subjected all eligible facilities requests to the substantial-change analysis. The Commission would therefore "obscure and defeat" Congressional intent if it attempted to limit the general term "change" to merely "increases."

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[37] *Compare* 47 U.S.C. § 1455(a) (2013) (adopting the broadly generic term "change"), *with* CTIA COMMENTS, *supra* note 3, at 14 (interpreting the broadly generic term "change" as the narrowly specific term "increase").
[38] *See* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/change (last visited on Feb. 17, 2014).
[39] *See* 47 U.S.C. § 1455(a)(2)(B).
[40] *See United States v. Alpers*, 338 U.S. 680, 682 (1950).

### 2. *The Commission Should Reject Proposals to Define Excavation Outside the Wireless Premises as an "Insubstantial" Change*

In the event that the Commission adopts the Collocation Agreement Test, it should reject the PCIA and Sprint proposal to expand the fourth prong to allow applicants to excavate outside the leased or licensed premises.[41] Many eligible facilities requests that involve excavation outside the premises will result in a substantial change, and States that do not consider it a substantial change may freely adopt a different rule.

The industry comments themselves demonstrate that communities that do not consider expanded ground space as a substantial change will reflect that value in its local laws. For example, the Carolinas Wireless Association points out that the North Carolina General Assembly found that an expanded 2,500 square feet did not constitute a substantial change whereas the California Wireless Association points out that the California State Senate considered but rejected a bill that would not cover such expanded premises.[42] Moreover, the Pennsylvania Wireless Association asks the Commission to adopt rules akin to Pennsylvania's Wireless Broadband Collocation Act, which does not require local approval when the proposal would expand the ground space boundaries.[43] The differences among these State laws demonstrate that whether a proposal will cause a substantial change depends in large part on the specific circumstances where the change occurs. The Commission should reject proposals to

[41] *See* PCIA COMMENTS, *supra* note 3, at 38; SPRINT COMMENTS, *supra* note 3, at 10.
[42] *Compare* COMMENTS OF THE CAL. WIRELESS ASS'N at 3, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) (citing 2006 Cal. Legis. Serv. Ch. 676 (S.B. 1627) (West)), *with* COMMENTS OF THE CAROLINAS WIRELESS ASS'N at 3 (citing N.C. GEN. STAT. §§ 160A-400.50(b), 153A349.50(b) (2013)).
[43] *See generally* COMMENTS OF THE PA. WIRELESS ASS'N, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); *see also* N.C. GEN. STAT. §§ 160A-400.53(a1); PA. STAT. ANN. § 11702.4(c)(2).

define excavation outside the wireless premises as an insubstantial change as a misguided lowest common denominator, one size-fits-all approach.

### 3. *The Commission Should Clarify That Eligible Facilities Requests That Do Not Mimic Existing Camouflage Constitutes a* Per Se *Substantial Change*

The Commission should reject the Collocation Agreement Test because it would permit a wireless upgrade or collocation to undo all the creative and collaborative efforts in the permit review and approval process to camouflage wireless sites. Local governments spend considerable time and resources to find camouflaged solutions, and reasonably expect such sites to remain camouflaged throughout its lifespan. The Commission should not interpret Section 6409(a) to frustrate those efforts or reasonable expectations.

For example, AT&T urges the Commission to find that a request to completely replace a support structure does not cause a substantial change.[44] Section 6409(a) could potentially require a local government to approve a proposal to replace a camouflaged site with an uncamouflaged monopole on the grounds that the replacement pole does not increase the height more than ten percent (10%) or the width more than twenty feet. Figure 2 and Figure 3, below, illustrate this example and its logical outcome under AT&T's proposed view of Section 6409(a).

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[44] *See* AT&T COMMENTS, *supra* note 3, at 24.

**FIGURE 2:** Camouflaged site in Denver, Colorado. (Source: Telecom Law Firm, P.C.)

**FIGURE 3:** A logical mandatory outcome under Section 6409(a) that destroys the approved camouflage. (Source: Telecom Law Firm, P.C.)

PCIA proposes to add a gloss to the Collocation Agreement Test that purports to resolve this issue, but the Commission should see that this proposal comments provide a case-in-point example of how the wireless industry attempts to dismantle local authority piece-by-piece.[45] PCIA concedes that a local government should consider whether a change that undermines elements designed to conceal an existing wireless facility rises to the level of a substantial change, but only to the extent that the change would remove such elements rather than whether the increases frustrate those elements.[46] PCIA also asserts that State and local governments may not deny an eligible facilities request on the ground that it does not comply with a prior condition of approval, as more fully discussed in Part III.D.1 below. Taken together, these proposed rules

[45] *See* PCIA COMMENTS, *supra* note 3, at 39.
[46] *See id.*

hardly preserve any aesthetics at all because the applicant does not need to replicate the camouflage for the new equipment so long as it does not diminish the current camouflage. The images in Figure 4 and Figure 5 depict this concept and logical outcome

**FIGURE 4:** Actual photograph of an unmanned camouflaged wireless site in Yucca Valley, California. (Source: Telecom Law Firm, P.C.)

**FIGURE 5:** Photo simulation that shows a permitted modification under the PCIA formulation. The original site completely concealed all the equipment within the faux-house, whereas the hypothetical collocation does not "remove" the camouflage. (Source: Telecom Law Firm, P.C.)

PCIA's proposed rule would require a local government to approve the collocated tower in Figure 5 because it maintains—but does not mimic—the existing camouflage on the collocated element(s). The Commission can see that this proposed formulation of the rule could cause a substantial change and lead to ridiculous results. Accordingly, the Commission should find that an eligible facilities request must at least effectively mimic the existing camouflage or else constitutes a substantial change *per se* to prevent haphazard, mismatched, and aesthetically disagreeable facilities like the one depicted above.

### D. The Commission Should Affirm that Wireless Facilities Must Comply with All Generally Applicable Laws and Conditions of Approval Because Section 6409(a) Does Not Authorize Wireless Providers to Choose Laws With Which It Wants to Comply

Industry comments that claim Section 6409(a) requires local approval regardless of whether the eligible facilities request would violate any generally applicable law wildly overstate its preemptive effect.[47] Section 6409(a) does not provide wireless carriers the unprecedented benefit to pick-and-choose which laws it would like to comply with. The Commission should affirm that (1) Section 6409(a) does not exempt applicants from generally applicable laws and (2) State and local governments retain their power to conditionally approve eligible facilities requests to ensure the projects comply with such laws.

#### 1. *The Commission Should Reject the Unreasonably Dangerous Proposal to Exempt Wireless Facilities from Generally Applicable Zoning and Structural Laws*

Section 6409(a) does not mandate local approval when an otherwise eligible facilities request would "substantially change the physical dimensions of the existing wireless tower or

[47] *See, e.g.*, CTIA COMMENTS, *supra* note 3, at 15 (arguing that a State or local government may not deny an eligible facilities request merely because it allegedly violates a local law); TOWERSTREAM COMMENTS, *supra* note 3, at 23 (asserting that State and local governments must approve *every* eligible facilities request).

base station."[48] Although some industry comments recognize that Section 6409(a) does not exempt wireless facilities from generally applicable zoning and structural laws, other industry commenters argue that the Commission should preempt some—or even all—such laws.[49] The Commission should reject this proposed rule. Any change in physical dimensions that would cause the structure to violate a generally applicable law must constitute a "substantial" change because these laws (1) protect lives and property, and (2) do not effectively prohibit or unreasonably discriminate against personal wireless services. Even industry-friendly State laws do not exempt eligible facilities requests from generally applicable zoning and structural laws. Any other result would compromise public safety only to financially benefit the wireless industry.

First and foremost, Congress did not intend Section 6409(a) to exempt wireless facilities from local oversight needed to prevent serious harm to people and property. As California Local Governments noted in its initial comments, overbuilt wireless facilities like the ones that caused the 2007 Malibu Canyon Fire seriously threaten public health and safety.[50] Recent tower fires and collapses underscore the need for local oversight.[51] Although PCIA asserts that such

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[48] *See* 47 U.S.C. § 1455(a).

[49] *See, e.g.*, CTIA COMMENTS, *supra* note 3, at 15; PCIA COMMENTS, *supra* note 3, at 41 (arguing that Section 6409(a) preempts discretionary zoning laws, but not ministerial structural codes); SPRINT COMMENTS at 11 (arguing that only objective, ministerial, and nondiscretionary structural codes should apply); TOWERSTREAM COMMENTS, *supra* note 3, at 23.

[50] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 14 (citing Melissa Caskey, *CPUC Approves $51.5-Million Malibu Canyon Fire Settlement*, MALIBU TIMES (Sep. 23, 2013), *available at* http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html).

[51] *See, e.g.*, Brad Doherty, *Spark Ignites Cell Tower Fire*, BROWNSVILLE HERALD (Jan. 6, 2014), http://www.brownsvilleherald.com/news/local/article_dfc15d14-7754-11e3-b856-0019bb30f31a.html; Kathi Belich, *Cellphone Tower Catches Fire in Sanford*, WFTV (Aug. 21, 2013), http://www.wftv.com/news/news/local/cell-phone-tower-catches-fire-seminole-co/nZX69/; Karen Araiza, *Welding Sparked Cell Phone Tower Fire: Officials Figured Out What Caused a Fire that Left a Cell Phone Tower Leaning, Ready to Collapse*, NBC PHILADELPHIA (July 8, 2013), http://www.nbcphiladelphia.com/news/local/Cell-Phone-Tower-on-Fire-in-Bucks-County-212489511.html.

"[c]atastrophic failures" rarely occur, they do occur and the Commission should not preempt laws designed to preserve public safety and prevent such structural failures.[52]

Contrary to some industry comments, State and local governments do not generally enact or revise zoning and structural laws—such as fall zones, setbacks, and limits on expansions to legal nonconforming uses—to thwart wireless infrastructure deployment.[53] From time to time, State and local governments must revise zoning ordinances to reflect natural community changes such as density and new development. In the rare case that a local government improperly exercises its authority, Congress granted the Commission the power to preempt such action "to the extent necessary to correct such violation or inconsistency."[54] The Commission should reject all proposals to preempt fall zones, setbacks, and limits on expansions to legal nonconforming uses because it would preempt far beyond "the extent necessary" as Congress required.[55]

Furthermore, the State laws touted in the industry comments do not exempt eligible facilities requests from generally applicable laws. For example, North Carolina explicitly permits the local government to review whether the proposed changes violate "[a]pplicable public safety, land use, or zoning issues addressed in its adopted regulations, including aesthetics, landscaping, land-use based location priorities, structural design, setbacks, and fall zones."[56] Moreover, the Pennsylvania Wireless Broadband Collocation Act explicitly requires all eligible facilities requests to comply with all prior conditions of approval.[57] For these reasons, the Commission should reject the unreasonably dangerous proposal to exempt wireless facilities from generally applicable zoning and structural laws.

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[52] *See* PCIA COMMENTS, *supra* note 3, at 45.
[53] *See, e.g.*, CTIA COMMENTS, *supra* note 3, at 15; PCIA COMMENTS, *supra* note 3, at 45.
[54] *See* 47 U.S.C. § 253(d) (2011).
[55] *See id.*
[56] *See* N.C. GEN. STAT. §§ 160A-400.52(c)(1).
[57] *See* PA. STAT. ANN. § 11702.4(c)(4).

### 2. *The Commission Should Affirm the Local Government Power to Conditionally Approve Eligible Facilities Requests*

Some industry comments incorrectly equate a conditional approval with an outright denial, and urge the Commission to effectively preempt the power to conditionally approve permit applications.[58] State and local government must retain their traditional police power to conditionally approve permits as a mechanism to enforce generally applicable laws. Like any other exercise of local power, the Telecom Act already provides an "expedited" remedy for prohibitory or unreasonably discriminatory permit conditions.[59]

Moreover, conditional approvals may even salvage some wireless facilities proposals that, for example, a local government might otherwise deny on the ground that it does not comply with the zoning code. For these reasons, the Commission should affirm the local government power to conditionally approve eligible facilities requests.

## E. The Commission Should Not Craft any New Section 6409(a) Remedies

Like many other commenters, California Local Governments explained how a deemed-granted remedy for an alleged failure for a government to act within the presumptively reasonable time violates the Tenth Amendment and federalism principles.[60] California Local Governments find nothing in the industry comments that shows otherwise. Moreover, California Local Governments reiterate its initial comments that Congress already established the appropriate judicial procedures to resolve Section 6409(a) disputes.[61]

The industry comments overstate Commission authority to adopt a deemed-granted remedy because: (1) the fact that a few State statutes provide a deemed-granted remedy merely

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[58] *See* AT&T COMMENTS, *supra* note 3, at 26; PCIA COMMENTS, *supra* note 3, at 42–43.
[59] *See* 47 U.S.C. § 332(c)(7)(B)(v).
[60] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 25–26; *see also* FAIRFAX CNTY. COMMENTS, *supra* note 2, at 18.
[61] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 24–25.

reflects the unique power of the State over its instrumentalities and does not evidence the Commission's power to do the same; (2) a self-executing deemed-granted remedy would be inappropriate because Section 6409(a) does not guarantee approval for every eligible facilities request; and (3) Congress intended the local courts, not the Commission in distant Washington D.C., to determine whether to order an approval.

#### 1. *Industry Comments Overstate Commission Authority to "Accelerate Broadband Deployment" Through a Deemed-Granted Remedy*

PCIA overstates the Commission authority to adopt a deemed-granted remedy because Congress did not authorize the Commission to bluntly preempt the vast majority of State and local land use laws as a means to accelerate broadband deployment. Section 706 of the Telecom Act authorizes the Commission to accelerate broadband deployment when it finds that deployment does not occur on reasonable and timely basis.[62] Although this authority appears broad, whether an adopted rule may stand depends on whether the agency acted reasonably—a standard that narrows as the impact of the rule broadens.

The Commission should carefully note that judicial deference to a legislative rule often depends on the nature of the issue and the impact of the rule.[63] In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court held that the FDA could not regulate tobacco as drugs even through the statutory term for "drug" appeared broad enough to encompass such products.[64] The Court reasoned that common sense dictates that Congress would not likely "delegate a policy decision of such economic and political magnitude to a political agency."[65] Similarly, in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, the Court held that the

[62] *See* 47 U.S.C. § 1302 (2013).
[63] *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *MCI Telecoms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994).
[64] *See Brown & Williamson*, 529 U.S. at 133.
[65] *See id.*

statutory power in Section 303(r) to "modify any requirement" under the Communications Act of 1932 did not allow the FCC to regulate long-distance telephone rates because Congress would not so subtly permit the Commission to regulate the rates of an entire industry.[66] Thus, the scope of reasonableness grows narrower as the social and economic impact of the rule grows broader.

Here, a court will likely interpret the scope of Commission authority as narrowly as possible because the proposed rules would massively and disruptively impact land-use policies nationwide. Congress preserved local discretion over eligible facilities requests that cause a substantial change, and as in *Brown & Williamson* and *MCI Telecoms*, common sense dictates that Congress would not delegate the power to completely eliminate local discretion in a subject matter of "such economic and political magnitude."[67] Moreover, even though the Commission might interpret the preemptive language of Section 6409(a) to include such power, Congress would not so cavalierly permit the Commission to preempt virtually every State and local zoning law across the nation on the threadbare basis of the 149 words in Section 6409(a), and lacking any real legislative record.[68] Thus, the Commission should note that its authority to promulgate rules to "accelerate broadband deployment" very likely does not permit all the rules proposed in the NPRM.

#### 2. *States May Impose Deemed-Granted Remedies that the Federal Government May Not Because a State Bears a Unique Relationship to Its Political Instrumentalities*

Several industry commenters urge the Commission to follow those few State legislatures that adopted deemed-granted remedies similar to the one proposed in the NPRM.[69] However, the

[66] *See MCI Telecoms.*, 512 U.S. at 225.
[67] *See Brown & Williamson*, 529 U.S. at 133.
[68] *See MCI Telecoms.*, 512 U.S. at 225.
[69] *See, e.g.*, CAL. WIRELESS ASS'N COMMENTS, *supra* note 42, at 3–4; CAROLINAS WIRELESS ASS'N COMMENTS, *supra* note 42, at 2; PA. WIRELESS ASS'N COMMENTS, *supra* note 43, at 1–2.

Commission should not consider these few statutes as evidence that the federal government may (or should) impose such remedies because the States and federal government bear fundamentally different relationships with local governments.

Just because a few individual States decided to enact a law does not automatically mean the federal government may enact the same law and impose it on all other States. State legislatures may exercise plenary authority over local governments because "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."[70] In contrast, the Tenth Amendment limits the federal power to those specifically enumerated in the Constitution.[71] The Commission should not view deemed-granted remedies under individual State law as evidence of federal power to impose the same.

### 3. *The Commission Should Not Adopt a Self-Executing Deemed-Granted Remedy Because Section 6409(a) Does Not Guarantee Approval for Every Eligible Facilities Request*

CTIA and other industry commenters rely on a false premise when it asserts that the Commission must adopt a deemed granted remedy because a judicial cause of action does not *guarantee* an approval.[72] Section 6409(a) does not guarantee that a local government will approve *every* eligible facilities request.[73] Even when the applicant submits an eligible facilities request, it still bears the burden to prove that its specific proposal will not create a substantial change.[74]

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[70] *See Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).
[71] U.S. CONST. Amend. X.
[72] *See* CTIA COMMENTS, *supra* note 3, at 18.
[73] *See* 47 U.S.C. § 1455(a).
[74] *See id.*

Nevertheless, many industry commenters urge the Commission to adopt a rule that would *automatically* deem granted any eligible facilities request after a mere forty-five days without independent review.[75] Congress already implicitly rejected this oppressive approach because the statute does not guarantee approval for every eligible facilities request through its explicit limit on substantial changes. Moreover, the Commission already implicitly rejected this approach when it proposed to find that an eligible facilities request presupposes the traditional permit application process. Indeed, what purpose would a permit application serve when it becomes "deemed granted" regardless of how the local government responds? The Commission should not impose a deemed-granted remedy.

#### 4. *The Commission Should Not Substitute Itself for the Courts as the Appropriate Venue to Resolve Section 6409(a) Disputes*

The Commission should reject the industry comments that urge the Commission to adjudicate wireless land-use disputes. Congress recognized that local courts, with more expertise in land-use matters, greater resources, and with local access to the facts in the matter, should serve as the neutral factfinder when it specified the remedies in the Telecom Act.[76] Congress did not indicate any intent to revisit its earlier choice, and the Commission should not unilaterally substitute itself for the courts.

## IV. THE COMMISSION SHOULD DECLINE TO IMPOSE RULES GUIDING FACT-INTENSIVE INQUIRIES ABOUT MUNICIPAL PROPERTY PREFERENCES

California Local Governments join the comments of the City of San Antonio, Texas, and urge the Commission to decline to adopt rules relating to local ordinances establishing a

[75] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 26; CTIA COMMENTS, *supra* note 3, at 18; PCIA COMMENTS, *supra* note 3, at 50; SPRINT COMMENTS, *supra* note 3, at 11; VERIZON COMMENTS, *supra* note 3, at 32–33.
[76] *See* 47 U.S.C. § 332(c)(7)(B)(v).

municipal property preference.[77] Local courts are best suited to resolve such disputes, assuming Section 332 even applies. For example, Section 332 does not apply at all when a government acts as a landowner because cities that exercise "property rights as a landowner . . . fall outside the [Telecom Act's] preemptive scope . . . ."[78]

The Commission should decline CTIA's request to establish a *per se* unreasonably discriminatory finding for "preferential [zoning] treatment for applicants utilizing municipal land or facilities."[79] Such a rule would be contrary to the requirement of *unreasonable* discrimination because it would block a municipality's opportunity to rebut that finding. The courts are best suited to resolve concerns, such as CTIA's, where a municipality delays or denies a permit for a "non-municipal site or facility solely to bestow an economic benefit upon a local jurisdiction . . . ."[80]

First, municipalities should have the opportunity, in court, to present facts demonstrating that, if some discrimination exists, why that discrimination is reasonable. Courts' analysis of Equal Protection claims under the Fourteenth Amendment presumes differential treatment to be valid "if the classification drawn by the statute is rationally related to a legitimate state interest."[81] Even under the Equal Protection Clause, which only requires discrimination (not *unreasonable* discrimination), after a plaintiff has established a prima facie case of discrimination, "the burden of proof shifts to the State to rebut the presumption of

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[77] *See* SAN ANTONIO COMMENTS, *supra* note 2, at 25–28.
[78] *Omnipoint Com., Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013) (holding city's decision that it could not license city-owned park "without voter approval is not the type of zoning and land use decision covered by § 332(c)(7)"); *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (concluding the Telecommunications Act of 1996 "does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity").
[79] CTIA COMMENTS, *supra* note 3, at 20.
[80] CTIA COMMENTS, *supra* note 3, at 21.
[81] *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

unconstitutional action . . . ."[82] Under CTIA's proposed rule, there would no presumption of validity, and no burden-shifting—contrary to how the courts have approached discrimination claims under the Equal Protection Clause. Municipalities should be afforded the opportunity to explain the application of their ordinances, for example, why they may require antennas on a police or fire station in a single-family residential area. There may be perfectly legitimate reasons for such a requirement, like encouraging the provision of wireless coverage in a residential area, yet simultaneously preventing the blight of antennas emerging from residential homes.

Second, municipalities should have the opportunity, in a neutral local court, to present facts explaining how they are not unreasonably discriminating against a particular service provider. In order to prevail on an unreasonable discrimination claim, the plain text of Section 332(c)(7)(B)(i)(I) requires a carrier to show the municipality unreasonably discriminated "among providers of functionally equivalent services." No discrimination exists when all carriers have the same opportunities to place facilities. Congress set forth the legal standard in the statute, and provided for judicial remedies. The Commission is not well-suited to set rules over these local, fact-intensive inquiries from its distant location in Washington D.C., and should avoid rulemaking in this area.

## V. CONCLUSION

The scant record before the Commission does not show an actual and present need for disruptive federal intervention. Rather, in the limited time since Congress enacted Section 6409(a) and the Commission promulgated the *2009 Declaratory Ruling*, local governments generally tailored their local policies to facilitate the federal objectives. The Commission should

[82] *See Washington v. Davis*, 426 U.S. 229, 241 (1976).

confirm the primary role of local governments to facilitate wireless deployment through rational policies that reflect local circumstances and values, just as Congress intended.

Respectfully submitted,

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## APPENDIX A

Several wireless industry commenters provided anecdotal examples that allegedly supports new or revised rules. This Appendix provides factual rebuttals to demonstrate why the Commission should not base any new or revised rules on the limited and misleading facts presented in some wireless industry comments.

* * *

***City of Albany, California***

Verizon complains that Albany deliberated for 90 days to determine whether a proposal qualified as an "eligible facilities request" under Section 6409(a), but fails to mention that it submitted its request *before* Congress enacted Section 6409(a).[83] The "eligible facilities request" concept therefore did not exist at the outset of this permit request.

Verizon omitted the material facts that show how Albany acted reasonably under the circumstances and within the presumptively reasonable timeframes. In 2011, Verizon proposed to add new equipment to a 65-foot-tall wooden monopole (in a zone with a maximum 45-foot height limit) that also supported MetroPCS equipment. Albany initially sought to bring this legal nonconforming use into compliance, but encountered substantial delays from Verizon when it requested Verizon produced a structural analysis to show the wooden pole could support all the current and planned equipment loads. In 2012, after Congress enacted Section 6409(a), Albany reassessed the facts, found that Verizon submitted an eligible facilities request, and approved the permit.

[83] *See* VERIZON COMMENTS, *supra* note 3, at 31.

***City of Campbell, California***

Both CTIA and Verizon vaguely allege that a request to upgrade Verizon antennas at an undisclosed site had been pending at the City of Campbell, California, for more than 130 days.[84] However, the Commission should ignore this anecdote because neither commenters actually identify the request nor can Campbell find any record of any permit request that matches that description. The Commission should not afford any weight to such suspiciously incomplete claims masqueraded as settled facts.

Moreover, PCIA misstates the facts when it alleges that Campbell required a wireless provider to seek a conditional use permit for a permit to upgrade "like-for-like antennas" at an existing site.[85] Campbell required a conditional use permit because (1) the Sprint monopole, originally built in an unincorporated area, violated zone height limit after Campbell annexed the land; and (2) Sprint proposed to add new equipment and larger antennas.[86]

First, Campbell did not retroactively apply its zone height ordinance to purposely deny Sprint's request to substantially upgrade its monopole because it never initially approved the monopole in the first place.[87] In 2004, Santa Clara County originally approved the Sprint permit to build this 70-foot-tall monopole in an unincorporated area near Campbell. Two years later, in 2006, Campbell annexed the land under the monopole. The monopole became a legal nonconforming use under the Campbell municipal code because it far exceeded the 45-foot zone

[84] *See* CTIA COMMENTS, *supra* note 3, at 15; VERIZON COMMENTS, *supra* note 3, at 31.
[85] *See* PCIA COMMENTS, *supra* note 3, at 44.
[86] *See* CONDITIONAL USE PERMIT TO ALLOW THE CONTINUED OPERATION AND MODIFICATION OF AN EXISTING SPRINT WIRELESS TELECOMMUNICATIONS MONOPOLE, at 3 (Mar. 26, 2013), *available at* http://www.ci.campbell.ca.us/Archive/ViewFile/Item/158 [hereinafter "CAMPBELL MEMORANDUM"].
[87] *Cf.* PCIA COMMENTS at 45 (warning the Commission that local governments retroactively apply fall zones and setbacks to deny eligible facilities requests).

height limit.[88] Thus, Campbell merely required Sprint to obtain the necessary permit to continue to operate the monopole.

Second, Campbell approved the conditional use permit with only small changes to the proposed equipment. Campbell staff advised the Site and Architectural Review Committee that Section 6409(a) required permit approval but recommended that Sprint install the smallest equipment possible mounted as close to the pole as possible to mitigate the visual impact of the substantially larger equipment.[89]

***Town of Hillsborough, California***

CTIA presented a legally incorrect and factually incomplete anecdote about the moratorium in the Town of Hillsborough, California, when it claimed Hillsborough could extend its moratorium *ad infinitum*.[90] However, Hillsborough could not possibly extend its moratorium an additional year, much less *ad infinitum* as CTIA claims because California state law limits a moratorium to no more than twenty-four months.[91] Moreover, California law ensures checks and balances through a procedure that requires a jurisdiction to approve three separate legal ordinances at a public hearing and extended to the maximum term.

Moreover, CTIA did not disclose that Hillsborough enacted the moratorium specifically to allow time to draft a new ordinance in response to certain acts from various wireless applicants. For example, in this small town with only 11,000 residents, one DAS applicant literally tossed multiple incomplete permit applications with nearly $80,000 in checks on the City's public counter and then exited the building as an effort to trigger the time limits in the

[88] *See* CAMPBELL MEMORANDUM, *supra* note 86, at 2.
[89] *See* CAMPBELL MEMORANDUM, *supra* note 86, at 3.
[90] *See* CTIA COMMENTS, *supra* note 3, at 19.
[91] *See* CAL. GOV'T CODE § 65858 (West 2013).

*2009 Declaratory Ruling*. Hillsborough returned those abandoned and incomplete permit applications to the applicant. Hillsborough also plans to introduce a revised ordinance this month, with an expected end the moratorium within the next 30 to 60 days.

***City of Livermore, California***

Verizon complains that the City of Livermore, California, approved its permit request to upgrade some antennas after 168 days, but omitted to mention that it submitted its application eight days before Congress enacted Section 6409(a).[92] Just like its example in Albany, Verizon showcased a permit request in a false light because the application required the local government to adjust its policies and procedures to Section 6409(a) mid-review.

On February 14, 2012, Verizon submitted an incomplete permit request, and received a notice of incompleteness 19 days later. On April 26, 2012, Verizon asserted its rights under Section 6409(a) for the first time and Livermore staff met with Verizon fifteen days later to discuss how to proceed. Livermore administratively approved the permit request 57 days after it met with Verizon to discuss Section 6409(a). Although the entire process lasted 168 days, Livermore responded within the presumptively reasonable time after it conferred with Verizon to determine the local impact of the radically new federal law. These more complete facts show that Livermore acted reasonably and cooperatively under the highly uncertain regulatory circumstances.

* * *

[92] *See* VERIZON COMMENTS, *supra* note 3, at 31.

**EXHIBIT C**

**Comments Filed by City of San Marcos, California, Regarding the FCC's Notice of Proposed Rulemaking**

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238)

[appears behind this coversheet]

EXHIBIT C

DOCKET FILE COPY ORIGINAL

Received & Inspected

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FCC Mail Room

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

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| In the Matter of | ) | |
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| Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies | ) | WT Docket No. 13-238 |
| | ) | |
| Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting | ) | WC Docket No. 11-59 |
| | ) | |
| Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers | ) | RM-11688 (terminated) |
| | ) | |
| 2012 Biennial Review of Telecommunications Regulations | ) | WT Docket No. 13-32 |

**COMMENTS FILED BY CITY OF SAN MARCOS, CALIFORNIA REGARDING THE FCC'S NOTICE OF PROPOSED RULEMAKING**

**Comment Date: FEBRUARY 27, 2014**


Jack Griffin, City Manager | 1 Civic Center Drive, San Marcos, CA 92069 | P: (760) 744-1050 F: (760) 744-9520


**INTRODUCTION**

The City of San Marcos, California offers these comments in response to the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking (NPRM) adopted and released on September 26, 2013.

Located 40 miles north of downtown San Diego in the foothills of northern San Diego County, the City of San Marcos has been one of the fastest growing cities in the region. Between the years 1980 and 1990, San Marcos more than doubled its population and the City is now home to nearly 85,000 residents across 25 square miles. Regional access to the City is provided by State Route 78, an east/west highway that links Interstate 5 with Interstate 15. Known as North County's educational hub, San Marcos

is also home to major educational institutions like California State University, San Marcos, Palomar College and the San Marcos Unified School District and several other higher education institutes that collectively serve more than 60,000 students. The City's key industry clusters include specialized manufacturing, biomedical devices and products, biotechnology and pharmaceuticals and information and communications technology.

San Marcos supports the thoughtful, detailed comments filed by the many municipal commenters (such as the City of Mesa, San Antonia, City of Alexandria, City of Eugene and those of the national municipal organizations like the League of California Cities) in this proceeding. Such comments address a wide range of issues and problems with Section 6409(a) and the Rule. San Marcos opposes the comments filed by the industry, such as PCIA, CTIA, Verizon, AT&T, among others.

Beginning in the 1980's, the City of San Marcos began permitting wireless telecommunication facilities. As the technology has advanced, so has the City's wireless infrastructure. Most notably, in the last three years, the wireless telecommunication facility operators in San Marcos have been replacing smaller antennas with new larger 6' to 8' antennas. Since the City does not regulate the technological capabilities of this equipment, beyond compliance with FCC regulations for RF emissions, little is known by the City of the capabilities of this equipment (i.e. to provide wireless broadband connectivity). To the best of our knowledge, the following eight companies own wireless telecommunication facilities within San Marcos and provide service: AT&T, T-Mobile, Verizon, Cricket, Sprint, Nextel, Crown Castle and TowerCo.

In San Marcos, most wireless telecommunication facilities have been constructed at a height of between 25 to 35 feet. In general, co-location on one of these facilities would place the colocated antennas at heights of between 20 to 12 feet. The service providers have given feedback to the City that such a low facility would not provide the coverage to address the service gap issue. As a result, colocation in the City is primarily done horizontally with additional wireless telecommunication facilities on the same site or additional antennas mounted at identical heights on existing buildings. Both examples given for "horizontal co-location" are treated as "new applications" and do not benefit from the rights provided by the Middle Class Tax Relief and Job Creation Act of 2012. In general, since the colocations are "new applications," the City processes these applications consistent with the provisions of the shot clock rule and PSA. Ninety days is *not* a sufficient amount of time to process an application. When the shot clock rule is violated by the City, more often than not, wireless telecommunication facility applicants will work with the City to complete processing of the application in lieu of legal recourse or tolling agreements.

**IMPLEMENTATION OF SECTION 6409(a)**

In its brief existence, Section 6409(a) appears to facilitate *de minimis* changes to legally established wireless facilities without much controversy. A diligent search revealed that only three cases even address the statute. The Commission should therefore find, at least at this early stage, that it should neither interpret the terms in Section 6409(a) nor adopt any related mandatory rules.

In the event that the Commission determines that it should exercise its regulatory authority with respect to Section 6409(a), San Marcos counsels the Commission to (1) narrowly interpret the statutory terms to afford them the narrow and common definition that Congress intended; (2) affirm the primacy of local authorities to define a "substantial" change; (3) bear in mind that the statute mandates a specific result without any reference to any specific process; (4) acknowledge local courts as the most appropriate and efficient means to resolve wireless land use disputes; and (5) consider the federalism and Tenth

Amendment limits on federal power over the States and their political subdivisions.

Additionally, although Section 6409(a) contains few words and virtually no legislative history, the Commission should not view it as a blank slate. Congress enacted Section 6409(a) within the context of the Telecommunications Act of 1996 ("Telecom Act"), and the Commission should interpret any new rules to govern Section 6409(a) in manner consistent with the policies, objectives, history, and well-developed case law connected with the Telecom Act. Section 6409(a) exists as a very narrow exception the rule of local authority explicitly reserved in the Telecom Act, and the Commission should not interpret the statute so broadly that the exception swallows the rule.

While service providers do not typically colocate on existing facilities in the San Marcos, the City currently uses a tiered system of permits that provide streamlined and ministerial approval processes for the least intrusive wireless telecommunication facility design (i.e. stealthed or concealed facilities not located in residentially zoned areas). For facilities that do not meet this criteria, a traditional discretionary permit is required (i.e. CUP). This tiered system creates an incentive for wireless telecommunication facility operators to propose the lowest impact facility in the least controversial location (not in residentially zoned areas of the City). In general, this system is well received by both the public and the wireless telecommunication facility operators; however it does not function without incident.

Residents in San Marcos receive public notification of a project for a wireless telecommunication facility when it is proposed at a site that requires a discretionary permit. As a result, these sites are often controversial. Most of the comments the City receives are related to Radio Frequency (RF) Radiation. The City has an extensive review process that requires the submittal of RF emissions modeling, independent review of the modeling to confirm compliance with FCC regulations and the submittal of a compliance report with field measurements within six months of becoming operational. Once this process is explained to residents, most of their concerns about RF emissions are addressed. On occasion, the City does receive an application for a facility with a design that is unacceptable. City staff is generally able to work with applicants to resolve these issues and either modify the project design, or find a suitable alternative site. On the rare occasion that the City receives a complaint from the public about the maintenance of a facility, these are addressed and corrected through the Notice of Violation - Cure Period approach of code enforcement. Maintenance issues are addressed at the time the wireless telecommunication facility operators pull building permits for antenna upgrades, which occurs about every five years. In the rare event that resolution is not found for citizen complaints, these issues have gone through civil litigation before the superior court, as was the situation with one horizontal colocation application processed by the City.

As cities and industry continue to successfully evolve best practices together and work towards streamlining the process for the collocation of, removal of and replacement of wireless transmission equipment , it is premature for the Commission to adopt narrow definitions for the terms in Section 6409 (a). Municipalities must retain the autonomy to determine specific process and because resident complaints are minimal and often resolved at a local level, local courts are the most appropriate and efficient means to resolve wireless land use disputes in San Marcos.

**IMPLEMENTATION OF SECTION 332(c)(7)**

The Commission also seeks comment on whether to modify its *2009 Declaratory Ruling* that interprets the term "reasonable time" as used in Section 332(c)(7)(B). For the most part, State and local

governments adapted well to the *2009 Declaratory Ruling*, and no factual record before the Commission provides a basis for change. The City of San Marcos recommends that the Commission should not adopt any new rules.

In the event that the Commission determines that it should exercise its regulatory authority with respect to Section 332(c)(7)(B), the City of San Marcos advises the Commission carefully preserve local control over and flexibility in the permit process to encourage government, industry, and community stakeholders to cooperate towards creative wireless solutions. Any finally-adopted rules must preserve enough local authority to bring wireless applicants to the negotiating table.

**CONCLUSION**

The City of San Marcos would like to thank the Commission for its efforts to better understand the practices and policies surrounding cities' management of public rights of way and the practices currently used to collocate wireless facilities. San Marcos strongly encourages the Commission to consider these comments, as well as those submitted by all cities, before taking any action that may adversely affect the rights of way authority of cities. The Commission has explicitly acknowledged that it does not intend to become a national zoning board, but the practical impact of the Draft Rules will likely result in that very outcome.

Respectfully submitted,
City of San Marcos

By: Jack Griffin, City Manager
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San Marcos, CA 92069

**EXHIBIT D**

**Reply Comments of the City of Richmond, California**

In the Matter of Acceleration of Broadband Deployment by Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59)

[appears behind this coversheet]

EXHIBIT D



Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

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| In the Matter of: | ) | |
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| Acceleration of Broadband Deployment | ) | WC Docket No. 11-59 |
| Expanding the Reach and Reducing the Cost of | ) | |
| Broadband Deployment by Improving Policies | ) | |
| Regarding Public Rights of Way and Wireless | ) | |
| Facilities Siting | ) | |

To: The Commission

**REPLY COMMENTS OF THE**
**CITY OF RICHMOND, CALIFORNIA**

The City of Richmond, California ("Richmond") respectfully submits these Reply Comments to the Commission in the above-entitled Notice of Inquiry ("NOI") proceedings.

Richmond has become aware that certain comments of Verizon and Verizon Wireless ("Verizon") submitted to the Commission in this NOI contain material factual errors and seriously distort the actual facts regarding Richmond's efficient, timely, and reasonable-cost processing of wireless site applications.

I
Matters of Fairness

Initially, Richmond notes that the allegations leveled by Verizon were never served on Richmond by Verizon. Richmond is aware that other municipal commenters in this NOI have also stated that the telecommunications industry has not served the allegations on the municipalities mentioned by the industry commenters. This attempt by the telecommunications industry to insert unsupported (and in various cases materially incorrect) allegations in the record without serving notice on the affected parties does not provide a sound basis or record upon which the Commission should act.



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II

Verizon Misstates Material Facts Regarding Richmond

Turning to the allegations raised by Verizon in connection with Richmond, Verizon states that "minor activities such as the addition of new antennas to an existing structure or other activities that do not effect (sic) any material change in the underlying structure must go through the same rigorous and time-consuming local zoning process as a new tower." (Comments of Verizon and Verizon Wireless @ Pg. 8 and fn. 12).

Richmond conducted a review of the wireless site applications tendered to it for the period of November, 2009 through September, 2011, after (as mentioned below) Richmond adopted a new comprehensive wireless ordinance addressing both industry and local concerns regarding process and siting of wireless telecommunications facilities. Of the 19 applications received during that period, Richmond approved 17 of them in an average of about 80 days, and at an average cost to the applicant of about $1,800. Only two of the 19 applications are still pending, with both now scheduled for review before the Planning Commission on October 6, 2011.

None of the 19 wireless siting applications received by Richmond during the past two years were tendered by Verizon. Given that Verizon has not participated in the City's wireless siting process for a period of years, it is disingenuous for Verizon to make clearly inaccurate claims about Richmond's wireless siting process and the efficient results flowing from Richmond's process.

III

PCIA Misstates Material Fact Regarding Richmond

Turning to an allegation raised by the Personal Communications Industry Association ("PCIA") in connection with Richmond, PCIA asserts that the City of Richmond, California has had in place a wireless facility siting moratorium since February, 2011. (Comments of PCIA Exhibit B, Section II @ pg. 6.) This is simply not true, and PCIA does not provide any source for its factually incorrect assertion.

The City did legally, prudently, and appropriately declare a wireless siting moratorium during the period it developed its current wireless siting ordinance (a development process that involved significant input from the wireless industry), but that moratorium was lifted on August 28, 2009, the same day the new wireless ordinance became effective. A further moratorium was declared and effective from February 1, 2011 to May 12, 2011, in order to revise the ordinance to address new concerns raised by Planning staff regarding aesthetics and public safety and welfare, including issues of compatibility and detriment to residential properties.

Richmond joins with other municipal commenters stating that PCIA's inaccurate claims should be rejected by the Commission.

## IV
## Use of Municipal Consultants is Useful in Speeding-up the Siting Process

PCIA also claims that various "consultants identified by the wireless infrastructure industry [are] obstructionists and problematic." Richmond joins with other municipal commenters stating that PCIA's claim should be rejected by the Commission.

As noted by the City of Glendale, California, "PCIA's allegations are vague and unsubstantiated. They fail to identify which consultants are identified, who identified them, and what they may have done to create the so-called barriers against deployment of wireless facilities." (Reply Comments of the City of Glendale, California @ Pg. 2.)

Richmond has only occasionally used municipal consultants to assist in the wireless siting process, but when Richmond has used municipal consultants, their use has been to provide specialized technical or legal expertise that was simply not available within the city government.

Given the increasing complexity of signal coverage and use capacity issues raised by wireless carriers in wireless facility siting applications, and in light of the various federal and state court decisions that shape wireless siting practices in California, the use of municipal consultants by Richmond and other city governments can actually speed-up the wireless siting process by identifying matters that can quickly be resolved by governments and wireless applicants. Richmond notes that while it only rarely uses municipal consultants in the wireless siting process, the opposite is true for wireless carriers who almost exclusively use local consultants to apply for wireless siting permits.

## V
## Conclusions

The process of wireless facilities siting is complex from a legal standpoint and from a community aesthetics viewpoint. It requires a reasonable balance of local encouragement and reasonable local restraints on unfettered proliferation. Richmond has struck a balance of these elements that respects the interests of all concerned, not merely the community or the wireless industry.

Richmond believes that good national guidance and policy comes from factually accurate and reliable information that is broadly applicable rather than industry-sponsored innuendo regarding a relative handful of communities. Accordingly, Richmond believes the Commission should not rely on factually inaccurate and unreliable information and information that is far out-of-date and only applicable to a minute number of governments as any basis for crafting new rules and policies in wireless tower siting matters.

Richmond supports the idea of the Commission serving as an information resource for local governments in wireless tower siting matters.

The City of Richmond thanks the Commission for its consideration of these Reply Comments.

THE CITY OF RICHMOND, CALIFORNIA
by

Randy Riddle
City Attorney

Date: 9/30/11

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**EXHIBIT E**

**Comments of the League of Oregon Cities**

In the Matter of Acceleration of Broadband Deployment by Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59)

[appears behind this coversheet]

EXHIBIT E

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

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| Acceleration of Broadband Deployment: | ) | WC Docket No. 11-59 |
| Expanding the Reach and Reducing the | ) | |
| Cost of Broadband Deployment by Improving | ) | |
| Policies Regarding Public Rights of Way and | ) | |
| Wireless Facilities Siting | ) | |

**COMMENTS OF THE LEAGUE OF OREGON CITIES**

These Comments are filed by the League of Oregon Cities in response to the Notice of Inquiry (Notice), released on April 7, 2011, in the above-entitled proceeding.

## 1. INTRODUCTION

The League of Oregon Cities (the League) is an intergovernmental entity under Oregon Revised Statutes (ORS) Chapter 190. Originally founded in 1925, the League is a voluntary statewide association representing all of Oregon's 242 incorporated cities. The League's mission is to be the effective and collective voice of Oregon's cities and their authoritative and best source of information and training. The League fulfills that mission through advocacy for city government at the state and national levels and by providing information, technical assistance, training, conferences, and workshops to local elected officials and city staff. Simply put, the League aims to protect its members and to provide them with timely information and resources on matters of concern and interest. The outcome of this Notice is a matter of great concern for Oregon cities.

## 2. OREGON CITIES ARE ACTIVELY SUPPORTING BROADBAND INITIATIVES

There are several broadband related initiatives in Oregon. Some have been completed while others are just underway. A number of public broadband initiatives have taken shape out of the need for

broadband service in communities that were not served or underserved by private broadband providers.[1] Other public broadband initiatives in Oregon are focused on strategically using the broadband that communities have or will have. These initiatives indicate that local government in Oregon supports and encourages broadband deployment in their communities.

The League recently finalized a report on municipal involvement in the funding, building, and operating of broadband networks. In summary, the findings of the report indicate that Oregon cities are:

(1) Aware of the significance of broadband, and

(2) Willing to go to great lengths to bring broadband to their communities.

Accordingly, and contrary to the assumptions in the Notice, the League's report did not find that cities are what stand in the way of broadband deployment. Instead, the League's report found that the obstacle to broadband deployment is hesitation on the part of industry to make capital investments that do not immediately produce positive returns. The League's Oregon Municipal Broadband report is attached to these comments for the Commission's convenient reference. (See Appendix A.)

In addition to the municipal broadband initiatives referenced in the League's attached report, there are a number of similar initiatives currently underway in Oregon. Many such initiatives are born out of the Oregon Broadband Advisory Council (OBAC). OBAC was created by the 2009 Oregon legislature and its purpose is "to help ensure the implementation of statewide broadband strategies" and "to encourage coordination and collaboration between organizations and economic sectors to leverage the development and utilization of broadband for education, workforce development and telehealth, and to promote broadband utilization by citizens and communities."[2]

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[1] One such example is found in the Oregon cities of Monmouth and Independence. In 1999, the cities of Monmouth and Independence asked their local cable company when high-speed Internet would be introduced to the cities. The cable company responded that services would not be available any sooner than the year 2020. Both cities realized that to be economically viable, the cities needed high-speed Internet service much sooner. This realization spurred the creation of an intergovernmental fiber network which provides voice, video, and data services in both cities. For more details about this story and similar ones, please refer to the League's report attached as Appendix A.

[2] See OBAC's website: http://www.oregon4biz.com/The-Oregon-Advantage/Telecommunications/oregon-broadband-council/

City representatives, including League staff, regularly attend OBAC meetings. Of particular relevance to this Notice, the conversations at OBAC meetings do not focus on reform of local policies related to rights of way management and wireless facilities siting. Rather, the conversations at the council meetings focus on the real issues facing broadband deployment in Oregon: adoption and utilization of broadband.

To address the issues of broadband adoption and utilization, the Oregon Public Utility Commission (PUC), working with OBAC, has developed and will implement a Broadband Outreach and Strategic Planning Project. This project is funded through grants from the National Telecommunications and Information Administration's State Broadband Data and Development program. The key deliverables of the project include a broadband strategic planning process template and as many as eight local broadband strategic plans, which in addition to the template, can be used as models for other communities.[3] The ultimate goal of this project is to increase broadband adoption and utilization in Oregon and to develop a strategic planning process that can be replicated by communities throughout the state.

This level of involvement by cities in activities that seek to encourage and effectuate broadband deployment is a true representation of the importance cities have placed on bringing broadband to their communities. Cities would not invest their limited resources in these types of activities if they were not truly committed to broadband deployment. It is important for the Commission to recognize and keep in mind this level of support by cities towards broadband deployment as it considers the various responses it receives to the Notice.

**3. CITY POLICIES ARE NOT OBSTACLES TO BROADBAND DEPLOYMENT**

It is not city policies that are creating obstacles to the accelerated deployment of broadband, but rather the real obstacles are the cost associated with investing in broadband infrastructure. The actual cost of investment may be increased and the cost/benefit analysis may be complicated when geographic,

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[3] See OBAC's website for January 27, 2011 approved minutes, page 7
http://www.oregon4biz.com/The-Oregon-Advantage/Telecommunications/oregon-broadband-council/2011/0111meeting/012711Minutes.pdf

demographic, and geological factors enter the equation. It is common knowledge that flat, clustered, densely populated areas in the country are the areas that have the most broadband services. This is not a coincidence.

The League is concerned that the Commission overlooks or minimizes the importance of the geographic, demographic, and geological obstacles that cause the private industry to hesitate before investing in broadband services. The League's concern is underscored and validated particularly now that the Commission has resources such as the National Broadband Map, which supports the conventional wisdom that unserved or underserved areas are those areas located outside of areas deemed by the private industry to be cost-efficient.

Using the state of Oregon as an example, when the Commission looks at the Oregon Broadband Map[4] it will see that broadband is readily available in all of Oregon's densely populated areas. According to the 2010 census, Oregon's statewide population is 3,831,074. Approximately 58% of Oregon's population lives in the Portland metro area.[5] After the Portland metro area, the second largest population cluster is found in the Willamette Valley (Salem, Corvallis, and Eugene/Springfield). These urban areas and other urban areas in Oregon with larger population bases are served by broadband providers.

Conversely, looking at the Oregon Broadband Map, the Commission will see large swaths of land in the state that do not have broadband services. These areas do not have large population centers and are not readily available for broadband development. For example, the federal Bureau of Land Management (BLM)[6] oversees 15,707,047 acres or 25% of the total land area in Oregon.[7] This land is forest land not

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[4] See the Oregon Broadband Map website: http://broadband.oregon.gov/StateMap/index.html

[5] Portland Metro Area population (2,226,009 based on 2010 census results) divided by Oregon's total population count (3,831,074 based on 2010 census results).

[6] The mission and function of the federal Bureau of Land Management, a bureau under the U.S. Department of the Interior, is summarized on its website (http://www.blm.gov/wo/st/en.html) as follows: *"To sustain the health, productivity, and diversity of America's public lands for the use and enjoyment of present and future generations...The BLM's multiple-use mission, set forth in the Federal Land Policy and Management Act of 1976, mandates that we manage public land resources for a variety of uses, such as energy development, livestock grazing, recreation, and timber harvesting, while protecting a wide array of natural, cultural, and historical resources...."*

available for development and primarily used for recreation, sustainable lumber production, research, and conservation purposes. Accordingly, these unserved areas do not pass a broadband investment cost/benefit analysis, which is the real reason why broadband development has not occurred in these areas.

With this better understanding of the Oregon Broadband Map in place, it should be easier for the Commission to recognize that local policies related to management of the right of way and wireless facilities siting are not the obstacle to accelerated deployment of broadband in Oregon. In populous cities, one will typically find more rigorous management of rights of way in general due to the fact that there will necessarily be more competing interests.[8] Conversely, in remote areas with smaller populations the need for as rigorous management is substantially less. Nonetheless, as pointed out in the preceding paragraphs, unserved or underserved areas tend to be rural areas where, at least in Oregon, counties may determine the location of utilities in the rights of way but may not charge rates.[9] Thus, if private broadband providers cite high rates and delays as obstacles to broadband deployment, then the FCC must require data to back up these allegations. In Oregon, the argument that local government prevents broadband deployment by charging high rates for use of the rights of way and by delaying facilities siting applications simply cannot be supported when all of the evidence points to a contrary conclusion.

**4. CITIES KNOW HOW BEST TO MANAGE THE PUBLIC RIGHTS OF WAY**

Rights of way are valuable and important government resources, which are best managed by the entities closest to them, local governments. Local governments have the unique ability to take into consideration all of the various concerns, values and desires of local citizens to maximize the value of this important resource. The Commission should not overlook this important aspect of the policy decision before it with this Notice.

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[7] According to a 2009 BLM Facts publication, in Oregon, the BLM is responsible for 15,707,047 acres. Oregon's land area is 98,381 square miles. 1 square mile equals 640 acres. 98,381 multiplied by 640 equals 62,963,840 acres. 15,707,047 acres divided by 62,963,840 acres equals 0.249 or 25%.

[8] For example the City of Portland has over 50 franchised entities including over 30 telecommunications and cable providers. http://www.portlandonline.com/cable/index.cfm?c=33150

[9] ORS 758.010(1)

Oregon is a home rule state and as such Oregon cities through their local charters have the authority to protect and manage the public's interest in the public rights of way. In addition to charter provisions and ordinances, Oregon cities are mandated to comply with state laws that impose further requirements on cities. For instance, Oregon cities are required by state law to adopt comprehensive land use plans and to adopt zoning and land use codes to manage growth and development in their communities.[10] Oregon cities are also required by statute to provide certain urban services, which currently do not include broadband services.[11] Further, Oregon statutes assign primary regulatory responsibility for control of local highways, streets, roads, and alleys within incorporated cities to the city's governing body.[12] As such and as designated by statute, Oregon municipalities have responsibility for the placement, maintenance, and control of traffic control devices necessary for the safe and expeditious regulation and guidance and warning of traffic conditions.[13]

Regardless of the many requirements that local rights of way policies must comply with and all of the public services and utilities that cities must accommodate in the right of way, Oregon cities through their local policies accommodate broadband and similar services in the public right of way. These local policies have been created and shaped through the local democratic process. For this reason, the League urges the Commission to closely listen to the stories of local governments through this Notice process. In doing so, the Commission will find that the local policies that it seeks to preempt are in place to protect the best interests of communities as expressed by the citizens of those communities. Further, the

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[10] ORS 197.175(2)

[11] ORS 195.065(4) For purposes of ORS 195.020, 195.070, 195.075, 197.005 and this section, "urban services" means:
(a) Sanitary sewers;
(b) Water;
(c) Fire protection;
(d) Parks;
(e) Open space;
(f) Recreation; and
(g) Streets, roads and mass transit.

[12] ORS 810.010(4)

[13] ORS 810.210(2)

Commission will discover that the significance of broadband and its availability is well understood by cities and that this understanding is reflected in local decisions and practices.

Finally, the Commission must recognize that management of the right of way is the management of a local resource, which needs to be protected and utilized in the best interests of the local citizens. One way local governments can use this valuable public resource is by requiring compensation for the use of the right of way, which helps to support the budgets of local governments. In Oregon, cities have the authority to allow private use of public rights of way in exchange for compensation for that use. Compensation comes in the form of fees collected through franchise agreements and/or right of way ordinances. These fees are typically a revenue source upon which cities rely to provide valuable services to the citizens in their communities. While the size of this revenue source varies from city to city, any loss in revenues during this challenging economic period is a decision that must be made by the local government.

The decision about how to set these rates and how much they will be is a decision best made at the local level and a decision that Oregon cities have the authority to make. The federal government should not step in and create a one size fits all policy that very well might contradict the concerns, values and desires of the citizens to whose benefit this public resource should be used. Accordingly, the Commission should not undertake a process by which it would deprive cities the authority to collect compensation for the private use of the public rights of way.

**5. CONCLUSION**

The League understands that the Commission is charged with ensuring that broadband is deployed in a reasonable and timely fashion. However, any perception of an impediment in the deployment of broadband related to local rights of way and facilities siting regulations is simply that—a perception. That said, the message that the League would like to leave with the Commission is that there is substantial evidence indicating that Oregon communities without broadband are not served because private broadband providers have determined that the infrastructure costs of deploying broadband to these areas is too high and the take rate would be too low to justify the costs. Ironically, these unserved

areas are also communities that tend to have the least amount of local regulations. Thus, local policies related to management of the public rights of way and wireless facilities cannot be obstacles to broadband deployment.

Through this process, the Commission is certain to find recurring themes among the comments filed by local governments and organizations that support local governments. These recurring themes should not be dismissed as repetitive but instead should be treated as significant and critical. The fact that they are recurring and repetitive is an indication that the themes are not isolated exceptions in certain parts of the country, but in fact reflect the true obstacles to achieving greater broadband deployment.

Finally, the League would like to thank the Commission for the opportunity to comment on how local governments are managing the rights of way to facilitate community development and expansion by serving the broad variety of users who can serve more efficiently by using the citizen's property. The League appreciates the Commission's efforts to better understand the practices and policies surrounding cities' management of public rights of way. The League strongly encourages the Commission to consider the League's comments, as well as those submitted by all cities, before taking any action that may adversely affect the rights of way authority of cities. The League respectfully reminds the Commission that it must resist moving forward in any other context to act on any of the issues raised in the Notice until the record in this proceeding is complete.

Respectfully submitted,
The League of Oregon Cities

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EXHIBIT E

# Appendix A:

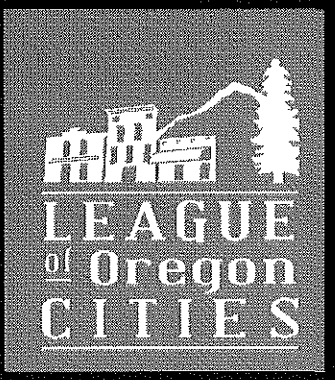
# Oregon Municipal Broadband
# A 2011 Report by the League of Oregon Cities

EXHIBIT E

LEAGUE OF OREGON CITIES

# OREGON MUNICIPAL BROADBAND

JULY 2011




Published by the League of Oregon Cities

EXHIBIT E

# Table of Contents

## Acknowledgements

Special thanks to the city and other government contacts who provided information and assistance to LOC in the development of this report. In some cases, these contacts provided technical advice and full review of the report. (*case study city)

- City of Ashland
- City of Astoria
- City of Bandon
- City of Cascade Locks
- City of Coos Bay*
- City of Cottage Grove*
- City of Eugene
- City of Forest Grove
- Cities of Independence and Monmouth*
- City of Lebanon*
- City of Oregon City
- City of Portland
- City of Redmond
- City of Sandy*
- City of Sherwood*
- City of The Dalles*
- City of Tigard*
- City of Yachats
- Clackamas County
- Lane Council of Governments
- Oregon Business Development Department

Special thanks to Rebekah Dohrman, League of Oregon Cities Assistant General Counsel, for the development of the "Legal Authority, Restrictions and Requirements" section.

## Introduction

Recognition of telecommunications infrastructure as a vital service in Oregon began in 1991 when the Task Force on Telecommunications was established. In 2010, this priority was reemphasized with the creation of the Oregon Broadband Advisory Council, whose goal is to develop and implement statewide broadband initiatives.

In today's digital age, high-speed broadband services are crucial to economic development, job creation, education, health care, civic engagement, government transparency and responsiveness, as well as public safety and emergency preparedness. If broadband services are not available or are insufficient, businesses may pass over a city when assessing potential locations for new offices and facilities. Even if a city expects enhanced broadband services in the next few years, businesses cannot afford to wait and may choose to make investments elsewhere.

Beyond the business sector, the general public is growing more accustomed to having Internet access everywhere they go. Not only do people want access to traditional local government services such as libraries and parks, but they also want to check their email while they use these city services.

The main purpose of a city is to provide essential services to a community. Due to insufficient services provided by private utilities, some cities have classified broadband as "essential" and have chosen to add broadband to the list of their city services. Even among those that have chosen to enter the realm of telecommunications, the roles and models used vary greatly. Some cities have implemented a city utility, others have entered into partnerships with other governmental entities and private providers, and some provide services only to other governmental entities. Some cities have chosen to provide services directly to the customer, while others lease network space to private service providers.

In addition to these variations in implementation, the type of broadband access varies as well; some cities have chosen to construct "wired" fiber-optic networks, while others provide free wireless broadband services to key areas around the city, including city hall, parks and downtown business areas.

### About this Report

There are many options available to cities that want to provide broadband services, and the purpose of this report is to provide general information to those cities. The report will discuss the link between broadband expansion and economic development, while posing several policy and legal issues cities should consider before deciding to provide these types of services. To assist readers with technical terms, there is a glossary on page 48.

This report also provides a general overview for the various models based on the actions and experiences of other Oregon cities that have chosen to provide broadband services. Additional information on any of the case study cities can be obtained by contacting the League of Oregon Cities.

## Broadband & Economic Development

### The Link Between Broadband & Economic Development

Although most agree that broadband is playing an ever increasing role in the global economy, several studies have attempted to assess whether the expansion of broadband services truly is an effective economic development tool.

**Broadband and the U.S. Economy**

- 62% of American workers rely on the Internet to perform their jobs.
- The U.S. Bureau of Labor Statistics forecasts that jobs depending on broadband and information and communication technologies will increase by 25% from 2008 to 2018.
- One third of the per capita GDP growth can be attributed to telecommunications infrastructure investments.
- Information and communications technology contributed 59% of growth in labor productivity from 1995 to 2000 and 33% from 2000 to 2005.

Source: Portland Broadband Strategic Planning Briefing Book (2010–Sect. 2; p. 2)

The city of Portland's "Broadband Strategic Planning Briefing Book" (2010) notes that "broadband is becoming a prerequisite to economic opportunity for individuals, small businesses and communities. Those without broadband and the skills to use broadband-enabled technologies are becoming more isolated from the modern American economy" (Section 2, page 2). Because of this reality, Portland is developing a comprehensive Broadband Strategic Plan to keep pace with future telecommunications and economic trends.

The Briefing Book examines many surveys and studies linking broadband and economic development. One objective of the Portland Broadband Strategic Plan is to "positively impact the policies, actions and directions of other Oregon communities and of the state as a whole" (Section 1, page 2). The Briefing Book helps fulfill this objective by providing other cities with information and resources on broadband, especially regarding economic development. Any city interested in expanding the provision of broadband services in their community should review the Portland Broadband Strategic Plan documents (see Resources section, page 45).

The Portland Briefing Book references a study conducted by the Public Policy Insitute of California (PPIC), "Does Broadband Boost Local Economic Development" (Kolko, 2010). The study found a very strong, positive relationship between the expansion of broadband and job growth, noting that the relationship is stronger for certain industries such as utilities, finance, insurance, scientific/technical, and other professional services. The study further noted that job growth after broadband expansion is not as strong in jobs that rely on local demand, such as retail stores or entertainment services. In fact, these types of businesses could be negatively affected by better connecting local consumers to the global market.

According to the PPIC study, the positive relationship is stronger in areas of lower population density, the theory being that the introduction and/or expansion of broadband connects these areas to a larger market. However, even areas of high population density do experience job growth after broadband services are expanded.

One interesting point made by the PPIC study was that even though broadband is linked to job growth, the study did not find a connection between broadband expansion and higher local employment rates or wages (Kolko, 2010). Some of the new jobs may not filled by current city residents, especially if the new industry requires a highly skilled workforce in a specific field.

Several of the cities in the Oregon municipal broadband case studies, however, have experienced broader economic benefits than what is presented in the PPIC study. For example, the city of Sandy expanded its municipal broadband services, SandyNet, to a nearby resort, which in turn was able to host larger business conferences. The resort then created more jobs to accommodate their business growth, and these jobs were filled mostly by Sandy area residents. The attendees at these conferences also became tourist patrons at local restaurants and businesses (see case study, page 25).

Another example can be found in The Dalles with the completion of QLife, an intergovernmental fiber network. The enhanced services provided by QLife attracted Google's attention, and the company chose to locate a new facility within the city. Due to the technical scope of the work needed at the facility, some jobs were filled from out-of-city recruitments. However, other jobs were filled by current city residents. In addition to job growth, the location of a highly visible business puts The Dalles on the map as a desirable place to locate. Even though some of the new jobs were not filled by local residents, the city benefits from the indirect economic impacts related to the new jobs, residents and income (see case study, page 33).

Local broadband projects have had positive impacts on cities throughout the nation. In 2009, The National Association of Telecommunications Officers and Advisors (NATOA) put together a briefing for the Federal Communications Commission (FCC) which highlighted several examples. Among these examples was Bristol, Virginia, which found its local economy drastically changing as the tobacco, textiles, coal mining and agriculture industries were in decline. The city decided to rebuild its economy on a foundation of advanced telecommunications infrastructure and services. In 2001, the city began building a fiber-to-the-home network, and by 2009 this system served more than 65 percent of city residents and businesses. This broadband network has begun attracting new employers, including two businesses which will bring in approximately 1,500 jobs that pay twice the average local wage. More information on Bristol, Virginia, as well as other examples from the NATOA briefing can be found in the Resources section on page 45.

Recent evidence shows there is a link between broadband and economic development. However, the issue of whether a city should become directly involved in the provision of broadband services is complicated by several factors, including the current local economy, skills of the workforce, and the city's economic goals (e.g. create new jobs for current residents). Regardless, broadband is crucial to national, state and local economies.

**Broadband Services in the U.S.**

> *"America's record in expanding broadband communication is so poor that it should be viewed as an outrage by every consumer and business person in the country. Too few of us have broadband connections, and those who do pay too much for service that is too slow. It's hurting our economy, and things are only going to get worse if we don't do something about it."*
>
> *Michael J. Copps, Federal Communications Commission Member (2006)*

As the global economy changes, it appears that broadband will play an increasing role in future economic markets. Despite this clear trend, the United States is lagging behind many countries in terms of broadband adoption and availability, which could have devastating impacts on the nation's recovering economy. In 2010, the United States was ranked 15th worldwide in terms of broadband penetration, whereas 10 years ago the U.S. ranked number one (Meinrath & Losey, 2010).

According to a study conducted by Pew Internet (Smith, 2010), after years of double-digit growth in broadband adoption, the U.S. saw a growth rate of only 3 percent from 2009 to 2010. As part of the solution, the American Recovery and Reinvestment Act (ARRA) designated $7.2 billion to broadband expansion projects, as well as nationwide mapping of broadband availability. The Oregon Broadband Advisory Council (2010) reports that $52 million was awarded to Oregon-based broadband projects. Of that $52 million, Oregon local government projects received the following: the city of Sandy received a grant/loan award of $749,085; Clackamas County received a grant of $7.8 million; Crook County received a grant of $3.9 million; and the Lane Council of Governments was awarded a grant of $8.3 million (see page 23 for more information).

**Download Speeds**
(Hours: Minutes: Seconds)

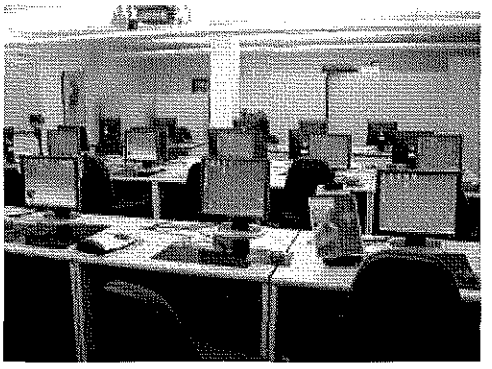
| Internet Speed | Movie File (1,000 MB) | Music File (5 MB) |
|---|---|---|
| 1 Mbps | 2:13:20 | 0:00:40 |
| 4 Mbps | 0:33:20 | 0:00:10 |
| 25 Mbps | 0:05:20 | 0:00:01 |
| 100 Mbps | 0:01:20 | < 0:00:01 |

As mandated by the ARRA, the Federal Communications Commission published its National Broadband Plan in 2010. The core principle of the plan is that "broadband is a foundation for economic job growth, job creation, global competitiveness and a better way of life" (page xi). A goal of this plan is to have universal broadband available to all U.S. households by 2020, with a minimum download speed of 4 megabits per second (Mpbs) and upload speeds of 1 Mbps. Furthermore, the FCC wants 75 percent of the population to have affordable access to download speeds of 100 Mbps, and 50 Mbps upload speeds. Even with the achievement of these goals, the U.S. may still lag behind – many countries had already met these standards by 2010, including Taiwan, Denmark and the U.K. (Meinrath & Losey, 2010).

Broadband adoption rates show part of the competitive issue facing the U.S. economy, but the cost and service levels within the U.S. show a dreary outlook. Compared to other countries, U.S. citizens pay more for broadband services, but receive substantially lower speeds. The FCC found that the high cost of services is one barrier preventing or discouraging some U.S. households from subscribing to broadband services (Meinrath & Losey, 2010). A competitive market can help lower the cost of services, but for communities that are still struggling to find one provider, additional private provider competition may never materialize. According to the FCC's National Broadband Plan (2010), areas that include 75 percent of the nation's population

are likely to have only one service provider that can provide top-speed Internet services. This paints a dire picture for the smaller, rural areas around the country, and in Oregon.

**Broadband Services in Oregon**



In 2009, the U.S. Department of Commerce reported that Oregon was ranked 8th nationally for broadband reach, with 70.1 percent of homes utilizing high-speed Internet access. A 2010 survey conducted by the Opinion Research Corporation shows even higher statistics for Oregon: 88 percent of Oregon adults use the Internet, 85 percent have Internet access at home, and 82 percent have broadband access.

Using a different broadband indicator, established by the Information Technology and Innovation Foundation (ITIF, 2010), Oregon was ranked 21st nationally. The indicator in ITIF's report, 2010 State New Economy Index, evaluates the availability of broadband services in the 50 states as well as the cost of services. A high score means affordable broadband services are widely available throughout the state.

The ITIF report found that states with a higher population density tended to have a higher broadband score. The lower population density around much of the state of Oregon may explain the lower ranking, meaning many Oregonians do not have affordable broadband available in their communities.

Private providers tend to offer more services to areas with a higher population density, higher household income, and flatter terrain (Kelko, 2010). This leaves some areas around the country and around the State of Oregon "underserved" in terms of broadband availability. In some cases, the underserved must decide what role cities should play in the expansion of local broadband services.

## The Role of Cities in Broadband Services

In the 2010 National Broadband Plan, the FCC stated that 96 percent of households are served by two or fewer providers. In Oregon, there are still a handful of cities that have no broadband options and many that have insufficient services from one provider. The goal of universal availability by 2020 may be too far off for some cities. For many of the Oregon cities providing broadband, the local providers' estimated date for providing services, or the inability to provide a date at all, prompted the discussion of whether these cities should provide broadband services.

> *Government's role is to let the market meet whatever needs it can, work with the market (public/private partnerships) when appropriate, and fill the void when the private sector offers inadequate solutions.*
>
> *Sonja Reece, Councilmember of Normal, Illinois & Chair of the National League of Cities Information Technology & Communications Steering Committee (2007)*

**FCC Broadband Tiers (2008)**

| Tier | Rate |
|---|---|
| 1 | 200 Kbps up to 768 Kbps |
| 2 | 768 Kbps to 1.5 Mbps |
| 3 | 1.5 Mbps to 3.0 Mbps |
| 4 | 3.0 Mbps to 6.0 Mbps |
| 5 | 6.0 Mbps to 10.0 Mbps |
| 6 | 10.0 Mbps to 25.0 Mbps |
| 7 | 25.0 Mbps to 100.0 Mbps |
| 8 | 100.0 Mbps and beyond |

Source: Federal Communications Commission: Order 08-89

Furthermore, the 2020 goal of universal 4 Mbps services will bring many areas to today's current standard of "high-speed," which is currently tier 4 in the FCC's categorization of broadband services. Today's standards may be insufficient to accommodate the demands of a mobile, online constituency in 2020. The public wants more access and faster speeds. For example, Tigard launched its free limited Wi-Fi service due to the demand from local citizens (see case study, page 37).

In 2005, a study found that 616 of the 2,007 municipal electric utilities in the United States were providing some sort of communications services (Ford, 2005). Many municipal electric utilities looked to telecommunications as a way to stay competitive after deregulation.

In Oregon, there are at least eight cities providing for-fee broadband services through a city utility or an intergovernmental partnership. Two of these cities also operate electric utilities. The main reason these cities chose to enter the telecom businesses was to facilitate economic development and to fill a gap in broadband services. In 2001, dial-up Internet was the only broadband option for Sandy residents. The SandyNet broadband utility filled a void, helped recruit several businesses, and prompted the introduction of additional services from local providers (see case study, page 25).

Private broadband providers are companies that need to make a profit. Therefore, decisions on how and when broadband services are introduced or expanded are made based on the bottom line. If a city is not densely populated, or if a city has difficult terrain, it will be more expensive for local providers to deploy services, thereby cutting into the profit margin.

The mission of cities, counties and other non-profits is to serve the needs of the local community, not shareholders. As stated in a 2011 report by Chris Mitchell of the New Rules Project, the United States is facing a broadband service monopoly, and municipal and community networks provide a way to increase competition and enhance services in local communities.

Municipal broadband services can create competition and help increase broadband services while lowering the costs. Ashland citizens have two choices for broadband: municipally-owned Ashland Fiber Network, and privately-owned Charter Communications. Based on a survey of sales flyers and promotional materials collected for cable television services offered in Ashland, Talent, Phoenix and Medford between 2000 and 2006, Ashland customers (either Ashland Fiber Network or Charter) saved at least $10 per month compared to customers in the other cities. With a cable TV penetration rate in Ashland of approximately 67 percent, this translated into a minimum annual savings of $714,000 for customers in Ashland during that time due to the presence of competition.

The cities in Oregon providing broadband services have thus far been successful in the development, implementation and management of their broadband networks. Oregon municipal broadband utilities are financially stable, and broadband service competition within the cities has increased. The recent economic crisis has put a damper on job growth, but most of these cities

are hopeful that as the economy strengthens, so will their local economies, due in part to the availability of broadband services.

However, the role of a city in local broadband does not need to be as extensive as building a citywide broadband network. Several cities in Oregon have chosen to take on another role, such as forming a public/private partnership or creating a free Wi-Fi network for local residents and businesses. These endeavors can also enrich the community and business life of a city.

## Policy Considerations

There are many policy issues to consider before a city begins providing broadband services. These are not decisions that should be made quickly, and both technical and legal consultation should be involved in the process.

Below are a few key questions to help begin the conversation regarding city broadband services. See Appendix A (page 43) for a visual flow chart which will help cities walk through some of these questions and make a more informed decision regarding their city's role in broadband services.

### The Need for Broadband Services

*What is the need for broadband services in a city?*

Need does not necessarily mean lack of service. In today's digital economy, a city needs fast, affordable broadband services to compete in business recruitment and retention.

If there are already affordable services provided within a city, a new city broadband utility or partnership will be coming into the market late, and the investment may not pay out as well. However, a city could still consider providing free Wi-Fi in parts of the city as a service to citizens, and to help promote certain areas of town (e.g. parks, city hall and downtown businesses).

If there is a serious unmet need for broadband services and the city council agrees that broadband is an essential service, cities could consider the option of providing broadband services to the community as either a city utility, or in partnership with another city, governmental entity or a private provider.

If a city is unsure of the level of local broadband services, the Oregon Public Utility Commission developed an interactive map of broadband availability around the state. In addition, the National Telecommunications and Information Administration (NTIA) developed a national interactive map of broadband availability that includes Oregon. Using these maps, city officials can view the number of providers offering services by address, city, county or other selected areas. Cities can also search coverage areas, search by broadband technology, and run speed tests on local current Internet connections. For more information on these map websites, see the Resources section on page 45.

To evaluate the affordability of services, the Citizens' Utility Board of Oregon has developed a database showing landline phone, mobile phone and Internet rates by zip code. For more information on this website, see the Resources section on page 45.

In order to help assess whether the current services are affordable and fast, a city should hire a consultant to conduct a feasibility study and market analysis. Several of the Oregon cities with broadband networks conducted these types of studies before building their broadband networks.

**Encouraging Private Broadband Services**

*Are there ways a city can encourage the introduction or expansion of private broadband services?*

If there is a need for broadband services but the city council is reluctant or there is no interest in building a network or providing services, cities could consider options to attract providers to the city, thereby providing initial services or encouraging competition to enhance services and reduce prices.

State Programs

Many cities have used enterprise zones as an economic development tool. Some of these enterprise zones are given an additional status of "e-commerce zone," which provides additional incentives to further encourage development in electronic commerce. This incentive cannot be used directly for private broadband network expansion – as in the laying of infrastructure. A local telecom provider could use the e-commerce zone status for purchasing equipment and other hardware needed to provide broadband services. Furthermore, a city could use the program as a tool to recruit more e-commerce businesses that will utilize the current provided broadband services, as well as create a need and demand for increased broadband service levels.

E-commerce zones give a qualifying business a credit against their state income or corporate excise tax liability. The credit equals 25 percent of the qualifying business's capital cost in a given tax year for electronic commerce investments within the designated area. This e-commerce tax credit is in addition to the standard enterprise zone exemption from local property taxes. For more information on e-commerce zones, see the Resources section on page 45.

Strategic Planning

The city of Portland is developing a broadband strategic plan (see Resources section, page 45). One major goal of this project is to assess the role the city can play in the development of broadband over the next 10 years. According to Portland's Broadband Briefing Book (2010), the strategic plan will include the adoption of city policies and initiatives which help support broadband expansion for Portland businesses. This plan also includes incentives Portland can offer that encourage the enhancement and expansion of broadband services.

Another key feature of Portland's broadband strategic plan is to aggregate the need of the local residents and businesses. The city plans to contact key institutions, such as schools, colleges and health care facilities, to get a pulse on the need for services. The city can use this information to talk with private providers and illustrate there is a ready-made demand for services.

Other City "Recruitment" Efforts

Other cities have successfully "recruited" private providers. Within the last 10 years, the city of Bandon formed an exploratory committee and issued an RFP for a private partner to work with the city to provide broadband services. The owner of ComSpan, a local telephone company in Roseburg, also owned a business in Bandon and chose to bring broadband services there.

Around the same time, the local telephone company began providing DSL in Bandon. ComSpan then became an independent provider with no formal partnership or investment from the city. The city treated ComSpan the same as the local telephone and cable companies in terms of franchising. However, the city provided incentives to ComSpan by expediting the permit process, leasing space to ComSpan for offices and equipment, and switching the city over to ComSpan's telephone and Internet services. Even though there is no formal partnership, ComSpan and Bandon have found other ways to support each other.

Similarly, within the last 10 years the city of Forest Grove developed a limited-area, free Wi-Fi network. The network was very affordable to deploy and maintain, so the city began discussing expansion. Just the discussion was enough of a nudge to the local phone and cable providers to enhance their services and lower their prices. Recently, the city found itself needing to upgrade the equipment in order to keep providing Wi-Fi services. Since there were more high-speed internet options available within the city, it decided to discontinue the Wi-Fi service.

**Community Attitudes & Usage**

*Will the community support a municipal broadband network and will the services be used?*

Having an identified need for broadband and resources available to provide the services are not necessarily enough reason to initiate a city broadband network. Cities must also consider whether or not the community is in support of this endeavor and whether the community will use the services.

A survey conducted by Pew Internet (Smith, 2010) found that 26 percent of Americans felt that the federal government should not be involved in the expansion of broadband services, and 27 percent felt this should not be a major priority of the federal government. Even though the survey referred to "federal" government, many people view "government" in a collective sense, and these opinions may apply to all levels of government. The Pew report often referred to government in a general sense.

It is also important to consider demographic factors such as age and income and their effect on the use of Internet services. The U.S. Department of Commerce (2010) found that 81 percent of Americans between the ages of 18 to 24 use the Internet at home, while only 46 percent of Americans over the age of 55 use the Internet at home. If a city is considering building a broadband network and the population demographic falls predominantly within the over-55 age group, a city may want to consider a technology education plan to help citizens better utilize the city's broadband investment.

According to the same survey, income was another major factor in Internet use at home. The usage rates start at 29 percent for households with incomes less than $15,000, and progressively

move upwards to almost 89 percent for households with incomes greater than $150,000. If a city can provide affordable services, however, municipal broadband may increase usage among lower-income populations, allowing them the access they desperately need.

Prior to developing municipal broadband networks, several cities in Oregon conducted community surveys. These surveys allowed the cities to determine the needs of the community and gauge the public perception towards a municipal broadband utility. When the public is engaged in the process early and often, they may develop a sense of ownership of the project and may be more supportive of the utility.

**Broadband Service Structure**

*How will the broadband services be structured?*

For cities, there are many options for providing broadband services. The examples listed below are only a few of the options available. There may be other service structures that more closely meet the needs and goals of a particular city. Because telecommunications is a constantly changing field, ingenuity and creative thinking can be useful tools.

Free City Service

One broadband service option available to cities is to provide free broadband services, such as a limited-area and/or limited-use Wi-Fi network. For cities that provide free Wi-Fi services, there is no need for an independent city utility. The Wi-Fi network just becomes a provided service under another department, such as Information Technology (IT), or is a contracted service. There may be opportunities for cities to partner with a private provider. More information on cities providing this type of service is detailed on page 23.

City Utility

In a city utility network structure, a city will likely own all or part of the broadband network, and the utility manages this network and any services provided. The utility would have a separate enterprise fund and would be a separate department or division within the city.

With a city utility structure, a city is able to make all decisions regarding the broadband network, including the expansion of the network and the service levels and prices. However, the city is also the sole bearer of the cost of the project and any debt that is incurred. More information on cities providing this type of service is detailed on page 23.

Partnerships

A partnership structure requires a city and at least one additional entity to jointly share resources to build a broadband network. From the case studies in this report, two types of partnerships emerge:

1. Intergovernmental Network: A city partners with other governmental entities to create a broadband network. All specifics regarding the network/utility, including financing and structure, are decided and agreed upon with an intergovernmental agreement. More information on cities providing this type of service is detailed on page 23.

2. Public/Private Partnership: A city enters into a partnership with a private provider. The roles and obligations of each party are agreed upon in contract. More information on cities providing this type of service is detailed on page 23.

A partnership is an excellent way to make a telecom project more cost effective by creating a larger market for services as well as a greater pool for sharing resources (staff, equipment, etc.). However, it may create financial ties between a city and its broadband partner. In these types of projects, it is common to accrue some debt.

In the case of public/private partnerships, there are loans available to cities that are not available to the private provider, so some debt may be solely in a city's name. If the partnership dissolves after the debt is incurred, a city may be placed in a dire financial position, especially if the utility is not operational yet and no revenue is being generated.

In the case of an intergovernmental utility, all governmental entities will likely be financially responsible for the utility and its debt/expenses. Intergovernmental partnerships can also be difficult with two or more community identities trying to move forward with one comprehensive plan. If a city decides to enter into a partnership, make sure there is a clear commitment and understanding of the partnership responsibilities, and preferably a previous history of cooperative ventures.

**Type of Broadband Network**

*What type of broadband network should a city deploy?*

Service needs and available funding will likely determine the type of network a city chooses to deploy. The first decision is whether a city wants to develop a wired broadband network, a wireless broadband network, or both.

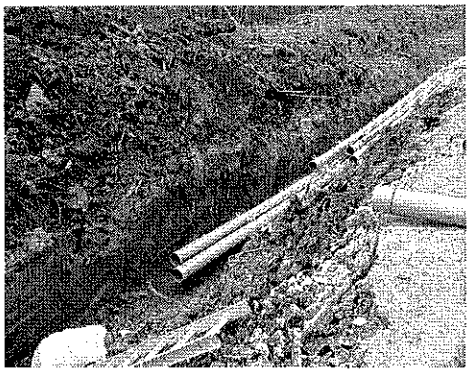
Broadband technology is changing rapidly and the market is competitive. If a city is considering a for-fee broadband utility, a technical consultant can help facilitate good decisions that will better protect a city's long-term investment in a broadband project.

Wired Network

Most private sector providers are moving toward fiber-optic networks for broadband service provision. The term "fiber-to-the-premises" describes the expansion of fiber-optic cable directly to homes and other buildings. Building a fiber-optic network can be costly, especially if a city builds the network all at once. However, a faster build-out means the network is up and running more quickly, allowing a faster return on investment through generated revenue.

According to an Oregon Public Utility Commission report (PUC, 2007), more than half of the broadband connections in Oregon are cable-modem connections provided by local cable company coaxial networks. However, a coaxial cable network may not be the best option for cities currently considering the construction of a new broadband network. Coaxial cables have a high data transmission capacity, but transmit over a shorter distance than fiber-optic cables and can be very costly to install.

Digital subscriber line (DSL) networks are more affordable to deploy than other wired networks. DSL transmits data over local telephone copper wires. In Oregon, approximately one-third of high-speed connections are DSL (PUC, 2007). DSL speeds tend to be slower than fiber networks and in some cases even commercial wireless services (see page 12 for more information on wireless broadband). Since telecommunications is an ever-evolving arena, even DSL and copper lines are undergoing technological change and innovation, and eventually the older copper networks could be revamped to accommodate today's high-speed demands. However, the recent trend in wired broadband seems to be a move toward fiber-optic networks. For example, the city of Sandy's utility, SandyNet, began as a DSL network, but the city is expanding using wireless and fiber-optic networks and eventually plans to phase out the DSL services (see case study, page 25).



If a city decides to build a fiber-optic network, but feels no urgency and does not want to accrue much debt, a network can be developed in stages. Some cities have begun to utilize "joint trenching," where fiber conduits are installed when streets and sidewalks are excavated for water, sewer or street projects. The actual fiber-optic cable can be easily blown, pulled or pushed through installed conduits at a later time.

The city of Sandy recently installed fiber-optic cable in a new water line trench. The city has also used abandoned water lines as conduit for fiber-optic cables. Joint trenching is also an excellent practice even if a network is needed for sole use by the city (e.g. to connect facilities, enhance public safety communication, etc.). Examples of efficient joint-trenching practices are available on the Oregon Utility Notification Center's website (see Resources section, page 45).

In accordance with city development codes or specifications, cities such as Sherwood, require city-owned conduits to be trenched along with other infrastructure in a new development. Therefore, the equipment pieces needed for a broadband network are installed for future use by the city.

Portland's franchise agreements require telecommunications companies to install city-owned conduit while installing the providers' own conduit in the right-of-way. Over time, using this conduit and additional city resources, Portland was able to build a fiber network, IRNE (Integrated Regional Network Enterprise). This network connects many of the city's facilities and is interconnected to Comcast's Institutional Network, which reaches more than 270 regional public facilities throughout Multnomah County, including: the cities of Fairview, Gresham, Portland, Troutdale and Wood Village; Multnomah County; Tri-Met; Metro; schools; and libraries. The IRNE is not being used to provide commercial services.

Wireless Network

Wi-Fi wireless networks represent one of the more affordable options for providing broadband services. Wireless technologies are evolving and the speeds are increasing. A Wi-Fi network is not truly "wireless," however. A typical Wi-Fi network consists of several access points that are

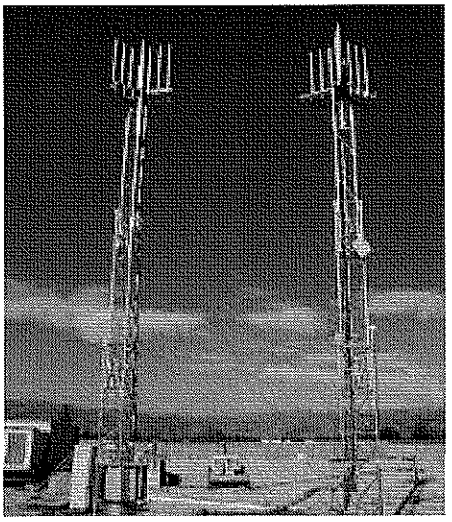
connected to a wireline backbone network. The number of access points needed to cover a city with Wi-Fi access depends on the size of the city and the topographical layout. With this type of network, the speeds can be slower depending the distance between the wireless access points and the fiber/cable connection.

When creating a for-fee wireless broadband utility, cities should conduct a site analysis. It is important to assess the best locations for wireless access points; confirm the wired infrastructure is available to support these access points; and verify the locations will provide competitive high-speed services throughout the city. Even if there is currently little or no competition for service within a city, there may be in the future. Taking the time to develop a utility that provides comparable services to the private providers may help the long-term viability of a utility.

If a city would like to provide free broadband to certain areas, Wi-Fi appears to be the best choice. The equipment is very affordable, and maintenance costs are manageable. The services are free, therefore the efficiency of the wired infrastructure and the placement of the wireless access points is not as crucial. For the city of Tigard, it cost $2,500 to establish a free, limited-area Wi-Fi network, and the ongoing expenses are minimal. Part of what made this project affordable was the strategic placement of access points at city facilities (e.g. city hall) or those of interested parties. By agreement, the city of Tigard mounts a wireless access point on the chamber of commerce building, which then provides free Wi-Fi to all users within the downtown business area (see case study, page 37).

WiMAX is a wireless technology that was released more than 10 years ago, but is currently increasing in popularity. WiMAX provides for a larger coverage area with fewer antennas and is being used to build nationwide 4G networks. WiMAX is even being offered by the wireless provider, CLEAR, in several locations in the Willamette Valley (Portland, Salem, Eugene). In some cases, WiMAX broadband speeds are faster than fiber-optic network services, however the full transmission capacity over a fiber-optic transmission is much greater than wireless. Because the cost of WiMAX equipment is still fairly high, WiMAX may not be a viable option for most cities.

WiMAX Antenna



Another 4G wireless standard that was recently released is Long Term Evolution (LTE). As with all "next generation" telecommunications technology, it boasts faster speeds than the previous generation. LTE is being deployed in Oregon by mobile wireless service providers such as AT&T Wireless and Verizon Wireless.

It is important to consider the advancement in technologies when making decisions regarding city broadband networks. If a city is considering a for-fee service, the utility may need to compete with WiMAX and LTE in the near future. As reported by the Oregon Broadband Advisory Council (2010), CLEAR is charging $25 for its mobile WiMAX wireless services. In comparison, the cost of cable modem services ranges from $27 to $80 per month.

Although watching and waiting may be costly when it comes to economic development, these newer technologies may also be beneficial to cities when the equipment costs decrease and WiMAX and LTE become a more affordable option for the provision of broadband services.

**Type of Broadband Provider**

*What type of broadband provider should a city become?*

Once the type of broadband network is selected, cities must determine the type of provider it will be and what services will be provided. Will broadband services be provided free to the public or to paying customers? This decision will affect the answers to subsequent questions based on whether a city needs to generate money to support a for-fee service, or if the city is providing a general service to residents, such as parks and libraries.

Broadband is a general term for high-speed telecommunications networks. Once a building or area is connected to a broadband network, there are other services that can be provided. Within the realm of broadband, there are many players and therefore many roles cities can play as a broadband provider.

Middle Mile Provider (For-Fee Service)

If a city owns and manages a broadband network, it can be a middle mile provider, building the network and leasing network facilities to other entities that provide services directly to the end user (customers).* The intergovernmental broadband network QLife (The Dalles) is an example of a middle mile provider (see case study, page 33).

The "middle mile" choice protects a city from the fiercest part of competition, which is the direct service to the customer. It also helps keep costs down since the city does not need to provide customer service to individual users, only technical support to those leasing space from the network.

Last Mile Provider (For-Fee Service)

In addition, a few Oregon cities are last mile providers, whereby a city utility provides services directly to its customers.* Ashland Fiber Network and MINET (Monmouth-Independence Network) both provide "triple-play" services (voice, video and data) to their local residents (see MINET case study, page 31).

Sandy, which has both DSL and wireless networks, is an Internet service provider, but does not offer voice or video (see case study, page 25). Cascade Locks started a cable utility in 1970 due to a lack of available services, and now also provides data but no voice services.

A utility can choose to be a middle mile provider, last mile provider, or some combination of the two. Sherwood Broadband operates primarily as a middle mile provider. However, in some cases it does lease fiber directly to large businesses. Conversely, Ashland Fiber Network functions mostly as a last mile provider, with a small share of its business related to middle mile network services.

** Note: "Middle mile" and "last mile" provider can have different meanings within the telecom industry.*

It is recommended that cities consult their attorney while considering the type of provider a city will become. There are many legal requirements within the telecommunications business, which may differ depending on the type of provider. For more discussion of the potential legal issues regarding municipal broadband, refer to page 21.

**Available Infrastructure**

*What infrastructure assets does a city already own that can be used to support a broadband network?*

One effective cost-saving strategy for cities is to inventory assets that are already available, such as street lights, utility poles, buildings, conduits, etc. City-owned assets are easier and more affordable to access, however arrangements can be made to utilize other public and private sector infrastructure.

City Wired Network

Does a city have any broadband networks connecting its facilities? If so, is the network sufficient enough to provide broadband services at today's fast speeds, or are there ways to affordably upgrade the network? Ashland expanded a 12-mile fiber loop in order to build the complete Ashland Fiber Network. A wired city network could also be used to support a limited-area Wi-Fi network.

Portland's franchise agreements require telecommunications companies to install city-owned conduit while installing the providers' own conduit in the right-of-way. Over time, using this conduit and additional city resources, Portland was able to build a fiber network, IRNE (Integrated Regional Network Enterprise). This network connects many of the city's facilities and is interconnected to Comcast's Institutional Network, which reaches more than 270 regional public facilities throughout Multnomah County, including the following: the cities of Fairview, Gresham, Portland, Troutdale and Wood Village; Multnomah County; Tri-Met; Metro; schools; and libraries. The IRNE is not being used to provide commercial services.

Other Governmental Networks

Do any other governmental entities have their own network? If so, can such a network be utilized in the provision of the city's broadband services in *exchange* for free or discounted services?

Through an intergovernmental agreement, the Lebanon Community School District joined Lebanon's public/private partnership wireless network. The city combined its fiber and wireless infrastructure with the school district's fiber network. This provided the city with more fiber bandwidth for wireless services, and the school district is able to provide wireless services to all school facilities (see case study, page 35).

Private Network

Are there businesses or hospitals in town which have private wired networks connecting facilities? If so, can these private networks be utilized in exchange for free or discounted services?

Though the negotiations can be difficult, some cities have successfully negotiated agreements to lease bandwidth from local phone and cable company networks. If private infrastructure is vital to the delivery of broadband services, cities should consult with private providers before investing in a broadband project.

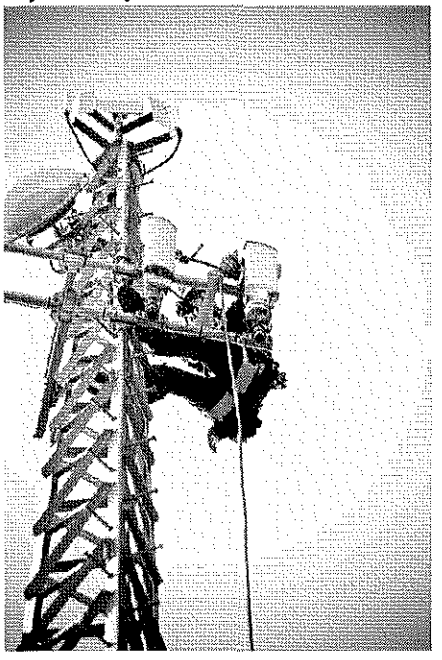
Long Haul Carriers

Are there "long-haul carrier" telecommunications providers that have fiber-optic cable running through a city, but do not provide services to the city? If so, can bandwidth be leased from the carrier's network? Because a long-haul carrier has infrastructure that is not used to provide local services and therefore is not generating revenue, this could be a mutually-beneficial arrangement for both parties. In some cases, the carrier may actually be paying a city franchise fee for the use of the right-of-way. More information on right-of-way franchises is available in the League of Oregon Cities' Telecommunications Tool Kit (see Resources section, page 45).

Street Lights and Utility Poles

Do cities own street lights or other utility poles that can be used to mount wireless access points across the city? Sandy owns most of the city street lights, which offers many site options for wireless access points (see case study, page 25).

City of Sandy



Some cities have successfully negotiated arrangements to mount wireless access points on private electric utility poles. Again, negotiations with private utilities can be difficult, so cities should talk with the local electric provider to see if an arrangement is feasible before moving forward with a broadband project.

Buildings and Towers

Are there city facilities, water towers or other facilities near the targeted area that could be used to install wireless access points? If a city is providing complimentary services, it may be best to minimize the up-front and ongoing costs. Cities could also use the building or tower of another entity under an agreement that is beneficial to both parties.

As mentioned earlier, the city of Tigard mounted wireless access points on city hall and parks facilities. The city also mounted an access point on the chamber of commerce building, which provides free Wi-Fi to all users within the downtown business area (see case study, page 37).

Other City Resources

As a city moves forward with a broadband project, it is important to consider all resources available to the city and assess how these resources can be used to support a new broadband service. For example, is there IT equipment that can be used to support or back up the

City of Ashland

broadband service equipment? Can electric utility bucket trucks be used to repair wireless access points? Creativity and ingenuity are crucial to the successful provision of public services.

**Funding Options**

*How will a city pay for a municipal broadband network?*

The financial resources needed to develop a broadband network depend on the size and type of network. The cities that built smaller networks did so with little or no debt, and ongoing costs are minimal. The city of Tigard spent $2,500 for the equipment needed to start up its free, limited area Wi-Fi network, and the ongoing cost is only about $145 per month (see case study, page 37).

The cities that have deployed fiber-optic loops and/or fiber-to-the-premise networks were able to fund these projects using various revenue sources. For more details on the costs for this type of project, see the case studies on page 23.

Loans and Other Debt

Many of the cities providing broadband services incurred debt in order to fund the project. Even if the utility does accrue debt, effective financial planning and an efficient business model can make the debt manageable. However, debt may also bring public scrutiny upon a newly-formed broadband utility.

MINET (an intergovernmental utility between the cities of Monmouth and Independence) obtained several smaller loans at the beginning of the project and then additional loans as funding was needed for expansion. However, in hindsight a better financial option would have been to acquire one larger loan and return any unused funds. Fortunately, the two cities were able to refinance MINET's debt with a full faith and credit bond. Currently MINET is facing an annual shortfall of about $600,000, but revenues are increasing; MINET projects it will be in the black within two years (see case study, page 31).

Grant Funding

Several cities have also used grants to help fund their broadband projects. The Oregon Business Development Department (OBDD) website contains information regarding state and federal grant funding for broadband projects. Even though grant funding through OBDD has not increased in recent years, some projects may be eligible for funding through the Special Public Works Fund.

Federal broadband grants were awarded through the American Recovery and Reinvestment Act. As reported by the Oregon Broadband Advisory Council (2010), more than $52 million was extended to Oregon-based broadband projects. See page 25 for more information on the city of Sandy and the other Oregon local government broadband projects that received ARRA funding. More federal funding is expected since broadband expansion is a federal priority.

General Fund Support

For most municipal broadband utilities, general fund revenues are not used to support broadband services. Instead, cities rely on subscriber revenue. In order to quell some public concern over the financing of a public broadband utility, the city of The Dalles and Wasco County promised there would be no ongoing general fund support (see case study, page 33).

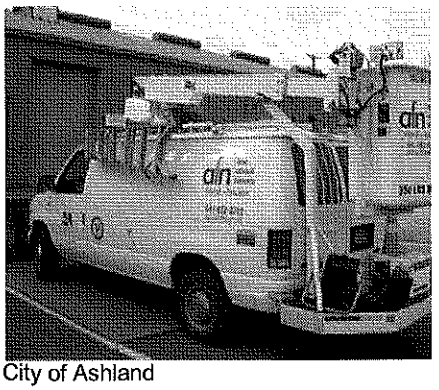
Some municipal broadband projects did receive initial funding from the city general fund, and a few received general fund loans for smaller expansion projects. For example, Sherwood Broadband has received two general fund transfers, but the utility will repay these loans along with any other debt.

The discussion on financing should extend beyond the initial cost of building a network. Long-range financial planning is essential in order to ensure the viability of a municipal broadband service.

**Maintenance & Operations**

*How will a city maintain and manage its broadband service?*

Providing broadband services is more than just building the infrastructure or purchasing equipment. Cities must plan for the resources needed to maintain and manage broadband networks and services. This also applies to cities only providing a limited area Wi-Fi service.


City of Ashland

For the broadband cities in Oregon, administrative options for maintenance and operations include the use of in-house staff and volunteers, contracted services, or a combination of the two.

City Staff & Volunteers

If a city would like to handle maintenance and operations in-house, the level of service provided may dictate how much staff time is needed. Some of the municipal broadband networks have city staff assigned to the utility. Sherwood Broadband has two primary staff and two support staff. All these employees have other duties in the city's information technology department, but part of their work responsibility includes the maintenance of the Sherwood Broadband network. Time spent on Sherwood Broadband by these four staff members is equivalent to a half-time employee.

If cities are only providing a free Wi-Fi service, it is best if there is already staff available who have the time and skill to maintain the equipment. It is not cost-effective to hire new staff to maintain a free service. A city could also consider a contract for the provision of Wi-Fi services to the public (see Contract Services/Equipment section below).

Another cost-saving option is to use volunteers. A councilor in Yachats who was helping the city install a weather station at the treatment plant also suggested the city use this new infrastructure to provide free Wi-Fi services downtown. The councilor is now in charge of network maintenance, which requires minimal time. There may be other volunteer partnership opportunities such as students in need of work experience or business owners hoping to reach out to the community.

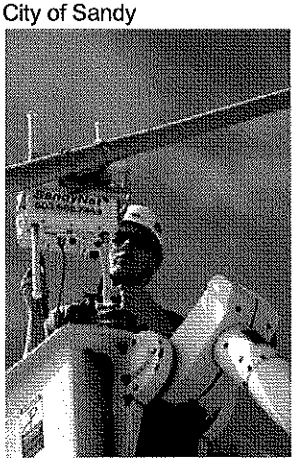
It is important to note that current staff may have expertise in one area needed for the provision of broadband services, but not in another. For example, the information technology department can manage the servers and other IT equipment, but may not be able to handle the electrical work needed to repair a wireless access point.

Contract Services/Equipment

Several cities utilize contract services as a cost-effective method of providing broadband services. QLife is an intergovernmental utility that has no direct QLife employees. All of the work is contracted out, including the management of the utility by The Dalles' city manager (see case study, page 33).

Coos Bay chose to contract with a local telecom company for the provision of free Wi-Fi services to several locations around the city, including the downtown area and the library. The monthly cost of the service contract is affordable, although the city did have to purchase the needed start-up equipment (see case study, page 38).

City of Sandy



The city of Sandy has two general information technology staff members who provide network support to SandyNet. However, for the Wi-Fi services, the city leases its Wi-Fi equipment and is not responsible for equipment maintenance or repair. At the end of the lease the city can either purchase the equipment or upgrade to new equipment under a new lease (see case study, page 25).

As previously mentioned, Sherwood has four staff members supporting Sherwood Broadband which is the equivalent of a half-time employee. In addition, the city has a contract with an on-call network contractor who can respond to outages or other network issues that arise when city staff are not available (see case study, page 27).

**Staying Competitive**

*If a city builds a state-of-the-art network now, can the city stay competitive in the future?*

Competition requires multiple providers to offer more services at a lower price. If a city chooses to provide broadband services, its services must compete with other providers, including mega-corporations of the telecommunications industry.

Telecommunications is a rapidly changing industry, where private providers have the benefit of being "for-profit." When major upgrades are needed to stay competitive, private providers have

more financial resources available and have access to newer technologies such as LTE. Private providers can target service areas they know are profitable, whereas the role of a city is not to make a profit, but to provide essential services to the community in the most cost-effective manner. Creating more broadband service competition can be a community benefit, but if a city cannot continue to compete with private sector services or prices, it may be difficult for the broadband utility to thrive.

The city of Cascade Locks has been running a cable utility since 1970. As satellite TV began to penetrate the market, the city began losing cable customers. The city made some upgrades to the network and then introduced its data service, which has helped customer retention. At that time, the city's broadband network was the premier service in town. Currently, some of the private providers have surpassed the city's service levels and the city is not in the financial position to make additional upgrades.

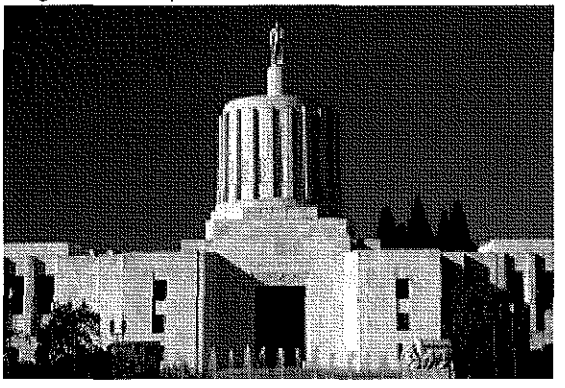
Furthermore, while city broadband services are subject to laws affecting private telecom and cable providers, cities are subject to additional laws as a governmental entity. This could put cities at a competitive disadvantage. For example, the voters in Cascade Locks approved a charter amendment requiring voter approval for city fee increases. The city's cable and data service rates are included in this requirement. As cable programming prices increase, the city is not able to increase its cable rates without voter approval and now loses more than $2 per HBO account. Fortunately, Cascade Locks' utility is well established, has no debt, and is not facing a fiercely competitive market. Even though the city is seeing a decline in revenues, the broadband service it provides is more affordable than most other providers and therefore is seen as a valued service to many citizens.

**Political Opposition**

Cities moving forward with a municipal broadband network could face political opposition from private providers. The goal of the opposition is to prevent and/or abolish city broadband utilities, and its efforts range from the threat of counter action to actual legislative and legal efforts. The Community Broadband Networks website provides information on state preemptions as well as opposition to specific municipal broadband networks (see Resources section, page 45).

Local Preemption

Oregon State Capitol



At the federal level, telecommunications industry lobbyists and politicians have made efforts to pass legislation that would prohibit local government authority to provide broadband services. While these efforts have not been successful, several states have passed preemptions on local government broadband services.

Currently in Oregon there are no state preemptions on municipal broadband services. However, there have been unsuccessful legislative efforts to prohibit or limit local government authority. Authorities in telecommunications law and politics

warn local governments that similar attempts could be made in the future. Cities that are considering a municipal broadband service, or that currently have one, should closely monitor both federal and state legislative efforts.

Local Opposition

In 2001, The Dalles and its broadband partners experienced political opposition as the QLife network proposal developed. Originally, the partnership was going to include the city, county, the port and the local People's Utility District (PUD). As the partnership progressed, the local telecom provider launched a campaign against the proposed broadband network and a lawsuit was filed against the PUD. Eventually the port and the PUD bowed out of the partnership; however, the city and the county moved forward. In response to the negative campaign launched against the proposed broadband network, the city and county changed the model and promised no ongoing public subsidies would be paid to the network.

As reported on the Community Broadband Networks website, other cities around the country have faced similar opposition to their municipal broadband networks. Recently, two cities in Minnesota, Silver Bay and Two Harbors, received letters from the local telecom provider stating that the company disagreed with a claim made in the city intergovernmental agreement. The company asserted that the agreement claimed the municipal broadband network was necessary because there were no other broadband providers in the area. The letter noted that this false claim was a legal liability to the revenue bonds and other funding the cities had received. In actuality, the telecom provider had not read the final revision of the agreement, and furthermore any claim that there were no other providers was not a condition of the funding sources. However, misinformation can be politically damaging when working with a constituency that may be cautious about a public broadband network.

## Legal Authority, Restrictions & Requirements

If a city chooses to pursue a municipal broadband network, several legal issues must be considered. Due to the unique nature of telecommunications, the following information is not a complete list of legal issues and cities should consult their attorney when pursuing a municipal broadband project.

### Authority & Local Restrictions

Oregon is a home rule state, giving cities broad authority to act according to the language in their charters, unless federal or state law preempts local authority. Currently there are no laws restricting the ability of cities to provide broadband services in Oregon. However, there have been efforts at both the state and federal levels to restrict this authority.

Most Oregon cities have adopted home rule charters with "broad" powers that would allow the city to provide broadband services as long as there is no specific restriction in the charter. To confirm a city's authority to provide broadband, a city must first have its charter reviewed by legal counsel.

In addition to city charters, there may be other local restrictions affecting the ability of cities to create broadband networks. Therefore, it is important for cities to take inventory of any additional local restrictions such as pole attachment agreements, franchise agreements, bond restrictions, ordinances, resolutions and/or contracts. These restrictions could be implicit or explicit, and these documents should be reviewed by legal counsel.

Charters, ordinances and other legal documents could also limit how cities operate and manage their broadband services. For example, if a city's charter contains a voter approval provision for any utility rate increase, a city should analyze the impact of this type of charter provision on the broadband services that the city may provide.

Despite the fact that most Oregon cities retain authority to provide municipal broadband services, there are, of course, other legal issues that a city should keep in mind when considering a municipal broadband network.

**The Communications Assistance for Law Enforcement Act**

The Communications Assistance for Law Enforcement Act (CALEA) requires telecommunications carriers and equipment manufacturers to modify and design equipment, facilities and services to ensure that built-in surveillance capabilities allow law enforcement and federal agencies to monitor all telephone, Internet (including emails) and VoIP traffic in real-time.

CALEA became effective in 1995, thus new commercial systems that a city might purchase should be CALEA compliant. A city providing broadband services will need to make sure that it complies with any other CALEA requirements. A city could contract with a third party that provides data to law enforcement agencies in the required format.

The Federal Communications Commission (FCC) has interpreted CALEA to include broadband providers not offering voice services. Thus, an Internet-only provider would be subject to CALEA. The CALEA requirements may shape the decisions a city makes in regards to broadband services, so for more information on CALEA see the Resources section on page 45.

**Risk Management**

The different business models demonstrated in this report may subject cities to a broad range of liabilities (see page 10 for more information on the different types of service models). Therefore, it is appropriate to consider not only the cost benefits of the different service models, but also the potential risks. Furthermore, grant or loan funding could also result in various financial and legal requirements which a city is then obligated to fulfill.

Another risk management consideration could be related to the type of services that a city provides. For example, if a city provides free Wi-Fi, it may want to adopt terms of use and privacy policies. These policies should establish that a city is not responsible for issues related to lost data or interrupted service. Additionally, city policies should establish that free Wi-Fi may only be used for legal, personal activities and are not for resale to another party. These types of policies can prevent claims against cities or be used to defend cities should such claims

arise. However, such a policy could have free speech implications, so legal consultation is recommended.

## Oregon Municipal Broadband – Case Studies

In today's digital society, high-speed broadband services are vital to local economic development and are in high demand with the general public and business community. The main purpose of a city is to provide essential services to a community. Due to insufficient services provided by private utilities, some cities have classified broadband as "essential" and have chosen to add broadband to the list of city services.

The following section examines several Oregon cities that provide broadband services. These case studies highlight the various roles and business models discussed in this report. They focus on cities that have led the way in municipal broadband; however, cities must still consider all of the policy and legal questions and determine what role they should play in the provision of broadband services.

This report only provides a general overview for the following Oregon municipal broadband networks and services. Additional information on any of the case study cities can be obtained by contacting the League of Oregon Cities.

**City Utilities**

- City of Sandy: city-owned broadband network (DSL, Wi-Fi, and fiber) (page 25)
- City of Sherwood: city-owned fiber-optic broadband network (page 27)
- City of Cottage Grove: city-owned fiber-optic network; public/private partnership for free and for-fee wireless services (page 29)

**Intergovernmental Partnerships**

- Cities of Monmouth & Independence: partnership for a fiber-optic broadband network (page 31)
- City of The Dalles: partnership for a fiber-optic broadband network (page 33)

**Public/Private Partnerships**

- City of Lebanon & Peak Internet: Partnership for free and for-fee wireless services (page 35)
- See Also: city of Cottage Grove (under city utilities - page 29)

**Free City Wi-Fi Services**

- City of Tigard: city provides free Wi-Fi at certain city facilities and parks (page 37)
- City of Coos Bay: city contracts with private provider for free Wi-Fi at certain locations (page 38)
- Other City Wi-Fi Networks (page 38)

**Other Broadband Projects**

- Other Local Government Networks (page 39)

## City of Sandy

| City Broadband Services |
| --- |
| **Network Type:** DSL, Wireless & Fiber Networks |
| **Service Type:** Internet Service Provider |
| **City Role:** City Broadband Utility |
| **Coverage:** Citywide |
| **Start Date:** 2003 |

### Needs Assessment & Planning

In 2001, the only Internet option for the city of Sandy was dial-up, even though the need and desire for faster services existed.

The city decided to take the initiative in solving its broadband issues by hiring a consultant to analyze the options for a city broadband utility. The consultant recommended a digital subscriber line (DSL) network as a simple, cost-effective method to deploy high-speed Internet services. Despite the fact that DSL has historically been a slower service than cable modem Internet, the belief was that these speeds would be a substantial improvement over dial-up Internet, and sufficient for local residents and small/home-based businesses. As plans moved forward, the public perception of a municipal broadband utility was very positive.

### Implementation & Administration

Later in 2001, the city council approved an ordinance establishing SandyNet, a municipal broadband utility which operates under its own enterprise fund. Despite having the option to provide voice, video and data, Sandy chose to only provide data services to its customers.

The city council also created a SandyNet Advisory Board to assist the city on decisions regarding broadband services. This board is appointed by the council and consists of members of the public, including some local business owners.

It only cost the city $150,000 to activate the major parts of the city with DSL services. Although the technology is fairly simple, the city found it difficult to coordinate with the local phone company regarding the city's use of the private network. The company was legally bound to respond, but there were no requirements on compliance deadlines.

At that time, DSL was an effective and affordable method for bringing high-speed Internet services to the city of Sandy. The utility's business model is to expand the network when a demand is demonstrated and there is subscriber revenue available to fund the expansion. This successful business model resulted in SandyNet being debt free within six years, and the utility continues to be financially stable. There are no ongoing general fund contributions to the SandyNet enterprise fund.

Even though DSL was the initial service provided by SandyNet, most of the network's recent expansions have been made using Wi-Fi technology. Wi-Fi is affordable to deploy and can provide faster speeds than other wired broadband services, including DSL. Currently, the city's Wi-Fi download speeds are approximately 10 megabits per second (Mbps), which is comparable to cable Internet speeds.

The topographic layout of Sandy makes it difficult to deploy Wi-Fi citywide, so DSL is still available through SandyNet. The city hopes that in the next few years Wi-Fi technology will advance, allowing Wi-Fi coverage for all areas and a full phase out of the DSL service.

SandyNet has laid fiber within the main business core and is currently studying the feasibility of expanding a fiber network to new subdivisions.

In order to provide the "middle mile" connection to the Internet, the city leases space on the local cable provider's fiber network. In the future, this connection will be provided through a federally-funded county fiber-ring (See Clackamas County case study on page 39).

The city leases the Wi-Fi equipment. At the end of the lease the city either owns the equipment or can acquire the latest devices through a new lease. Under the lease, the city is not responsible for the maintenance, repair or replacement of the equipment. The city has found this to be a cost-effective approach to equipment management. Most of the Wi-Fi access points are mounted on city-owned street lights, with a few located on roof tops and towers.

For utility operations, there are no staff members exclusively designated to SandyNet. Two staff members provide support to SandyNet, but they also serve as the city's general information technology (IT) department.

**Results & Benefits**

In the last few years, cable modem Internet was introduced to Sandy residents, however many customers are still satisfied with the Wi-Fi and DSL services provided by the city. SandyNet's rates are $19.95 per month for residential services of 10 Mbps download speeds, and $175 per month for commercial fiber services with speeds up to 80 Mbps. There are approximately 600 SandyNet customers, equal to 20 percent of the local market.

SandyNet has been a successful economic development tool for the city. Its services support a local business which writes technical manuals for corporate aircraft. This business needs to upload and download large documents, and the city's fiber-optic services have met this need.

Furthermore, the city expanded its network outside of the city and up to the Resort at the Mountain. This expansion allowed the resort to recruit more high-tech conferences. The success of the resort means more jobs for Sandy-area residents and more tourists visiting Sandy stores and restaurants.

The city initially created SandyNet to bring higher speed Internet services to residents and businesses, however the city has also found many cost-effective uses for government business. The city uses the Wi-Fi network for police department e-ticketing, security cameras at city parks, and "smart" water meter reading. With the SandyNet fiber connecting all city facilities, the city was able to switch to VoIP telephone services, saving approximately $1,500 per month.

Since SandyNet began, the city council has been faced with many decisions about the future direction of the utility. The city always uses these opportunities to evaluate the utility and the services it provides. The city of Sandy received a $750,000 United States Department of Agriculture (USDA) stimulus grant to expand wireless Internet to the rural areas surrounding the city. To this day, the public perception of SandyNet is still very positive, and the community is supportive of the city's efforts to expand its Wi-Fi and fiber network.

## City of Sherwood

**City Broadband Services**

**Network Type:** City-Owned Fiber Network (Limited Area Wireless Network)

**Service Type:** Middle/Last Mile Provider (Wi-Fi Services)

**City Role:** City Broadband Utility

**Coverage:** City of Sherwood & Neighboring City

**Start Date:** 2005

### Needs Assessment & Planning

In 2000, Sherwood was experiencing rapid growth, mostly through residential development. The only broadband service provided was the phone company's DSL service, which at the time met the need of most residential users, but was not ideal for business recruitment. By 2001, the city of Sherwood decided it needed to develop a fiber-optic broadband network in order to facilitate more business growth. After extensive discussion and the completion of feasibility studies, the city council, acting as the urban renewal agency board, approved a resolution authorizing $300,000 to create the city utility Sherwood Broadband.

### Implementation & Administration

Of the initial $300,000 expenditure, $250,000 was used to connect Sherwood to a large fiber network in downtown Portland. The remaining $50,000 was spent on capital equipment.

In 2004, Sherwood began laying fiber all around the city. Since the primary focus of the project was business development, the city started construction in the downtown area, and this portion of the project was funded by the urban renewal district. The city then continued the expansion, bringing fiber-to-the-premise citywide. In 2005, the city decided to expand the network outside of city boundaries into the neighboring city of Newberg. This decision to expand the network paid off, and several of the utility's biggest customers are currently located in Newberg.

Sherwood Broadband is generally a "middle mile" provider, meaning the utility owns and manages the network but leases network space to other vendors, who in turn provide services directly to the customer. A few larger companies lease fiber for their own use.

In order to fund the construction and expansion of the Sherwood Broadband Network, the city accrued approximately $1.25 million in debt. Sherwood Broadband is revenue positive, and the city has a plan to repay this financial obligation. To help keep operational costs down and eliminate the need for additional debt, the current business plan is for no further expansions of the network outside of the city, to expand only with new development, and to maintain the existing network. However, the city can deviate from this business model with city council approval.

For operations and administration, the city of Sherwood has four employees in the information technology department whose job descriptions include assistance to Sherwood Broadband. The staff time spent maintaining Sherwood Broadband equates to approximately one half-time employee. In the case of outages, which only occur a few times a year, if at all, one of the city staff responds to the incident. If city staff is not available, an on-call network contractor responds. If there are no outages or major network repairs needed, ongoing maintenance of the broadband utility is approximately $50,000 to $60,000 per year.

Around the same time Sherwood Broadband launched its network, the local cable company decided to deploy their broadband service. Because the city is not providing services directly to the customer, there is no direct competition between the city and the cable company. However, there is now one more service option for local businesses and residents.

**Results & Benefits**

Just when the broadband utility had hit full momentum, the current economic recession set in and at least one prospective business that was considering locating to Sherwood put their expansion plans on hold. However, the city is still confident that as the economy recovers, Sherwood Broadband will play a vital role in the city's economic development efforts.

Having a city-owned broadband network has also allowed Sherwood to provide other benefits to the community. For instance, all the school facilities are now connected to Sherwood Broadband. The school district covered a small portion of the expenses needed to connect all the schools, and there is now an improved communication network between school facilities.

In addition, Sherwood's broadband network allows the city to provide free Wi-Fi services at 10 locations around the city. Because the city owns the wired network and does not need to lease network space from a private provider, the cost to provide these free Wi-Fi services is minimal. The Wi-Fi hotspots are located in areas such as downtown (on city facilities such as city hall), the YMCA, senior center, a major park, the public works facility, and the police department. The city is hoping to eventually provide free Wi-Fi at all the city parks.

Negative public feedback was minimal when the utility was first being discussed. The public is still satisfied with the benefits Sherwood Broadband has provided to the community, including more competition, leading to a better choice of services at a more affordable price. Sherwood Broadband is considered an essential service to the community, just like any other service or infrastructure. With the utility in a sound financial position and the adoption of a conservative business plan, Sherwood Broadband should continue to be successful, and the community will continue to see the rewards.

## City of Cottage Grove

**City Broadband Services**

**Network Type:** Fiber Network; Wireless Network

**Service Type:** Fiber services to key institutions; Public Wi-Fi services.

**City Role:** City manages the fiber-optic network; Partnership with an ISP to provide free and subscription Wi-Fi services.

**Coverage:** 1 fiber loop and 80% Wi-Fi coverage in Cottage Grove; 1 fiber loop in Creswell.

**Start Date:** 2008

### Needs Assessment & Planning

In 2005, there was no cable Internet service and limited DSL services within the city of Cottage Grove, which left the schools and other key stakeholders with few options for a vital service.

The Cottage Grove City Council set a goal to connect local schools to a high-speed fiber network. Since the private providers had no interest in offering this service, the city considered a municipal broadband network.

### Implementation & Administration

The city leased two strands of fiber-optic cable from the Regional Fiber Consortium, an ORS 190 organization which includes cities, counties and other public entities. The city's fiber backbone starts in Eugene, runs through Creswell and ends in Cottage Grove. To connect schools, city hall, and other government agencies, the city built a complete fiber loop and a second fiber line (partial loop) in Cottage Grove. The city also built a fiber line (partial loop) in nearby Creswell, which connects key institutions such as schools and city hall.

The cost to construct this broadband network was approximately $2.5 million. The South Lane School District and the Lane Education Service District made a combined contribution of $300,000. At that time, the ruling in *Qwest Corp. v. City of Portland* was being appealed and the city was saving its Qwest franchise fees and settlement payments in case a subsequent ruling required the city to return the funds. When the decision was finalized, the city had roughly $700,000 to help fund the broadband project. Additional funds were secured through a bank loan. To prevent future debt, the city plans to expand the network and related services only when the funds are available.

As the fiber-optic network was launched, it became clear to the city that there was a need and demand for residential broadband services. However, the newly-built fiber-optic loop did not bring fiber-to-the-premise, so the city decided to utilize Wi-Fi as an affordable means to cover the city with faster services.

The city entered into a $500,000 lease/purchase agreement for more than 100 radios, and has placed most of them in locations that cover 80 percent of the city. In partnership with the local Internet service provider OIP Earthclick, the city is providing free and subscription Wi-Fi services. The city purchases the equipment while OIP handles the maintenance and customer service. The city has several Wi-Fi service tiers, starting with 10 hours of free Internet at 128 Kilobits per second (Kbps) upload and download speeds. The top service tier is $50 for unlimited time and unlimited speed (over 7 Mbps). Currently the city has 800 subscribers, including 250 paying customers.

**Results & Benefits**

Through this broadband project, the city of Cottage Grove met its goal of connecting all area schools to high-speed broadband services. Before the South Lane School District (SLSD) was connected to the city's fiber network, the district was using a 10 Mbps network connection to conduct business with the Lane Education Service District (ESD) in Eugene. With the city's network, SLSD is currently utilizing a 1 gigabit per second (1,000 Mbps) connection to the ESD. The nine schools within SLSD are connected through a 1.5 Mbps, district use-only network. Six of the school facilities are even benefiting from 1 Gbps connection speeds between schools. The schools are also able to have direct phone access to each classroom, a significant benefit to classroom safety. The affordability and efficient connectivity of the city's fiber network has provided a needed benefit to the local school district.

Schools and residents in the city of Creswell are also benefiting from the fiber network built by Cottage Grove. The school facilities in Creswell, including the district office, middle school and high school, are also connected to Lane ESD with faster speeds. Furthermore, the city of Cottage Grove was able to lease dark fiber and rack space to the local incumbent telecommunications provider in Creswell. This arrangement will hopefully bring more opportunities for faster, affordable telecommunications services to Creswell citywide.

The city plans to install a third broadband fiber loop in Cottage Grove which would pass by several major businesses, as well as extend the network out to the hospital and wastewater treatment facility. One local business, which primarily conducts sales by phone and the Internet, is very interested in this third loop which would connect two of the business's local facilities.

The demand for Wi-Fi services also illustrates a need for residential broadband services. Though the city's Wi-Fi services cover most of the city, many of the residents that are not currently in the city's coverage area are eager to see the city expand this service.

As funds become available, the city is hoping to expand the fiber-optic network and Wi-Fi services. However, the city also hopes that other Internet service providers will lease space off of the fiber network, thereby creating more service options for local residents and providing revenue sources for the city broadband network.

## Cities of Monmouth and Independence

**City Broadband Services**

**Network Type:** Intergovernmental Fiber Network

**Service Type:** "Triple-Play" voice, video & data

**City Role:** Intergovernmental Partners

**Coverage:** Citywide (both cities)

**Start Date:** 2006

### Needs Assessment & Planning

In 1999, the cities of Monmouth and Independence asked their local cable company when high-speed Internet would be introduced to the cities. The cities were told services would be available no sooner than 2020. With the new millennium approaching, both cities realized that to be economically viable, high-speed Internet services were desperately needed.

Accordingly, the two cities conducted a feasibility study regarding an intergovernmental broadband network. This study also included a public survey, which showed that the citizens of Monmouth and Independence were receptive to the idea of a municipal broadband utility. Furthermore, a major client was eager to receive better telecommunications services, Western Oregon University. These and other factors illustrated to the two city councils that a municipal broadband utility was a viable and necessary project.

### Implementation & Administration

In 2002, MINET (Monmouth-Independence Network) was created and in 2004 the two cities approved an ORS 190 intergovernmental agreement, establishing that MINET would be governed by a six-member board of directors, including the city manager, a councilor and a citizen from each city. MINET is now a licensed Competitive Local Exchange Carrier (CLEC) under the Oregon Public Utilities Commission (PUC) and can operate statewide. However, the network is currently operating only within the Monmouth/Independence city limits.

The first phase of the project was to build the primary fiber loops in Monmouth and Independence. Phase two, full fiber-to-the premise in both cities, was completed in 2006. MINET began providing broadband services to customers later that year.

The cost for phase one (primary loops within both cities), was approximately $1.45 million. From 2005 to 2008, MINET took out an additional loan of $27 million for the fiber-to-the-premise expansion.

MINET obtained several smaller loans at the beginning of the project and then additional loans as funding was needed for expansion. However, in hindsight a better financial option would have been to acquire one larger loan and return any unused funds. Fortunately, the two cities were able to refinance $17 million of MINET's debt with a full faith and credit bond. Currently MINET is facing an annual shortfall of about $600,000, but with each passing year the utility sees increasing revenues. MINET projects it will be in the black within two years. Since MINET has already brought fiber-to-the-premise throughout both cities, the only network expansion that is expected is for new development, which is considerably less expensive to install than in developed areas.

MINET spends little revenue on marketing, though it actively promotes services through advertisements on the MINET video service, the local newspaper and city utility billing flyers. Occasionally the utility does embark on a door-to-door campaign. Despite the nominal revenue spent on marketing, the utility's subscriber revenue has been growing at a healthy pace over the last three years. MINET holds a 46 percent penetration rate in the local market, and expects it to rise to 60 percent by 2014.

The utility's Internet services run from download speeds of 5 megabits per second (Mbps) to 100 Mbps. The basic Internet package price to a residential user is $30 per month and offers 5 Mbps download and 1.5 Mbps uploads speeds. MINET monitors network traffic and service speeds to ensure that customers receive the advertised speeds. In comparison, Qwest's DSL services run $40 a month for up to 7 Mbps download and 768 kilobits per second (Kbps) upload, though services could be slower depending on location and customer traffic.

MINET's basic "triple-play" package (voice, video and data) costs $94 per month and includes the basic Internet package, 100 video channels, and basic telephone services (e.g. local and long-distance calls).

**Results & Benefits**

The goals of the MINET utility are:
1) To provide affordable, state-of-the-art broadband services;
2) To be an economic development partner and help recruit businesses by offering creative, customized service solutions; and
3) To be financially stable, with debt service and operation costs being paid exclusively from subscriber revenue.

Among the major successes for MINET has been the utility's ability to provide excellent service with a small staff due to a network of highly automated systems for network management and billing. MINET works diligently to ensure that they provide cutting-edge services at competitive speeds and prices.

MINET has also been successful as a partner with businesses. Western Oregon University has been very pleased with the cost and level of services it receives through MINET. This service has also made Monmouth and Independence an attractive location for telecommuters. MINET also showed its ingenuity in business service solutions by creating a state-of-the-art, redundant broadband service package for the new Independence City Hall that is both highly efficient and cost effective for the city.

Finally, the utility is on the right track for financial stability. With subscriber revenue climbing at a healthy pace, the utility projects to be in the black within two years. MINET does not envision any regular general fund contributions from either city.

As an intergovernmental utility, MINET is an important public service to the community. It provides support to the local PEG channel and gives free advertising space to local businesses within the utility's billing notices. It also helps local businesses create TV advertisements, which run on the MINET video service. The utility has exceeded the expectations of the two cities and will continue to be a vital service provided by the partnership of Monmouth and Independence.

## City of The Dalles

**City Broadband Services**

**Network Type:** Fiber Network

**Service Type:** Middle Mile Provider

**City Role:** Intergovernmental Partner with Wasco County

**Coverage:** 17-mile loop around most of the city

**Start Date:** 2004

### Needs Assessment & Planning

In 2001, The Dalles was in need of affordable high-speed broadband services. The local provider told the city it would be 5 to 10 years before broadband services would be available within city limits. During this time, a business that was considering locating to The Dalles decided to locate in another city because of the affordability and speed of available broadband services.

Meanwhile, local schools and the community college were also in need of more broadband service options. The Dalles needed urban broadband services at urban prices, and they needed it right away. In an effort to meet these needs, a partnership was formed between the city of The Dalles, Wasco County, the port of The Dalles and the local People's Utility District (PUD). The goal was to create a broadband network to provide affordable, high-speed broadband services to local agencies (such as schools, colleges and the regional hospital) and to recruit businesses.

As the partnership progressed, a local telecom provider launched a campaign against the proposed broadband network. After a lawsuit was filed against the PUD, the port and the PUD bowed out of the partnership. However, the city and the county moved forward, changing the model in response to the negative campaign. In the new model, phases of the project were built only after subscriber revenue could cover the monthly cost of any loan payments incurred. This allowed the city and county to promise that no ongoing public subsidies would be paid to the network. The new model alleviated enough public concern that in 2002 the city and county were able to begin building the fiber-optic broadband network. The final construction phase ended in 2003, and the end result was the QLife Network, a 17-mile fiber loop intergovernmental broadband utility.

### Implementation & Administration

The QLife Broadband Network was officially created by an intergovernmental agreement between the city of The Dalles and Wasco County. The utility is governed by a board of directors appointed by the city and county. The utility is managed and supported by the city through a contractual agreement. In fact, the QLife network is a 100 percent contract entity that has no direct QLife employees. In addition to a contract with the city, there are two contracts with Internet providers for network management. There are also contracts for an attorney, engineer services, and plant management and maintenance. Contract GIS services are provided by the county.

QLife is a middle mile provider that leases space on the fiber network to other vendors who offer commercial broadband services directly to the customer. The only "end-users" who use the network directly are local government agencies (city, county, schools and community college).

Approximately 50 percent of the initial funding for the QLife Network consisted of federal and state grants, while 50 percent came from loans with a one-time public subsidy of $10,000. The

total cost for the 17-mile fiber loop was $1.8 million. QLife expects this debt to be paid off by June 2018. As promised, there have been no public subsidies from either the city or the county.

A major success of QLife has been the utility's revenue model. The utility does not expand services unless there is revenue to cover expenses – both for construction and ongoing maintenance. The utility does not build out to a new area unless a need or interest is demonstrated. QLife also works to complement existing services from private providers rather than compete with them.

QLife earns about $500,000 per year. Approximately $180,000 is applied towards system operations, $190,000 is used to retire the accumulated debt, and the remaining revenue is used at the board's discretion for reserves, contingencies or projects identified as best for the network or the community.

QLife did face a potential financial setback when a private partner went bankrupt and left the city with an $800,000 loan. Fortunately, the company reorganized and agreed to a payment arrangement with QLife. Both entities use a portion of their revenue to pay off the loan. The company's revenue comes from the services they provide using the QLife network, and QLife uses the revenue from the company's lease. Had this provider been unwilling to cooperate, Qlife would have faced a huge setback in its financial debt repayment plan.

**Results & Benefits**

QLife has been a tremendous economic development tool. In 2005, a shovel-ready site, affordable electricity and the QLife Network services helped attract Google, which located a new facility in The Dalles and created 150 new local jobs within one year.

In addition, QLife has experienced some unexpected revenues. There is a QLife facility in city hall which houses the QLife Network equipment and servers. Other providers lease space from this rack to house their equipment, and the resulting revenue makes up one third of QLife's annual total.

The local cable provider eventually introduced its broadband service to the area, but QLife has allowed other providers to enter the market, thereby increasing the level of service and decreasing the cost through competition. As a middle mile provider, QLife does not actively advertise for users of the network. QLife provides services over the fiber-optic network to seven local government organizations (including all schools and the community college), the State of Oregon, the regional medical center and affiliated medical offices, seven telecom and Internet service providers, and a Google Data Center.

QLife and Google plan to partner to provide free Wi-Fi access downtown by the summer of 2011. All of these efforts are added benefits to the local community and the public perception of QLife is very positive. Currently, QLife is exceeding the goals and expectations that were originally envisioned and local government agencies are all receiving excellent services at affordable prices.

## City of Lebanon

**City Broadband Services**

**Network Type:** Wireless Network

**Service Type:** Free/Subscription Wi-Fi Services

**City Role:** Partnership with ISP

**Coverage:** City-wide

**Start Date:** 2005

### Needs Assessment & Planning

In 2004, Lebanon was looking to bring high-speed wireless to its police patrol cars and public works vehicles. Available cellular phone service consisted of voice, but no data/Internet service for "smart" phones.

As the city began looking to improve its wireless network, it coordinated with other Wi-Fi network owners to ensure all networks would be compatible. From these discussions, a partnership began between the city of Lebanon and Peak Internet. The city proposed to create a wireless network with a capacity far beyond what it needed for its patrol and public works vehicles. With no affordable high-speed Internet options in the city, Lebanon and Peak decided to provide Wi-Fi to the public – both free and extended subscription services. Not only would this be an excellent service for residents, but a vital service for businesses and economic development. Even though no similar partnership existed, the city decided to move forward with the project.

### Implementation & Administration

The contract between the city and Peak directed that the city purchase the start-up equipment and that both parties install the equipment. The city was not interested in starting a utility and dealing with the issues that are unique to Internet services (customer support, federal regulations, etc.). As an Internet provider, Peak was already equipped to handle the management of an Internet utility and was therefore designated as the manager of the wireless network. The city replaces any equipment that fails on the main network, and Peak is responsible for the repair of failed equipment on a customer's premise.

The Lebanon City Council approved $100,000 for the start-up equipment, including 80 wireless access points to cover the entire city, and the Wi-Fi network launched in 2005. Anyone can use the wireless services free of charge for up to 10 hours per month. If residents or businesses want more time, a subscription from Peak can be purchased with the base rate of $19.95 per month. This is an affordable option compared to $50-60 being charged by the local phone and cable company companies for broadband services.

The city did not incur any debt with this project. The total contribution to date has been approximately $135,000. The city receives a "kick-back" of 6 percent for any subscription that Peak acquires. The ongoing expenses run about $5,000 per year, including a fee for the electric utility pole attachments and a maintenance fee with the equipment provider.

Through an intergovernmental agreement, the Lebanon Community School District joined Lebanon's public/private network, combining the city's fiber and wireless infrastructure with the school district's fiber network. This provided the city with more fiber bandwidth for wireless services, and the school district is able to provide wireless services to all school facilities.

**Results & Benefits**

Among its other uses for the wireless network, the city connected its water treatment plant to the network, which brought wireless broadband services to an unserved, remote area. This also enhanced communication between the water treatment plant and other city facilities. The wireless network has also saved the city money by reducing the need for commercial telecom services.

The public perception of the city/Peak service was very positive when it was first proposed, and it is still considered a beneficial service. Not only did it help facilitate competition in the local broadband market, thereby bringing down the cost of wired high-speed Internet access, it also has been used to help recruit businesses to the city. In the last few years, Western University of Health Sciences built a new campus in Lebanon. Although the wireless network was not the only reason the university decided to locate to Lebanon, it was a positive factor in the decision.

Over the last five years, the local phone company has brought down their prices for DSL, and in some areas of the city the speeds are faster than the Peak wireless services. The city has noticed a decline in the number of Peak subscriptions; however, the free access is still popular. Even though subscriptions are declining, and therefore so are the city's "kick-backs," the city still feels this is a valuable service to residents and is worth the small ongoing cost.

## City of Tigard

**City Broadband Services**

**Network Type:** Wireless Network

**Service Type:** Free Wi-Fi Services

**City Role:** City provides services through wireless access points

**Coverage:** Parks, Downtown, City Hall

**Start Date:** 2008

### Needs Assessment & Planning

The city of Tigard's Wi-Fi network provides free services to targeted areas within the city, including parks, the downtown area and city hall.

The idea of a free Wi-Fi network was first discussed by city staff in response to an increasing demand by local citizens. The goal was to provide a free service without the need for additional staff. Meraki, a new technology utilized by the city, allowed for the creation of a mesh network without the reconfiguration of any existing city Wi-Fi networks. Because of the small price tag, city staff made the decision to launch a free Wi-Fi network.

### Implementation & Administration

The initial pilot project, which cost less than $500, allowed the city to test the equipment. The city was pleased with the service provided and the low maintenance needs of the devices. The city then decided to expand services to other targeted areas. The total cost of implementing the Wi-Fi network was less than $2,500. The city used funding allocated for unanticipated projects, leaving no debt associated with this project.

The affordability of this project is due in part to the strategic placement of access points on city facilities such as city hall and the facilities of interested parties. Under an agreement with the chamber of commerce, the city mounted a wireless access point on the chamber's building, which then provides free Wi-Fi to all users within the downtown business area.

Three Wi-Fi connections cover several key locations around the city. Internet speeds vary depending on how far away users are from the primary device. The city uses its information technology (IT) staff to respond to any network problems, but the ongoing maintenance since installation has been minimal – an average of $145 per month.

### Results & Benefits

The wireless devices used by the city of Tigard are very flexible, which has provided some additional benefits to the city. For example, Internet access was needed at the Tigard Balloon Festival, and within hours the city was able to temporarily redirect Wi-Fi to the festival location.

Another city benefit is the availability of the Wi-Fi network to serve as a back-up for the city's emergency operations center. The city can also promote itself by directing the free Wi-Fi users to the city's website from the log-in page.

Internet speeds vary depending on how far away users are from the primary device. Despite this issue, city staff believe this free Wi-Fi service is a successful project, and public utilization rates seem to reflect this opinion.

## City of Coos Bay

In 2008, the city of Coos Bay began offering free Wi-Fi to the library and downtown area. Rather than directly providing the services, the city contracts with ORCA, a competitive local exchange carrier (CLEC), which then provides the wireless services. The free Wi-Fi is part of a larger contract for services provided to the city, though the city purchased the start-up equipment.

**City Broadband Services**

**Network Type:** Limited Area Wireless Network

**Service Type:** Free Wi-Fi Services

**City Role:** City pays a local CLEC to provide services by contract

**Coverage:** Downtown & Library

**Start Date:** 2008

The city pays $940 per month for ORCA to provide Wi-Fi to city hall and several city facilities including fire stations, parks and city shops. These services are not free to the public; use of the Wi-Fi at these sites must be approved by the city.

The city also pays $130 per month for free public Wi-Fi in the downtown area and $103 for services to the library. Public use is limited to one hour per day. The downtown area includes some of the major tourist sites, including the visitors' center and the art museum.

Because it is paying ORCA to provide the service, the city is not responsible for customer service or maintenance of the network. This arrangement has proven to be very cost-effective to the city and has been a valued service to the community.

## Other City Wi-Fi Networks

As the demand for broadband services on-the-go increases, more cities are providing free Wi-Fi services at key locations. In addition to the free Wi-Fi services provided by municipal broadband utilities, there are other cities that are using the ease and affordability of Wi-Fi to provide free services. Other cities may be providing Wi-Fi, but are not listed in this report.

One of the most popular locations to provide free Wi-Fi is in the downtown business corridor. This city service also helps support local businesses. Astoria and Yachats provide free services downtown, and Eugene has a hot-spot in the downtown blocks that include its Saturday Market.

Other popular Wi-Fi "hot-spots" are recreation areas. Astoria provides Wi-Fi at its aquatic center. Eugene has Wi-Fi at three swimming pools, seven community centers and at the Hult Center for the Performing Arts. Salem provides Wi-Fi to its Senior Center and Center 50+. Oregon City recently began providing Wi-Fi at the city community center and swimming pool.

To help facilitate learning, some cities, including Astoria, Corvallis, Eugene, Hillsboro, Oregon City, Salem and Springfield, have created wireless networks at library facilities.

Several cities have Wi-Fi at city administrative buildings, such as city hall, and have made this service free to citizens as an added benefit. If a city is buying and maintaining equipment for a city network, it takes minimal resources to extend that service to members of the public who are using city facilities. Eugene, Hillsboro, Oregon City, Salem and Springfield provide Wi-Fi at city hall or a civic center. Eugene also has free services at its planning department.

Though many cities do not have airports, these facilities can also be a valued location for free city Wi-Fi services. Redmond and Eugene have Wi-Fi at their commercial airports, providing a useful service to business travelers.

Cities can use Wi-Fi networks to help increase communication between "mobile" departments such as police, fire and public works. Eugene has staff-only Wi-Fi for 911, fire and emergency medical services (EMS), but free access is available in the police and fire training classrooms.

## Other Local Government Broadband Networks

### Clackamas County

Clackamas County, in partnership with Clackamas Education Service District and SandyNet, is building approximately 185 miles of backbone and last mile fiber-optic cables throughout the county. This project is funded in part by a $7.8 million grant from the Broadband Technology Opportunities Program (BTOP), which is part of the 2009 American Recovery and Reinvestment Act (ARRA). The fiber network will be available to any entity on a nondiscriminatory basis. The county will not provide any broadband services, nor will it compete with local service providers. This extensive network will be available for local communication providers to enhance their networks, and it will be used to enhance broadband services to community anchor sites such as schools, libraries, health care and public safety.

### Crook County

According to the National U.S. Department of Commerce's website, Crook County received a $3.9 million grant from the 2009 American Recovery and Reinvestment Act. Along with the state's highest unemployment rate, Crook County has limited broadband services. The county partnered with other public, private and non-profit organizations to establish a 65-station computer learning center, to be located in the city of Prineville. The Crook County Computer and Education Center will give county residents the access to education, training and broadband services, which is vital to an area that is in economic distress. The center will deploy a mobile lab which will help bring broadband access to the more remote areas within the county.

### Lane Council of Governments

In 2010, the Lane Council of Governments (LCOG) received $8.3 million in American Recovery and Reinvestment Act funding, which was matched by $2.7 million in local contributions. The planned project will bring broadband services to more than 100 critical institutions in portions of Douglas, Klamath and Lane counties. LCOG will be installing more than 100 miles of fiber to connect these institutions to existing fiber networks. Approximately 70 percent of the critical institutions to be connected will be local government facilities including schools, city halls, libraries, fire stations and police buildings. Some state offices, including the state police, will be connected as well. The total miles of fiber installed and the number of institutions that will be connected has not been finalized. For more information on this project, see the Resources section on page 45.

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EXHIBIT E

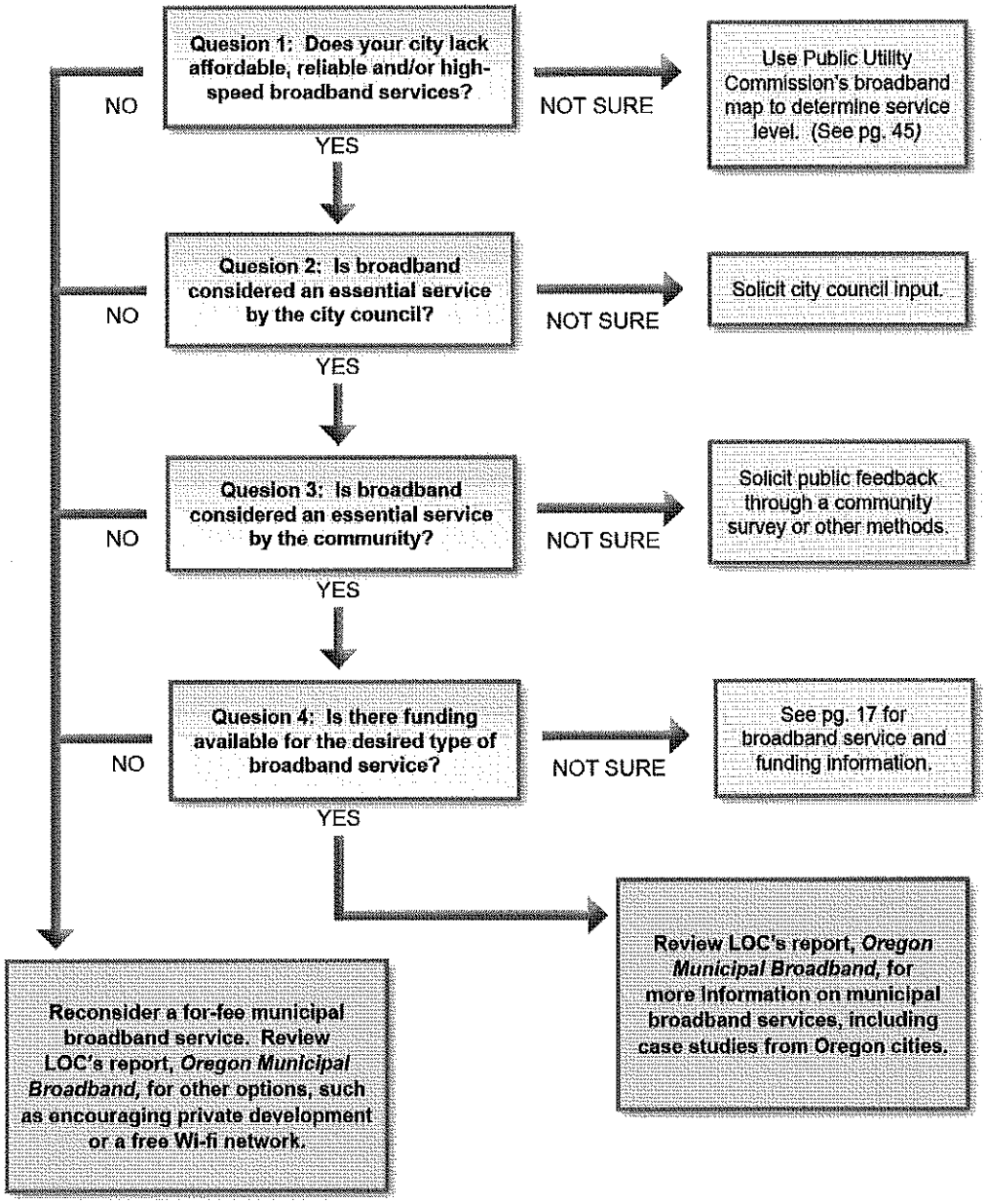
EXHIBIT E

# Appendix A

## Broadband Flow Chart

### Is Municipal Broadband Service the Right Choice for Your City?

Four questions to ask before your city decides to provide broadband services.



# EXHIBIT E

# Appendix B

## Additional Resources

**Referenced in the report**

(See also References, page 40)

### Municipal Broadband Networks

- Oregon Municipal Broadband Information – resources from Oregon cities (e.g. master plans; enabling ordinances; agreements; policies)
  http://www.orcities.org (select A-Z Index – "T" for Telecommunications)

- National Association of Telecommunications Officers and Advisors (NATOA) – Examples of local broadband initiatives; broadband and economic opportunity (comments to FCC)
  http://www.natoa.org/documents/NATOA%20et%20al%20Comments%20-%20NBP%20Public%20Notice%20%2318.pdf

- Community Broadband Networks
  http://www.muninetworks.org/

- "Mediacom Falsely Accuses Lake County Communities of False Statements"
  http://www.muninetworks.org/content/mediacom-falsely-accuses-lake-county-communities-false-statements

- MuniWireless.com – Information and resources on municipal wireless projects worldwide
  http://www.muniwireless.com/

- Lane Council of Governments – Broadband Network
  www.connectingoregon.org

- "From the Digital Divide to Digital Excellence: Global Best Practices to Aid Development of Municipal and Community Wireless Networks in the United States" – New America Foundation
  http://mediapolicy.newamerica.net/publications/policy/from_the_digital_divide_to_digital_excellence

### Broadband and Economic Development

- Portland Broadband Strategic Plan (preliminary documents) – City of Portland
  http://www.portlandonline.com/cable/index.cfm?c=54013

- E-Commerce Zones – Oregon Business Development Department
  http://www.oregon4biz.com/The-Oregon-Advantage/Incentives/Enterprise-Zones/ecommerce-zone/

### Broadband Funding

- Special Public Works Fund (Government Projects) – Oregon Business Development Department
  http://www.orinfrastructure.org/Learn-About-Infrastructure-Programs/Interested-in-a-Community-Development-Project/Special-Public-Works-Fund/

### Broadband Services - Cost and Availability

- Oregon Broadband Map – Oregon Public Utility Commission
  www.broadband.oregon.gov

- National Broadband Map – National Telecommunications and Information Administration (NTIA)
- http://broadbandmap.gov/

- Landline/Mobile/Internet Providers Database – CUB Connects
  http://cubconnects.org/

### Broadband Strategic Planning

- National Broadband Plan – Federal Communications Commission
  http://www.broadband.gov/download-plan/

- Portland Broadband Strategic Plan (preliminary documents) – City of Portland
  http://www.portlandonline.com/cable/index.cfm?c=54013

### Telecommunications and Right-of-Way

- Telecommunications Tool-Kit – League of Oregon Cities
  (A-Z Index – "T" for Telecommunications. Available to download for LOC members)
  http://www.orcities.org

- Oregon Utilities Notification Center – Joint Trenching Examples
  http://www.digsafelyoregon.com/joint-trench-examples.asp

### Legal Resources

- Community Assistance for Law Enforcement Act (CALEA) – Federal Communications Commission (FCC)
  http://www.fcc.gov/calea/

# Appendix C

## Glossary

NOTE: NOT ALL TERMS LISTED WERE USED IN THE REPORT. THESE DEFINITIONS MAY BE USEFUL IF A CITY CONDUCTS MORE RESEARCH ON TELECOMMUNICATIONS AND BROADBAND.

**Broadband Services & Users**

Broadband: High-speed Internet connections that allow users to connect to websites and download content at a faster speed. Broadband can also be a wireless service carrying voice, video and data channels simultaneously. The Federal Communications Commission (FCC) defines broadband as advanced communications systems capable of providing high-speed transmission of services such as data, voice and video over the Internet and other networks. Transmission is provided by a wide range of technologies, including digital subscriber line (DSL) and fiber-optic cable, coaxial cable, wireless technology and satellite. Broadband platforms allow the convergence of voice, video and data services onto a single network.

Cable Services: Defined in the Federal Telecom Act as (A) the one-way transmission to subscribers of (i) video programming or (ii) other programming service; and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

End User: An individual, association, business, government agency or other entity that subscribes to a broadband service and does not resell it to another provider.

Voice over Internet Protocol (VoIP): Wireless or wireline technology that allows the use of a broadband Internet connection to make voice telephone calls. A special adapter is used to send a voice call in a digital form using the Internet rather than the traditional voice stream. A wireless example is Clearwire; a wireline example is Comcast Digital Voice.

**Broadband Technology**

Broadband over Power Line (BPL): BPL systems use existing electrical power lines as a transmission medium to provide high-speed communications capabilities by coupling radio frequency (RF) energy onto the power line, then distributing it to a home. BPW systems operate on an unlicensed basis under Part 15 of the FCC's rules. Because power lines reach virtually every community in the country, BPL has the potential to play an important role in providing broadband services to American homes and consumers. There are two types of BPL systems: In-House BPL, which uses the electrical outlets available within a building to transfer information between computers and other home electronic appliances; and access BPL systems, which carry high-speed communication signals outdoors over the medium voltage (MV) lines, from a point where there is a connection to the Internet (backhaul point), to neighborhoods where they are distributed to homes via the low voltage (LV) power lines or Wi-Fi links.

Coaxial Cable (Cable): An electric cable composed of an insulated central conducting wire wrapped in another conducting wire. This type of network is mostly used by cable TV providers.

Digital Subscriber Line (DSL): A generic name for a family of digital lines that are provided by CLECs and local telephone companies to their local subscribers. Such services, known by

different names, propose to give the subscriber up to 8 million bits per second one way downstream to the customer, and somewhat fewer bits per second upstream to the phone company. DSL lines typically operate on one pair of wires like a normal analog phone line. (Newton's Telcom Dictionary, 25th Edition)

Fiber-Optic Cable (Fiber): Thin filaments of glass through which light beams are transmitted over long distances, carrying enormous amounts of data. This network is being used by Verizon and other companies offering "fiber-to-the-premise."

Satellite: A microwave receiver, repeater and regenerator of voice, video and data transmissions. The satellite is in orbit above the earth.

Wireless Technology: Any system of transmitting and receiving data without wires. Examples include:

*Long Term Evolution (LTE)*: Provides for a larger coverage area with fewer antennas and is being used to build nationwide 4G networks. LTE is being deployed in Oregon by mobile wireless service providers such as AT&T Wireless and Verizon Wireless.

*Wi-Fi*: A term coined by the Wireless Ethernet Compatibility Alliance which designates wireless products that are interoperable even if they are from different manufactures. The use of these products creates a wireless broadband network that can be utilized by any user.

*WiMAX*: Provides for a larger coverage area with fewer antennas, however it uses a different standard than LTE. WiMAX is being used to build nationwide 4G networks and is currently being offered in the Willamette Valley by the wireless provider, CLEAR.

*Wireless Mesh Network*: A wireless network configured so that each wireless node is interconnected to every other node within the network, thereby creating the "mesh."

*Wireless Access Point*: A device that connects wireless communication devices (e.g. computers and laptops) to form a wireless network, such as Wi-Fi.

**Broadband Providers**

Cable Providers: Companies with right-of-way franchises to provide cable services. Many of these companies now provide voice and data services. Examples include Comcast and Charter.

Competitive Local Exchange Carriers (CLECs): Providers of local phone services that have Public Utility Commission certificates for operation. Some own a facility located in the public right-of-way and some may compensate to a facility-based carrier for use of that facility for resale purposes.

Incumbent Local Exchange Carriers (ILECs): Traditional phone companies that provide exchange access service (dial tone service). Some of these providers offer cable and data services.

Internet Service Providers (ISPs): A vendor providing Internet access to corporate and individual customers.

Long Distance/Long Haul Carriers: Service providers that do not offer local service, but "transmit" through public right-of-way via facilities. They may own, lease or pay compensation to a facility-based carrier. Examples include AT& T, MCI and Sprint.

Last Mile Providers*: Provides broadband services, such as voice, video and data, directly to the end user. The provider may own their own broadband network, or lease space off another network, such as a middle mile provider.

Middle Mile Providers*: Connects last mile providers to a broadband backbone.

Resellers: Companies that may or may not own telecommunications facilities but pay compensation to a facility-based provider for use of systems to deliver wholesale or retail services to an end user.

Wireless Service Providers: Companies that provide telecommunications services primarily through wireless technologies. These include Verizon Wireless, Sprint, AT& T, Nextel and T-Mobile, and wireless resellers such as Virgin Mobile, TelePlus and Consumer Cellular that pay compensation to a wireless provider for use of their facilities. Some wireless companies provide broadband services as direct connections to the Internet.

**Other Technical Terms**

Bit: The basic unit of measurement for information data and digital communication. Bits per second is a measurement of data transmission speed.

*Kilobit*: 1,000 bits

*Megabit*: 1 million bits

*Gigabit*: 1 billion bits

Redundancy: Having at least one back-up system in place in case of a network failure on the main broadband network.

** Note: "Middle mile" and "last mile" provider can have different meanings within the telecom industry.*

EXHIBIT E


**League of Oregon Cities**

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Salem, Oregon 97308
(503) 588-6550
www.orcities.org

**EXHIBIT F**

**Joint Comments of the League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities**

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

[appears behind this coversheet]

EXHIBIT F

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

| | |
|---|---|
| IN THE MATTER OF | |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | WT Docket No. 17-79 |

**JOINT COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS, LEAGUE OF CALIFORNIA CITIES and LEAGUE OF OREGON CITIES**

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EXHIBIT F

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EXHIBIT F

**TABLE OF CONTENTS**

EXHIBIT F

## STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities (collectively, "Local Governments") offers these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry.[1]

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 241 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

[1] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Notice of Proposed Rulemaking and Notice of Inquiry* (Apr. 20, 2017) [hereinafter "*Wireless NPRM/NOI*"].

## I. BALANCED RULES THAT RESPECT THE PROPER ROLE FOR LOCAL GOVERNANCE AND REFLECT REALITIES IN LOCAL REVIEW PROCESSES WILL ACCELERATE WIRELESS BROADBAND DEPLOYMENT

### A. Municipalities Support Expanded Wireless Services, but Existing Limitations on Local Review Encourage Some Applicants to "Game" the Shot Clock, Which Ultimately Hinders Wireless Broadband Deployment

Access to wireless broadband services plays an important role in the local economic, educational and social development for cities across the nation. These services play an especially important role in Arizona, California and Oregon, where new and expanded technology firms have significantly expanded employment.[2]

Local Governments recognizes how important infrastructure is to continued growth. Much the same way that communications and commerce brought by the railroads in the 19th century transformed small towns like Los Angeles and Chicago into metropolises,[3] advanced wireless broadband has the potential to help cultivate the places where it is deployed.

To this end, municipalities throughout the United States have taken steps to encourage responsible, community-appropriate wireless infrastructure deployments. In places like Springfield, Oregon, local staff work collaboratively with wireless industry members to update their local codes with the most cutting-edge concealment requirements to open up aesthetically-sensitive areas for new facilities. Cities in California, such as Vista and Lakewood, recently

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[2] *See, e.g.*, Tom Krazit, *Why the Pacific Northwest Will Be a Data Center Powerhouse for Years to Come*, GEEKWIRE.COM (May 31, 2017, 12:56 PM), https://www.geekwire.com/2017/pacific-northwest-will-data-center-powerhouse-years-come/ (noting the multi-billion dollar investment in Oregon tech sector by companies like Intel); George Avalos, *Silicon Valley Economy Slows, but Still Grows*, MERCURYNEWS.COM (Feb. 17, 2017, 3:26 AM), http://www.mercurynews.com/2017/02/16/silicon-valley-economy-pauses-but-still-is-growing/ (noting that Silicon Valley added more than 110,000 new jobs between 2015 and 2016); Chris Camacho, *Why All These Silicon Valley Startups are Moving to Phoenix*, TECHNICAL.LY (Jul. 13, 2016, 12:15 PM), https://technical.ly/2016/07/13/phoenix-tech-startups/ ("Since 2000, tech employment in the [Phoenix] region has grown by nearly 80 percent, with software employment jumping by nearly 30 percent since 2010.").

[3] *See* Oakland Museum of California, *Early Statehood: 1850 – 1880s: The Rise of Los Angeles*, MuseumCa.org, http://picturethis.museumca.org/timeline/early-statehood-1850-1880s/rise-los-angeles/info (last visited June 12, 2017); BENJAMIN W. DREYFUS, THE CITY TRANSFORMED: RAILROADS AND THEIR INFLUENCE ON THE GROWTH OF CHICAGO IN THE 1850S (1995), *available at*: https://www.hcs.harvard.edu/~dreyfus/history.html (last visited June 12, 2017).

amended their municipal codes to allow wireless facilities on existing structures in the public rights-of-way subject to an administrative use permit, or only an encroachment permit for facilities placed on municipal structures under a license agreement.

Unfortunately, not all the interaction between municipalities and the wireless industry has been productive. Complex procedural regulations, with short deadlines and harsh penalties, entice some savvy applicants to "game" the shot clock in order to circumvent legitimate local review processes to deploy more facilities faster. Municipalities often spend time policing applicant misconduct that could be more productively spent facilitating deployment.

Increasingly common tactics include misrepresenting an applicant's regulatory authority; misrepresenting the proposed project; submitting woefully incomplete applications, often without application fees or to the wrong department; changing the project scope after the first completeness review to prevent further tolling; providing inadequate or non-responses to incomplete notices to trigger the 10-day review period; triggering shot clock events before weekends, holidays or other government closures to burn additional days; and even constructing facilities without permits. Comments and Reply Comments filed by the League of Arizona Cities and Towns, *et al.*, in response to *In the Matter of Mobilitie, LLC Petition for Declaratory Ruling* provide more detailed examples and are included with these comments as **Exhibit 1** and **Exhibit 2**, respectively.

One applicant's attempt to "game" the shot clock often causes delay for all similarly situated applicants as local governments who have been burned by misconduct strengthen their policies to prevent further abuses. For example, Hillsborough, California, replaced its open-door policies with a requirement that all applicants submit by appointment after a contractor for Crown Castle tossed eight applications into town hall at approximately 4:50pm on a Friday and left without any explanation. Aggressive tactics by Mobilitie, and the threat of new 120-foot

wood poles in the sidewalks, have caused some jurisdictions to adopt temporary moratoria.[4] Applicant misconduct has become such a problem that even wireless industry members recognize that the delays in deployment are at least partially self-inflicted.[5]

### B. Balanced Shot Clock Reforms Will Accelerate Wireless Broadband Deployment

Unfortunately, state and local governments remain the scapegoat for perceived delays in wireless broadband deployment.[6] Even more unfortunately, the proposed rules in the *Wireless NPRM/NOI* appear poised to further exacerbate the regulatory conditions that encourage applicant misconduct and engender conflict between municipalities and service providers who should share a common interest in deployment.

The Commission has the opportunity to accelerate wireless broadband deployment by mitigating perverse incentives to game the shot clock rules. The following subsections offer some specific recommendations the Commission should adopt. Alternatively, the Commission

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[4] *See* Marc Benjamin, *Fresno County to Cellphone Tower Companies: Stay Off Our Land, at Least for Now*, FRESNOBEE.COM (Nov. 20, 2016, 3:01 PM), http://www.fresnobee.com/news/local/article116012318.html.

[5] *See* Colin Gibbs, *Small Cells: Still Plenty of Potential Despite Big Challenges*, FIERCEWIRELESS (Sept. 1, 2016), http://www.fiercewireless.com/wireless/small-cells-still-plenty-potential-despite-big-challenges (noting how backlash to aggressive tactics by firms like Mobilitie and Crown Castle cause delays in deployment); Martha DeGrasse, *Carrier Small Cells Appear Slowly but Surely*, RCRWIRELESS (May 24, 2016), http://www.rcrwireless.com/20160524/carriers/carrier-small-cells-tag4 (quoting a T-Mobile executive's remark that "some companies are being 'a little too cavalier in some instances and messing up [the industry's] ability to deploy small cells.'"); *see also* Martha DeGrasse, *Mobilitie to Increase Transparency for Jurisdictions*, RCRWIRELESS (May 27, 2016), http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4; Martha Degrasse, *Sprint Small Cell Delays Could Impact Other Carriers*, RCRWireless (May 12, 2016), http://www.rcrwireless.com/20160512/network-infrastructure/sprint-small-cell-delays-tag4 (quoting an industry observer's comment about "stories out there and issues with people trying to circumvent the process and go around to get themselves in faster, which doesn't help anybody . . . things stop, the process slows down . . . when some cities start saying 'time out; we need to go look at this' that becomes a major problem for everybody." (internal quotations omitted)).

[6] *See In the Matter of Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, WT Docket No. 16-421, *Petition for Declaratory Ruling* (Nov. 15, 2016); *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, *Public Notice*, 2016 WL 7410755 (Dec. 22, 2016).

should direct the Broadband Deployment Advisory Committee to study these issues and produce recommended reforms to mitigate the delays caused by shot-clock gaming.

### 1. *The Commission Should Define a "Duly Filed" Application as a "Complete" Application Submitted in Accordance with Applicable Local Procedures*

Obligations under § 332(c)(7)(B)(ii) are not triggered until the state or local government receives a "duly filed" application.[7] However, it appears that neither the *2009 Declaratory Ruling* nor the *2014 Infrastructure Order* properly took into account the fact that the "reasonable time" for a decision does not begin to run until and unless the state or local government receives a "duly filed" application.[8] As a result, the Commission found that the shot clock commences after an application is "submitted" but made no provisions as to whether such submittal was "duly filed."

Ambiguities in the prerequisites for a "submitted" application have engendered counterproductive conduct because some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate the submittal may be. Despite the Commission's rule from the *2014 Infrastructure Order* that local governments must publicly

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[7] *See* 47 U.S.C. § 332(c)(7)(B)(ii); *Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d 687 (3d Cir. 2002) (holding that the application could not claim a failure to act because it never filed an application); *see also ATP Orlando/Tampa, Inc. v. Orange Cnty.*, No. 97-891-CIV-ORL-22, 1997 WL 33320573, *4 (M.D. Fla. Dec. 10, 1997) (finding that claims under § 332(c)(7) are not ripe without an application).

[8] *Compare* 47 U.S.C. § 332(c)(7)(B)(ii) (requiring state and local governments to "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" (emphasis added)), *with In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14015, ¶ 52 (Nov. 18, 2009) (finding that the shot clock commences when an application is "submitted" without any discussion about whether an incomplete application is "duly filed") [hereinafter "*2009 Declaratory Ruling*"], *and In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, *Report and Order*, 29 FCC Rcd. 12865, 12970, ¶ 258 (Oct. 17, 2014) (reiterating that the shot clock commences upon submittal without consideration as to whether an incomplete application may be considered "duly filed") [hereinafter "*2014 Infrastructure Order*"].

state all application requirements in advance, woefully incomplete applications have become the rule rather than the exception.[9] Given that the Commission's other rules already bar *ex post facto* application requirements, carriers should be expected (and required by the Commission) to tender complete submittals and there should be no excuse for an incomplete application—and certainly no incentive.[10]

As the following examples illustrate, incomplete and/or improperly filed applications create significant costs and delays for all parties involved:

- In Springfield, Oregon, Mobilitie submitted two encroachment permit applications on February 2, 2017. Both applications were incomplete, and one involved an installation on a utility pole owned by a third party but did not include any documentation that the third party consented to the application. The city cannot issue an encroachment permit to install equipment on third-party poles without the pole owners consent because it would create potential inverse-condemnation liabilities.[11] On March 27, 2017, city staff sent written incomplete notices. Mobilitie never responded and, on April 5, 2017, city staff re-sent the same notice. To date, after more than 76 days, Mobilitie has still not contacted the city to discuss the applications.

- The California Street Light Association ("CALSLA") compiled comments from its constituent California cities and counties documenting, among other things, that Mobilitie has (1) failed to provide accurate project descriptions or equipment specifications upon request by local officials, (2) submitted incomplete applications, (3) terminated communications with local officials after submitting incomplete applications, (4) erroneously claimed exemptions from permitting procedures, local regulations and state environmental compliance laws and (5) complained of high fees without explaining why the fees would be unreasonable.[12] CALSLA's full response appears in an attachment to **Exhibit 1** to these comments.

[9] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12964 ¶ 260 ("[I]n order to toll the timeframe for review on grounds of incompleteness, a municipality's request for additional information must specify the code provision, ordinance, application instruction, or otherwise publically-stated [sic] procedures that require the information to be submitted.").
[10] *See id.*
[11] *See generally Vokoun v. City of Lake Oswego*, 76 P.3d 677, 684 (Or. Ct. App. 2003) ("An action for inverse condemnation is one for damages asserted against a governmental entity with the power of eminent domain that has taken private property for public use without initiating condemnation proceedings, that is, without paying just compensation.").
[12] *See* Letter from Jean A. Bonander, CALSLA, to Michael Johnston, Telecom Law Firm PC (Feb. 15, 2017).

- Mobilitie's representative hand-delivered to the City of Pleasanton, California, a letter styled as an introduction with 12 plan sets for new facilities attached.[13] Rather than follow the city's publicly-stated application process, Mobilitie treated the letter as a single application filed for all 12 sites. The letter was dated and delivered on a Friday. Under California state law, any application for a wireless installation may be deemed-approved if the local government fails to act within the applicable shot-clock timeframe.[14] The apparent intent behind the letter was to submit an "application" that would trigger the shot clock but not be seriously reviewed by the local government staff, which would likely result in a deemed-approval. The same scenario played out in several other Northern California cities, including Antioch, Brentwood, Concord, Richmond, San Pablo, and Pittsburg. Mobilitie's representative also delivered a letter to the City of Fresno, California, which at that time did not require a special permit for installations on unpaved road shoulders, on a Friday.[15]

- In Richmond, California, Mobilitie's representative submitted encroachment applications for 13 new wireless facilities even though the Richmond Municipal Code expressly required a prior authorization from the Community Development Department.[16] A month later, Mobilitie emailed the city project plans for three additional sites but did not submit any additional applications or fees. Two sites were proposed to be located on city-owned streetlights without prior authorization from the city. City staff also discovered that one site was proposed to be located on private property. Although city staff suggested some potential alternative locations on private electric company poles, Mobilitie ultimately withdrew its applications.

- In Brentwood, California, Mobilitie's representative submitted a letter to the city's Public Works Department with project plans, an insurance certificate and a check for $144, but not an application for a use permit as expressly required by the Brentwood Municipal Code.[17] Again, Mobilitie tendered the "application" on a Friday. Although the letter described the project plans as "construction drawings," the attached plans stated on each page: "PRELIMINARY NOT FOR CONSTRUCTION."[18]

- In Goleta, California, Mobilitie's representative emailed that city project plans for six new wireless facilities, but with no application or fees. The email acknowledged that the city requires a "Right-of-Way Access Agreement" (*i.e.*, a standard document required for all entities that carry on operations in the public rights-of-way that sets out maintenance, insurance, safety and other operational requirements, but does not require any fees), but Mobilitie claimed that "our CPCN . . . can serve in lieu of a City-specific ROW

[13] *See* Letter from Richard Tang, Mobilitie, LLC, to Jenny Soo, City of Pleasanton, Cal. (Oct. 14, 2016).
[14] *See* CAL. GOV'T CODE § 65964.1.
[15] *See* Letter from Rebecca Eichinger, Mobilitie, LLC, to Andrew Benelli, City of Fresno, Cal. (Jun. 3, 2016).
[16] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Richmond, Cal. (Aug. 29, 2016). This letter was dated on a Monday, but Mobilitie's representative hand delivered the applications on a Wednesday (the city closes on Fridays due to State budget shortfalls).
[17] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Brentwood, Cal., Public Works Department (Aug. 2, 2016). The letter was received on August 19, 2016, as evidenced by the city's in-take stamp.
[18] *See id.*

Access/Franchise Agreement."[19] The email also requested that the city confirm who owns the poles to which Mobilitie wanted to attach their equipment.[20] This email made clear that Mobilitie did not positively know who owned the pole before it submitted applications for attachments.

- In Richmond, California, ExteNet submitted 31 encroachment permit applications for small cells without first obtaining a use permit from the city, which was required by the City's recently adopted ordinance that was effective and published before ExteNet submitted its applications.[21] These applications were received by the city on a Thursday.

- ExteNet submitted 10 applications to Concord, California, for facilities throughout both residential and commercial neighborhoods that it alleged should all be subject to administrative approval, despite local regulations that required public notice with a possible public hearing for highly visible wireless facilities placed in close proximity to residential uses.[22]

- In Gresham, Oregon, Mobilitie submitted a single application for six of its sites without addressing the criteria clearly set out in the local code. Subsequently, a Mobilitie representative acknowledged that the applications were submitted without reviewing the applicable code provisions.[23]

- In early April 2016, Mobilitie submitted four encroachment permit applications to the City of Antioch, California, for installations on city-owned streetlights without any prior authorization from the city to use its streetlights. The applications listed the owner as "N/A."

- In Sacramento, California, Mobilitie requested to meet with Public Works staff and brought 40 incomplete applications, which included applications for fifteen 120-foot steel poles. When staff informed Mobilitie that it could not accept 40 incomplete applications, Mobilitie's representative left the packet on the security desk in the lobby in an apparent attempt to be able to later claim that the shot clock had been started.[24]

- In Yuma, Arizona, after receiving a letter from the city that outlined how Mobilitie's initial application failed to satisfy the city's code for obtaining a city telecommunications license, Mobilitie resubmitted its application with general responses that appeared

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[19] *See* Email from Ben Johnson, Mobilitie, LLC, to Marti Milan, City of Goleta, Cal. (Jan. 31, 2017, 4:13 PM).
[20] *See id.*
[21] *See* Letter from Yader Bermudez, City of Richmond, Cal., to Matt Yergovich, ExteNet Sys. (Cal.) LLC (Nov. 15, 2016).
[22] In this case, ExteNet's representative submitted both the initial applications and his responses to the city's incomplete notices on Mondays. Although the applications were misfiled and incomplete, it does not appear that their representative attempted to intentionally game the shot clock in the same manner as those who routinely submit on Fridays.
[23] *See* Email from David R. Ris, City of Gresham, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 23, 2017, 3:56 PM).
[24] *See* Email from Darin Arcolino, City of Sacramento, to Omar Masry, City of San Francisco (July 7, 2016, 12:35 PM).

> intended to avert answering the city's questions. After a second letter from the city, Mobilitie's third submission continued to provide vague and inadequate responses to the city's questions on items as basic as what infrastructure Mobilitie intended to install in the city's right-of-way. When the city sent a third letter to Mobilitie explaining the deficiencies, Mobilitie never responded.

In addition to the delays in deployment, improperly filed applications, incomplete applications and applicants who disappear from the review process drain municipal staff resources. The Commission can mitigate delays (and the costs) associated with improperly filed applications if it clarifies that a "duly filed" application means a "complete" application filed in accordance with the procedures, if any, established by the state or local government.

The Communications Act does not define "duly filed" and so its ordinary meaning controls.[25] "Duly" ordinarily means to be in accordance with what is required or appropriate.[26] The root word "due" may also refer to an enforceable or actionable item.[27] Thus, the most natural interpretation for a "duly filed" application is one on which the state or local government may take action.

This interpretation would be more consistent with state and federal procedural rules for application submittals.[28] Moreover, this interpretation would also be more consistent with

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[25] *See Clark v. Rameker*, 134 S.Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012).

[26] *Definition of Duly*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/duly (last visited June 12, 2017) (defining "duly" as "in a due manner or time"); *Definition of Due*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/due#h1 (last visited June 12, 2017) (defining "due" as "according to accepted notions or *procedures*" (emphasis added)); *see also* BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 301 (3d ed. 2011) (defining the word "duly" in the phrase "duly authorized" as "properly").

[27] *See* GARNER, *supra* note 26 at 300 (defining "due" as "immediately enforceable"); BLACK'S LAW DICTIONARY 227 (3d pocket ed. 2006) (defining "due" as "[j]ust, proper, regular, and reasonable" or "[i]mmediately enforceable").

[28] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-835 (authorizing cities to establish separate timeframes for "administrative completeness review" and "substantive review"); CAL. GOV'T CODE § 65943 (providing that the timeframe for action does not commence until the applicant submits a complete application or the application is deemed-complete by law); OR. REV. STAT. § 227.178 (requiring action within a specified timeframe "after the application is deemed complete"); 47 C.F.R. § 1.746(a) (authorizing the Commission to reject "defective" applications); *see also id.* § 1.1114(a)(1) (authorizing the Commission to dismiss an application if submitted without the appropriate fee).

Congress' intent that wireless applications should not be given "preferential treatment . . . or . . . to subject their requests to any but the generally applicable time frames for zoning decision."[29]

### 2. *A More Flexible "Publicly Stated" Rule Would Reduce Unnecessary Costs and Delays in Application Preparation and Review*

To be sure, the publicly-stated rule provides applicants with fair notice as to what will be required for a complete application. Rather than eliminate the rule altogether, the Commission should amend and clarify the rule to allow greater flexibility in the completeness review process.

An inflexible rule tends to encourage local governments to develop exhaustive checklists that require applicants to produce materials that could potentially be necessary even if the project could be approved without such materials.

The publicly-stated rule should also account for multi-step review processes in which different materials may be required at each step. For example, in a jurisdiction that requires the planning department to determine whether an eligible facilities request would defeat the concealment elements at an existing monopine before the building department can issue construction permits, it would be more cost efficient to require preliminary zoning drawings (or "ZDs") at the initial stage before the applicant produced signed and stamped construction drawings (or "CDs") that would be necessary for the construction permit. However, the publicly-stated rule could be interpreted to mean that the jurisdiction must require the CDs upfront, which would be an economic waste if the applicant mistakenly believes that the project qualifies as an eligible facilities request.

[29] *See* H.R. CONF. REP. NO. 104–458, at 208.

### 3. *The Commission Should Dispense with the 10-Day Resubmittal Review Period and the "One-Bite" Rule*

Some applicants attempt to game the shot clock through the Commission's procedures for incomplete notices, and specifically the 10-day resubmittal review period and the so-called "one-bite" rule. The Commission should eliminate them.

As a practical matter, these rules engender conflict because they do not reflect basic norms in the permit review process. They might make sense if only one department handled application reviews; however, local governments often route applications through multiple departments with expertise in the various disciplines implicated in a single project. For example, a planning department, with its expertise in community development and aesthetics, may require an approval for design and placement; a building department, with expertise in construction, may require a building permit to ensure structural safety; and a public works department may require an encroachment permit to coordinate work with utilities and other entities in the public rights-of-way. Each department may have its own requirements, perform its own completeness review, and issue its own incomplete notice. Moreover, these reviews may occur simultaneously or sequentially.

The one-bite rule in particular forces these departments to act in concert, even when it may not be in anyone's best interest to do so. For example, if an applicant must obtain an approval from the planning department and the building department for a new facility, any resources expended by the building department would be completely wasted if the planning department determined that the installation would be better suited on a nearby rooftop than as a freestanding tower. However, if the building department does not commence its review upon

submittal, the applicant may later claim that any subsequent incomplete notices are barred by the one-bite rule.[30]

These rules do not reflect the practical realities in the review process. Accordingly, the Commission should dispense with the 10-day resubmittal period and the "one-bite" rule.

#### 4. *Déjà vu All Over Again: Municipalities Need Reasonable Moratoria to Adjust to New Deployments that Require New Siting Processes*

Many wireless industry members complain that municipalities continue to evaluate "small cell" applications under standards and procedures devised for "macrocell" facilities.[31] A similar disruptive change occurred after Congress enacted the Telecommunications Act.[32] Many state and local governments adopted moratoria as local officials studied the then-new technologies and evaluated policies and procedures to review and approve macrocells.[33]

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[30] *See, e.g.*, Letter from Joseph M. Parker, counsel for Crown Castle, to Afshan Hamid, City of Concord, Cal. (Apr. 12, 2017) (asserting that the city cannot require Crown to submit *anything* further for any other permits after the city determined that a project qualified for approval under § 6409).

[31] *See, e.g.*, *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of AT&T*, at 15 (Mar. 8, 2017) (noting that "[s]ome municipalities continue to evaluate small cell deployments in the context of their experience with macro facilities"); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of Sprint Corp.*, at 5 (Mar. 8, 2017) (noting that many regulations applied to small cells were designed for macrocells); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of T-Mobile USA, Inc.*, at 7 (Mar. 8, 2017) ("Often municipalities still review small cells the same way they review macrocells because they have either a telecommunications siting process designed for macrocells or no special process for telecommunications facilities."); *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Comments of Verizon*, at 20 (Mar. 8, 2017) (noting that many jurisdictions have not yet adopted specific policies for small cells).

[32] *See generally* Malcom J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 FED. COMM. L.J. 887, 897 (1999) (estimating that more than 300 communities adopted a moratorium after the TCA to study wireless facilities siting issues); Shannon L. Lopata, Note, *Monumental Changes: Stalling Tactics and Moratoria on Cellular Tower Siting*, 77 WASH. U. L. REV. 193, 199–202 (1999) (describing how a "recent flood of cellular tower applications has forced local municipalities and governments throughout the United States to balance the desire to modernize against concerns about citizens' property rights"); Timothy L. Gustin, Note, *The Perpetual Growth and Controversy of the Cellular Superhighway*, WM. MITCHELL L. REV. 1001, 1009 (1997); Susan L. Martin, Note, *Communications Tower Sitings: The Telecommunications Act of 1996 and the Battle for Community Control*, 12 BERKELEY TECH. L.J. 483, 492 (1997).

[33] *See, e.g.*, *Sprint Spectrum, LP v. Jefferson Cnty.*, 968 F. Supp. 1457, 1461 (N.D. Ala. 1997) (finding that applications for cell sites "virtually tripled" immediately after the TCA); *Sprint Spectrum, LP v. City of Medina*, 924 F. Supp. 1036, 1037 (W.D. Wash. 1996) ("On February 13, 1996—five days after the TCA became law—the

However, the Commission's effective prohibition on moratoria denies municipalities the traditional tool used to establish new rules for new developments.

Moratoria serve an important and essential function. These procedural devices temporarily pause new development activities to allow local officials to study any potential impacts on the community and establish standards and procedures to review and approve new projects.[34] Municipalities generally cannot adopt a moratoria without specific findings that the moratoria is necessary to respond to new developments and narrowly tailored to avoid unnecessary delays.[35]

Without moratoria, many municipalities face an impossible choice. Either attempt to comprehend the issues, evaluate existing regulations and adopt new rules within the shot clock timeframe, continue to evaluate small cells under potentially ill-suited standards or simply deny projects that cannot reasonably be reviewed within the applicable shot clock. These conditions do not accelerate broadband deployment.

The Commission should relax its restrictions on local moratoria, or at least consult with the Broadband Deployment Advisory Committee to develop model ordinances that reasonably preserve local review, to allow municipalities a reasonable opportunity to adapt to small cell

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Medina City Council, seeking time to deal with an expected flurry of applications, adopted a six-month moratorium on the issuance of new special use permits for wireless communications facilities.").

[34] *See, e.g.*, CAL. GOV'T CODE § 65858(a) (authorizing municipalities to adopt an "interim ordinance" to prohibit certain uses while local officials study the issue for up to 45 days); OR. REV. STAT. §§ 197.520(3)–(4) (authorizing municipalities to adopt a "moratorium" for up to 120 days when "existing development ordinances or regulations and other applicable law [are] inadequate to prevent irrevocable public harm from development"); *see also* ARIZ. REV. STAT. ANN. § 9-463.06 (authorizing municipalities to adopt a "moratorium" to address a shortage in essential public facilities for up to 120 days).

[35] *See* ARIZ. REV. STAT. ANN. § 9-463.06; CAL. GOV'T CODE § 65858; OR. REV. STAT. §§ 197.520(1)–(3) (setting out specific requirements for a moratorium, with specialized requirements for moratoria on developments in urban and rural areas, and for moratoria for reasons other than essential public facilities shortages); *see also Thunderbird Hotels, LLC v. City of Portland*, 180 P.2d 87, 94–95 (Or. Ct. App. 2008) ("[A]lthough a local government is authorized to delay or stop development, it may not do so in an *ad hoc* manner or without following the express procedures and requirements for moratoria.").

deployments. To the extent that any abuses may occur, courts can discern a reasonable moratorium from one imposed in bad faith.[36]

If the Commission finds it necessary to adopt formal rules, it should look to the *Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process* developed in cooperation by industry and municipal stakeholders in response to changes that followed the Telecom Act.[37] Principles for reasonable moratoria in the *Implementation Guidelines* are simple and effective:

1. Moratoria may be mutually beneficial when used to establish or amend local regulations in response to new technologies.
2. Moratoria should be for a fixed timeframe.
3. Local governments should continue to accept applications during the moratorium.
4. All stakeholders should cooperatively participate in the regulatory development process.
5. Pending applications should be processed in accordance with the new regulations.

An ounce of prevention is worth a pound of cure. The Commission should allow for reasonable moratoria to enable state and local governments to adjust their policies and procedures for new technologies and deployments.

[36] *See, e.g.*, *Merrick Gables Ass'n, Inc. v. Town of Hempstead*, 691 F. Supp. 2d 355 (E.D.N.Y. 2010) (noting that a moratorium imposed as a means to regulate wireless facilities based on RF emissions would violate § 332(c)(7)(B)(iv)); *Masterpage Commc'ns, Inc. v. Town of Olive*, 418 F. Supp. 2d 66, 81 (N.D.N.Y. 2005) (granting injunctive relief after the town adopted successive moratoria to indefinitely delay action on an application); *Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1196 (W.D.N.Y. 2003) (finding that a permit denial without substantial evidence, coupled with a moratorium, effectively prohibited wireless services); *Sprint Spectrum, LP v. Town of Farmington*, No. 3:97 CV 863 (GLG), 1997 WL 631104, *5–6 (D. Conn. Oct. 6, 1997) (finding that a nine month moratorium enacted in part due to concerns about the effects that RF emissions would have on property values violated the TCA).

[37] *See* LSGAC, CTIA, PCIA and AMTA, *Guidelines for Facilities Siting Implementation and Informal Dispute Resolution Process* (Aug. 5, 1998), available at: https://transition.fcc.gov/statelocal/agreement.txt [hereinafter "*Implementation Guidelines*"].

## II. A DEEMED-GRANTED REMEDY FOR § 332(c)(7)(B)(ii) WOULD BE BOTH IMPERMISSIBLE AND IMPRUDENT

The Commission should not adopt a deemed-granted remedy for the mere failure to act because Congress already specified the exclusive judicial remedy. Even if the statute were ambiguous, any potential ambiguities would not fairly allow for a deemed granted remedy given the statutory remedy and supporting Congressional history. In short, a deemed-granted remedy under § 332(c)(7)(B)(ii) would be "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law."[38]

### A. The Proposed Deemed-Granted Remedies Would Exceed the Commission's Interpretive Authority Because Congress Already Specified Expedited Judicial Review as the Exclusive Recourse for a Failure to Act

All three deemed-granted theories exceed the Commission's interpretive authority because "Congress has directly spoken to the precise question at issue."[39] Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any . . . failure to act . . . that is inconsistent with this subparagraph may . . . commence an action in any court of competent jurisdiction."[40]

Although the Commission notes that § 332(c)(7)(B)(v) "does not explicitly state that [its] enforcement mechanisms are *exclusive*,"[41] the Congressional record specifically provides otherwise.[42] Courts will construe the ordinarily-permissive word "may" as mandatory when the legislative history and the statutory structure demonstrate that the drafters meant "shall."[43] As the Conference Report unequivocally stated:

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[38] *See* 5 U.S.C. § 706(2)(A).
[39] *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).
[40] 47 U.S.C. § 332(c)(7)(B)(v).
[41] *See Wireless NPRM/NOI* at ¶ 14 (emphasis in original).
[42] *See* H.R. CONF. REP. NO. 104–458, at 208.
[43] *See, e.g.*, *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 198–99 (2000); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 376 (2d ed. 1980) (stating that "where a statute directs the doing of a thing for the sake of justice, or the public good, the word *may* is the same as the word *shall*" (emphasis in original)).

> It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 *the courts shall have exclusive jurisdiction* over all other disputes arising under this section.[44]

The fact that Congress also provided that "[a]ny person adversely affected by an act or failure to act . . . that is inconsistent with clause (iv) may petition the Commission" does not require that the word "may" be construed as permissive. The Conference Report clarified that:

> [t]he limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications . . . .[45]

Indeed, the conferees explicitly rejected a proposed amendment that would centralize authority over wireless facilities in the Commission. The adopted version "*prevents Commission preemption of local and State land use decisions* and preserves the authority of State and local governments over zoning and land use matters."[46]

Taken together, the statute and the Conference Report show that § 332(c)(7)(B)(v) directed disputes related to state and local land use regulations and decisions to the courts but created an exception for disputes that arose from state or local attempts to regulate RF emissions that could be resolved by the Commission. This framework closely resembles a similar division in § 253(d), which authorizes the Commission to preempt barriers to competitive telecommunication services except when such barriers arise from local rights-of-way management practices.[47]

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[44] *See* H.R. CONF. REP. NO. 104–458, at 208 (emphasis added).
[45] *See id.* at 209.
[46] *See id.* at 207–08 (emphasis added); *see also Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 407 (3rd Cir. 1999).
[47] *See* 47 U.S.C. § 253(d); *see also* 141 CONG. REC. S8305 (Aug. 4, 1995) (statement of Sen. Feinstein) (arguing that Commission preemption over local issues under § 253 should be curtailed and litigated in local district court instead).

Accordingly, the Commission lacks authority to interpret a deemed-granted remedy for a mere failure to act because § 332(c)(7)(B)(v), as confirmed by the Conference Report, unequivocally establishes the courts as the exclusive venue for disputes over a failure to act.

### B. Any Ambiguity in § 332(c)(7)(B)(ii) Does Not Fairly Allow for a Deemed-Granted Remedy for a Mere Failure to Act

Section 332(c)(7)(B)(v) directly answers the precise question at issue. But even if it did not, a deemed-granted remedy would be an impermissible interpretation because § 332(c)(7)(B)(ii) requires State and local governments to "act" on—but not necessarily "approve"—an application, and any alleged violations must be resolved by the courts. All three deemed-granted theories aim to force an approval, usurp the courts' exclusive role or both, and therefore seek to reach a result Congress would not have sanctioned.

#### 1. *Proposed Interpretations Would Receive "Considerably Less Deference" Because They Depart from Consistently Held Views by the Commission and the Courts for Nearly 20 Years*

As a threshold matter, any deemed-granted interpretation would be subject to more scrutiny because it departs from the long-held view by the Commission and the courts that judicial remedies are the exclusive enforcement mechanism for failures to act within a reasonable time. Although the Commission may change its position, it must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[48] That basis for change in view "is 'entitled to considerably less deference' than a consistently held agency view."[49] The theories advanced in the *Wireless NPRM/NOI*, while

[48] *See Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).
[49] *See INS v. Cardoza–Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); *see also State Farm*, 463 U.S. at 42 ("If Congress established a presumption from which judicial review should start, that presumption . . . [is] *against* changes in current policy that are not justified by the rulemaking record." (emphasis in original)).

certainly a "fresh look" at the issues, lack a reasoned basis to depart from the Commission's and the courts' consistently held view.[50]

All three deemed-granted theories conflict with the Commission's long-held views that § 332(c)(7) limits its authority over land use decisions and does not support a deemed-granted remedy.[51] In the *Rural Services Order*, for example, the Commission stated:

> With respect to preemption, as discussed above, *Section 332(c)(7) generally preserves local authority over land use decisions, and limits the Commission's authority in this area*. In appropriate cases, the Commission or its Bureaus have considered petitions alleging that particular regulations impinge on areas within the Commission's exclusive jurisdiction.[52]

Consistent with this position, the Commission stated in the *2009 Declaratory Ruling*, and reiterated in the *2014 Infrastructure Order*, that courts should craft case-specific remedies.[53]

Although the Commission points out that neither the *2009 Declaratory Ruling* nor the *2014 Infrastructure Order* expressly stated that courts were the exclusive enforcement mechanism for § 332(c)(7)(B) violations, the Commission's own website currently does. At the time these comments were filed, the Commission's own website stated that:

> [A]llegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be *resolved exclusively by the courts* (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than in RF

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[50] *See Wireless NPRM/NOI* at ¶ 8.

[51] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12978, ¶ 284; *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39; *In re Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order and Notice of Further Rulemaking*, 19 FCC Rcd. 19078, 19143, ¶ 123 (2004) [hereinafter "*Rural Services Order*"]; *see also id.* at 19143, ¶ 123 n.368 (noting that "courts have exclusive jurisdiction over most complaints under Section 332(c)(7)(B)").

[52] *Rural Services Order*, 19 FCC Rcd. at 19143, ¶ 123 (emphasis added, internal footnotes omitted). With respect to the "areas within the Commission's exclusive jurisdiction," the Fifth Circuit in *Arlington I* found that this statement "makes clear that the limitation to which the FCC was referring was § 332(c)(7)(B)(v)'s grant of exclusive jurisdiction to the courts over most disputes arising under § 332(c)(7)(B)." *See City of Arlington v. FCC*, 668 F.3d 229, 254 (5th Cir. 2012) ("*Arlington I*").

[53] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12978 ¶ 284; *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39.

> emissions cases, the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation.[54]

Accordingly, the proposed deemed-granted remedies would be inconsistent with the Commission's long-held view that judicial remedies are the exclusive enforcement mechanism for § 332(c)(7)(B)(ii) violations.

The Commission's prior view also coincides with long-standing judicial interpretations. Although wireless industry members often cite to various judicial decisions as alleged support for the proposition that an injunction is appropriate relief under § 332(c)(7)(B), "case law does not establish that an injunction granting the application is always or presumptively appropriate when a 'failure to act' occurs."[55]

Courts grant injunctive relief only when inaction, coupled with some conduct that manifests an intention not to approve the application, amounts to a *de facto* denial that violates other provisions in § 332(c)(7)(B).[56] For example, the Sixth Circuit in *Tennessee ex. rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392 (6th Cir. 2005), ordered Chattanooga to issue permits after the city verbally informed the applicant that it would not approve the proposed project and failed to act for more than nine months.[57] However, the mere failure to act did not trigger the mandamus. As the court made clear, "[Chattanooga]'s fatal flaw

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[54] *See Tower and Antenna Siting*, FCC (Sept. 20, 2016), https://www.fcc.gov/general/tower-and-antenna-siting (last visited on June 11, 2016) (emphasis added).
[55] *See 2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39; *see also* Plaintiff's Reply Brief in Support of Motion for Partial Summary Judgment on the First Cause of Action of the Complaint at 2, *GTE Mobilnet of Cal. Ltd. P'ship v. City of Watsonville*, No. 16-cv-03987-NC (filed Oct. 11, 2016) (claiming that courts have "almost uniformly held" that injunctive relief is appropriate for a mere failure to act without citing case law that stands for such proposition).
[56] *See, e.g.*, *Tennessee ex. rel. Wireless Income Props., LLC v. City of Chattanooga*, 403 F.3d 392, 398–99 (6th Cir. 2005).
[57] *See id.*

here was that it failed to issue a written decision supported by substantial evidence."[58] At least four other circuits also require some more serious violation than a mere failure to act.[59]

### 2. *Nothing in § 332(c)(7)(B)(ii) Suggests that Congress Intended State and Local Governments to Reach Anything Other than a Decision within a Reasonable Time*

Unlike other statutes in which the Commission found a basis for a deemed-granted remedy, such as the Spectrum Act, § 332(c)(7)(B)(ii) does not compel state or local governments to reach a specific result. Congress merely required that state and local government's act within a reasonable time.

Congress knows how to compel a specific outcome when it chooses to do so.[60] Deemed-granted rules for eligible facilities requests, cable franchises, pole attachments and requests for regulatory forbearance all derive from statutes that compel an approval for a very specific application.[61] Section 332(c)(7)(B)(ii) merely imposes an obligation to "act" within a reasonable

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[58] *See id.* at 400 n.6.

[59] *See Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1221–1222 (11th Cir. 2002) (granting injunctive relief because the county denied an application without substantial evidence); *See Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24–25 (1st Cir. 2002) (granting injunctive relief because the board's denials effectively prohibited personal wireless services); *See Pine Grove Twp.*, 181 F.3d at 409–10 (granting injunctive relief because the township denied an application without substantial evidence); *See Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2nd Cir. 1999) (granting injunctive relief because the town denied an application without substantial evidence); *see also T-Mobile Ne. LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 463 (S.D.N.Y. 2009). (distinguishing procedural and substantive Telecom Act violations and granting an injunction because the plaintiff showed a substantive violation occurred); *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 214 n.7 (S.D.N.Y. 2004) (finding that a mere failure to act can be mooted by a decision during the pendency of litigation).

[60] *Cf. Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994).

[61] *See* 47 U.S.C. § 1455(a) ("[A] State or local government *may not deny, and shall approve*, any eligible facilities request . . . ." (emphasis added)); *id.* § 541(a)(1) ("[A] franchising authority *may not . . . unreasonably refuse to award* an additional competitive franchise." (emphasis added)); *id.* § 537 ("If the franchising authority fails to render a final decision on the request within 120 days, such request shall be *deemed granted* unless the requesting party and the franchising authority agree to an extension of time." (emphasis added)); *id.* § 224(f)(1) ("A utility *shall provide a cable television system or any telecommunications carrier with nondiscriminatory access* to any pole, duct, conduit, or right-of-way owned or controlled by it." (emphasis added)); *id.* § 160(c) ("Any such petition *shall be deemed granted* if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission." (emphasis added)).

time and covers all applications for all new and modified personal wireless service facilities.[62] The plain language expresses no preference or opinion as to what the decision should be.

In this regard, the Commission's view that § 332(c)(7) and the Spectrum Act are not materially different (insofar as Congress did not intend facilities under either framework to be "mired in [a] protracted approval process") appears misplaced.[63] Section 332(c)(7) requires that state and local governments process wireless applications in the same manner as they process other zoning applications—no slower and no faster, whereas the Spectrum Act mandates approval whether the proposed project complies with local zoning rules.[64] Although § 332(c)(7)(B)(v) requires the *courts* to hear complaints on an "expedited" basis, this does not affect the "reasonable" time state and local governments have to act under § 332(c)(7)(B)(ii). Accordingly, an interpretation that would mandate an approval would be manifestly contrary to the plain language that compels only a decision within a reasonable time.

### 3. *Congress Did Not Intend the Commission to Act for States or Local Governments Who Fail to Act Within a Reasonable Time*

The Conference Report also makes clear that Congress did not intend for the Commission to preemptively step in and make "zoning and land use decisions" after a failure to act within a reasonable time.[65] However, whether by an "irrebuttable" presumption, a lapse in local authority or wholesale preemption, all three deemed-granted theories in the *Wireless NPRM/NOI* usurp the

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[62] *See id.* § 332(c)(7)(B)(ii) ("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." (emphasis added)).
[63] *See Wireless NPRM/NOI* at ¶ 12.
[64] *Compare* H.R. CONF. REP. NO. 104-458, at 208, *with* 47 U.S.C. § 1455(a); *see also 2014 Infrastructure Order*, 29 FCC Rcd. at ¶ 201 (permitting Section 6409(a) modifications to legal non-conforming structures that would otherwise be prohibited under local zoning laws).
[65] *See* H.R. CONF. REP. NO. 104–458, at 207–08.

state or local government's role as the primary decision-maker. Such an expansive construction that would fundamentally change the regulatory scheme laid out in the statute must be incorrect.[66]

The Commission's reliance on *Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) ("*Arlington I*"), and *Arlington v. FCC*, 133 S.Ct. 1863 (2013) ("*Arlington II*"), for the proposition that "courts must follow" Commission interpretations appears overstated.[67] The Fifth Circuit in *Arlington I* upheld the Commission's guidance to the courts in the *2009 Declaratory Ruling* because the court found the word "reasonable" contained an ambiguity that fairly allowed for the presumptively reasonable timeframes.[68] The Supreme Court in *Arlington II* addressed an even narrower question as to whether *Chevron* deference applied to agency interpretations that could enlarge the agency's jurisdiction.[69] Neither case expressed any opinion as to potential ambiguities in § 332(c)(7)(B)(v), or whether such ambiguities, if any, fairly allowed for a deemed-granted remedy.

Accordingly, even if § 332(c)(7)(B)(v) did not directly foreclose deemed-granted remedies, the proposed remedies would exceed the Commission's interpretive authority because all three theories go further than any ambiguity in the statute would allow.

#### 4. *An "Irrebuttable" Presumption Creates a New Substantive Limitation on State and Local Authority that Impermissibly Instructs the Courts How to Rule in a Particular Case*

In addition to the fatal flaws noted above, the Commission's proposed "irrebuttable" presumption would impermissibly create a new substantive limitation on state and local governments and instruct the courts how to rule in individual cases. Even if the Commission's

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[66] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *MCI Telecommns. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 224 (1994).
[67] *See Wireless NPRM/NOI* at ¶ 10.
[68] *See Arlington I*, 668 F.3d at 259–60.
[69] *See Arlington v. FCC*, 133 S.Ct. 1863, 1867–1868 (2013) ("*Arlington II*") ("We granted certiorari . . . limited to the first question presented: 'Whether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction.'" (internal citation omitted)).

proposed rule did not obviate the courts' role altogether, the Commission cannot create new substantive limitations that effectively dictate outcomes in a judicial proceeding.

Section 332(c)(7)(B) contains the *only* limitations on state and local authority with respect to personal wireless service facilities.[70] Unlike a rebuttable presumption, which merely shifts the burden of proof from one litigant to another, an irrebuttable presumption establishes a new substantive law.[71] Thus, the Commission cannot interpret § 332(c)(7)(B)(ii) to contain a silent irrebuttable presumption because it would create a new substantive limitation on state and local authority.

Moreover, the irrebuttable presumption binds the courts' discretion and effectively instructs it how to rule. Although proponents may claim that an irrebuttable presumption does not eliminate the judiciary's role because shot clock disputes would still be heard in court, the rule would render the proceedings a meaningless exercise and substitute the Commission's desired outcome for the judge's reasoned opinion as to the facts and the law. Congress cannot instruct the courts how to rule in any case, and the Commission cannot do what Congress could not do itself.[72] Therefore, an irrebuttable presumption is forbidden because it would impermissibly instruct the courts how to interpret and apply the law to the circumstances in a case.[73]

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[70] *See T-Mobile S. LLC v. City of Roswell*, 135 S.Ct. 808, 816 (2014) (finding that "the enumerated limitations [in § 332(c)(7)(B)] to set out an exclusive list").

[71] In adopting the rebuttable presumption, Chairman Genachowski stressed that "the process we establish does not dictate any substantive outcome in any particular case, or otherwise limit state and local governments' fundamental authority over local land use." *2009 Declaratory Ruling*, 24 FCC Rcd. at 14030 (statement of Chairman Julius Genachowski).

[72] *See Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1322–1323 (2016) (holding that Article III "blocks Congress from requiring federal courts to exercise the judicial power in a manner that Article III forbids" (internal punctuation omitted)).

[73] *See id.* at 1323; *see also In re Taxable Municipal Bond Securities Litigation*, 796 F. Supp. 954, 960 (E.D. La. 1992) ("Congress unquestionably possesses the power to change or make law. What Congress cannot do is instruct the court on how to decide the merits of a particular controversy without changing the legal rules that prescribe the rights of the parties.").

### 5. *State and Local Government Police Powers Cannot "Lapse"*

Lastly, the proposed interpretation that state and local authority lapses after a failure to act stretches the statutory text beyond its breaking point.[74] When Congress provides that applicants may sue a state or local government that fails to act within a reasonable time, it does not ordinarily mean that state and local governments forfeit all their authority if they fail to act within a reasonable time. Especially when the same statute generally preserves all state and local authority, the Commission's proposed lapsed-authority interpretation would violate the doctrine that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[75]

Any argument that Congress impliedly intended state and local land use authority to lapse would face a significantly uphill challenge in the courts to overcome the presumption against preemption in traditionally local matters unless preemptive intent is "unmistakably clear" in the statutory text.[76] Section 332(c)(7) clearly does not preempt the field because § 332(c)(7)(A) expressly preserves state and local authority over land use decisions.[77] Likewise, no express intent to preempt state or local authority after some timeframe elapses appears anywhere in the statute. The Commission would need to rely on implied preemption, which Congress forbids.[78]

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[74] *See Wireless NPRM/NOI* at ¶ 13.
[75] *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").
[76] *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1996).
[77] *See* 47 U.S.C. § 332(c)(7)(A); *Sprint Tel. PCS LP v. Cnty. of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008) [hereinafter "*Sprint II*"]; *see also Hillsborough Cnty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) ("The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme.").
[78] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (Feb. 8, 1996) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."); *City of Dallas v. FCC*, 165 F.3d 341, 347–48 (5th Cir. 1999).

### C. Any Deemed-Granted Remedies for Discretionary Authorizations Must Incorporate Due Process Protections

To the extent that the Commission does attempt to impose some deemed-granted rules, it should ensure that no requests for authorization under § 332(c)(7) may be automatically approved without prior notice and an opportunity to be heard. Land use decisions implicate due process protections insofar as new developments diminish property interests.[79] Under both federal and state law, prior notice and an opportunity to be heard is an essential due process protection.[80]

The plain language in § 332(c)(7)(B)(ii) and its legislative history show that Congress envisioned enough space for due process in wireless siting. Under § 332(c)(7)(B)(ii), the timeframe for review depends on the "nature and scope of [the] request." The Conference Report explains that this feature was intended to facilitate a "public hearing or comment process" when required under local law.[81]

Wireless facilities are not exempt from due process concerns. For example, in *American Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014), the Ninth Circuit held that applications to renew three macrocells could not be deemed approved under California state law without due process because the court had "little trouble finding that the automatic approval . . . would constitute a substantial or significant deprivation of other landowners' property interests .

[79] *See, e.g.*, *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1049 (9th Cir. 2014) (quoting *Horn v. Cnty. of Ventura*, 596 P.2d 1134, 1140 (Cal. 1979)).
[80] *See* U.S. CONST. Amends. V and XIV; ARIZ. CONST. art. II, § 4 ("No person shall be deprived of life, liberty, or property without due process of law."); CAL. CONST. art. 1, § 7 ("[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws"); *Londoner v. Denver*, 210 U.S. 373, 386 (1908).
[81] *See* H.R. CONF. REP. NO. 104-458, at 208

. . ."[82] Thus, decisions to approve (or renew) authorizations for wireless facilities subject to local discretion under § 332(c)(7) require prior notice and an opportunity to be heard.

Procedural protections are a common feature in deemed-approved provisions under state law.[83] Accordingly, any deemed-granted rule imposed by the Commission should not become effective without proper notice and an opportunity to be heard.

## III. THE COMMISSION SHOULD NOT ADOPT NEW OR SHORTER SHOT CLOCKS

The wireless deployment process thrives on cooperation among all stakeholders. Just as the Commission found in the *2009 Declaratory Ruling* that too much time for review hindered deployment, it should now recognize that too little time for review threatens to grind cooperative efforts—and deployment—down. Similarly, the Commission should not adopt new shot clock classifications based on over-simplified assumptions about what impacts review periods.

### A. Commission Authority to Define "Reasonable" Timeframes for Review is Not Unlimited, and Cannot Frustrate Ordinary Zoning Procedures

Nowhere in the *Wireless NPRM/NOI* does the Commission question its authority to create new or shorter shot clocks.[84] Although the Supreme Court in *Arlington v. FCC*, 133 S.Ct. 1863 (2013), upheld the Commission's authority to interpret a "reasonable" timeframe, the actual interpretations must always be "based on a permissible construction of the statute."[85]

Shot clocks cannot be so short that they frustrate ordinary permitting processes within a given jurisdiction. The obligation to act within a reasonable time must be read in conjunction with Congress' stated intent that "[i]f a request . . . involves a zoning variance or a public hearing

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[82] *See Am. Tower Corp.*, 763 F.3d at 1050–1051.
[83] *See, e.g.*, CAL. GOV'T CODE § 65964.1(a)(2) (prohibiting deemed approvals without all notices required for the application); 53 PA. CONS. STAT. ANN. § 10908(9) (authorizing a deemed approval only after the notice required by law has occurred).
[84] *See Wireless NPRM/NOI* at ¶¶ 16–19.
[85] *See Arlington II*, 133 S.Ct. at 1874 (quoting *Chevron*, 467 U.S. at 842) (internal quotations omitted).

or comment process, the time period for rendering a decision will be the usual period under such circumstances."[86] Congress intended the "reasonable" time to allow for "the generally applicable time frames for zoning decision . . . ."[87] Any new interpretations that effectively foreclose traditional zoning processes for wireless facilities would go "further than the ambiguity [in § 332(c)(7)(B)(ii)] will fairly allow."[88]

### B. Over-Granulized Shot Clock Classifications Proposed in the *Wireless NPRM/NOI* Are Based on False or Over-Simplified Assumptions about Which Facilities Require More or Less Time for Review

As a general matter, the Commission should not further granulize shot-clock classifications. More specifically, the Commission's proposed classifications distort the reasons why some facilities require a lengthier review than others. Although distinctions such as overall height, equipment size and location may impact the review process, the most important factor is whether the proposed deployment complies with local zoning codes.

#### 1. *Overall Height*

The Commission should not create a new shot clock classification based on overall height. Whether a tower at a particular overall height will create aesthetic concern depends on context. Structures with the same overall height have a greater aesthetic impact in a hilly area than in a flat area due to relative vantage points throughout the neighborhood.[89] A 50-foot tower in an industrial park may not require the same public process as a 50-foot tower in the public

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[86] *See* H.R. CONF. REP. NO. 104-458, at 208; *see also 2009 Declaratory Ruling*, 24 FCC Rcd. at 14010, ¶ 42 (finding that "Congress intended the decisional timeframe to be the 'usual period' under the circumstances for resolving zoning matters").
[87] *See* H.R. CONF. REP. NO. 104-458, at 208.
[88] *See Arlington II*, 133 S.Ct. at 1874.
[89] *See, e.g.*, John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME L.J. ETHICS & PUB. POL'Y 537, 549 (2009) (noting hillsides as a location associated with greater aesthetic impacts); Sandy Bond, *Cell Phone Tower Proximity Impacts on House Prices: a New Zealand Case Study*, 13 PAC. RIM PROP. RESEARCH J. 63, 84 (2007) (noting that topographical differences between neighborhoods impacted public opinions about aesthetic concerns).

rights-of-way. To be sure, tall towers tend to raise more general concerns, but location and context matters far more than overall height.

Moreover, delays in approvals due to height generally have more to do with the fact that the proposed tower exceeds the zone height limit. Different communities adopt different zone heights for the same zone classifications; the limit in a residential zone in Scottsdale, Arizona, may be 35 feet whereas the limit in the same zone classification in Hermosa Beach, California, may be 25 feet.[90] Height limits may also widely differ within the same general zone classification for specific sub-classifications, such as in Portland, Oregon, where overall height limits across various commercial zones range from 35 feet to 75 feet.[91]

Accordingly, a shot clock classification based on overall height would not reflect the interactions between height, context and code compliance. Any attempt to account for these diverse factors in a meaningful way would be nearly impossible.

**2. *Zone Classifications***

The Commission should not create a new shot clock classification for zone classifications. Timeframes that incent certain deployments over others based on zone classifications alone would intrude on state and local authority to determine which locations would be most appropriate for particular facilities.

Moreover, increasingly common mixed-use zones, design overlay districts, environmental preservation districts and other special zoning classifications would inevitably outpace the Commission's rules and create further confusion about the applicable shot clock

[90] *Compare* SCOTTSDALE, ARIZ., CODE § 5.014(D), *with* HERMOSA BEACH, CAL., CODE § 17.08.030(A).
[91] *See* PORTLAND, OR., CODE § 33.130.210, Table 130-3.

timeframe. For example, both Portland, Oregon, and Tucson, Arizona, each have 28 separate zone classifications.[92] Los Angeles, California, has 68 separate zone classifications.[93]

### 3. *Utility Structures and the Public Rights-of-Way*

The Commission should not create a new shot clock classification for utility structures and deployments in the public rights-of-way. Shorter timeframes for facilities on utility structures or in the public rights-of-way would conflict with the Commission's prior determination that such deployments "are *more* likely to raise aesthetic, safety, and other issues" than traditional towers.[94]

- ***Wireless facilities on utility structures and in the public rights-of-way are more difficult to conceal.*** Slim concrete or wooden poles and bare lattice towers significantly curtail concealment options for wireless attachments. Moreover, these locations are often highly visible because utilities and rights-of-way are naturally close to where people live and work. Applicants often strongly resist concealment techniques that work well, such as decorative replacement poles, underground equipment or landscape screening for ground-mounted equipment.

- ***Additional structures in the public rights-of-way create additional potential hazards to the public.*** A common concern among public works directors is that pole proliferation in the public rights-of-way threatens public safety. For example, overbuilt towers and pole attachments can cause severe damage, as happened in 2007 in California when a utility pole overloaded with wireless transmission equipment collapsed and started a fire that ravaged nearly 4,000 acres and caused millions of dollars in property damage.[95]

- ***Work in the public rights-of-way generally requires greater coordination with third parties than as compared with deployments on private property.*** Both new structures and new attachments to existing structures must ensure proper separations from existing utilities and other uses, which often requires a technical review.[96] When a deployment requires excavation, such as for new wireline utilities, hand holes or reinforced pole foundations, local officials must ensure that the proposed work does not damage or

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[92] *See* City of Portland, Bureau of Planning & Sustainability, *Zoning Map* (Jan. 1, 2017), *available at:* https://www.portlandoregon.gov/bps/article/59265; TUCSON, ARIZ., DEV. CODE § 4.5.
[93] *See* City of Los Angeles, Dept. of Building and Safety, *Generalized Summary of Zoning Regulations* (Jan. 24, 2006), *available at:* https://planning.lacity.org/zone_code/Appendices/sum_of_zone.pdf.
[94] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12948, ¶ 195.
[95] *See* Melissa Caskey, *CPUC Approves $51.5-Million Malibu Canyon Fire Settlement*, MALIBU TIMES (Sep. 23, 2013), *available at* http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html.
[96] *See, e.g.*, Cal. Pub. Utils. Comm'n, *Rules for Overhead Electric Line Construction*, General Order No. 95 (Jan. 2015), *available at:* http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M146/K646/146646565.pdf (last visited June 15, 2017).

interfere with any pre-existing underground utilities. Sidewalk closure and traffic control plans may also be necessary to ensure that the construction, excavation or installation work does not disrupt pedestrian and vehicular traffic.

**4. *DAS and Small Cells***

The Commission should not establish special shot clock rules for DAS or small cells. Such rules would be inevitably discriminatory against other technologies and based on the false premise that all DAS and small cells are smaller or less obtrusive.

First, the Commission should not create new shot-clock classifications that discriminate based on the technological configuration proposed. This proposal would reverse long-standing Commission policies that favor technologically neutral rules, and create incentives for competitive carriers to prefer DAS and small cell technologies over others. State and local governments could not discriminate in this manner,[97] and neither should the Commission.

Second, a shorter shot clock for DAS or small cells apparently stems from the false premise that these facilities are "small" and uniform in appearance. A "small" cell can be just as large and intrusive as a "macro" cell because the word "small" refers to the coverage area rather than the equipment. Although some DAS and small cell deployments may involve pizza box-sized antennas,[98] the vast majority do not and many use the same equipment as traditional macro sites. Indeed, the Commission's own volume-based definition for a "small cell" could contain more than 76 large pizza boxes.[99]

As the example photographs below show, DAS and small cell deployments come in all sizes and shapes:

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[97] *See, e.g.*, *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105-106 (2nd Cir. 2010) (invalidating a local ordinance that made it virtually impossible to deploy any facilities other than a DAS).
[98] *See* Letter from Brian M. Josef, CTIA, to Marlene H. Dortch, FCC (April 13, 2017).
[99] *See 2014 Infrastructure Order*, 29 FCC Rcd. at 12907, ¶ 92 n. 251 (defining a small cell as an installation with no more than six cubic feet in antenna volume and no more than 17 cubic feet in equipment volume). The average large pizza box is approximately 0.30 cubic feet (16.25" x 16.25" x 2.00").

*Figure 1: Outdoor Small Cell with Integrated Backhaul by ip.access in the United Kingdom.*

The equipment depicted in Figure 1 provides outdoor LTE services with an integrated wireless backhaul solution.

*Figure 2: CommScope Small Cell Deployment at Petco Park, San Diego, Cal. (Photo Robert C. May III)*

The “pizza box” antennas shown in Figure 2 are typically used indoors or at venues such as shopping malls and stadiums. Not visible in this example are the remote radio units, equipment racks and cables that support these antennas.

*Figure 3: Spectrum Cable (fka Time Warner) Strand-mounted Node in Santa Monica, Cal. (Photo by Dr. Jonathan L. Kramer)*

*Figure 4: Mobilitie Small Cell in Los Angeles (Photo by Dr. Jonathan L. Kramer)*

*Figure 5: Crown Castle Small Cell in Riviera Beach* (Susan Salisbury, *New: Is Fast Digital Service Worth Placing a Pole in Front of Your Home?*, PalmBeachPost.com (Mar. 20, 2017 8:45AM), *available at:* http://www.palmbeachpost.com/business/new-fast-digital-service-worth-placing-pole-front-your-home/bw1EEYC4loOlyJGk0yQqKJ/.)

*Figure 6: Zayo Small Cell* (Mark Ambrogi, *Zayo Group Installing Small Cell Equipment Around Town to Enhance Mobile Coverage*, CurrentInZionsville.com (Sept. 13, 2016), available at: http://www.currentzionsville.com/2016/09/13/zayo-group-installing-small-cell-equipment-around-town-to-enhance-mobile-coverage/.)

*Figure 7: AT&T "Small Cell" in Oakland, Cal. (Photo by Omar Masry*)

*Figure 8: T-Mobile "Small Cell" in Riverside, Cal. (Photo by Tellus Venture = http://www.tellusventure.com/images/2017/5/tmobile_small_cell_alessandro_riverside.jpg)*

*Figure 9: "Small Cell" in Portland, Or. (Photo by Omar Masry)*

To the extent that DAS and small cells use the same or similar large equipment as macro sites, these facilities often implicate the same aesthetic concerns as traditional deployments. Moreover, applicants typically seek to place these facilities in the public rights-of-way where the equipment will be even more visible and less screened than it might be on private property.[100] Narratives that DAS and small cells do not raise the same aesthetic or safety concerns as "traditional, larger . . . equipment" are simply not true.[101]

**5. *Batched Applications***

[100] *Compare Clarkstown*, 612 F.3d at 101–02 (describing a local ordinance that incentivized DAS), *with NewPath Networks LLC v. City of Irvine*, No. SACV 06–550–JVS (ANx), 2009 WL 9050819, *19 (C.D. Cal. Dec. 23, 2009) (describing local opposition to DAS because it would be in close proximity to residences).
[101] *See Wireless NPRM/NOI* at ¶ 18.

The Commission should encourage experimentation with batched applications, but should not adopt any rigid classifications or mandatory rules. Although batched applications may be an appropriate solution under some circumstances, it may mutate into a problem if local governments are required to accept more applications than their resources would allow them to process within the applicable timeframe. The Commission should allow local governments to serve as laboratories for innovation and determine whether sufficient resources are available to handle batched applications.

Batched applications should not require local governments to issue a single permit for multiple sites. At least some individualized review will be necessary no matter how similar the batched installations may seem. Poles that seem identical may have different structural capacities, may be placed on streets with higher traffic volumes or may be in more visually prominent locations. Moreover, many public works departments track encroachments in the public rights-of-way by individual permit numbers.

This common tracking system allows local governments to ensure that conditions specific to an individual permit can be recorded and monitored during the installation process. A common problem local governments encounter when considering a blanket permit approach is that permit-tracking software generally does not contemplate this function, and customized upgrades can be prohibitively expensive for some smaller jurisdictions. This approach would inevitably leave some local governments that cannot afford expensive software upgrades without the tools to effectively monitor a permittee's compliance with public health and safety laws.

## IV. LOCAL GOVERNMENT RESPONSES TO THE NOTICE OF INQUIRY

Local Governments appreciate the Commission's effort to harmonize the provisions in §§ 253 and 332(c)(7), as similar statutes should be whenever possible.[102] We also respectfully remind the Commission that:

> [i]t would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.[103]

Although different interpretations may have emerged for superficially similar terms, sections 253 and 332(c)(7) concern two different technologies at two different stages in market development at the time Congress adopted the Telecommunications Act. Given the dissimilarities between the facilities and services covered under each statute, it may be a more reasonable approach to admit that these statutes are simply different.

### A. Congress Never Intended Sections 253 and 332 to be Simultaneously Applied to Both Wireless and Wireline Facilities

Congress created two different statutory frameworks to govern the interaction between federal, state and local authority over different services: one for "telecommunication services" in general under § 253 and another for wireless telecommunications services under § 332. These frameworks bear a certain resemblance. Both contain a general prohibition on state and local laws that would prohibit or effectively prohibit competitive market entry; both contain safe harbors for state laws necessary for universal service and consumer protections; and both contain safe harbors for state and local land use and construction regulations.[104] However, these

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[102] *See Wireless NPRM/NOI* at ¶ 85; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 ("A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' . . . and 'fit, if possible, all parts into an harmonious whole' . . . .").

[103] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

[104] *Compare* 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."), *with id.* § 332(c)(3)(A) ("[N]o State or local government shall have any authority to

frameworks also contain important differences that show Congress never intended both to be simultaneously applicable to wireless and wireline services.

First, Congress created a narrower classification for wireless services within the broader telecommunications services class and afforded wireless service providers *broader* protections from state-level regulations for universal service and consumer protections. Section 332(c)(3) only subjects commercial mobile services to the same state regulations as other telecommunication services "where such services are a substitute for land line telephone exchange service . . . within such State . . . ."[105] Thus, Congress understood that wireless services *could potentially* be a substitute for landline services but needed additional protections until and unless wireless could compete against landline services.

Second, Congress afforded wireless service providers *narrower* protections from state and local land use and construction regulations. For example, the plain text in § 253 expressly preserves only "non-discriminatory" rights-of-way management practices but Congress saw fit to allow state and local governments to reasonably discriminate among functionally equivalent services under § 332(c)(7). Moreover, unlike § 332(c)(3), state and local authority over land use and construction specifically preserved over wireless facilities never reverts to the analogous (but less robust) safe harbor applicable to telecommunication services in general no matter how competitive wireless services may be with landline services. Thus, Congress understood that

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regulate the entry of . . . any commercial mobile service or any private mobile service . . . ."); *compare id.* § 253(b) (preserving state authority "to impose, on a competitively neutral basis and consistent with section 254 of this title, 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"), *with id.* § 332(c)(3)(A) (preserving state authority to impose "requirements . . . necessary to ensure the universal availability of telecommunications service at affordable rates"); *and compare id.* § 253(c), *with id.* § 332(c)(7)(A).

[105] *See* 47 U.S.C. § 332(c)(3)(A). This section also contains a procedure in which the state can regulate commercial mobile services in the same manner as other telecommunication services when the Commission finds that wireless and wireline services are in effective competition within that particular state. *See id.* §§ 332(c)(3)(A)(i)–(ii).

wireless facilities would always implicate different land use and construction issues than wireline facilities and should therefore be regulated under different rules.

Accordingly, the Commission should approach any attempt to harmonize the provisions in §§ 253 and 332(c)(7) with the understanding that Congress created different statutes, with different standards, as a vehicle to recognize the real differences between wireless and wireline telecommunications. Moreover, the Commission should not attempt to harmonize these statutes to the extent that it would eviscerate the more specific protections Congress created for state and local land use and construction regulations applicable to wireless facilities.[106]

### B. Effective Prohibitions

#### 1. *Section 253(a) Requires an Actual Prohibition, and Earlier Decisions that Set a Lower Bar Have Been Generally Overruled or Isolated to Their Facts*

The plain language in § 253(a) bans "prohibitions" rather than mere burdens.[107] As the Ninth Circuit explained:

> Section 253(a) provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting . . . provi[sion of] . . . telecommunications service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect.[108]

[106] *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (citations omitted) (holding "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.").
[107] *See* 47 U.S.C. § 253(a).
[108] *See Sprint II*, 543 F.3d at 578; *see also Level 3 Commc'ns LLC v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir. 2007) (holding that a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition" to prevail under § 253(a)).

Although earlier decisions misread § 253(a), at least one court expressly reversed its approach and others have trended in the same direction.[109]

Decisions from the First, Second and Tenth Circuit cited in the *Wireless NPRM/NOI* all stemmed from *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000), which never actually interpreted the provisions in § 253(a). The court in *RT Communications* merely reviewed a challenge to how the Commission interpreted "competitively neutral" under § 253(b) in *In re Silver Star* under the deferential *Chevron* deference standard.[110] Although the decision in *RT Communications* did not even address "effective prohibitions" under § 253(a), the Second Circuit in *TCG New York, Inc. v. White Plains*, 305 F.3d 67 (2nd Cir. 2002) cited it as the only circuit court decision available and the First Circuit subsequently followed suit.[111]

Perhaps in recognition that *White Plains* adopted the wrong approach, decisions from the Second Circuit have since gradually moved toward the approach adopted in the Eighth and Ninth Circuits. In 2010, the court affirmed a lower court decision that expressly adopted the Ninth Circuit approach.[112] Last year, the court in *Global Network Communications, Inc. v. New York*, 562 F.3d 145 (2nd Cir. 2016), isolated *White Plains* to its facts.[113] Thus, case law from other

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[109] *See Sprint II*, 543 F.3d at 578 (overruling *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001); *Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006); and *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004)); *Global Network Commc'ns Inc. v. City of New York*, 562 F.3d 145, 152 (2nd Cir. 2016) (distinguishing *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002), and limiting its impact to its facts).

[110] *See RT Commc'ns Inc. v. FCC*, 201 F.3d 1264, 1267–1268 (10th Cir. 2000).

[111] *See Puerto Rico Tel. Co. Inc. v. Mun. of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004), which relied on *RT Commc'ns Inc.*, 201 F.3d at 1268); *City of Santa Fe*, 380 F.3d at 1269 (citing *RT Commc'ns Inc.*, 201 F.3d at 1268); *White Plains*, 305 F.3d at 76 (citing *RT Commc'ns Inc.*, 201 F.3d at 1268).

[112] *See New York SMSA Ltd. P'ship. v. Town of Clarkstown*, 603 F. Supp. 2d 715, 731 (S.D.N.Y. 2009) (adopting the reasoning in *Sprint II*), *aff'd* 612 F.3d 97 (2nd Cir. 2010) (approving the district court's decision but not directly addressing whether to adopt the reasoning in *Sprint II*).

[113] *See Global Network Commc'ns, Inc.*, 562 F.3d at 152; *see also Telebeam Telecomms. Cotelerp. v. City of New York*, 194 F. Supp. 3d 178, 183 (E.D.N.Y. 2016).

circuits that relied on either *RT Communications* or *White Plains* would likely be decided differently today.

### 2. *Although Different Circuits Interpret § 332(c)(7)(B)(i)(II) Differently, All Require More than a Potential or Hypothetical Prohibition and Share Other Important Similarities that Should be Retained*

Similar to the standard under § 253(a), courts properly require plaintiffs to show more than a merely hypothetical prohibition to prevail under § 332(c)(7)(B)(i)(II).[114] Every circuit court to interpret this provision requires that the plaintiff show that the local government denied its request despite (1) a technical need and (2) a demonstration that their proposal is either the least intrusive or only reasonable solution.[115]

Various circuits phrase these requirements slightly differently. With respect to the technical-need element, the First, Second, Third, Seventh, Eighth, Ninth and Tenth circuits require a plaintiff to show a "significant gap" in its service, whereas the Fourth Circuit requires a plaintiff to show "no effective coverage."[116] As to the second element, the Second, Third, Eighth, Ninth and Tenth circuits follow the "least intrusive means" approach and the First, Fourth and Seventh circuits follow the "no reasonable alternatives" approach.[117]

The salient technical difference between approaches to § 332(c)(7)(B)(i)(II) is how the courts allocate evidentiary burdens between the parties. A least intrusive means analysis involves

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[114] *See, e.g.*, *Sprint II*, 543 F.3d at 578.
[115] *See AT&T Mobility Servs. LLC v. Village of Corrales*, 642 Fed. Appx. 886 (10th Cir. 2016); *T-Mobile Northeast LLC v. Loudoun Cnty. Bd. of Supervisors*, 748 F.3d 185 (4th Cir. 2014); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715 (9th Cir. 2005); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003); *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002); *Sprint Spectrum LP v. Willoth*, 176 F.3d 630 (2nd Cir. 1999); *ATP Pittsburgh Ltd. P'ship v. Penn Twp. Butler Cnty.*, 196 F. 3d 469 (3rd Cir. 1999).
[116] *Compare Village of Corrales*, 642 Fed. Appx. at 890; *City of Des Moines*, 465 F.3d at 825; *San Francisco*, 400 F.3d at 725; *VoiceStream*, 342 F.3d at 834; *Town of Pelham*, 313 F.3d at 635; *Willoth*, 176 F.3d at 643; *ATP Pittsburgh Ltd. P'ship*, 196 F. 3d at 480, *with Loudoun Cnty.*, 748 F.3d at 200.
[117] *Compare Village of Corrales*, 642 Fed. Appx. at 890; *Des Moines*, 465 F.3d at 825; *San Francisco*, 400 F.3d at 725; *Willoth*, 176 F.3d at 643; *ATP Pittsburgh Ltd. P'ship*, 196 F. 3d at 480, *with Loudoun Cnty.*, 748 F.3d at 200; *VoiceStream*, 342 F.3d at 834; *Town of Pelham*, 313 F.3d at 635.

a burden-shifting framework between applicants and local reviewers, whereas the burden of production always remains with the applicant under a no reasonable alternatives approach.

Under the least intrusive means approach, the burden of production shifts back and forth between the parties as one side establishes a presumption and the other rebuts. At the outset, the applicant must submit evidence that it evaluated alternatives to establish its *prima facie* case. If the local government disputes those alternatives or believes additional alternatives exist, it must say so. The applicant may then reestablish the presumption with a meaningful comparative analysis to show those alternatives are either not technically feasible or not potentially available. Subject to the shot clock timeframes, this process continues until an acceptable site is identified or the parties exhaust the ascertainable alternatives. If more than one alternative is technically feasible and potentially available, the local government may choose among them.

Under the no reasonable alternatives approach, the burden of production remains with the applicant. To satisfy this burden, the plaintiff must show "a lack of reasonable alternative sites from which to provide coverage or that 'further reasonable efforts to gain approval for alternative facilities would have been fruitless.'"[118] That burden becomes "particularly heavy" when the plaintiff already provides service in the area.[119] Although this approach still evaluates whether the plaintiff adequately investigated the technical feasibility and potential availability, the burden to produce such evidence exists whether the local government identifies potential alternatives or not.[120]

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[118] *See Loudoun Cnty.*, 748 F.3d at 200 (quoting *T-Mobile Northeast LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 266 (4th Cir. 2012)).
[119] *See Loudoun Cnty.*, 748 F.3d at 198; *Town of Pelham*, 313 F.3d at 629.
[120] *See, e.g.*, *360° Commc'ns Co. of Charlottesville v. Bd. of Sup'rs of Albemarle Cnty.*, 211 F.3d 79, 88 (4th Cir. 2000) (assuming that plaintiff did not investigate all possible alternatives because the record only contained six potential sites).

Despite their different verbal formulations and evidentiary burdens for the second element, many substantive interpretations—and the manner in which they are applied—are often virtually identical. The following paragraphs describe some important similarities that the Commission should retain in any interpretation for an effective prohibition under § 332(c)(7)(B).

***Plaintiffs Must Define Their Technical Objectives.*** As noted above, all judicial interpretations begin with the same question: what purpose or technical objective does the proposed facility serve? Applicants must be required to disclose the technical service objective that it intends to achieve so that local governments can accurately evaluate whether potential alternatives would be technically feasible. It would make little sense for local planners to look for alternatives all over town if the applicant's only objective is to serve a single busy intersection. If an applicant discloses that its subscribers drop calls in an area that lacks a dominant server, planners would know that a technically feasible solution needs a clear view to that particular location on the cell edge. To find a solution, you must first understand the problem.

***Courts Evaluate Alleged Technical Need under the One Provider Rule.*** Consistent with the *2009 Declaratory Ruling*, courts evaluate whether a technical need exists based on the *applicant's* service levels in a given area.[121] Although some commenters complain that the Fourth Circuit has not expressly adopted the one-provider rule,[122] courts within that jurisdiction

[121] *See, e.g.*, *T-Mobile Cent. LLC v. Charter Twp. of West Bloomfield*, 691 F.3d 794, 807 (6th Cir. 2012) (adopting the one-provider rule); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 49 (1st Cir. 2009) ("In this circuit we consider whether a significant gap in coverage exists within the individual carrier's network."); *San Francisco*, 400 F.3d at 733 ("[W]e elect to follow the district court's lead and formally adopt the First Circuit's rule that a significant gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant gap in *its own* service coverage." (emphasis in original)); *VoiceStream*, 342 F.3d at 834; *see also T-Mobile Cent. LLC v. Unified Gov't of Wyandotte Cnty/Kansas City*, 528 F. Supp. 2d 1128, 1154 (D. Kan. 2007) (adopting the one-provider rule).

[122] *See* Andrew J. Erber, Note, *The Effective Prohibition Preemption in Modern Wireless Tower Siting*, 66 FED. COMM. L.J. 357, 365–66 (2014).

consistently evaluate the plaintiff's service without regard to any services provided by others in the same area.[123]

***Whether a Technical Need Exists Depends on a Fact-Intensive and Case-by-Case Review, that Considers Both Service Coverage and Capacity Levels.*** Not all gaps or deficits in service justify preemption.[124] Courts uniformly consider the gap's geographic size, uses within the gap area, whether the gap impacts a heavily trafficked commuter corridor, how many potential users the gap might impact and how many dropped connections occurred.[125] Moreover, courts increasingly agree that both service coverage and capacity levels are appropriate factors to determine whether a technical need exists.[126]

***Plaintiffs Cannot Rely on Bald Conclusions that Their Preferred Site is the Best or Only Feasible Solution.*** Courts require actual, valid reasons why a plaintiff could not comply with the local zoning regulations. Consider examples from the Ninth Circuit's decision in *American Tower Corp. v. City of San Diego*, 763 F.3d 1035 (9th Cir. 2014), and the Seventh Circuit's decision in *VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818 (7th Cir. 2003). In both cases, the applicants requested approval for tall towers in locations where tall

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[123] *See, e.g.*, *Loudoun Cnty.*, 748 F.3d at 199; *T-Mobile Northeast LLC v. Howard Cnty. Bd. of Appeals*, 524 Fed. Appx. 9, 15 (4th Cir. 2013); *Fairfax Cnty.*, 672 F.3d at 267–68.

[124] *See Fairfax Cnty.*, 672 F.3d at 277-78; *City of Cranston*, 586 F.3d at 49; *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 727 (9th Cir. 2009); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006); *San Francisco*, 400 F.3d at 725; *Willoth*, 176 F.3d at 644.

[125] *See, e.g.*, *Village of Corrales*, 642 Fed. Appx. at 891; *Orange Cnty.-Poughkeepsie Ltd. P'ship v. Town of East Fishkill*, 632 Fed. Appx. 1, 2–3 (2nd Cir. 2015); *Loudoun Cnty.*, 748 F.3d at 199; *West Bloomfield*, 691 F.3d at 807; *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 727 (9th Cir. 2009); *City of Cranston*, 586 F.3d at 49; *Des Moines*, 465 F.3d at 825; *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 n.2 (3rd Cir. 1999).

[126] *See, e.g.*, *Village of Corrales*, 648 Fed. Appx. at 891 (recognizing capacity as a factor to be considered); *Loudoun Cnty.*, 748 F.3d at 199; *T-Mobile West Corp. v. City of Huntington Beach*, No. CV 10–2835 CAS (Ex), 2012 WL 4867775, *6 (C.D. Cal. Oct. 10, 2012); *T-Mobile West Corp. v. City of Agoura Hills*, No. CV 09-9077 DSF (PJWx), 2010 WL 5313398, *8–*9 (C.D. Cal. Dec. 20, 2010); *see also MetroPCS New York, LLC v. Village of East Hills*, 764 F. Supp. 2d 441, 454–55 (E.D.N.Y 2011); *T-Mobile Northeast LLC v. City of Lowell*, No. 11-11551-NMG, 2012 U.S. Dist. LEXIS 180210, *10 (D. Mass. Nov. 27 2012); *USCOC of New Hampshire RSA No. 2 v. Town of Dunbarton*, No. Civ.04–CV–304–JD, 2005 WL 906354, *2 (D.N.H. Apr. 20, 2005).

towers would be prohibited, and the applicants refused to consider multiple smaller structures as an alternative.[127] Both courts upheld denials in each case because the applicants provided only "conclusory statements" that the preferred alternative would not work or were not less intrusive.[128]

### 3. *If the Commission Finds it Necessary to Endorse One Effective Prohibition under § 332(c)(7), It Should Favor the Ninth Circuit's Significant Gap/Least Intrusive Means Approach*

To the extent that the Commission feels compelled to endorse one approach over the others, the Commission should favor the least intrusive means approach. As the majority rule among the circuit courts, this test strikes an appropriate balance between the dual policies of the Communications Act, provides greater certainty, better enables judicial review and incentivizes the parties to actively engage in the alternatives evaluation process.

First, the least intrusive means approach balances the national interest in infrastructure deployment with the local interest in land use regulation. Local governments cannot flatly refuse to permit facilities necessary to address a significant gap, and the applicant cannot deploy whatever and wherever it chooses. The parties must work together to find a solution that respects both legitimate interests.

Second, this approach offers a settled rule that clearly establishes who must do what and when. Both applicants and local governments know with greater certainty how a judge might rule on the merits if a dispute arises, which may help avoid needless litigation.

Third, the burden-shifting framework naturally creates a more robust record for expedited judicial review. Each step in the process—whether the *prima facie* case, a rebuttal with additional alternatives or a surrebuttal with a meaningful comparative analysis on feasibility or

[127] *See VoiceStream*, 342 F.3d at 836.
[128] *See id.*

availability—requires documentation. Courts can more easily trace the events and evaluate whether a particular party satisfied its evidentiary burden.

Lastly, the presumptions create incentives for the parties to actively engage in the alternatives evaluation process. Applicants are encouraged to evaluate alternatives before they even submit their proposal. Local government staff cannot sit on the sidelines if they believe better alternatives exist, and applicants cannot stonewall suggested alternatives. Anyone who refuses to engage in the process almost inevitably loses when they complain about the outcome.

#### 4. *The Commission Should Clarify that § 253(c) Preserves State and Local Zoning Regulations*

The Commission requested comment on whether it should provide further guidance on the *California Payphone* standard for an effective prohibition, and the proper role for aesthetic regulations.[129] Consistent with the Commission's statement in the *Wireless NPRM/NOI* that "aesthetic considerations [are] not inherently improper,"[130] the Commission's earliest gloss on local rights-of-way management regulations in *Classic Telephone* recognized that localities may continue to enforce zoning regulations. As the Commission stated:

> The legislative history sheds light on permissible management functions under section 253(c). During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that . . . (4) "*enforce local zoning regulations*;" . . . .[131]

Accordingly, the Commission should take this opportunity to harmonize its decisions in *California Payphone* with *Classic Telephone* and clarify that § 253(c) also preserves state and local zoning regulations.

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[129] *See Wireless NPRM/NOI* at ¶¶ 86, 88.
[130] *See id.* at ¶ 88.
[131] *In the Matter of Classic Telephone, Inc.*, CCB Pol 96-10, *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, 13103, ¶ 39 (Oct. 1, 1996) (quoting 141 CONG. REC. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)) (emphasis added).

### C. Provisions in the Communications Act Refer Exclusively to Regulatory Acts or Requirements by State and Local Governments

Sections 253 and 332(c)(7) both recognize the distinction between regulatory and proprietary government functions.[132] The Commission should find that Congress intended the words "statutes," "regulations," "legal requirements" and "decisions" refer only to regulatory behavior because proprietary acts fall outside the federal government's preemptive scope.

#### 1. *State and Local Governments Increasingly Both Perform Proprietary and Regulatory Functions in Connection with Wireless Facilities*

Many municipalities in Arizona, California and Oregon have carried on ordinary landlord-tenant relationships with wireless carriers and infrastructure companies for decades. Indeed, community centers, parks and fire stations commonly lease space to macrocells because these locations are often exempt from zoning regulations and situated near restrictive residential areas.

The fact that a wireless tenant may lease municipal property does not negate the separate regulatory relationship between the parties. Facilities on municipal property must still obtain all necessary permits and approvals, and pay all required regulatory fees. Municipalities in their regulatory capacities cannot afford special treatment to particular entities or facilities merely because they happen to be on municipal property.

Despite the long-settled distinction between proprietary and regulatory functions in the macrocell context, the wireless industry appears reluctant to recognize is that state and local governments have property rights in the places and structures where small cells are commonly

[132] *See, e.g.*, *City of Portland*, 385 F.3d at 1240 (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

located—streets, sidewalks, light poles, traffic signals, bus shelters and other similar improvements in the public rights-of-way.[133] State and local governments have an increasingly proprietary role (in addition to their regulatory role) in the deployment process as installations largely move from largely private property to spaces and structures owned by the state or local governments.

Different small cell proposals can implicate different property interests. A proposed installation in the public rights-of-way may implicate the local government's *real property* interest in the land that comprises the public rights-of-way, its *personal property* interest in the government-owned improvements placed within the public rights-of-way or, in some cases, both. For example, if a wireless provider seeks to attach an antenna to a private (investor-owned) electric company's distribution pole, the local government may have a real property interest in generalized access to the streets for a commercial purpose, but would not likely have a personal property interest in that specific pole. On the other hand, the local government might have both a real property interest and a personal property interest if the proposal involved a city-owned streetlight in the public right-of-way.

Whether and to what extent local government may have a proprietary interest in the public rights-of-way also differs based on state law. Some states, such as Arizona and Oregon, grant municipalities the right to receive compensation from telecommunication service providers that use the municipality's real property, subject to certain limits.[134] Local governments may also

[133] *See City of Huntington Beach*, 738 F.3d at 194; *City of Rome v. Verizon Commc'ns Inc.*, 362 F.3d 168, 174 (2nd Cir. 2004) ("The text and legislative history of Section 253 of the Telecommunications Act indicate that Congress intended to retain a sphere in which states and localities could negotiate and make agreements with telecommunications companies without being automatically subject to federal jurisdiction.").

[134] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C) (authorizing an annual fee for undergrounded conduit on a linear-foot basis); OR. REV. STAT. § 221.515 (authorizing municipalities to collect up to a seven percent gross-revenues privilege tax); *see also* N.M. STAT. ANN. § 62-1-3 (authorizing counties and municipalities to grant franchises, but limiting county franchise fees to "reasonable and actual costs" to grant and administer the franchise).

be permitted to charge a separate fee for installations on their streetlights and other government-owned structures. Other states, like California, grant so-called "state-wide franchises" that prohibit local franchise fees for access to the real property in the public rights-of-way, but do not prohibit private proprietary agreements with telecommunications providers for attachments to municipally-owned structures within the public rights-of-way.[135]

Failure to appreciate these nuances in how municipalities exercise their proprietary functions in the public rights-of-way can explain why firms like Mobilitie perceive costs and decisions timelines as unreasonable compared to their past experiences in a pre-small cell world.[136] However, at bottom, the same familiar distinction from the macrocell context applies in the small cell context: municipalities enter into proprietary agreements to grant access to their property, and separately perform the ordinary regulatory functions that would be required for to permit the facilities no matter who owned the underlying property.

### 2. *State and Local Property Rights are Protected under the Constitution, and the Commission Cannot Rewrite the Market Participant Exception to Adjust the Line between Proprietary and Regulatory*

The Commission requested comment on how it should draw the distinction between proprietary and regulatory functions when wireless facilities use municipal property.[137] The simple answer to this question is that the Commission cannot rewrite the Constitutional protections that insulate state and local proprietary functions from federal preemption.[138]

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[135] *See, e.g.*, CAL. PUB. UTILS. CODE § 7901; *Williams Commc'ns, Inc. v. Riverside*, 8 Cal. Rptr. 3d 96, 107–08 (Cal. Ct. App. 2003) (construing § 7901 as "a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration").

[136] See Iain Gillott, *Sprint's New Plan: Network Suicide*, LINKEDIN (Jan. 25, 2016), https://www.linkedin.com/pulse/sprints-new-plan-network-suicide-iain-gillott (describing abandoned past attempts to site wireless facilities in the rights-of-way for various reasons related to property ownership).

[137] *See Wireless NPRM/NOI* at ¶ 90.

[138] *See Bldg. & Constr. Trades Council of the Metro. Dist. v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226–27 (1993).

The Supreme Court holds that a state or local government crosses the line between proprietary and regulatory functions when it either does not actually participate in the affected market or when the challenged action is tantamount to regulation or policymaking.[139] A local government that leases space on a streetlight or rooftop to a wireless carrier participates in the wireless infrastructure market just as much as Crown Castle, American Tower or any other infrastructure provider. Moreover, a local government that charged less than market rates for such access would appear less like other private actors and more like a regulator seeking to achieve some policy objective.[140]

Accordingly, arms-length agreements on market rates, terms and conditions for access to government-owned property, including property in the public rights-of-way, are proprietary in nature. The Commission cannot rewrite the market participant exception to expand its preemptive authority.

### 3. *"Statutes, Regulations and Legal Requirements" under § 253(a) Are Not Coextensive with "Decisions" under § 332(c)(7)*

The Commission requested comment on whether it could equate "legal requirements" and "decisions" as each is used in § 253 and § 332(c)(7). "[L]egal requirements" under § 253 are not coextensive with "decisions" under § 332(c)(7) because Congress employed a "different term [that] denotes a different idea."[141] As used in the Telecommunications Act, the terms "legal

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[139] *See id.* at 229 ("[A] State may act without offending the pre-emption principles . . . when it acts as a proprietor and its acts therefore are not 'tantamount to regulation' or policymaking."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) ("The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.").
[140] *Cf. Bldg. & Constr. Trades Council*, 507 U.S. at 229 (noting that private actors without a profit motive can be said to affect the marketplace is a regulatory fashion).
[141] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (1st ed. 2012); *see also See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997)) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

requirements" refer to legislative-type acts whereas "decision" refers to judicial-type act.[142] Although both "decision" and "regulation" may be susceptible to multiple definitions, their true meaning can be discerned by reading them "in context and with a view to their place in the overall statutory scheme."[143]

The word "decision" means a "determination arrived at after consideration."[144] In the zoning context, a decision refers to the "exercise [of] an adjudicative function that involves applying land use rules to individual property owners."[145] Section 332(c)(7)(B)(iii) provides that "[a]ny *decision* by a State or local government or instrumentality thereof *to deny a request to place, construct, or modify personal wireless service facilities* shall be in writing and supported by substantial evidence contained in a written record."[146] After a dispute arises from that decision, "[t]he court shall hear and *decide* such action on an expedited basis."[147] The same word, used in the same statute, refers to a result reached after deliberation.

The word "regulation" means "an authoritative rule."[148] In the zoning context, this refers to legislative "plans and zoning maps that affect the classification and use of property

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[142] *See City of Huntington Beach*, 738 F.3d at 194 ("In addressing land use *regulations* and *decisions* related to the installation of wireless communication facilities, the TCA closely tracks the typical division of land use decision making." (emphasis added)); *cf. Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (contrasting "[t]he sort of land use regulations" that "involved essentially legislative determinations classifying entire areas of the city," with a city's "adjudicative decision to condition petitioner's application for a building permit on an individual parcel").
[143] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. The Communications Act does not explicitly define these terms, and so their ordinary meaning controls. *See Clark v. Rameker*, 134 S.Ct. 2242, 2245 (2014); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). Although these terms also appear in the Communications Act, the Supreme Court rejected the notion that how Congress used these terms in 1934 would shed any persuasive light on how Congress used them decades later in 1996. *See City of Roswell*, 135 S.Ct. at 817 n.5.
[144] *Definition of Decision*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/decision (last visited June 15, 2017); *see also* BLACK'S, *supra* note 27 at 182 (defining "decision" as "[a] judicial determination after consideration of the facts and the law").
[145] *See City of Huntington Beach*, 738 F.3d at 194.
[146] *See* 47 U.S.C. § 332(c)(7)(B)(iii) (emphasis added).
[147] *See id.* § 332(c)(7)(B)(v) (emphasis added).
[148] *Definition of Regulation*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/regulation (last visited June 15, 2017); *see also* BLACK'S, *supra* note 27 at 182 (defining "regulation" as "[t]he act or process of controlling by rule or restriction").

generally."[149] As used in § 253(b), the word "requirement" refers to legal rules other than statutes or regulations.[150] The term "legal requirement" does not appear anywhere in § 332. The most closely analogous usage in that section appears in § 332(c)(3)(A) and refers to "requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."[151] Accordingly, Congress uses the phrase "legal requirements" as a catch-all for laws other than statutes or regulations.

#### 4. *The Term "Legal Requirements" in § 253 Does Not Encompass All Public-Private Agreements*

The Commission requested comment on whether "legal requirements" properly spans the divide between proprietary and regulatory capacities. Although we acknowledge that the line between proprietary and regulatory capacities must be drawn on a case-by-case basis, we strongly recommend to the Commission that it revisit its decision in *Minnesota Preemption Order* because not all public-private agreements are "legal requirements."

The term "legal requirements" must be construed in context with the words "statute" and "regulation" that appear in the same list.[152] Although legal requirements may be susceptible to broad interpretations, general items must be read with reference to more specific items in the same list.[153] Given that statutes and regulations flow from police powers, a "legal requirement" subject to § 253 must likewise refer to some obligation imposed on the service provider through the state or local government's regulatory authority.[154]

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[149] *See City of Huntington Beach*, 738 F.3d at 194.
[150] *See* 47 U.S.C. § 253(b); *see also id.* § 254 (using the word "requirements" in reference to legal standards).
[151] *See id.* § 332(c)(3)(A).
[152] *See Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).
[153] *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980).
[154] Other usage within § 253 confirms this conclusion. Section 253(b) preserves state authority to "impose . . . *requirements* necessary to preserve and advance universal service, protect the public safety and welfare, ensure the

Although we respectfully disagree with the Commission's overbroad interpretation in the *Minnesota Preemption Order* that "legal requirement" reaches proprietary agreements, the Commission may have reached the correct result for the wrong reason. That case involved an agreement with a single service provider for exclusive access to the entire state highway system, which can hardly be characterized as a "narrow scope" intended to "address a specific proprietary problem" rather than "encourage a general policy . . . ."[155] Accordingly, an analysis under § 253 may have been appropriate because the agreement was a regulatory act, but not merely because the matter involved a public-private agreement.

Similarly, the Commission should recognize that the process and standards a state or local government uses to enter into proprietary agreements may superficially appear to be "regulatory" in nature. As the Ninth Circuit recognized in *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013), formalities required by municipal corporations prior to contract execution fall "outside the City's framework for land use decision making because it does not implicate the regulatory and administrative structure established by the City's general plans and zoning and subdivision code."[156] Municipal corporations must follow its formalities, just as any other corporation must adhere to its bylaws for any major decision or disposition. The Commission should not consider these decisions or dispositions to

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continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b) (emphasis added); *see WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. 2007) ("It is clear that states have authority under the Telecommunications Act to adopt their own universal service standards and create funding mechanisms sufficient to support those standards, as long as the standards are not inconsistent with the FCC's rules, and as long as the state program does not burden the federal program.").

[155] *See In the Matter of the 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 the State Freeway Rights-of-Way*, CC Docket No. 98-1, *Memorandum Opinion and Order*, 14 FCC Rcd. 21697, 21708–21716, ¶¶ 20–36 (Dec. 23, 1999) [hereinafter "*In re Minnesota Preemption*"]; *accord In the Matter of Amigo.net*, CC Docket No. 00-220, *Memorandum Opinion and Order*, 17 FCC Rcd. 10964, 10967, ¶ 8 (June 13, 2002) (finding that the agreement in the *Minnesota Preemption Order* "would violate section 253(a) because it gave to one party exclusive physical access to the only feasible and cost-effective rights-of-way, and therefore potentially deprived other parties, specifically facilities-based competitors, of the ability to provide telecommunications services.").

[156] *See City of Huntington Beach*, 738 F.3d at 200–01.

be "legal requirements" under the *Minnesota Preemption Order* approach merely because the formalities resemble legislative or adjudicative procedures.

### D. "Functionally Equivalent Services" for Unreasonable Discrimination Purposes under § 332(c)(7)(B)(i)(I) Means Wireless Services in Competition with One Another

The Commission need not adopt any hyper-technical definition for "functionally equivalent services." The Conference Report specifies that the phrase "functionally equivalent services . . . refer[s] only to *personal wireless services* as defined in [§ 332(c)(7)] that directly compete against one another." *See* H. CONF. REP. 104-458 at 207–08.

Wireless and wireline facilities are not functional equivalents.[157] Although wireless and wireline connections can technically deliver the same content to the end user, the consumer does not regard them as substitute goods. Wireless reception may be a consideration in an office manager's decision to rent commercial space, but access to fiber optic connections matter far more.

Moreover, wireless and wireline facilities cannot be subject to the same regulations because their equipment has different characteristics. Whereas wireless antennas generally cannot be placed underground, virtually all wireline facilities can be. To subject these two different technologies to the same regulations threatens to undermine substantial investment in underground utility districts. If wireless facilities physically cannot be placed underground, and wireline facilities are entitled to equal regulatory treatment, then neither can be placed underground. This is not consistent with Congress' intent that § 253(c) respect local zoning and undergrounding ordinances.

[157] *See Mills*, 65 F. Supp. 2d at 157 (rejecting "Sprint's argument that landline services are 'functionally equivalent' to the wireless services provided by Sprint and reject[ing] Sprint's claim of discrimination on the grounds that it is barred from competing with conventional landline telephone services").

Lastly, not all "wireless" services are functional equivalents.[158] The Ninth Circuit rejected American Tower's argument that San Diego's permit requirements unreasonably discriminated against commercial wireless facilities because the city exempted similar-looking towers for governmental use. The court reasoned that the facilities were not functionally equivalent because "[i]n contrast to [American Tower]'s telecommunication operations, which are entirely commercial, the City's telecommunication operations are primarily public in nature."[159] The Commission should respect the distinction and not burden public safety radio facilities with the same regulatory treatment as commercial radio facilities.

## V. CONCLUSION

Local Governments applauds the Commission's desire to promote expanded and advanced wireless broadband services, but has serious concerns about the Commission's proposed rules. Limitations on local authority have encouraged applicants to "game" the shot clock and discouraged collaborative efforts to permit facilities that meet the carriers' needs and respect local community values. Further limitations, like a deemed granted remedy and over-granulized shot clocks, would only exacerbate conflicts that impede deployment. The Commission should not adopt the proposed rules in the *Wireless NPRM*.

In addition, proposals to harmonize interpretations under §§ 332(c)(7) and 253 would conflict with Congress' clear intent to treat wireless and wireline services differently, and the Commission's precedents that classify wireless broadband as an information service not subject to § 253. Although these statutes contain some similar provisions, the Commission should ultimately conclude that different interpretations are warranted because §§ 332(c)(7) and 253 govern two different services provided through technologically different facilities.

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[158] *See In re Cell Tower Litigation*, 807 F. Supp. 2d at 936–37.
[159] *See Am. Tower Corp.*, 763 F.3d at 1055–1056.

EXHIBIT F

Respectfully submitted,

Dated: June 15, 2017

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**EXHIBIT G**

**Consolidated Joint Reply Comments of League of Arizona Cities and Towns, League of California Cities & League of Oregon Cities**

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

[appears behind this coversheet]

EXHIBIT G

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

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|---|---|
| IN THE MATTER OF | |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | WT Docket No. 17-79 |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | WC Docket No. 17-84 |

# CONSOLIDATED JOINT REPLY COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS, LEAGUE OF CALIFORNIA CITIES & LEAGUE OF OREGON CITIES

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EXHIBIT G

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EXHIBIT G

**TABLE OF CONTENTS**

## STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 241 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

## I. INTRODUCTION

The League of Arizona Cities and Towns, the League of California Cities and the League of Oregon Cities (collectively, "Local Governments") offers these consolidated joint reply comments in response to the comments filed in the Commission's Notice of Proposed Rulemaking and Notice of Inquiry regarding wireless broadband deployment as well as the Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment regarding wireline broadband deployment.[1] Although Local Governments filed separate comments in the above-captioned proceedings, these reply comments are combined to more directly respond to the industry commenters who combined the legal and factual issues in connection with these different services and the facilities that deliver them.

The record in these proceedings, like the record in *In re Mobilitie Petition*, make it clear that the Commission lacks the authority and the factual predicate for the proposed interpretations for sections 332(c)(7) and 253. Specifically, the Commission should find that:

- The Commission lacks authority to impose a deemed-granted remedy for mere failure to act under § 332(c)(7)(B)(ii) because § 332(c)(7)(B)(v) and its related Congressional history unambiguously vest exclusive authority in the courts to resolve disputes.

- The Commission lacks authority to truncate the shot clock, either by reducing the overall timeframe or by expanding its scope to include activities that occur before or after a duly filed request is received, because such a rule would frustrate Congress' intent to allow the usual timeframe for a decision under applicable local law.

- Alleged delays in the deployment process are often attributable to acts or omissions by the applicant, and further limitations on State or local governments would (i) have little (if any) impact on deployment and (ii) create perverse incentives to game the shot clock.

[1] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Notice of Proposed Rulemaking and Notice of Inquiry* (Apr. 20, 2017) [hereinafter "*Wireless NPRM/NOI*"]; *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, (Apr. 21, 2017) [hereinafter "*Wireline NOI*"].

- Sections 332(c)(7) and 253 regulate different services provided through different facilities and therefore should not be harmonized.

These consolidated joint reply comments highlight the deficiencies in the industry comments. In addition, Local Governments responds to the instances where industry comments identified allegedly bad actors within its constituency and provides the Commission with some real-world examples to show how the public health, safety and welfare benefits from reasonable State and local control over the public rights-of-way.

## II. INDUSTRY COMMENTS FAIL TO SHOW A LEGAL OR FACTUAL BASIS FOR A DEEMED-GRANTED REMEDY, SHORTER SHOT CLOCKS OR NEW SHOT CLOCKS

### A. The Commission Cannot and Should Not Impose a Deemed-Granted Remedy for Mere Failures to Act within a Presumptively Reasonable Time

Section 332(c)(7)(B)(v) unambiguously vests authority to resolve disputes over failures to act in the courts. Industry commenters fail to explain what ambiguity serves as the basis for the Commission's interpretive authority, and further fail to show any substantial evidence that such a remedy is necessary. Accordingly, the Commission should find that it lacks authority to interpret a deemed-granted remedy for a mere failure to act under § 332(c)(7)(B)(ii).

#### 1. Commission Authority to Interpret § 332(c)(7) is Not Unlimited, and § 332(c)(7)(B)(v) Precludes a Deemed-Granted Remedy Because it Unambiguously Vests Exclusive Authority to Resolve Timeliness Disputes with the Courts

A general theme in industry comments seems to be that the *Arlington* cases stand for the proposition that the Commission wields unlimited authority to interpret § 332(c)(7) however the Commission deems fit.[2] For example, Lightower boldly contends that "there is no legal limitation

[2] *See, e.g.*, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of AT&T*, at 9 (June 15, 2017) [hereinafter "AT&T Comments"]; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, *Comments of CTIA*, at 15 (June 15, 2017) [hereinafter "CTIA Comments"]; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure*

on the Commission's authority to interpret statutory definitions."[3] This contention is obviously false.

As the Supreme Court explained in *Arlington II*, the Commission's interpretive authority is limited to what the ambiguity in the statute will fairly allow.[4] Rather than grapple with the real legal issue (*i.e.*, what the ambiguity would fairly allow), Lightower and many other industry commenters chant the name "*Arlington*" like a magic charm to ward off judicial review.

Reluctance to deal with the limitations on the Commission's authority is understandable given that "Congress has directly spoken to the precise question at issue."[5] The plain language in sections 332(c)(7)(B) and 253, and the related Congressional histories clearly establish the courts as the exclusive recourse for applicants aggrieved by an alleged failure to act within a reasonable time.[6]

Although the Fifth Circuit in *Arlington I* noted that § 332(c)(7) does not preclude the Commission's interpretive guidance to the courts, the Supreme Court's holding in *Arlington II* cabins that interpretive guidance to only ambiguous statutory provisions. Neither court held that the Commission could interpret an unambiguous provision like § 332(c)(7)(B)(v), which vests exclusive jurisdiction with the courts to resolve disputes over unreasonable delays.

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*Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, *Comments of Verizon*, at 37 (June 15, 2017) [hereinafter "Verizon Comments"].

[3] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Initial Comments of Lightower Fiber Networks*, at 6 (June 15, 2017) [hereinafter "Lightower Comments"].

[4] *See Arlington v. FCC*, 133 S.Ct. 1863, 1874 (2013) ("*Arlington II*").

[5] *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

[6] *See generally In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Joint Comments of League of Arizona Cities and Towns et al*., at 14-23 (June 15, 2017) [hereinafter "Local Gov'ts Comments"].

### i. Remedies for § 332(c)(7) and other Statutes with a Deemed-Granted Remedy Cannot Be "Harmonized" Because These Different Statutes Use Different Language to Describe Different Obligations for Different Facilities

Some industry commenters urge the Commission to "harmonize" the remedies for a failure to act under § 332(c)(7)(B) with a failure to act under other statutes that allow for a deemed-granted approach.[7] As more fully explained in Local Governments' principal comments, comparisons between a failure to act under § 332(c)(7)(B)(ii) and failures to act in other contexts do not account for critical differences in statutory construction.[8]

ExteNet and CTIA argue that the remedies under § 332(c)(7) should be aligned with the deemed-granted remedy in § 6409(a).[9] Although the same language in the same act should generally be construed to mean the same thing, these statutes use starkly different language. The requirement in § 332(c)(7)(B)(ii) that state and local governments act within a reasonable time under the circumstances bears no material resemblance to the mandate in § 6409(a) that state and local governments "shall approve and may not deny any eligible facilities request." CTIA also points to § 621(a)(1) as another example where a failure to act results in a deemed granted approval.[10] However, the express language in the statutory provisions related to cable franchises provide for a deemed-granted remedy but no such provision exists in § 332(c)(7).[11]

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[7] *See, e.g.*, *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, *Comments of ExteNet Sys., Inc.*, at 13 (June 15, 2017) [hereinafter "ExteNet Comments"].
[8] *See* Local Gov'ts Comments at 19.
[9] *See* ExteNet Comments at 13; CTIA Comments at 12.
[10] *See* CTIA Comments at 10.
[11] *See* 47 U.S.C. § 541(a)(1) ("[A] franchising authority may not . . . unreasonably refuse to award an additional competitive franchise."); *id.* § 537 ("If the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time.").

Accordingly, the Commission should find that remedies under sections 332(c)(7)(B)(ii), 6409(a), 621(a)(1) and other similar statutes should not and cannot be harmonized because each uses different language for a different purpose.

#### ii. Section 253(a) Does Not Authorize a Deemed-Granted Remedy for Failures to Act on Applications for Wireless Broadband Facilities

ExteNet raises a novel argument that a failure to act on a wireless facilities application could be subject to a deemed grant because it violates § 253(a).[12] The problem with this argument is that § 253(a) does not apply to wireless deployments because such facilities provide an information service rather than a telecommunications service. Moreover, as explained in Local Governments' principal comments, this argument will soon also fail in the wireline context to the extent that the Commission follows through on its intent to recast wireline broadband as an information service. Accordingly, the Commission should find that it lacks the legal authority to impose a deemed-granted remedy for a mere failure to act within the presumptively reasonable timeframes.

### 2. The Record Lacks a Reliable Factual Record that Shows Any Need for a Deemed-Granted Remedy

In addition to the insurmountable fact that no ambiguity in § 332(c)(7)(B) would fairly allow for a deemed-granted remedy, the record does not contain substantial evidence that municipalities routinely fail to meet the shot clock deadlines or allow the Commission to draw a rational connection between the facts found and the proposed rules.[13] Rather, as Local Governments and other commenters show, delays are often caused by applicants who fail to follow (and sometimes willfully ignore) local application requirements.

[12] *See* ExteNet Comments at 14.
[13] *See Motor Vehicles Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

### i. Industry Comments Generally Fail to Produce Any Substantial Evidence to Justify the Proposed and Requested Rules

Despite the Commission's direction in these proceedings that anecdotal evidence would be discounted, wireless industry commenters generally provided *more* anecdotes than ever before.[14] The record offered by industry stakeholders is replete with unidentified jurisdictions. Worse still, most industry comments cite unsupported and unverifiable anecdotes from other industry comments in the *In re Mobilitie Petition* proceeding in a hopelessly circular attempt to establish facts through repetition rather than reality.[15]

As Smart Communities points out in their comments, only Crown Castle made a meaningful effort to name allegedly bad actors.[16] However, Local Governments rebutted this "evidence" with more concrete facts that showed the maligned municipalities acted reasonably under the circumstances.[17] Moreover, even if the Commission accepted Crown Castle's claims as true, the record from the *In re Mobilitie Petition* would show only that less than 1% of municipalities in the United States engaged in misconduct.[18]

All this hardly amounts to substantial evidence needed to sustain a deemed-granted remedy. Accordingly, the Commission should find that a deemed-granted remedy is not warranted.

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[14] *See Wireless NRPM/NOI* at 6 n.9.

[15] *See, e.g.*, ExteNet Comments at 6; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, *Comments of Mobilitie, LLC*, at 2 (June 15, 2017) [hereinafter "Mobilitie Comments"]; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, *Comments of Sprint Corp.*, at 37 (June 15, 2017) [hereinafter "Sprint Comments"]; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, *Comments of T-Mobile USA, Inc.*, at 7 (June 15, 2017) [hereinafter "T-Mobile Comments"]; Verizon Comments at 6 n.19.

[16] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of Smart Communities and Special Dists. Coal.*, at 9 (June 15, 2017) [hereinafter "Smart Communities Comments"].

[17] *See In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies*, WT Docket No. 16-421, *Joint Reply Comments of League of Arizona Cities and Towns et al.*, at 1-5 (Apr. 7, 2017) [hereinafter "Local Gov'ts Mobilitie Reply Comments"].

[18] *See* Smart Communities Comments at 9.

### ii. Applicant Misconduct Accounts for a Significant Share in Alleged Deployment Delays, and a Deemed-Granted Remedy Would Improperly Reward Such Bad Behavior

Several industry commenters claim that their generally unsupported anecdotal evidence about lengthy delays shows that local governments simply ignore the presumptively reasonable timeframes.[19] These anecdotal stories conveniently omit to mention the often months-long delays are caused by applicants who submit wholly inadequate applications in piecemeal fashion and then disappear for weeks at a time after the local government properly deems the "application" incomplete.[20] A deemed-granted remedy would merely reward an applicant's misconduct, a result "so implausible it could not be ascribed to a difference in view or the product of [the Commission's] expertise."[21]

Moreover, the assumption that a local government that fails to meet the presumptively reasonable timeframe ignores the fact that the *2009 Declaratory Ruling* anticipated that some projects would require more time to review.[22] To the extent that any anecdotal stories (or "statistics" derived from these anecdotes) from the industry comments turn out to be true, the Commission would need to take a hard look at each instance to determine whether the "nature and scope of the request" reasonably required more than the presumptively reasonable timeframe for review.

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[19] *See, e.g.*, AT&T Comments at 25; Lightower Comments at 7; ExteNet Comments at 5–8.
[20] *See, e.g.*, Local Gov'ts Comments at 1–10; *In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices*, WT Docket No. 16-421, *Joint Comments of League of Arizona Cities and Towns et al.*, at 10-21 (Mar. 8, 2017) [hereinafter "Local Gov'ts Mobilitie Comments"]; Local Gov'ts Mobilitie Reply Comments at 5.
[21] *See Motor Vehicles Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[22] *See In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14006-07, ¶ 34 n.111 (Nov. 18, 2009) [hereinafter "*2009 Declaratory Ruling*"].

Accordingly, the Commission should not accept the premise that all delays stem from local government misconduct. Given the factual record before the Commission that applicants' own misconduct significantly contributes the allegedly unreasonable delays, a deemed-granted remedy would not bear a rational connection to the facts.

#### iii. Expedience Does Not Permit the Commission to Usurp the Courts' Exclusive Role under § 332(c)(7)(B)(ii)

Industry commenters generally assume that a proposed deemed-granted remedy will speed up deployment by, among other things, obviating the need for litigation.[23] The bare assertion that administrative remedies might be more convenient for aggrieved applicants does not license the Commission to usurp the courts' exclusive role in disputes under § 332(c)(7)(B)(ii).[24]

### 3. If the Commission Attempts to Impose a Deemed-Granted Remedy, an Authorization to Proceed with Construction without Health and Safety Review Puts People and Property in Serious Peril

Local Governments oppose in the strongest possible terms AT&T's and CCA's proposed rules that would authorize applicants to commence construction without prior health and safety review and approval.[25] The Commission should categorically reject this dangerous proposal that would put public safety in hands primarily motivated by speed-to-market.

Unauthorized and unregulated deployment already occurs and results in significant damages. As the California Public Utilities Commission noted:

> [U]tility poles overloaded with unauthorized attachments, as well as poorly-maintained telecommunications and electrical supply lines, have led to serious service outages, including E9-1-1 service outages. Worse, they set off wildfires that have burned hundreds of square miles of state land and ***killed at least ten people***.

[23] *See, e.g.*, CTIA Comments at 9–10.
[24] *See, e.g.*, Lightower Comments at 6.
[25] *See* AT&T Comments at 26; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WT Docket No. 15-180, WC Docket No. 17-84, *Comments of Competitive Carriers Ass'n*, at 13 (June 15, 2017) [hereinafter "CCA Comments"].

> Some of those people were electrocuted when the poles came down. The others burned to death.
>
> . . .
>
> Safety is not an accident. The potential consequences of these rules could force poorly reviewed projects through truncated coordination with safety agencies (fire, forestry, flood protection, highway agencies, etc.), resulting in more downed poles, more fires, more property destruction, and more deaths.[26]

A rule that would sanction unregulated deployment without even the bare minimum ministerial health and safety review would inevitably lead to an increase in similarly avoidable tragedies.

The Commission rejected similar proposals in the *2009 Declaratory Ruling*, and expressly contemplated that courts could mandate that local governments issue the permits on a case-by-case basis.[27] Even in situations where it would be appropriate to order a local government to approve a proposed installation, there is simply no reason to excuse the applicant from a universally applicable requirement to demonstrate compliance with all public health and safety regulations.

### B. Shorter and New Shot Clocks Exceed the Commission's Authority to the Extent that Such Regulations Would Effectively Prevent Local Review or Are Otherwise Based on Unsupported Assertions and Arbitrary Distinctions

Several industry commenters requested that the Commission truncate the presumptively reasonable timeframe for collocations from 90 days to 60 days, and for all other sites from 150 days to 90 days.[28] However, these commenters similarly overstate the Commission's authority

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[26] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WC Docket No. 17-84, WT Docket No. 17-79, *Comments of the Cal. Pub. Utils. Comm'n*, at 16-17 (June 15, 2017) (emphasis added) [hereinafter "Cal. PUC Comments"].

[27] *See 2009 Declaratory Ruling* at ¶ 39.

[28] *See, e.g.*, ExteNet Comments at 8; T-Mobile Comments at 18; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of the Wireless Internet Serv. Providers Ass'n*, at 5 (June 15, 2017); Verizon Comments at 41; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, *Comments of the Computer & Commc'ns Industry Association (CCIA)*, at 10 (June 15, 2017); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of Crown Castle Int'l Corp.*, at 29 (June 15, 2017) [hereinafter "Crown Castle Wireless Comments"]; CTIA Comments at 11.

under the *Arlington* cases to create shorter shot clocks. Although the Commission may interpret a "reasonable" time under § 332(c)(7)(B)(ii), the interpretation must be "based on a permissible construction of the statute," which requires a rational connection between the facts found and the rule promulgated.[29]

Various proposals outlined below attempt to chisel away at the ordinary time for a zoning decision that Congress expressly intended to allow.[30] Such proposals aim to effectively transform local review into a ministerial-only process that would require a statutory revision by Congress rather than an administrative reinterpretation by the Commission. Accordingly, the Commission should reject proposals to truncate the shot clock, create new shot clocks or expand the shot clock to cover matters that occur before an application is duly filed and after the State or local government acts on such a duly filed request.

### 1. Proposed 90 and 60-day Shot Clocks Unreasonably Frustrate Local Review and Decision Processes Congress Intended to Preserve and Run Counter to the Evidence in the Record

Shot clocks cannot be so short that State and local governments cannot complete the application review and decision process. Proposals to cut the current timeframe for new sites by 40% and for discretionary collocations by 33% would in many cases effectively mandate that local officials confer "preferential treatment to the personal wireless service industry," which directly conflicts with Congressional intent.[31] Local Governments endorse collaborative and voluntary efforts to streamline application processes, but the Commission cannot effectively alter the process required under local law.

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[29] *See Arlington II*, 133 S.Ct. at 1874 (quoting *Chevron*, 467 U.S. at 842) (internal quotations omitted); *Motor Vehicles Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).
[30] *See* H.R. CONF. REP. NO. 104-458, at 208; *see also 2009 Declaratory Ruling* at ¶ 42 (finding that "Congress intended the decisional timeframe to be the 'usual period' under the circumstances for resolving zoning matters").
[31] *See* H.R. CONF. REP. NO. 104-458, at 208.

Although some industry commenters complain that the current shot-clock timeframes are unreasonable as compared to review periods for "other" users in the public rights-of-way, this analogy compares apples to oranges. Congress intended a "reasonable" period for a decision to mean the "usual" or "generally applicable time fram[e] for [a] zoning decision" by the State or local jurisdiction.[32] Congress expressly contemplated a zoning-type review and did not intend to require or prohibit any particular permit or approval.

**i. Discretionary Collocation Applications Should Not be Subject to the Same 60-Day Timeframe for Review as Mandatory Eligible Facilities Requests**

Several industry commenters urge the Commission align the timeframe for discretionary collocations under § 332(c)(7) with mandatory collocations under § 6409(a).[33] However, when the Commission adopted the 60-day shot clock for eligible facilities requests, it did so based on its determination that such period would be reasonable for a *nondiscretionary* determination guided by limited factors.[34]

Moreover, this proposed interpretation would run counter to the findings in the *2014 Infrastructure Order* that support structure replacements and other substantial changes to existing facilities reasonably require more than 60 days to review.[35] A 60-day shot clock for substantial changes in the public rights-of-way would also conflict with the Commission's finding that these proposals "are more likely to raise aesthetic, safety, and other issues" that would reasonably require additional time.[36] The public right-of-way is a dynamic environment in close proximity to where

[32] *See* Local Gov'ts Comments at 25–24.
[33] *See, e.g.*, CTIA Comments at 11–12.
[34] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, *Report and Order*, 29 FCC Rcd. 12865, 12957 ¶ 126 (Oct. 17, 2017) ("We find that a period shorter than the 90-day period applicable to review of collocations under Section 332(c)(7) of the Communications Act is warranted to reflect the more restricted scope of review applicable to applications under Section 6409(a).") [hereinafter "*2014 Infrastructure Order*"].
[35] *See 2014 Infrastructure Order* at ¶¶ 181, 195.
[36] *See id.* at ¶ 195.

people live and work. Even relatively small changes requires coordination with these other users and uses.

#### ii. State Laws that Require Decisions in Shorter Timeframes are Either Applicable to Non-Discretionary Permits or Not as Short as Industry Comments Claim

Several industry commenters argue that some state statutes that require municipalities to process wireless applications within shorter timeframes justifies a new national limit on a "reasonable" review period. However, like § 6409(a), most state statutes mandate approval for *non-discretionary* applications. For example, Arizona, California, Indiana, Michigan, North Carolina, Texas and Virginia require municipalities to approve collocations to existing facilities only if the applications meet specified criteria.[37]

While Minnesota requires development projects to be approved or denied within 60 days after the applicant tenders a complete application, the process to trigger or extend the 60-day period is much more balanced and flexible than the Commission's shot clock rules.[38] For example, the initial review period resets after each timely incomplete notice; the 60-day period does not commence unless the applicant obtained all other approvals required to tender the application; and the local government can unilaterally extend the 60-day period (once and not to exceed an additional 60 days) on written notice to the applicant.[39]

### 2. Commenters Generally Agree that the Commission Should Not Invent New Shot-Clock Classifications Based on Height or Zoning District

[37] *See* ARIZ. REV. STAT. § 9-592, adopted in ARIZ. H.B. 2365 (2017); CAL. GOV'T CODE § 65850.6; IND. CODE. ANN. § 8-1-32.3-22; MICH. COMP. L. SERV. § 125.3514; N.C. GEN. STAT. ANN. § 160A-400.53; TEX. LOC. GOV'T CODE ANN. § 284.001, adopted in TEX. S.B. 1004 (2017); VA. CODE ANN. § 15.2-2316.4 (2017).
[38] *See* MINN. STAT. § 15.99(2)(a).
[39] *See id.* § 15.99(3).

Municipal and industry commenters alike agree that new shot-clock classifications based on height or zoning district would inject unnecessary complexity into the review process.[40] Accordingly, the Commission should abandon its proposals to create new shot clocks based on these categories.[41]

### 3. The Commission Should Reject Proposals to Truncate Local Review for "Small Cells" Because Such Facilities are Not Always Smaller or Less Intrusive than Macrocells

Many industry commenters posit that the 150-day shot clock for new sites should not be applicable to "small cells" because such facilities are "far less visually intrusive" than the macro cells commonly deployed around the time the Commission issued the *2009 Declaratory Ruling*.[42] However, the record clearly establishes that not all small cells are small. Many so-called small cells or microcells can be *taller* and *more visually intrusive* than macrocells.

As a prime example, AT&T and ExteNet consider "small" facilities to include those with antennas and related equipment that would be more than twice as large as the volume limits the Commission determined to be a "small cell" in the *2014 Infrastructure Order*.[43] ExteNet claims that its facilities "are often the same size or smaller than wireline and utility attachments" despite the fact that the average pole-type electrical transformer is approximately 10 cubic feet and traffic signal control boxes can be as small as four cubic feet.[44] Based on ExteNet's definition of a small

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[40] *See, e.g.*, Local Gov'ts Comments at 26; CTIA Comments at 16; T-Mobile Comments at 22.
[41] See Wireless NPRM/NOI at ¶ 18.
[42] *See* Mobilitie Comments at 5; see also Verizon Comments at 40-41; ExteNet Comments at 8-9; T-Mobile Comments at 6; CTIA Comments at 28-29; Crown Castle Wireless Comments at 52; *In the Matter of Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of the Wireless Infrastructure Ass'n*, at 21 (June 15, 2017).
[43] *Compare* ExteNet Comments at 2 (defining a small cell as one with antenna enclosures no greater than six cubic feet and associated equipment no greater than 28 cubic feet), *with 2014 Infrastructure Order* at ¶ 92 (defining a small cell as one with antenna enclosures no greater than three cubic feet and associated equipment no greater than 17 cubic feet); *see also* AT&T Comments at 22–23.
[44] *See, e.g.*, Cooper Industries, *Single-Phase Overhead Transformers* (Aug. 2015), *available at:* http://www.cooperindustries.com/content/dam/public/powersystems/resources/library/201_1phTransformers/CA201001EN.pdf (last visited July 13, 2017); McCain, Inc., *Backpack Cabinet* (Apr. 26, 2017), *available at:* http://www.mccain-inc.com/images/mccain-files/products/cut-sheets/Cabinets/Backpack_Cabinet.pdf.

cell (28 cubic-foot equipment, plus the six cubic-foot antenna arrays), ExteNet's facilities would be approximately ***240% larger*** than the average pole-mounted single-phase transformer and approximately ***600% larger*** than some traffic control cabinets. Of course, this does not include the utility equipment, cables and concealment ExteNet would exclude from the total volume calculation.

The images below illustrate the differences between what ExteNet considers "the same size or smaller than wireline and utility attachments" such as transformers and traffic control cabinets:

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Figure 1: Dr. Jonathan L. Kramer, Esq. inside a 28 cubic-foot frame. (http://wireless.blog.law/2017/04/22/california-sb-649-big-lie-small-cells/)

Figure 2: Cincinnati small cell with a pole-mounted 24 cubic-foot equipment shroud.

Figure 3: Pole Mounted Single-Phase Transformer (approximately 10 cubic feet in volume).

Figure 4: McCain pole-mounted "Backpack Cabinet" for traffic control (approximately four cubic feet in volume).

AT&T and ExteNet also define a small cell deployment to be no more than 50 feet above ground level or 10 feet taller than the tallest utility pole within 500 feet from the installation, *whichever is greater*.[45] An average streetlight, traffic signal or utility pole in a typical neighborhood stands approximately 35 feet above ground level, which would mean that ExteNet's facilities would be 15 feet taller than virtually all other neighboring structures. This seems absurd when ExteNet's facilities would be only 10 feet taller than all other neighboring structures in areas where the average pole height exceeds 50 feet.

Small cells in the public rights-of-way are closer to the general public's view with fewer opportunities for concealment. Local Governments does not necessarily oppose voluntary streamlined practices for truly small cells, but the facilities described by ExteNet and Verizon are anything but small and should not be treated differently than other new installations. Representatives from Local Governments' coalition would be willing to collaborate with the BDAC, IAC and other interested parties on reasonable, community-appropriate recommended practices and standards for streamlined small-cell deployments.

#### 4. The Commission Should Reject Industry Proposals to Reinterpret "Collocations" to Include New Installations on Non-Tower Structures without Any Previously Approved Wireless Facilities

Several industry commenters asked the Commission to re-interpret "collocation" to include new facilities on structures not previously approved as a wireless support structure and support structure replacements.[46] The proposed definition conflicts with the ordinary definition for

[45] *See* AT&T Comments at 22–23; ExteNet Comments at 2.
[46] *See, e.g.*, Lightower Comments at 12; *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, *Comments of Crown Castle Int'l Corp.*, at 15 (June 15, 2017) [hereinafter "Crown Castle Wireline Comments"].

"collocation," which refers to multiple wireless facilities in a shared space.[47] Installations on non-tower structures without any previously approved wireless facilities are not "collocations" in the commonly understood sense.

Collocation as a regulatory concept first appeared in the Telecommunications Act as a mandate to allow competitive local exchange carriers into the incumbent carriers' facilities.[48] Later, the *2009 Declaratory Ruling* utilized the term to distinguish "collocation applications" for additions to previously approved sites from applications for "new facilities or major modifications" and all other facilities.[49] Indeed, the state statutes the Commission cited as support in the *2009 Declaratory Ruling*—and even some the Commission omitted—define "collocation" as multiple wireless facilities in a shared location.[50] Although the Commission's interpretation in the *2014 Infrastructure Order* deviated from the traditional definition because it no longer contemplated multiple equipment owners but rather additional equipment without respect to ownership, it nevertheless confirmed an "existing wireless tower or base station" as a fundamental prerequisite for a collocation.[51]

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[47] *See* 47 U.S.C. § 251(c)(6); *2009 Declaratory Ruling*, *supra* note 22, at ¶ 43 (distinguishing between collocation applications and applications for "new facilities or major modifications"); *2014 Infrastructure Order*, *supra* note 34, at ¶ 178 (defining "collocation" as the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes"); *see also* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 315 (27 ed. 2013) (defining "collocation" as "the sharing of an antenna tower by two or more wireless operators").

[48] *See* 47 U.S.C. § 251(c)(6).

[49] *See 2009 Declaratory Ruling*, *supra* note 22, at ¶ 43.

[50] *See id.* at ¶ 47–48 (citing CAL. GOV'T CODE § 65850.6(d)(1) ("'Collocation facility' means the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility."); FLA. STAT. ANN. § 365.172(3)(f) ("'Collocation' means the situation when a second or subsequent wireless provider uses an existing structure to locate a second or subsequent antennae."); KY. REV. STAT. § 100.985(3) ("'Co-location' means locating two (2) or more transmission antennas or related equipment on the same cellular antenna tower."); N.C. GEN. STAT. ANN. § 160A-400.51(4) ("The installation of new wireless facilities on previously-approved structures, including towers, buildings, utility poles, and water tanks."); *see also* IND. CODE. ANN. § 8-1-32.3-4 ("As used in this chapter, 'collocation' means the placement or installation of wireless facilities on existing structures that include a wireless facility or a wireless support structure, including water towers and other buildings or structures. The term includes the placement, replacement, or modification of wireless facilities within an approved equipment compound.").

[51] *See* 47 C.F.R. § 1.40001(b)(2) ("The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.").

The proposed reinterpretation would unreasonably extend the definition to cover applications for new installations on structures without any previously approved wireless facilities.[52] Even when the Commission has classified installations on towers without existing antennas to be a collocation, the tower itself received a prior approval as a structure solely intended to support FCC-licensed or authorized equipment.[53] Accordingly, the Commission should reject the proposal to reinterpret the phrase collocation to include new installations on support structures without any previously approved wireless facilities.

### C. The Commission Should Reject Proposals to Effectively Shorten the Shot Clock by Including Pre-Submittal Conferences and Post-Approval Health and Safety Reviews in the Timeframe for Review

Several industry commenters asked the Commission to declare that the shot clock timeframes encompass the entire local review process—which includes both pre-submittal conferences and ministerial review for compliance with health and safety codes.[54] As discussed in Local Governments' principal comments, the "reasonable" timeframe for a decision commences when the State or local government receives a "duly filed" application and terminates when the reviewing authority "acts" on the request.[55] Accordingly, conduct that occurs before a duly filed application is received (such as pre-submittal conferences) or after the reviewing authority acts (such as ministerial health and safety review) falls outside the shot clock's scope.

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An "eligible support structure" means a tower (a structure built solely or primarily to support FCC-licensed or authorized equipment) or a base station (a non-tower structure locally approved as a support for FCC-licensed or authorized equipment). *See id.* §§ 1.40001(b)(1), (4) and (9).

[52] *See* Lightower Comments at 11-12; Crown Castle Wireline Comments at 15; Verizon Comments at 41.

[53] *See 2014 Infrastructure Order*, *supra* note 34, at ¶ 174.

[54] *See, e.g.*, CTIA Comments at 8, 15.

[55] *See* Local Gov'ts Comments at 8.

### 1. Crown Castle Falsely Maligns California Cities as Obstructionists for Requiring Health and Safety Permits Prior to Deployment

Crown Castle alleges that California cities such as Cupertino, Hillsborough, Monterey, Rancho Palos Verdes, Pacific Grove, San Luis Obispo and Santa Cruz delay or completely obstruct deployments by "tak[ing] the position that the shot clock does not apply to collateral permits, such as encroachment permits . . . ."[56] However, Crown Castle offers no real evidence that shows local governments are obstructing deployments during the health and safety review phase.

The cities that were able to respond by the time of this filing strenuously object to Crown Castle's characterization that local governments manipulate the shot clock rules to delay and obstruct infrastructure deployment. Cities are merely attempting to comply with shot clock deadlines and perform necessary health and safety review.

- ***City of Cupertino, California.*** Crown Castle's allegations obscure a key distinction that arises when a provider seeks to attach its facilities to city-owned infrastructure. Like any other property owner, the city requires private entities to first obtain the property rights to use city-owned poles before any permit applications can be processed. Here, Crown Castle proposed to deploy nodes on city-owned poles, but had not yet obtained the appropriate property rights to do so. To the extent that Crown Castle believes, or represents to the Commission, that the city's proprietary negotiations over access to city poles is a regulatory function governed under the federal shot clocks, this position is clearly mistaken. The city notes, however, that as of this filing the city has agreed to grant Crown Castle the property rights to attach facilities to city-owned poles. Accordingly, the city engineer is now able to process Crown Castle's encroachment applications for compliance with health and safety codes and does so, contrary to Crown Castle's claims, faster than any shot clock would require.[57]

- ***Town of Hillsborough, California.*** Crown Castle has an ongoing project for 16 DAS nodes and a fiber optic network in the town, but has repeatedly failed to follow established application procedures. The town is unaware of any circumstances that would lead Crown Castle to believe that delays in encroachment permit review have exceeded the shot clocks, especially considering that until June 2017 Crown Castle had not submitted a complete application for the current proposed deployment. The town's application requirements are publicly stated in the application form and were

[56] Crown Castle Wireline Comments at 15.
[57] *See* Email from Chad Mosley, City Engineer, Cupertino, Cal., to David Brandt, City Manager, Cupertino, Cal. (July 11, 2017, 7:52:06 AM).

referenced in timely incomplete notices. Any delays in the application process have been attributable to deficiencies in Crown Castle's applications, not the town's alleged manipulation of the shot clocks.[58]

- ***City of Monterey, California.*** The city does not delay or obstruct the processing of encroachment permits and believes that Crown Castle misrepresents the city's permitting process and practices. Crown Castle has submitted only one small cell application to the city—a proposal to install antennas on a replacement utility pole that did not support any existing wireless equipment—which the city approved in less than 150 days. After receiving applications for the required encroachment permits, the city issued each permit in seven days. Given that the city issued its discretionary siting approval within the applicable shot clock and performed its public health and safety review in one week, there is no basis to conclude that the city manipulates the shot clock rules to delay and obstruct small cell deployments.[59]

- ***City of Pacific Grove, California.*** Contrary to Crown Castle's claims, the city adheres to the applicable shot clocks. The city indicated that it had processed only one application from Crown Castle and that it was approved within the required shot clock. To the extent that Crown Castle perceived any delay, the city contends that it was caused by Crown Castle's own decision to change the site location and design when Crown Castled learned that the project would require a separate approval from the California Coastal Commission. These material alterations to the scope of the project required the city to review Crown Castle's new proposal as an entirely new project. Any delays in the permitting process were therefore solely attributable to Crown Castle and not the city.[60]

- ***City of Rancho Palos Verdes, California.*** Crown Castle's allegation that the city delays issuing collateral permits is unfounded. The city is currently processing a number of Crown Castle's applications for right-of-way facilities that are still in the discretionary review phase and have not yet been submitted for collateral permits. The city further disputes that it must apply the 90-day shot clock to "collocations of small cell equipment in the right-of-way."[61] In this context, Crown Castle interprets "collocations" to mean the addition of equipment to structures that *do not* currently support wireless equipment. The legal authority for this position is tenuous at best and the city elects not to take a position that the Commission itself has not endorsed outside of a limited programmatic agreement for historic preservation purposes.[62]

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[58] *See* Memorandum from Dr. Jonathan Kramer, Telecom Law Firm PC, to Paul Willis, Public Works Director, Town of Hillsborough, Cal. (Jan. 27, 2017) (identifying that Crown Castle's applications contained materially inconsistent statements, omitted contractor information and failed to adequately respond to certain questions on the application).

[59] Email from Todd Bennett, Senior Associate Planner, City of Monterey, Cal., to Michael Johnston, Telecom Law Firm PC (July 14, 2017, 3:39 PM).

[60] *See* Email from Heidi A. Quinn, Assistant City Attorney, Pacific Grove, Cal., to Michael Johnston, Telecom Law Firm PC (July 14, 2017, 5:33 PM).

[61] Crown Castle Wireline Comments at 15.

[62] *See 2009 Declaratory Ruling* at ¶ 46 (citing 47 C.FR. Part 1, App. B—Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Definitions, Subsection C).

- ***City of San Luis Obispo, California.*** Contrary to Crown Castle's claims, the city adheres to the applicable shot clocks. Any delays in encroachment permitting were directly attributable to proposals submitted by Crown Castle that would have interfered with city-owned infrastructure or caused a public safety hazard. These practical deficiencies required Crown Castle to revise and resubmit the appropriate plans and specifications to ensure compliance with generally applicable health and safety standards.[63]

- ***City of Santa Cruz, California.*** Contrary to Crown Castle's allegation, the city has not taken a position on whether the shot clocks apply to collateral permitting processes.[64] Rather, the city informed Crown Castle that facilities proposed in the public rights-of-way undergo a bifurcated permit process where the planning department reviews the project for land use purposes and the public works department reviews the project for compliance with public health and safety codes. Given that a project may require location modifications at the planning stage, public works does not perform its review until land use approval has been granted. In the city's experience, the encroachment phase occurs faster than the land use phase and the city strongly rejects Crown Castle's implication that it delays and obstructs projects by failing to grant encroachment permits in due course.

### 2. Proposals to Subsume Ministerial Construction and Encroachment Approvals into the Shot Clock Subjects Critical Health and Safety Review to Unreasonable Time Pressure

Proposals from industry commenters to simultaneously truncate the presumptively reasonable timeframes and expand the shot clock to cover the entire review process would therefore mean that building and safety officials would have potentially only a few days to evaluate whether a proposed deployment endangers the public.

Such a rule would not serve the public interest because it would subject building and public works officials to unreasonable time pressure as they conduct essential health and safety reviews.

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[63] *See* Email from Jon Ansolabehere, Assistant City Attorney, City of San Luis Obispo, Cal., to Michael Johnston, Telecom Law Firm PC (July 12, 2017; 12:38) (stating that "initial plan submittals lacked information regarding pole structural, conductor and conduit location and capacity, and existing equipment on poles. Subsequent submittals showed radios that would have prevented breakaway hardware from functioning, radios in locations that were already occupied by other equipment, coring and chipping signal foundations in a manner that would likely comprise structure integrity, and drawing power from unmetered flat rate City facilities which is a violation of the City's service agreement with PG&E.").

[64] *See* Email from Heather J. Lenhardt, City Attorney, City of Santa Cruz, Cal., to Michael Johnston, Telecom Law Firm PC (July 10, 2017; 1:13 PM).

A deemed-granted remedy—especially if coupled with AT&T's and CCA's perilous proposal to authorize construction without health and safety approval—would further exacerbate this unnecessary time pressure. Comments from State and local agencies charged with health and safety responsibilities echo this point.[65]

Moreover, the ministerial review process for building and/or encroachment permits does not allow health and safety officials to contribute to the allegedly unreasonable delays or exactions that the industry generally points to as the impetus for new limitations. Deployments either meet the code requirements or not, and these objective requirements are applicable to all similarly situated entities.

There is simply no valid reason to burden health and safety officials with the shot clock. Accordingly, the Commission should reject industry proposals to expand the deadlines to include ministerial health and safety reviews.

### D. Shot Clock Timeframes Cannot be Applied to Proprietary Functions or Decisions, and Any Regulations on Proprietary Negotiations Must Reflect Realities of Municipal Contracting

As in *In re Mobilitie Petition*, industry commenters generally urged the Commission to ignore the well-established distinction between regulatory and proprietary functions and find that all local government conduct in connection with wireless facilities falls within the shot clock. For example, Mobilitie asks the Commission to find the applicable shot clock timeframe begins to run

[65] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of Alaska Dept. of Trans. and Pub. Facilities*, at 3 (June 15, 2017); Cal. PUC Comments at 12–17; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of City of Chicago*, at 4–6 (June 15, 2017); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of Georgia Dept. of Trans.*, at 1–3 (June 15, 2017); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of Illinois Dept. of Trans.*, at 2 (June 8, 2017); *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, *Comments of Utah Dept. of Trans.*, at 4–5 (June 15, 2017).

at the time that the applicant requests a license or franchise to install facilities in the public rights-of-way.[66] The Commission should reject this and other similar requests.

CTIA attempts to justify this rule on the basis the § 332(c)(7)(B)(ii) applies to "requests for authorization to place, construct or modify personal wireless service facilities," but fails to explain how this limitation on state and local *regulatory* authority limits state and local *proprietary* authority.[67] In addition, CTIA criticizes municipal commenters' reliance on case law and attempts to argue that the Communications Act does not recognize the distinction between regulatory and proprietary functions.[68] Put simply, CTIA has the law exactly backwards. The distinction between regulatory and proprietary functions, and the notion that federal preemption does not reach the latter, are embedded in our legal system such that Congress is presumed to know these doctrines when they enact new laws. Congress does not need to explicitly limit the Communications Act to regulatory functions—it already is because Congress did not say otherwise.

The Commission should not find that proprietary negotiations for property rights to use municipal assets fall within the reasonable-time limitation under § 332(c)(7)(B)(ii). However, to the extent that the Commission does attempt to impose time limitations on non-regulatory activity, the Commission should recognize that this separate process requires a separate shot clock, and should not subsume pre-application activities into the same timeframe set aside for application review.

Agreements between municipalities and private parties typically require approval by an elected or appointed body, much the same as any other corporation. Even if agreements could be reached within a relatively short timeframe, additional time will be necessary to calendar the item

[66] *See* Mobilitie Comments at 6.
[67] *See* CTIA Comments at 15.
[68] *See id.* at 14.

for the next available meeting date. Any rules should reflect these basic realities about municipal business.

### F. Moratoria

The California Association of Competitive Telecommunications Companies ("CALTEL") on behalf of Sonic Telecom alleges that the City of Berkeley, California, imposes local moratoria on most streets desired for wireline deployment.[69] In addition, CALTEL objects to Berkeley's street-cut notice procedures that require posting on each building within 500 feet and furnishing proof to the city.[70] These comments concern "street cut" moratoria that warrant some additional explanation.

First, the moratoria on street cuts does not violate § 253(a) because it falls within the safe harbor for right-of-way management. The city's streets are subject to a limited five-year moratoria after a street has been rehabilitated.[71] Such moratoria are applied on a nondiscriminatory and competitively neutral basis and only restricts wireline deployments to the extent that they require a street cut on a street under moratorium. In some cases, providers could simply install overhead facilities as a feasible substitute.[72]

With respect to CALTEL's objection to standard noticing procedures, the city is fairly dense and values providing residents notice of street work that may cause noise or some other unexpected disturbance. The city has made a reasonable decision to ensure that potentially impacted residents and property owners are notified, and that a system exists to ensure compliance

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[69] *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure* Investment, WC Docket No. 17-84, *Comments of CALTEL*, at 18 (June 15, 2017).
[70] *See id.*
[71] *See* Berkeley Public Works Dept., *Streets on Moratorium* (last visited July 17, 2017), http://www.ci.berkeley.ca.us/Public_Works/Sidewalks-Streets-Utility/Streets_on_Moratorium.aspx.
[72] *See* Berkeley Public Works Dept., *Aesthetic Guidelines for PROW Permits Under BMC Chapter 16.10* (Mar. 15, 2011), *available at*: http://www.ci.berkeley.ca.us/uploadedFiles/Public_Works/Level_3_-_Sidewalks,_Streets_-_Utility/Aesthetic%20Guidelines%20for%20PROW%20Permits%20Under%20BMC%20Chapter%2016_10.pdf.

with the city's noticing requirements. Ultimately, the city welcomes CALTEL's suggestion that any perceived problems with local rights-of-way management practices are collaboratively resolved between stakeholders rather than preempted by the Commission.[73]

## III. THE COMMISSION SHOULD NOT INTERPRET OR RE-INTERPRET SECTIONS 332(C)(7) AND 253

### A. The Commission Should Reject Verizon's Proposed "Substantial Barrier" Standard as Inconsistent with Sections 253 and 332, and Equally Ambiguous as the Existing Standards for an Effective Prohibition

Verizon asks the Commission to declare that a state or local requirement effectively prohibits telecommunications services when it "erects a 'substantial barrier' to service."[74] Furthermore, a substantial barrier would include "significant" increases in costs and "meaningful strains" on ability to provide service.[75] This proposal eviscerates the high "prohibition" standard set by the plain text in both sections 253(a) and 332(c)(7)(B)(i)(II), and also fails to shed any more light on when an "effective" prohibition occurs than the existing administrative and judicial tests.

As more fully explained in Local Governments' principal comments, sections 253(a) and 332(c)(7)(B)(i)(II) do not need to be harmonized but at the very least both require an *actual* prohibition rather than a merely hypothetical prohibition.[76] Those courts that initially considered less-than-actual prohibitions sufficient have either fully or partially abrogated those earlier positions.[77] Verizon's "substantial barrier" standard would depart from the plain text in these statutes and take the Commission backwards.

Moreover, Local Governments fails to see how this test—chock full with ambiguous words like "substantial," "significant" and "meaningful"—would provide any more concrete guidance to

[73] *See* CALTEL Comments at 18.
[74] *See* Verizon Comments at 11.
[75] *See id.* at 11.
[76] *See* Local Gov'ts Comments at 39–45.
[77] *See id.* at 39–41.

public agencies, applicants, courts or even the Commission. Rather than litigate what constitutes an "effective" prohibition, municipal and wireless industry lawyers will now have three new ambiguous phrases over which to litigate. The Commission should reject this proposed "substantial barrier" standard.

### B. Amortization

As it did in *In re Mobilitie Petition*, Crown Castle alleges that some California cities intend to adopt "ordinances (virtually identical to ordinances adopted in Irvine, Santa Monica and San Diego)" that use amortization provisions to effectively prohibit new eligible facilities requests or negate the Commission's rules.[78] This assertion is incorrect because (1) municipalities may, consistent with the Commission's rules, amortize legal nonconforming structures; and (2) the draft amortization provisions expressly would not bar approval for any eligible facilities request.[79]

### C. Fair and Reasonable Compensation

Industry commenters generally criticize the lease and license fees required for access to property and/or structures they do not own and mischaracterize these fees as regulatory in nature. As occurred in *In re Mobilitie Petition*, industry comments fail to name allegedly "bad actors" in an apparent effort to dodge additional scrutiny.[80]

However, Crown Castle provides an opportunity for Local Governments to respond directly to allegations that its constituents "impose onerous and discriminatory restrictions and fees that thwart" small cell deployment.[81]

- ***City of Carlsbad, California.*** Crown Castle asserts that it "has been able to negotiate a reduction to the proposed market based rents" for access to city-owned poles in Carlsbad after previously citing issues "with respect to the [city's] imposition of substantial annual

[78] *See* Crown Castle Comments at 21.
[79] *See* Local Gov'ts Mobilitie Reply Comments at 4–5.
[80] *See generally* Local Gov'ts Mobilitie Reply Comments at 1 n.2.
[81] Crown Castle Comments at 10.

attachment fees."[82] The city agrees that the original fee has been reduced, but disagrees that the fee was ever "imposed" like a regulatory fee.[83] Crown Castle's apparent satisfaction with the progress of the negotiations is emblematic of private parties staking positions and making reasonable concessions. The new fee is still market-based and wholly unrelated to the city's regulation over access to the public rights-of-way. Access to municipal property is not subject to the type of rate regulation that applies to public utilities under § 224 and to the extent that Crown Castle, or any other industry commenter, alleges unreasonable or excessive regulatory fees that violate § 253, the Commission should look critically at whether the fee is actually regulatory. The city's experience with Crown Castle evinces that industry commenters' general allegations that cities impose discriminatory regulatory fees cannot be taken at face value.

Industry commenters also protest that fees that exceed the cost to manage the public rights-of-way are "excessive and do not constitute fair and reasonable compensation."[84] The Oregon Telecommunications Association ("OTA") alleges that local governments make "no effort to relate the total fees collected to the actual costs of administering the rights of way" and adopt ordinances that are "revenue generation schemes."[85]

To the contrary, Oregon cities take a holistic and even-handed approach to ensuring that all service providers that benefit from the use of the public rights-of-way contribute to the localities that invest in, maintain and operate this public good. For a detailed survey on local franchises in Oregon cities, the Commission may refer to the League of Oregon Cities Franchise Agreement Survey Report attached to this filing as **Exhibit 1**.[86]

- ***City of Aumsville, Oregon.*** OTA named the city as one that adopted a "revenue generation" ordinance. However, the $7,000 raised by franchise fees from three telecommunications

[82] *See* Crown Castle Comments at 11.
[83] *See generally* Carlsbad Reply Comments.
[84] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WC Docket No. 17-84, WT Docket No. 17-79, *Comments of the Oregon Telecommunications Ass'n*, at 2 (June 15, 2017) [hereinafter "OTA Comments"]. The Commission should note that the comments from Oregon Telecommunications Association contain allegations for which it fails to provide adequate factual support or legal authority. Accordingly, and in light of Local Governments' responses that point out critical defects, OTA's comments should be afforded little, if any, weight.
[85] *See* OTA Comments at 3.
[86] *See* League of Oregon Cities, *Franchise Agreement Survey Report* (March 2017), *available at*: http://www.orcities.org/Portals/17/Library/Franchise%20Agreement%20Survey%20Report_FINAL%203-6-17.pdf.

providers "hardly covers" the city's administrative costs.[87] In addition, when disputes arise with telecommunications providers over franchise terms, unpermitted work or information disclosures, the city has a limited ability to recover its own legal expenses. These expenses are just one example of hidden costs of operating the rights-of-way that the industry fails to appreciate.[88]

- ***City of Beaverton, Oregon.*** The city charges a five percent gross revenue fee for utilities that generate revenue in the city and a per-foot transit fee for utilities that do not. However, the city applies these fees even-handed to all utilities, including city utilities for water, sewer and storm.[89] OTA objects to any fees that are not related to construction and inspection, but ignores additional complexities related to managing and operating the rights-of-way. Staff time and costs accrue from nearly all levels of local government, particularly from the offices of the city manager, finance, public works, planning, mayor and city attorney.[90]

- ***City of Gladstone, Oregon.*** Earlier this year, a bill proposed in the state Senate was defeated and would have limited local right-of-way fees to direct cost recovery. In a letter to the bill's sponsor, the city stated that it already runs a deficit on its right-of-way maintenance operations, and limiting right-of-way fees on a direct cost basis would further add to the city's deficit.[91] The city's alleged "revenue generation" scheme cannot even keep up with current right-of-way costs and the deficit may grow as its responsibilities increase to accommodate the entry of new users into the rights-of-way.

- ***City of Happy Valley, Oregon.*** The city adopted a new right-of-way ordinance in 2016 that "appl[ies] to all utilities (not just telecommunications providers) that own or use facilities in the rights of way to provide service in the City, including City-owned utilities and other governmental entities' utilities."[92] Contrary to OTA's claims that the city charges an annual license fee, the city's $250 license application fee is due once for the five year term of the license for the purpose of processing the license application.[93] The city's annual five percent gross revenue fee that applies to all users was established "at the same rate [prior franchisees] were paying to avoid placing them at a competitive disadvantage to new licensees."[94] Taken together, it is clear that the city imposes its right-of-way fees on a competitively neutral and nondiscriminatory basis in order to foster competition and

[87] *See* Email from Ron Harding, City Administrator, City of Aumsville, Or., to Patty Mulvihill, General Counsel, League of Oregon Cities (July 11, 2017, 7:54 AM).
[88] *See id.*
[89] *See* Email from Dave Waffle, Assistant Director of Finance, City of Beaverton, Or., to Patty Mulvihill, General Counsel, League of Oregon Cities (July 10, 2017, 11:54 AM).
[90] *See id.*
[91] *See* Letter from Tamara Stempel, Mayor, City of Gladstone, Or., to Mark Hass, Oregon State Senator (Mar. 7, 2017).
[92] *See* Letter from Nancy L. Werner, counsel for City of Happy Valley, Or., at 1 (July 13, 2017).
[93] *See id.* at 2.
[94] *See id.*

preserve the city's ability to manage and operate the public rights-of-way as a finite resource.[95] The city's full response is attached to this filing as **Exhibit 2**.

- ***City of Milwaukie, Oregon.*** In an opposition letter to a state bill that would have preempted local rights-of-way fees, the city emphasized that Oregon is a home rule state that relies on monetizing its right-of-way assets to manage the "use and is some cases abuse of the [rights-of-way]."[96] The city's recently adopted right-of-way ordinance is not a money grab as OTA implies. Rather the ordinance was implemented "to create equity in how to charge users to occupy the space, and over time to improve the overall condition of the [rights-of-way]" and "keep[ ] costs down for all users . . . ."[97]

- ***City of Monmouth, Oregon.*** The city is currently considering a license fee system in light of the ruling in *City of Eugene v. Comcast*, but notes that contrary to OTA's claims the system would require all service providers, including municipal entities, to pay the right-of-way fees.[98] This system can hardly be considered a revenue generation scheme built on the contributions of private telecommunications companies when all users of the right-of-way would be required to pay an equitable share.

- ***City of Oregon City, Oregon.*** For fiscal years between 2012 and 2015, the city calculated revenue generated from all users of the rights-of-way and the city's total costs associated with ownership, management and maintenance of the rights-of-way.[99] The city found that its gross revenues for right-of-way use is equal to approximately three times below cost.[100] That the city runs a deficit even after enacting its new right-of-way ordinance in 2013 is a clear indication that the ordinance is not the revenue generation scheme that OTA alleges. Rather, the city determined that it needed to implement an equitable cost-sharing fee structure and replace a system that required the city to negotiate individual franchises with each right-of-way user.[101] Contrary to OTA's allegations, the city charges a nominal application fee of $50 for each five-year license term that is limited to the costs of processing the application.[102] Registration fees are not required if the user maintains a license or franchise. Like the City of Happy Valley, the city's annual five percent gross revenue fee that applies to all users was established "at the same rate [prior franchisees]

[95] *See id.* (stating that "[c]ontrary to OTA's assertion that these ordinances are "revenue generating schemes" . . . Happy Valley found that the Ordinance would not generate new revenue from existing franchisees. Any new revenue would come from entities using the rights of way without a franchise and thus not paying the City for such use.").
[96] *See* Letter from Mark Gamba, Mayor, City of Milwaukie, Or., to Mark Hass, Chairman, Oregon Senate Committee on Finance and Revenue (Mar. 6, 2017).
[97] *See id.*
[98] *See* Email from Scott McClure, City Manager, City of Monmouth, Or., to Patty Mulvihill, General Counsel, League of Oregon Cities (July 11, 2017, 7:54 AM).
[99] *See* Declaration of Ryan Bredehoeft in Support of Defendant's Response to Plaintiff's Motion for Summary Judgment, Case No. CV 14060280, at 1-2 (Or. Cir. Ct. Feb. 26, 2015).
[100] *See* Email from Lance Powlison, Rights of Way Program Manager, City of Oregon City, Or., to Patty Mulvihill, General Counsel, League of Oregon Cities (July 10, 2017, 8:19 AM).
[101] *See* Letter from Nancy L. Werner, counsel for City of Happy Valley, Or., at 1 (July 13, 2017).
[102] *See id.*

were paying to avoid placing them at a competitive disadvantage to new licensees."[103] Taken together, it is clear that the city imposes its right-of-way fees in a competitively neutral and nondiscriminatory basis in order to foster competition and preserve the city's ability to manage and operate the public rights-of-way as a finite resource.[104] The city's full response is attached to this filing as **Exhibit 3**.

- ***City of Portland, Oregon.*** The city's public right-of-way "constitutes a finite resource that must serve many important but competing uses" that include transportation, gas and electric utilities, water and sewer, telecommunications, cable and broadband services.[105] The city assesses "similarly situated users of the rights-of-way comparable compensation" that also applies to governmental agencies.[106] Although OTA did not specifically name the city in its comments, the city engages in similar right-of-way fee structures that OTA maligns and supports with inadequate factual or legal basis. The city, like many other Oregon cities, rely on right-of-way fees "to effectively manage . . . public rights-of-way held in trust by cities for their citizens."[107]

- ***City of Warrenton, Oregon.*** Contrary to OTA's claims, the city's licensing ordinance that was adopted in 2012 "is designed to ease access to the rights of way by eliminating the sometimes time-consuming franchise negotiation process" and "eliminates any competitive advantages" that may arise under individual franchises.[108] OTA misleads the Commission into believing that the city charges registration fees, attachment fees, per-foot fees or minimum annual fees that the city does not assess. Rather, aside from the gross revenue fee, the city charges a nominal application fee in order to process a license application and has never denied a license since enacting the ordinance.[109] In addition, rather than blame Oregon municipalities for the current gross revenue fee structures, OTA need only look to its own members that have lobbied the state legislature to preserve the status quo.[110]

Ultimately, OTA paints each Oregon jurisdiction it names with a broad brush and misrepresents the nuances involved in the operation of local government and the functions it serves for the public's benefit. Like elsewhere around the United States, Oregon cities are often different

[103] *See id.* at 2.
[104] *See id.*
[105] *See* Letter from Thomas Lannom et al., Revenue Division Director, City of Portland, Or., to Mark Hass, Chair, Senate Committee on Finance and Revenue, at 1 (Mar. 7, 2017).
[106] *See id.*
[107] *See id.*
[108] *See* Email from Nancy Werner, counsel for City of Warrenton, Or., to Patty Mulvihill, General Counsel, League of Oregon Cities (July 11, 2017, 2:19 PM).
[109] *See id.*
[110] *See id.*

in geography and population and must implement programs for the public rights-of-way that respond to uniquely local needs. Local Governments urge the Commission to recognize these real differences and allow local agencies to implement rules and fees that reflect realities of operating, managing and owning the rights-of-way.

### D. Local Right-of-Way Management Practices

#### 1. Concealment and Design Requirements

Virtually all industry commenters complain that "unreasonable" concealment and design requirements effectively prohibit wireless services.[111] However, as explained in Local Governments' principal comments, both sections 253 and 332(c)(7) preserve State and local authority to implement and enforce local zoning requirements, which include concealment and design criteria.[112]

Concealment and design criteria for facilities in the public rights-of-way are not just legally permitted, but also good common sense. As discussed *supra*, small cells are not always small and are more often than not placed on bare poles in close proximity to the general public. Aesthetic concerns are particularly salient when applicants propose to install their facilities in residential, historic or other areas where investment-backed expectations underpin requirements that future development occur in harmony with the existing environment. The photograph in Figure 5 below shows how "small cells" can be, in fact, large and obtrusive without aesthetic regulations.

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[111] *See, e.g.*, AT&T Comments at 16–17.
[112] *See* Local Gov'ts Comments at 46.


**Figure 5:** AT&T "small cell" (San Diego, California) with large, unconcealed equipment placed in prominent view.

Municipalities have limited options for concealment. For example, many equipment enclosures cannot even be painted to match the pole because applicant's claim it would void the warranty on the device. Municipalities often then turn to strategies such as requiring non-antenna equipment to be installed underground in environmentally controlled vaults, within landscaped planters, street furniture or uniform equipment shrouds. The images below provide some examples to show how these approaches result in significantly better designs.

***Undergrounded Equipment.*** As discussed above, undergrounded equipment serves both public safety and community aesthetic purposes. Technical concerns such as water intrusion can be addressed through environmentally controlled vaults, often fitted with sump pumps and other measures to protect the electronic equipment. The photos below show some thoughtfully-designed examples of small cells and DAS facilities with undergrounded equipment.

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**Figure 6:** T-Mobile Site (Calabasas, California) with environmentally controlled equipment vault to conceal the ground-mounted equipment, and radome to conceal the pole-mounted antennas.

**Figure 7:** AT&T/Crown Castle DAS installation (Ole Miss Campus, Mississippi) with undergrounded equipment in environmentally controlled vaults and antennas concealed in the luminaires. Crown Castle uses this deployment in its promotional materials. *See University of Mississippi, MS*, CROWNCASTLE.COM, http://www.crowncastle.com/projects/venues_ole-miss.aspx (last visited July 17, 2017).

**Figure 8:** AT&T/Crown Castle DAS installation (Ole Miss Campus, Mississippi) Technicians install antennas concealed within luminaires.

**Figure 9:** AT&T small cell (West Los Angeles) with equipment located in an environmentally controlled vault with hatched doors in the sidewalk just beyond the stop sign, and antennas concealed within the radome.

***Concealment with Landscape Features and Street Furniture.*** Circumstances may arise when undergrounding is not feasible or desirable. For example, some public works departments may find that ground disturbance in congested downtown streets causes more disruption than well-placed pole-mounted equipment. In addition, some communities may find that, on balance, undergrounded equipment is not necessary where landscaping, street furniture or other existing objects can be used to conceal the equipment. Given that these decisions involve local concerns such as right-of-way safety and community aesthetics, decisions about when to use these alternatives must be left to the reasonable discretion of local officials.


**Figure 10:** T-Mobile Site (Calabasas, California) with superimposed insert to show ground-mounted equipment concealed behind existing landscape features.

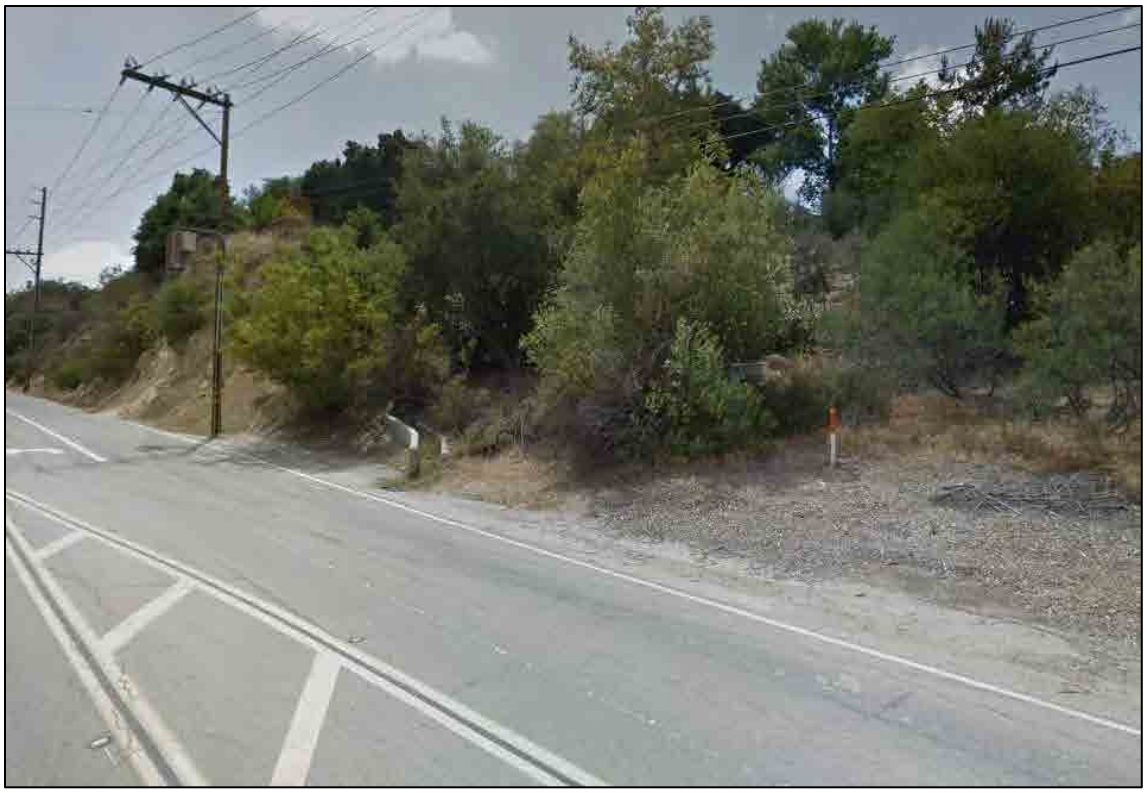

**Figure 11:** Crown Castle Site (Calabasas, California) with pole-mounted antennas on stand-off brackets and ground-mounted equipment behind the existing landscape features.

**Figure 12:** Sprint Site (Calabasas, California) with ground-mounted equipment behind landscape features installed as a condition of approval. Above-ground antennas mounted on an existing streetlight pole not shown in this view.


**Figure 13:** Finished small cell inside bus shelter. *See* David Chambers, *JCDecaux Offers Multi-Operator Urban Small Cell Solution* (June 1, 2017) https://www.thinksmallcell.com/images/articles/2017/JCD_Bus_Shelter.jpg.

**Figure 14:** Small cell (location unknown) being installed above a bus stop shelter.


**Figure 15:** Finished small cell inside information kiosk (location unknown). *See* David Chambers, *JCDecaux Offers Multi-Operator Urban Small Cell Solution* (June 1, 2017) https://www.thinksmallcell.com/images/articles/2017/JCD_Bus_Shelter.jpg.

In addition to using existing street furniture, equipment manufacturers have begun to offer pre-fabricated equipment enclosures that mimic trash cans, park benches and other objects commonly found in the public rights-of-way.


**Figure 16:** *See* Sabre Indus., *Sabre Small Cell and DAS Total Solutions Product Catalog* at 1.6 (July 2016).

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## Telecomm Bench

[180E065_000 | Concrete Telecommunications Equipment Bench]

A part of our outdoor and indoor shroud and enclosure family, the Telecomm Bench provides a source for storing small telecommunications equipment in a public space while maintaining a sleek and stealth profile. The Bench also provides public functionality any field site environment.

**Design Features:**

- Front and rear access door
- NEMA 3R rated
- Lockable door latches
- Integrated cable management system
- Concrete structure with internal metal structure
- Stainless steel material
- 20" x 13" door clearance
- 26" Wide metal frame

**Product Specifications:**

- Product Dimensions:
  - 60"W x 31"D x 35"H (28"D x 55"W at base)
  - 44" Seat Width
- 19" Rack Rails
- 6 RU rack capacity
- Fan cooling, blows from rear
- (2) 2 gang electrical box ports

Figure 17: *See* Sabre Indus., *Sabre Small Cell and DAS Total Solutions Product Catalog* at 4.9 (July 2016)

***Concealment Through Uniform Equipment Shrouds.*** If equipment cannot be hidden, many communities prefer that the equipment maintain a uniform appearance. This is a compromise between the service providers and the local permitting agencies: a pre-approved configuration may

be less flexible from an equipment-configuration standpoint, and may be less desirable from an aesthetic standpoint, but it that can be deployed quickly throughout a wide area.

**Figure 18:** Crown Castle Small Cell Deployment (La Jolla, California). Several dozen identical sites dot this neighborhood.

**Figure 19:** Crown Castle Small Cell Deployment (La Jolla, California). This site is related to the one shown in Figure 18, above. The equipment is housed in an identical shroud and the antennas are concealed within a radome with a shroud that covers the mounting brackets.


**Figure 20:** Crown Castle Small Cell Deployment (La Jolla, California). This site is related to the one shown in Figures 18 and 19, above. The city recently invested in new roundabout intersections, light standards and landscaping for this street segment, so additional efforts were made to reduce the overall size and visual impact of the equipment.

**Figure 21:** Crown Castle Small Cell Deployment (La Jolla, California). This site is related to the one shown in Figures 18, 19 and 20, above.

Although AT&T complains that form-factor restrictions unreasonably interfere with their equipment configurations, municipalities that adopt uniform equipment concealment regulations

do so in collaboration with the industry to ensure that the pre-approved designs remain technologically neutral and flexible. For example, Crown Castle praised Cincinnati's small cell regulations, which were developed over a three-day workshop with members of the wireless industry. AT&T was invited but did not participate.

The drawings in Figure 22 below show the final pre-approved designs on poles typically found in Cincinnati. These designs take into account the usual equipment various service providers would want to deploy and reasonably foreseeable expansions or upgrades. Although undergrounded equipment may still be required in historic or other design-sensitive locations, these permits for these deployments can be issued over the counter in nearly all areas of the city.

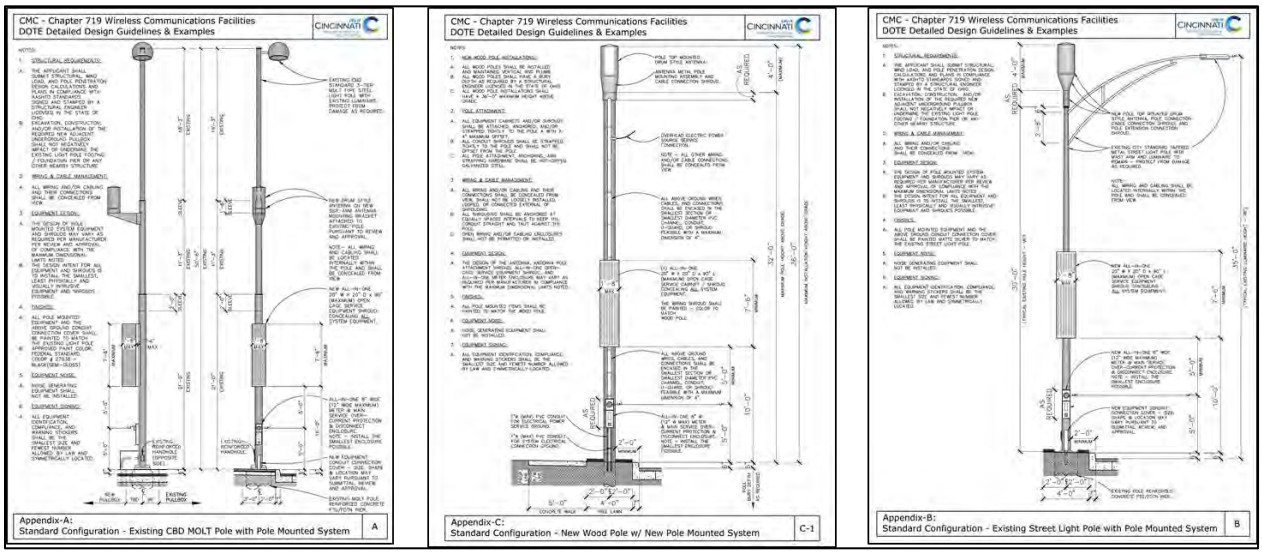


**Figure 22:** Standardized equipment configurations for Cincinnati small cells. These were designed in collaboration with the wireless industry with an aim to create a pre-approved design that could fit virtually any equipment by any carrier. Sites located in historic, undergrounded or redeveloped neighborhoods will still require undergrounded equipment.

### 2. Undergrounding Requirements for Non-Antenna Equipment are Appropriate and Permissible Right-of-Way Management Regulations

Contrary to AT&T's comments, undergrounding requirements do not prohibit wireless services because these rules are not applicable to the antennas. Most local ordinances tailored to

wireless facilities merely require that the applicant to place the non-antenna equipment underground *to the extent feasible*.[113] This hardly amounts to an effective prohibition.

AT&T also misstates the holding in *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) as it pertains to undergrounding requirements.[114] Although true that the Ninth Circuit stated in *dicta* that an ordinance would effectively prohibit wireless services if it "required . . . that *all* facilities be underground," the ordinance in that case did not require antennas to be placed underground and was upheld against a facial challenge.[115]

### 3. Limitations on New Poles and Minimum Setbacks Serve Important Safety and Aesthetic Purposes

AT&T and Mobilitie ask the Commission to "outlaw" prohibitions on new poles and minimum separations between poles in the public rights-of-way based on the notion that such limitations unreasonably interfere with the provider's network design.[116] However, as recognized by the Federal Highway Administration, public rights-of-way are dynamic environments with multiple users for transportation, utility, social and expressive purposes.[117] Local officials must be permitted to reasonably limit new encroachments in order to balance these sometimes competitive interests, and to maintain safe and aesthetically pleasing streets and sidewalks.

Collisions with utility poles cause more than 1,000 fatalities in the United States each year.[118] The only other more deadly fixed objects in a collision are trees.[119] Although utility pole

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[113] *See, e.g.*, VISTA, CAL., DEV. CODE §§ 18.92.080(D)(1), (3); BRENTWOOD, CAL., CODE § 17.795.090(F)(2); SAN PABLO, CAL., CODE § 17.62.200(H)(4)(c); WILSONVILLE, OR., DEV. CODE § 4.803.01(G).
[114] *See* AT&T Comments at 15.
[115] *See Sprint Telephony PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008).
[116] *See* AT&T Comments at 14–15; Mobilitie Comments at 7–8.
[117] *See* Federal Highway Admin., *Noteworthy Practices: Roadside Tree and Utility Pole Management* at 32 (Sept. 2016), *available at:* https://safety.fhwa.dot.gov/roadway_dept/countermeasures/safe_recovery/clear_zones/fhwasa16043/fhwasa16043.pdf
[118] *See* Amanda Gagne, *Evaluation of Utility Pole Placement and the Impact on Crash Rates* 9 (Apr. 23, 2008) *available at:* https://web.wpi.edu/Pubs/ETD/Available/etd-043008-155826/unrestricted/Gagne.pdf.
[119] *See* Amanda Gagne, *Evaluation of Utility Pole Placement and the Impact on Crash Rates* 9 (Apr. 23, 2008) *available at:* https://web.wpi.edu/Pubs/ETD/Available/etd-043008-155826/unrestricted/Gagne.pdf; *see also* Penn.

designs have made significant safety improvements (e.g., breakaway poles that collapse on impact), the more utility poles, ground-mounted equipment cabinets and other obstructions placed in the public rights-of-way, the more likely a collision would result in death or serious bodily harm.

One common sense method to reduce the hazards caused by additional poles is to require equipment to be placed on existing poles, and to forbid new poles unless absolutely necessary.[120] Public works departments may also require or prohibit ground-mounted equipment in certain locations so as to maintain visibility and prevent accidents. Requirements to use existing infrastructure to the extent feasible also improves community aesthetics—an independently legitimate regulatory purpose.

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Dept. of Trans., *Pennsylvania Crash Facts and Statistics* 15 (2014) *available at:* http://www.penndot.gov/TravelInPA/Safety/Documents/2014_CFB_linked.pdf.

[120] *See* Van Towle, *Highway Safety and Utility Poles*, Right of Way (Oct. 1983), *available at:* https://www.irwaonline.org/eweb/upload/web_1183_Highway_Safety.pdf

**Figure 23:** Crown Castle Small Cell (Cincinnati, Ohio) placed in front of a historic bridge. This was one of the unregulated sites that led to the overhaul of small cell regulations now praised by Crown Castle in their comments. Under the new regulations, this site would have been placed across the street rather than in direct sightlines of the bridge.

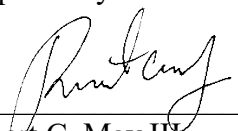
The fact that these reasonable, evenhanded limitations on new encroachments negatively impacts wireless deployments does not violate the Communications Act. Section 253(c) unambiguously preserves local authority to establish nondiscriminatory and competitively neutral management regulations, even if such regulations would prohibit or effectively prohibit any entity's ability to provide telecommunications services.[121] These management regulations include, as the Commission stated in *Classic Telephone*, the right to implement and enforce regulations for public safety and community zoning.[122]

[121] *See* 47 U.S.C. § 253(c);
[122] *See In the Matter of Classic Telephone, Inc.*, CCB Pol. 96-10, *Memorandum Opinion and Order*, 11 FCC Rcd. 13082, 13103, ¶ 39 (Oct. 1, 1996) (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)) (emphasis added).

## IV. CONCLUSION

The Commission should not adopt any new rules proposed or suggested in either the *Wireless NPRM/NOI* or the *Wireline NOI* proceedings. Similarly, the Commission should not issue a declaratory ruling interpreting or construing sections 332(c)(7) or 253. Any efforts to further streamline broadband deployment should be undertaken in collaboration with the Intergovernmental Advisory Committee, the Broadband Deployment Advisory Committee and State and local government stakeholders.

Respectfully submitted,



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July 17, 2017

**EXHIBIT 1**

**League of Oregon Cities Franchise Agreement Survey Report**

(attached behind this coversheet – 32 pages)

EXHIBIT G

LEAGUE OF OREGON CITIES

# FRANCHISE AGREEMENT SURVEY REPORT

**MARCH 2017**

Published by the League of Oregon Cities

EXHIBIT G

# Franchise Agreement Survey Report

## Technical Report

## March 2017

A League of Oregon Cities study of utility franchise agreements found striking new information on franchise revenue and fees. Since the early 2000s, telecom revenue has been declining as cable revenues have increased. This difference masks the aggregated trend in the revenue. Combined, city franchise revenue from these two major sources have been declining. Adjusted for inflation, this decrease is even greater.

# Executive Summary

Since 2002, the League of Oregon Cities has periodically surveyed its membership in order to update data pertaining to the types, bases and rates that they charge franchisees operating in the public rights of way owned by cities. This data helps cities understand how other cities manage their rights of way and receive compensation for them, and is crucial to the understanding of revenue sources available to cities.

The 2015 survey was conducted between October and November 2015. Responses were received from 91 cities, representing 66 percent of the Oregon population residing in a city.

## Key Findings

The 2015 survey is very revealing about the second largest revenue collected by most cities. The key findings include the following:

- Revenues derived from telecommunications franchise fees have been declining since 2002.
- Cable franchise fee revenues, on the other hand, have increased significantly since 2000.
- In the aggregate, both telecommunications and cable franchise fee revenues have remained relatively flat when adjusted for inflation. When also adjusted on a per capita basis, the data shows a decline among respondent cities.
- While only a few cities pay franchise fees to other governments, fully one-third of them charge themselves franchise fees (typically for water, wastewater or stormwater services).

## Background

Franchise fees (also sometimes referred to as privilege taxes) are a legal agreement between a city and another entity involving compensation for the entity's use of the city's right of way. These agreements can include a contract negotiated individually by a city and its utility providers, or an ordinance approved by a city council. In either case, the agreement usually outlines the rate charged, the terms and conditions, and any special services provided by either party.

These agreements ensure that companies using a right of way are paying fees to reimburse a local government for the use of public property. They also prevent general taxpayers from subsidizing extraordinary use. Franchise fees are typically calculated as a percentage of the sales revenues of a utility company to customers in a given service area or territory. In light of Oregon's restrictive property tax system, diminution of franchise fees would have a very detrimental effect on city fiscal capacity.

## Survey Results

Telecommunications franchise agreements are most often established by ordinance (72 percent), but are also created by a contract with the service provider (20 percent). The remaining 8 percent includes agreements that result from a city council resolution or situations in which the franchisee operates without an agreement. The franchise fee is usually, although not universally, charged in lieu of a general business license fee or tax. Agreements which include a contract have an average duration of 11 years.

By state statute, the basis for franchise fees charged to a traditional incumbent local exchange carrier (ILEC) is gross revenues derived from dial tone (basic telephone connection) services provided to customers within a city's jurisdiction. It does not account for the myriad of other revenue-producing services currently provided by ILECs. On the other hand, there is no restriction on the basis for franchise fees charged to competitive local exchange carriers (CLEC), the independent, often smaller and geographically specific telecommunications companies that have sprung up since deregulation of the industry in 1996.

Similar to telecommunications agreements, 67 percent of cities responding to the survey enter into agreements with cable franchises by ordinance; 21 percent do so by contract. The median length of cable agreements is slightly more than 10 years.

In addition, cities can grant right-of-way access to other governments and charge them franchise fees for doing so. Cities also charge themselves franchise fees to facilitate proper accounting for a city business activity. This is most commonly practiced by larger cities and most often occurs in the Portland metropolitan area. The most common franchise fees local governments charge themselves are for water, wastewater and stormwater services.

As the report demonstrates, while franchise agreements with telecommunications providers represent a significant source of such revenue to cities, these other services provide franchise revenue as well:

- Electricity
- Natural gas
- Solid waste disposal
- Water
- Wastewater

## Conclusion

Because Oregon is a home rule state, cities can govern themselves in areas not specifically preempted by state or federal law. With right-of-way management and franchise fees, cities have local control of their individual relationships with utility service providers. This is a principle which the League of Oregon Cities will continue to protect.

Any preemption of a city's right to enter into franchise agreements (via ordinance or contract) with its service providers will be resisted. Similarly, attempts to create a universal methodology for the administration of franchises and the collection of fees will also be opposed, as they fail to take local circumstances into consideration.

Rights of way in the public domain are government's responsibility to manage and maintain, and cities take this responsibility very seriously. The fees charged for the occupancy of such a right of way are critical to the financial health of cities and should be viewed as a normal cost of doing business by an entity reliant on that access.

As policy discussions unfold, either in the Legislature or in agency rulemaking, these basic tenets will govern the League's response.

# Introduction

A revenue-expenditure imbalance for cities has resulted from the combination of Oregon's restrictive property tax system and an increase in expenses beyond city control. The importance of property tax revenues to cities cannot be overstated. They are the single highest and most flexible revenue source for funding core city services such as public safety and street projects.

In a recent League of Oregon Cities survey[1], costs associated with employees (wages, healthcare and retirement) were identified by cities as the three highest cost drivers. Controlling the top three expenses is beyond a city's ability—as they are controlled by market factors and state and federal regulations. To maintain services to their communities, cities are looking to revenue sources other than property taxes. In a 2014 League survey[2], 54 percent of respondents cited franchise fees as either the second or third highest revenue source.

Since 2002, the League surveys its members every few years to collect and analyze data on the status of franchise agreements throughout the state, with the last survey conducted in 2011. The survey asks cities to provide their most recent rates and rate calculations for telecommunication and cable franchises. Questions are also posed for other franchises, such as electricity, water, garbage, and franchises to other governments. This information is crucial to understanding revenue sources in Oregon cities and to forecasting future revenue trends.

# Methods

This survey was conducted from October 30 to November 30, 2015 and received responses from 91 cities. These cities represent 1,801,900 residents, or 66 percent of the population residing in a city in Oregon. The League created the survey using software from Qualtrics and distributed it to city managers, city recorders, and other individuals with positions equal to a city's chief executive officer. These individuals often relied on support from relevant city staff or forwarded the survey to be completed by that individual.

[1] League of Oregon Cities 2015 State of the Cities Report

[2] League of Oregon Cities 2014 State of the Cities Report

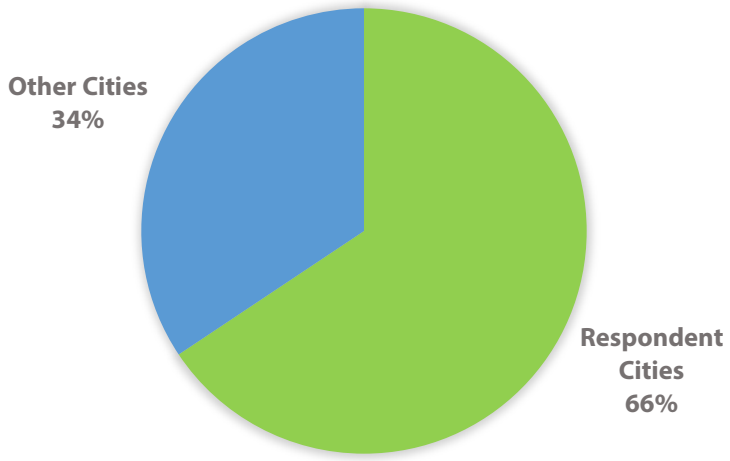


*Figure 1: Respondent Population Proportionate to Oregon Urban Population*

For data analysis, cities are divided into population quintiles, or groups of cities representing roughly one-fifth of the 241 total cities. This allows for a more accurate comparison among similar sized cities. If LOC randomly selected cities from each quintile, we would expect 20 percent to come from each of the five quintiles. Among these respondent cities, there was overrepresentation in cities more than 10,000 population and underrepresentation in cities between 1,251 and 3,100 population. Further, with the exception of the Valley and Eastern Oregon, all other small city regions as defined by the League were represented proportionately.

| Category | Population Range | # Cities | % Cities | Diff. from OR Population |
|---|---|---|---|---|
| 1st Quintile | <450 | 18 | 20% | 0% |
| 2nd Quintile | 451-1,250 | 18 | 20% | 0% |
| 3rd Quintile | 1,251-3,100 | 10 | 11% | -9% |
| 4th Quintile | 3,101-10,000 | 17 | 19% | -1% |
| 5th Quintile | >10,000 | 27 | 30% | 10% |
| **Region** | | **# Cities** | **% Cities** | **Diff. from OR Population** |
| N. Coast | | 6 | 7% | -1% |
| Metro | | 22 | 24% | 0% |
| Valley | | 21 | 23% | 6% |
| S. Coast | | 4 | 4% | -1% |
| S. Valley | | 10 | 11% | -2% |
| Central Oregon | | 12 | 13% | 2% |
| NE Oregon | | 10 | 11% | -1% |
| E. Oregon | | 5 | 6% | -4% |
| **TOTAL** | | **91** | **37%** | |

*Table 1: Respondent Characteristics by Population and Region*

# Survey Results

## Telecommunication Franchises

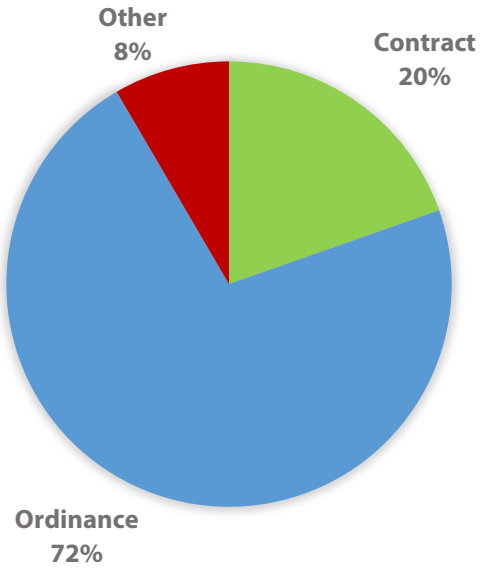


*Figure 2: Telecommunications Franchise Establishment Method*

Telecommunications franchise agreements are one of the largest sources of revenue generated in a city's right of way. According to the survey, 72 percent of responding cities indicated their telecommunications agreements are established by ordinance. Twenty percent establish theirs by contract, while the remaining 8 percent reported using other means, most commonly through city council resolution. While agreement duration ranged from three years to "open ended," the average duration was 11.1 years, indicating that most telecommunications agreements are established for the long term.

Cities address the unique position of providers that operate in the right of way differently. Seventy-nine percent of cities do not require telecommunications providers to pay a general business license fee or tax. This occurs more often in the Metro region and less likely to occur in the Valley region. This added cost in those cities that require telecommunications franchises to pay additional fees or taxes is typically less than $100 per year. This fee is often charged based on the number of telecommunication company employees within city limits. Cities also may charge permit fees for a company to operate in the municipal right of way. Seventeen percent of cities charged this fee, 94 percent of which were in cities with populations greater than 3,100. This was also more likely to occur in the Metro region. Among the 17 percent of cities that have a permit fee, 41 percent of these waive the fee for telecommunications providers.

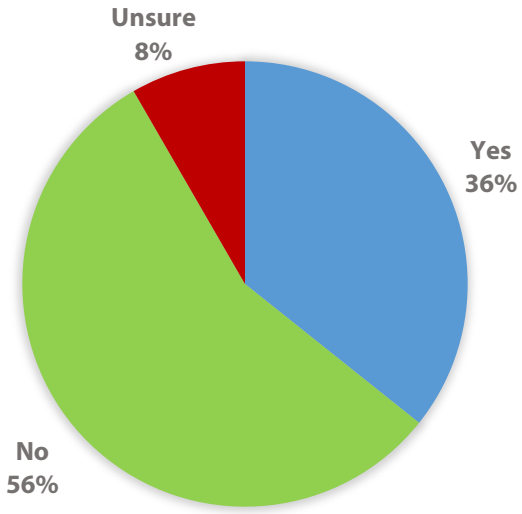


*Figure 3: Does Your City Have Telecommunications Towers on Public Property?*

Cell towers and telecommunications towers are often placed on public property within city limits. While the median number of cell towers in respondent cities was one, this number can vary tremendously. Portland lists more than 900 cell towers within city limits. Among respondent cities, 36 percent report telecommunications towers on public property. Again, this is most likely to occur in larger cities (with a population more than 10,000) and in the Metro region. Fifty-six percent of respondents do not have telecommunications towers on city property. This is most likely to occur in cities with a population less than 1,250. The monthly lease rate for the property on which these towers stand ranges from $330 per month to $5,000 per month. The lease rate depends on the city and the nature of the individual agreement.

Cities may also charge telecommunications providers to replace wireless attachments on utility poles in the right of way. However, 70 percent of cities do not charge for these attachments.

## Cable Franchises

Cable franchises, similar to telecommunications franchises, are the other major category of franchise agreements examined by this survey. Sixty-seven percent of cities surveyed establish cable agreements by ordinance, and 21 percent do so as a contract. These proportions are similar to telecommunications, as is the median length of cable agreements (10.3 years).

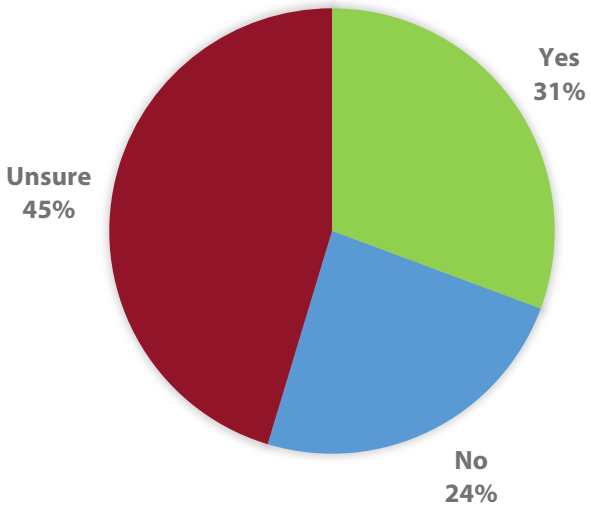


*Figure 4: Voice-Over-Internet-Protocol in Cities*

There are, however, notable and fundamental differences between cable and telecommunications agreements. Cable franchises in the last several years have begun offering voice-over-internet-protocol (VoIP), which allows for phone calls via internet connection. Thirty-one percent of cities responded to having VoIP as part of their cable franchise agreement. This figure is higher than the League's 2011 survey (26 percent), indicating an increase in the service offered. This service was statistically more likely to be offered in 5th quintile cities as well as in the Metro region.

Large cities and cities in the Metro region were also more likely to have added provisions in their cable agreements. Forty-two percent of cities (66 percent of these in cities with a population greater than 10,000) had additional provisions. The most common added provisions included free or reduced prices for cable in city government facilities, or public, educational and government access (PEG) channels. Like telecommunications, business licenses and taxes are usually not charged to cable utilities. Eighty-two percent of cities do not impose license fees. This is also statistically less likely to occur in the Valley region.

## Government Franchises

A city right of way is most often granted to utility providers. This, however is not exclusive to private firms and can also be granted to other government entities. These government franchises can take the form of franchise fees to other governments (cities and special districts) or franchises charged to the city itself. This latter charge (often called an in-lieu-of franchise) is most often used for city business activities as an accounting practice. While 85 percent of cities do not charge government franchises, larger cities and those in the Metro region are most likely to have such arrangements. Most common in-lieu-of franchises are charged for water, wastewater and stormwater utilities. All these are most often owned by the city. Ninety-five percent of cities do not pay franchise fees to other governments.

## Other Franchises

While telecommunication and cable franchise fees are large revenue sources in a city, other services provide franchise revenue as well. These include:

- Electric (often the largest source of franchise revenue)
- Natural gas
- Solid waste
- Water
- Wastewater
- Other

Other franchises can vary dramatically based on a city's region and local economy. For example, Salem and Portland both have flat fee franchises charged to universities. Portland has several franchises with private companies that operate oil and gas pipelines, cement production, and sustainable energy.

# Analysis

The League has telecommunications revenue data from 58 cities dating back to 2002. Analyzing aggregated data in this manner can be performed in two ways. First, by examining revenues nominally, or by looking at revenue as the simple dollar amount. Issues arise with this figure when considering inflation. Inflation produces a situation in which $10 today will be worth less in the future. As a result, telecommunications revenue is shown below as both nominal and adjusted to account for inflation.

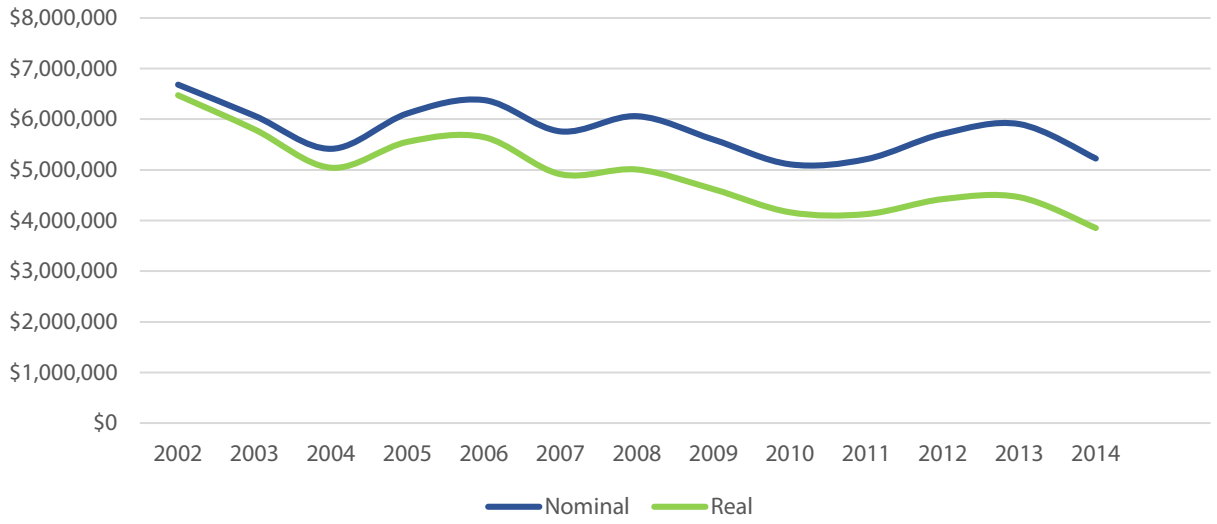


*Figure 5: Telecommunications Franchise Revenue*

While the nominal data indicates a gradual decline in franchise revenue, the inflation adjusted (or real dollar amount) shows a much steeper decline in the amount of revenue collected by cities from telecommunications utilities (Figure 5). This trend is partially due to the fact that fewer residents use

landline phones. This data indicates that less revenue will be available from telecommunications franchise in the future.

Cable revenues are a more positive trend. Figure 6 shows that even after adjusting for inflation, cable franchise revenue is on the rise. Much of this change can also be explained by changing behavior on the part of the end user, as more and more hours are spent daily using services online. Cable companies also have an advantage in some areas of Oregon with the VoIP services that could displace telecommunications further in coming years.

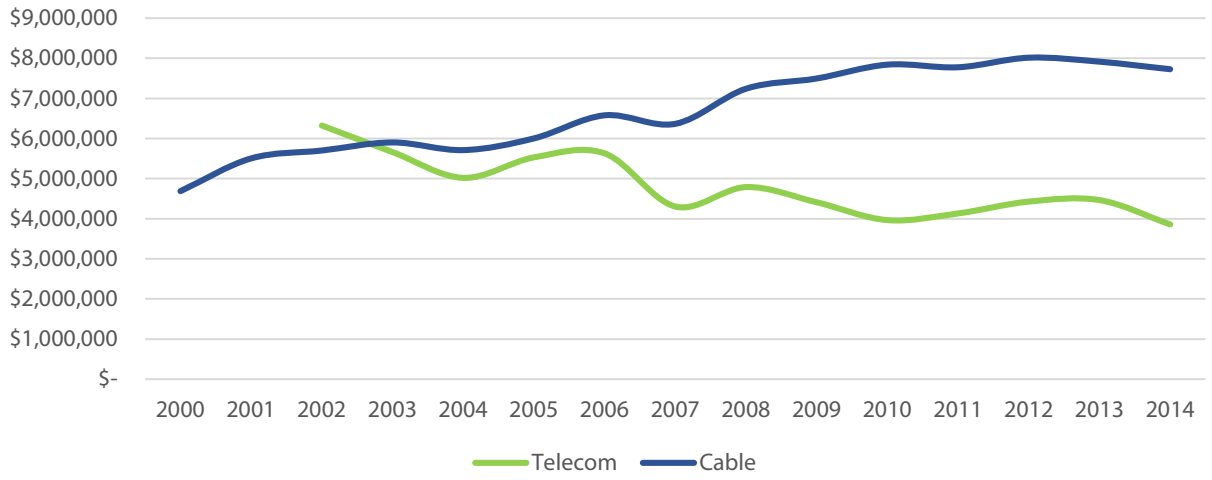


*Figure 6: Inflation Adjusted Telecommunications & Cable Revenues*

When these two revenue sources are combined, the results (Figure 7) shows that while adjusted for inflation, revenues in telecommunications and cable franchise remain relatively steady. Among the cities for which the League has long-term data, revenue has remained flat since the early 2000s except for a slight downturn during the recent deep recession.

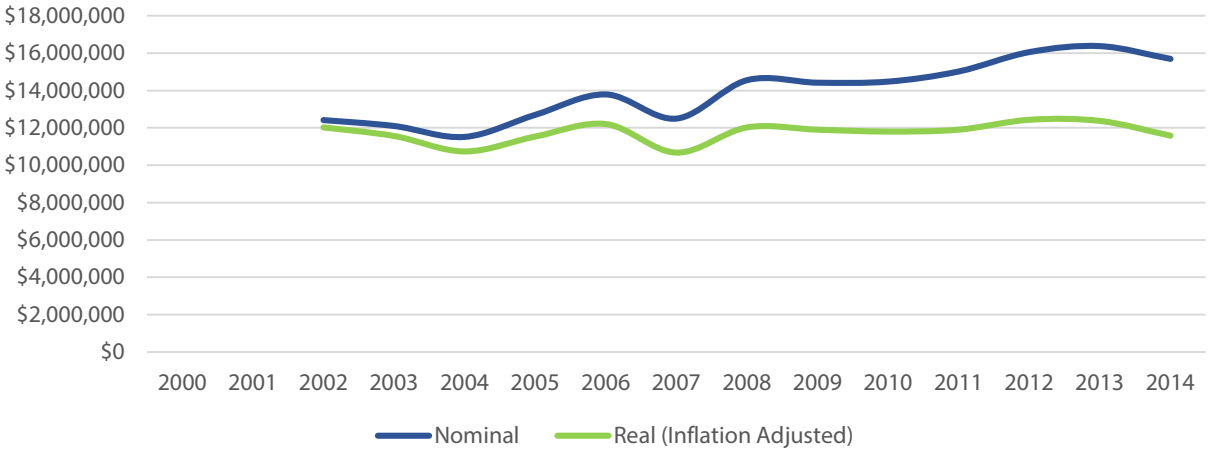


*Figure 7: Aggregated Telecommunications and Cable Revenues*

It should be noted that this pool of revenue has been flat in these cities for more than 12 years. However, this has not halted the influx of new residents and subsequent increase in population. Larger populations

mean less money per person for essential city services, the results (Table 2) is that cities receive less revenue per capita over time.

| Aggregate Telecommunications and Cable Per Capita (2002-2014) | | |
|---|---|---|
| | Nominal | Real |
| **2002** | $ 13.78 | $ 13.34 |
| **2014** | $ 14.45 | $ 10.66 |
| Change | *5%* | *-25%* |

*Table 2: Aggregate Telecommunications and Cable Revenues per Capita*

The League has relatively complete data for telecommunications and cable franchise revenue but unfortunately not for other major franchise revenues, such as electric utilities. Yet, for the few cities that have submitted such data in the past, the same trend appears true of electric franchises as well. For the 14 cities that have submitted data, electric utilities revenue has increased 22 percent in the aggregate since 2007. When adjusted for inflation, this number is only 6 percent.

## Summary

Charges for the use of a city's right of way take many forms and are often dependent on a city's size, location and history. In general, larger cities and those in the Metro region tend to have the most complex franchise agreements, as well as the most unique sources of franchise revenue. Universally, however, franchises represent an essential revenue source for all Oregon cities.

Analysis of city revenue over the last decade reveals that franchise revenue is either steady or in decline. In most circumstances, these revenue sources are spread increasingly thin due to population growth. While telecommunications and cable were the primary focus of the research, this trend appears to be true for other franchises as well.

# Appendix A: Responses by Question

*Note: Due to the volume of individualized city responses, some responses have been excluded from this report. For detailed information, please contact Paul Aljets at paljets@orcities.org.*

| Q13. Are your telecom franchise agreements established by contract, city ordinance, or other methods? | | | | | |
|---|---|---|---|---|---|
| *Contract* | | *Ordinance* | | *Other* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 21 | 23% | 77 | 86% | 9 | 10% |

| Q13. Other Responses |
|---|
| No Agreements |
| City Council Resolution |
| Ordinances for all individual franchise agreements still in effect, plus a 2008 ordinance establishing licensing process for new and renewing franchises, with the exception of Comcast cable due to specific FCC regulations. |
| Written agreement w/charter advanced & charter fiberlink at 6%. In lieu of franchise at 5% |
| We have never made any telecom franchise agreements. |
| I don't know. |
| City Resolution if utility company agrees to sign city's standard franchise agreement without modification. |
| No franchise agreements for telecom, Privilege Tax in Troutdale Municipal Code adopted by ordinance. |
| Ordinances, resolutions and licenses |

| Q14. What is the Length of time of your telecom franchise agreements? |
|---|
| ***Common Responses*** |
| 3 Years (2) |
| 5 Years (8) |
| 5 to 10 Years (2) |
| 10 Years (29) |
| 12 Years (1) |
| 15 Years (4) |
| 19 Years (1) |
| 20 Years (8) |
| 10 to 20 years (2) |
| 15 to 20 years (1) |
| Open Ended (2) |
| ***Other Responses*** |
| 20 (CenturyLink) and 6 (Wave) |
| 5 years for CLEC and 10-20 years for ILEC |
| All of our providers follow our privilege tax ordinance and we do not have franchise agreements |
| Cal-Ore and Hunter-5 Years; and all others 10 years |

| Q14. What is the Length of time of your telecom franchise agreements? (Cont'd) |
|---|
| Century Link - 5 years; Charter - 10 years; CoastCom - 5 years; Oregon Fast - 10 years; Alaska Communications 5 years |
| CenturyLink - Annually, LSN - 10 years |
| CenturyTel - 20 years, CoastCom - 7 years |
| Currently extension agreement for one year; negotiating a new 10-year agreement |
| Depends on agreement- typically 7 years for new franchises, and 10 for renewals. Cenutrylink had 20 yr. agreement. |
| Frontier - 15 years and Sprint - 5 years |
| MINET - 10 YEARS; QWEST - 20 YEARS; US SPRINT 12 YEARS |
| No telecom franchise agreements in effect any longer. 5-year licenses are now granted to utility operators per Ordinance 2008-2703. |
| Qwest 20; LS Networks and Astound 5 each |

| Q15. Does your city have any other form of compensation as a result of your telecom franchises? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 13 | 15% | 67 | 78% | 6 | 7% |

| Q16. Please describe |
|---|
| Ability to request conduit in the build at marginal cost |
| City receives approximately $100,000 per year in franchise fees from the telecom franchises. |
| CoastCom provides service to City Hall at no charge. |
| Discount fiber rates in exchange for allowing equipment to be placed on towers. |
| Franchise fee and linear foot fee on ELI ($3 per foot) when greater than Franchise Fee. |
| Free Cable |
| Question is somewhat confusing in that we do receive a 5% privilege tax as outlined above. Not sure what other intent is behind the question. |
| See franchise fees above. |
| The percentage as listed in the franchise. It is generally submitted quarterly from sales the franchise provides to our community. |
| Use of a specified number of dark fiber strands. |
| We receive the 7% revenue |

| Q17. Does your city have a general business license fee/tax which telecom providers must pay? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 13 | 15% | 70 | 79% | 6 | 7% |

| Q18. How much revenue was generated from the general business license fee on telecom providers for FY 2014-2015? |
|---|
| $15 (2) |
| $50 per year |
| $100 |
| $200 |
| $225 |
| $300 |
| $700 |
| $ 110 (applies to CoastCom only) |
| Confidential |
| Less than $1,000 |
| None |
| None, fee is waived for franchised utilities |
| Unsure of total, but the general business license fee is $100 a year. |

| Q19. What is the rate and methodology of the general business license fee? |
|---|
| $15 Annual Business License Fee |
| $50 flat annual rate for all businesses |
| $50 per year |
| $75/year each |
| $15 annual fee |
| 2.2% of net |
| $50 |
| Above Answered |
| Basic rate with variables depending on if office is in City Limits and how many employees |
| Employees located within the city limits |
| Fixed nominal fee based on number of employees |
| flat rate based on number of employees |

| Q20. Does the general business license fee offset the franchise fee or is it required to pay both? | | | | | |
|---|---|---|---|---|---|
| *Fee offsets franchise fee* | | *Both must be paid* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 3 | 23% | 9 | 69% | 1 | 7% |

| Q21. Does your city charge a permit fee for operating in the right of way for telecom? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 15 | 17% | 63 | 72% | 9 | 10% |

| Q21. Does your city's telecom franchise agreement waive permit fees for franchised telecom providers? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 9 | 41% | 11 | 50% | 2 | 9% |

| Q18. How much permit fee revenue was collected from telecom providers for FY2014-2015? |
|---|
| 300 |
| $0 (3) |
| Less than $1,000 and not separately tracked in the financial system |
| Minimal |

| How many cell towers and/or antennas are located in the city? |
|---|
| 0 (33) |
| 1 (16) |
| 2 (4) |
| 3 (3) |
| 4 |
| 4.5 |
| 5 |
| 6 (2) |
| 7 (2) |
| 10 |
| 12 |
| 14 |
| 17 |
| 18 |
| 27 |
| 34 |
| 37 |
| 900 |
| This is something that we do not track. Unsure of the total number. |

| Q25. Is city property being used as a site for any telecom towers and/or antennas? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 30 | 36% | 47 | 56% | 7 | 8% |

| Q26. What is the monthly lease rate? |
|---|
| $0 (3) |
| $750 (2) |
| $1,000 |
| $1,100 |
| $1,265.32 |
| $1,400 |
| $1,500 |
| $1,900.15 |
| $2,000 |
| 5,000 |
| $1,600-$3,500 |
| $1,860 and $2,337 |
| $2,252/month |
| 1,000 average |
| 2 sites, $1,296 each, $2,592 total/mo. |
| Airport $1,043.82/ water $1,772.60, $788.66, $1,050.59, $2,585.80, $1,671.67, $2,185.45 |
| Annual rental charge $1,500 |
| depends on contract- between 1,300 and 1,800 pm |
| In 2012 it was $600 per month with an annual CPI adjustment based on 20 City ENR. Current Rate is $669.10/month |
| Lease 1) Lease of city-owned property $992.13/month ($11,902.50 paid annually with 15% increase every 5 years);Lease 2) Lease space on water tower $4,502.10/month (3% annual increase)Lease 3) Lease space on water tower $3,434.67/month (3% annual increase)Lease 4) Lease space on water tower $3,815.00/month (3% annual increase)NOTE: Water tower leases vary by number of antennas and ground space rented. |
| Site 1 $997, Site 2 $532, Site 3 $1,069 |
| Varies |
| Varies based on site current lease rates range from $1,000 to 2,050 per month. |
| Varies between $330 - $1,332 per month |
| Varies, but I believe only 2 City sites are being used. Leased at $150/per month. |

| Q27. Does your city charge for wireless attachments on utility poles in the right of way? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 10 | 12% | 60 | 70% | 16 | 19% |

| Please describe the amount and method of collection (i.e. $500 per month, 5% of gross revenue, etc.) |
|---|
| $5,000 per attachment |
| $5,849.29 - $6,083.26 per year per site. Varies based on agreement. |
| $5.50 per pole per year for utilities, $25 per pole per year for private parties other than utilities. We invoice for payment. |
| $50 per month |
| $7500/pole/year + annual accelerator of either CPI or flat percentage |
| 5% or minimum fee |
| 7% of gross |
| Currently we are not aware of any antennas on utility poles but if we were approached we would treat these like a telecommunications franchise so minimum fee of $1,000 per quarter. |
| This has not been determined, but we will charged something. |
| We have not had any wireless attachments in the ROW but we intend to charge when they show up. Method is currently undetermined. |

| Q34. Are your cable franchise agreements established by contract, city ordinance or other methods? | | | | | |
|---|---|---|---|---|---|
| *Contract* | | *Ordinance* | | *Other* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 19 | 21% | 60 | 67% | 10 | 11% |

| Q34. Other Responses |
|---|
| Based on an IGA with the Mt. Hood Cable Regulatory Commission (MHCRC) handles all cable franchise agreements, enforcement, and fee collection. The City receives a NET distribution each year AFTER funding the MHCRC's annual budget. |
| City Council Resolution (2) |
| Contract are negotiated by MACC and adopted by resolution or ordinance. |
| Mt. Hood Regulatory Commission by intergovernmental agreement bargains on our behalf, and while adopt an ordinance with the franchise terms, all activities are through Mt. Hood Regulatory Commission. |
| Negotiated by Metropolitan Area Cable Commission for Washington County cities - Council adopts contract by ordinance. |
| No Agreements-No Cable Company |
| No known cable franchise companies in area |

| Q14. What is the Length of time of your telecom franchise agreements? |
|---|
| ***Common Responses*** |
| 5 Years (6) |
| 8 Years |
| 10 Years (36) |
| 12 Years (3) |
| 13 Years |
| 15 Years (6) |
| 20 Years |
| 10 & 15 Years (2) |
| ***Other Responses*** |
| 10 years Comcast and 15 years Frontier |
| 5 years increment and is new and franchisee is setting up the process/system to be "able" to provide such service. It will be at 7% of gross sales (minus federal taxes). |
| Auto Renewed |
| Same as Telecommunications |
| Existing agreement for Verizon is 15 years, 10 years for Comcast, and all other cable operators are under the 5-year licensing structure. |

| Q36. Does your city provide Voice-over-Internet-Protocol? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 23 | 31% | 18 | 24% | 34 | 45% |

| Q37. What is the annual revenue from VoIP? |
|---|
| $0 (6) |
| $70,041 |
| $93,104 |
| $116,050.47 |
| $536,173.81 FY 2014-15 |
| This is included in their Gross Revenue calculation and is not separated out. |
| Included above under Telecom providers |
| Lumped in with cable franchise fees identified under MACC |
| Not listed Separately. |
| Not separated from cable/telecom |
| Nothing Yet, but they will have the capability in the near future. Franchise written as such. |
| Unknown (2) |
| Unsure from summary of revenues provided as subject to franchise fees? |
| VoIP revenue is captured through City's utility license code and under code, specific revenue for licensees is confidential. |

| Q38. Do the city cable franchise agreements include additional service provisions? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 32 | 42% | 28 | 36% | 17 | 22% |

| Q39. Please list the additional services provided. |
| --- |
| Funding for regional grant programs, funding for the regulatory commission, funding for local access and locally originated programming all provided through the franchise agreements. |
| Service to public buildings, PEG channel. |
| $1 subscriber per month for PEG/INET capital support 5 PEG channels -- more available per agreement but not being used 1 free limited basic drop to City facilities. |
| 1 Basic Cable service at City facilities. |
| 1% gross revenue PEG fees for capital equipment plus studio rent for local access station. |
| Access to one municipal building public access channel. |
| Additional public, education, and government access channels |
| community access channel |
| Community Access: HD channels, VoD, live video transport, 1% gross rev funds for capital costs Community Grants: 1% gross rev funds for grants to nonprofits, local gov't, schools, libraries to use access channels and I-Net: layer one transport services for 298 institutional sites throughout County; monthly fee paid to cable company on per site basis. |
| Educational and government access. |
| Free basic cable at multiple public facilities (City and School District), and there are also PEG fees that cover PEG Broadcasting facility capital costs. |
| FREE DROP TO Library and schools |
| Government Access Channel. Complimentary service to government and schools (They want to take both out during our current negotiations). |
| Include funding for PEG and provide channels to host PEG programing. |
| Local Information channel. |
| MetroEast, PCM, Comcast and the MHCRC worked together to implement ' a major technology change to launch the initial two local channels in a high definition (HD) format, including the channels which carry local government programs. The new channels available to all cable subscribers and is one of the first in the nation to have local community channels delivered in an HD format. Funding for community grants providing critical technology funds for local schools, libraries, nonprofits and local governments to use the Institutional Network (I-Net) and community access channels to support their services, and I-Net fiber network capital construction reimbursement. The MHCRC also provides capital funds to MetroEast Community Media to upgrade the video capabilities at the. Gresham, Fairview and Troutdale city council chambers and the Multnomah County Board |
| MINET: Emergency Alert System. PEG Channel. Live council feed. Basic service to City Hall, Police Dept, Library PW, Amphitheater, WIMPEG Head-End |
| PEG Access Support: PEG capital funding equal to 1.5% gross revenues from cable subscribers, PEG channels as designated by franchise, provision of free public building installation and basic cable services, use of interactive nodes (dark fiber) between designated public facilities. |
| PEG access, digital cable box deployment in government facilities, and a capital grant. |
| PEG channel |

| Q39. Please list the additional services provided (Cont'd) |
|---|
| PEG Channel, service to public buildings, EAS capability |
| PEG fee .80 cents per subscriber paid quarterly. 4- PEG channels Free connection to City Buildings |
| PEG fees |
| PEG services through the Tualatin Valley Cable Television services (MACC) and public computer network for 17 public agencies. |
| Public Access Channels, PEG (Public, Educational & Governmental) funding and access program listings on digital channel guide, and Public Communications Network (PCN). |
| Public Education Channel |
| Reserve one local access (Public, Education, and Government) channel for the City. Provide an emergency audio override capability to permit the City to transmit an emergency alert signal to all subscribers. Provide one basic cable service to City Hall |
| Two non-discreet Public Education Government Access Channel. Installation to Public Facilities with no installation fee or monthly service charge. |

| Q40. Does your city have a general business license fee/tax which cable providers must pay? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 10 | 13% | 64 | 82% | 4 | 5% |

| Q41. How much revenue was generated from the general business license fee on cable providers for FY 2014-2015 |
|---|
| $15 |
| $50 |
| $75 |
| $300 |
| Immaterial |
| Info is proprietary. For those services subject to franchise fees the business license tax due on those services is offset against Franchise fees. However there could be other business lines (not subject to franchise fees) that would be assessed for business license tax. |
| less than $1,000 |
| No additional as providers are also telecom providers |
| roughly $200 |
| Unsure Total |

| Q42. What is the rate and methodology of the general business license fee? |
|---|
| $15 per year business license fee |
| $50 per year |
| flat rate |
| based on employees |
| $50 flat |
| 2.2% of net income |
| per employee working in the city limits |
| $50 flat annual rate all businesses |
| Home office location and number of employees in Oregon City |
| Business License is $100 per year. |

| Q43. Does the general business license fee offset the franchise fee or is it required to pay both? | | | | | |
|---|---|---|---|---|---|
| *Fee offsets franchise fee* | | *Both must be paid* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 0 | 0% | 9 | 90% | 1 | 10% |

| Q55. Does your city collect franchise fees from any other government entity? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 10 | 11% | 74 | 85% | 3 | 3% |

| Q56. Does your city charge franchise fees to itself? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 31 | 36% | 53 | 62% | 2 | 2% |

| Q46. Does your city pay franchise fees to other government entities? | | | | | |
|---|---|---|---|---|---|
| *Yes* | | *No* | | *Unsure* | |
| *#* | *%* | *#* | *%* | *#* | *%* |
| 1 | 1% | 83 | 95% | 3 | 3% |

# Appendix B: Survey

**Utility & Franchise Fee Survey 2015**

Q1 City Name:

Q2 Name of responding person:

Q3 Title of responding person:

Q4 Email Address of responding person:

Q5 In order to accurately analyze and report on your city's utility and franchise fees, **four (4) years of data on telecommunication and cable television franchises** is requested. In the following survey, the League asks questions related to:

-Telecommunications Providers
-Cable Television/Video Providers
-Government Franchise Agreements (In-Lieu-Of Franchises)
-Other Franchises (such as electric, natural gas, solid waste, water and wastewater)

**Telecommunication Companies**

*Terms & Definitions*

-ILEC: (Incumbent Local Exchange Carrier) Primary provider of local phone service. Examples: Qwest, Sprint, Verizon, and Centurytel
-CLEC: (Competitive Local Exchange Carrier) Alternative provider competing with ILECs. Examples: ATG and ELI
-Long Haul Carrie: Provider who has facilities in city's right of way, but does not provide services to residence. Usually charged a per foot fee.

Q7 Please list the telecommunication companies contracted with the city as well as the type of provider (ILEC, CLEC, Long Haul Carrier, Other).

| | Company Name (1) | Type of Provider (2) |
|---|---|---|
| Company 1 (1) | | |
| Company 2 (2) | | |
| Company 3 (3) | | |
| Company 4 (4) | | |
| Company 5 (5) | | |

Q8 Please list any telecom franchise fees, privilege taxes, and/or per foot fees as well as the revenue generated by these taxes and fees for **FY2011-2012**. Please list in the same order as in Question 7.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) | Per Foot Fee Rate (%) (5) | Per Foot Fee Revenue ($) (6) |
|---|---|---|---|---|---|---|
| Company 1 (1) | | | | | | |
| Company 2 (2) | | | | | | |
| Company 3 (3) | | | | | | |
| Company 4 (4) | | | | | | |
| Company 5 (5) | | | | | | |

Q10 Please list any telecom franchise fees, privilege taxes, and/or per foot fees as well as the revenue generated by these taxes and fees for **FY2012-2013**. Please list in the same order as in Question 7.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) | Per Foot Fee Rate (%) (5) | Per Foot Fee Revenue ($) (6) |
|---|---|---|---|---|---|---|
| Company 1 (1) | | | | | | |
| Company 2 (2) | | | | | | |
| Company 3 (3) | | | | | | |
| Company 4 (4) | | | | | | |
| Company 5 (5) | | | | | | |

Q11 Please list any telecom franchise fees, privilege taxes, and/or per foot fees as well as the revenue generated by these taxes and fees for **FY2013-2014**. Please list in the same order as in Question 7.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) | Per Foot Fee Rate (%) (5) | Per Foot Fee Revenue ($) (6) |
|---|---|---|---|---|---|---|
| Company 1 (1) | | | | | | |
| Company 2 (2) | | | | | | |
| Company 3 (3) | | | | | | |
| Company 4 (4) | | | | | | |
| Company 5 (5) | | | | | | |

Q12 Please list any telecom franchise fees, privilege taxes, and/or per foot fees as well as the revenue generated by these taxes and fees for **FY2014-2015**. Please list in the same order as in Question 7.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) | Per Foot Fee Rate (%) (5) | Per Foot Fee Revenue ($) (6) |
|---|---|---|---|---|---|---|
| Company 1 (1) | | | | | | |
| Company 2 (2) | | | | | | |
| Company 3 (3) | | | | | | |
| Company 4 (4) | | | | | | |
| Company 5 (5) | | | | | | |

Q13 Are your telecom franchise agreements established by contract, city ordinance, or other methods? (Check all that apply)

- ❑ Contract (1)
- ❑ City Ordinance (2)
- ❑ Other (Please Describe) (3) _____

Q14 What is the Length of time of your telecom franchise agreements? (Please answer in years)

Q15 Does your city receive any form of compensation as a results of your telecom franchises?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city receive any form of compensation as a results of your franchises? Yes Is Selected

Q16 Please describe

Q17 Does your city have a general business license fee/tax which telecom providers must pay?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city have a general business license fee/tax which telecom providers must pay? Yes Is Selected

Q18 How much revenue was generated from the general business license fee on telecom providers for FY 2014-2015?

Answer If Does your city have a general business license fee/tax which telecom providers must pay? Yes Is Selected

Q19 What is the rate and methodology of the general business license fee?

Answer If Does your city have a general business license fee/tax which telecom providers must pay? Yes Is Selected

Q20 Does the general business license fee offset the franchise fee or is the provider required to pay both?
- ❍ License fee offsets franchise fee (1)
- ❍ Both must be paid (2)
- ❍ Unsure (3)

Q21 Does your city charge a permit fee for operating in the right of way for telecom?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city charge a permit fee for operating in the right of way? Yes Is Selected

Q22 Does your city's telecom franchise agreement waive permit fees for franchised telecom providers?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city's telecom franchise agreement waive permit fees for franchised telecom providers? No Is Selected

Q23 How much permit fee revenue was collected from telecom providers in FY 2014-2015?

Q24 How many cell towers and/or antennas are located in the city?

Q25 Is city property being used as a site for any of these telecom towers and/or antennas?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Is city property being used as a site for any of these telecom towers and/or antennas? Yes Is Selected

Q26 What is the monthly lease rate?

Q27 Does your city charge for wireless attachments on utility poles in the right of way?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city charge for wireless attachments on utility poles in the right of way? Yes Is Selected

Q28 Please describe the amount and method of collection (i.e. $500 per month, 5% of gross revenue, etc.)

**Cable Television/ Video Franchises**

Q30 Please list any **Cable TV/Video Provider** franchise fees and/or privilege taxes as well as the revenues generated by these taxes and fees for **FY2011-2012**.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Cable Company 1 (1) | | | | |
| Cable Company 2 (2) | | | | |
| Cable Company 3 (3) | | | | |
| Cable Company 4 (4) | | | | |
| Cable Company 5 (5) | | | | |

Q31 Please list any **Cable TV/Video Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for **FY2012-2013**.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Cable Company 1 (1) | | | | |
| Cable Company 2 (2) | | | | |
| Cable Company 3 (3) | | | | |
| Cable Company 4 (4) | | | | |
| Cable Company 5 (5) | | | | |

Q32 Please list any **Cable TV/Video Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for **FY2013-2014.**

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Cable Company 1 (1) | | | | |
| Cable Company 2 (2) | | | | |
| Cable Company 3 (3) | | | | |
| Cable Company 4 (4) | | | | |
| Cable Company 5 (5) | | | | |

Q33 Please list any **Cable TV/Video Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for **FY2014-2015**.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Cable Company 1 (1) | | | | |
| Cable Company 2 (2) | | | | |
| Cable Company 3 (3) | | | | |
| Cable Company 4 (4) | | | | |
| Cable Company 5 (5) | | | | |

Q34 Are your cable franchise agreements established by contract, city ordinance, or other methods? (Check all that apply)
- ❑ Contract (1)
- ❑ Ordinance (2)
- ❑ Other (Please Describe) (3) _____

Q35 What is the Length of time of your cable franchise agreements? (Please answer in years)

Q36 Does your city cable provider provide Voice-Over-Internet-Protocol (VoIP)?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city cable provider provide Voice-Over-Internet-Protocol (VoIP)? Yes Is Selected
Q37 What is the annual revenue from VoIP?

Q38 Do the city cable franchise agreements include additional service provisions? (i.e. community access provisions)
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Do the city cable franchise agreements include additional service provisions? (i.e. community acc... Yes Is Selected
Q39 Please list the additional services provided.

Q40 Does your city have a general business license fee/tax which cable providers must pay?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city have a general business license fee/tax which telecom providers must pay? Yes Is Selected
Q41 How much revenue was generated from the general business license fee on cable providers for FY 2014-2015?

Answer If Does your city have a general business license fee/tax which telecom providers must pay? Yes Is Selected
Q42 What is the rate and methodology of the general business license fee?

Answer If Does your city have a general business license fee/tax which telecom providers must pay? Yes Is Selected
Q43 Does the general business license fee offset the franchise fee or is the provider required to pay both?
- ❍ License fee offsets franchise fee (1)
- ❍ Both must be paid (2)
- ❍ Unsure (3)

**Government Franchise Fees**
*(In-Lieu-of Franchise Fees)*

Q55 Does your city collect franchise fees from any other government entity?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city collect franchise fees from any other government entity? Yes Is Selected
Q45 Please list any Government fees, as well as the revenue generated by these fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) |
|---|---|---|
| Telecommunication (1) | | |
| Cable (2) | | |
| Water (3) | | |
| Wastewater (4) | | |
| Electric (5) | | |
| Other (Please Specify) (6) | | |

Q56 Does your city charge franchise fees to itself?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city charge franchise fees to itself? Yes Is Selected
Q57 Please list any fees the city charges itself (*in-lieu-of fees*), as well as the revenue generated by these fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) |
|---|---|---|
| Telecommunication (1) | | |
| Cable (2) | | |
| Water (3) | | |
| Wastewater (4) | | |
| Electric (5) | | |
| Other (Please Specify) (6) | | |

Q46 Does your city pay franchise fees to other government entities?
- ❍ Yes (1)
- ❍ No (2)
- ❍ Unsure (3)

Answer If Does your city pay franchise fees to other government entities? Yes Is Selected

Q58 Please list any fees paid to other government entities, as well as the expenses accrued by these fees for FY2014-2015.

| | Name of Government (1) | Franchise Fee Rate (%) (2) | Franchise Fee Expenditure ($) (3) |
|---|---|---|---|
| Telecommunication (1) | | | |
| Cable (2) | | | |
| Water (3) | | | |
| Wastewater (4) | | | |
| Electric (5) | | | |
| Other (Please Specify (6) | | | |

**Other Franchises**

Q48 Please list any **Electric Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Company 1 (1) | | | | |
| Company 2 (2) | | | | |
| Company 3 (3) | | | | |
| Company 4 (4) | | | | |
| Company 5 (5) | | | | |

Q49 Please list any **Natural Gas Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Company 1 (1) | | | | |
| Company 2 (2) | | | | |
| Company 3 (3) | | | | |
| Company 4 (4) | | | | |
| Company 5 (5) | | | | |

Q50 Please list any **Solid Waste Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Company 1 (1) | | | | |
| Company 2 (2) | | | | |
| Company 3 (3) | | | | |
| Company 4 (4) | | | | |
| Company 5 (5) | | | | |

Q51 Please list any **Water Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Company 1 (1) | | | | |
| Company 2 (2) | | | | |
| Company 3 (3) | | | | |
| Company 4 (4) | | | | |
| Company 5 (5) | | | | |

Q52 Please list any **Wastewater Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Company 1 (1) | | | | |
| Company 2 (2) | | | | |
| Company 3 (3) | | | | |
| Company 4 (4) | | | | |
| Company 5 (5) | | | | |

Q53 Please list any **Other Provider** franchise fees and/or privilege taxes as well as the revenue generated by these taxes and fees for FY2014-2015.

| | Franchise Fee Rate (%) (1) | Franchise Fee Revenue ($) (2) | Privilege Tax Rate (%) (3) | Privilege Tax Revenue ($) (4) |
|---|---|---|---|---|
| Company 1 (1) | | | | |
| Company 2 (2) | | | | |
| Company 3 (3) | | | | |
| Company 4 (4) | | | | |
| Company 5 (5) | | | | |

Q54 Additional Comments?

**EXHIBIT 2**

**Oregon City and Happy Valley Responses to OTA Comments**

(attached behind this coversheet – 3 pages)

EXHIBIT G

Beery Elsner & Hammond LLP
ATTORNEYS AT LAW

On behalf of Oregon City, Oregon and Happy Valley, Oregon, please see the following points that may be relevant to the League of Oregon Cities' joint reply in the FCC Dockets related to Accelerating Wireline Broadband Deployment, particularly in response to the Comment filed by the Oregon Telecommunications Association ("OTA"):

1. OTA states: "The license fee is a flat fee developed by the city and charged on an annual basis. In most ordinances there is an additional right-of-way use fee based on a percentage of gross revenue derived from service in the city. Then, in many cases there is an additional requirement to register and pay a registration fee above the license fee. In some cities the registration is an annual requirement. In others, registration is valid for two or three years. Municipalities that operate communications networks are usually exempted from registration." Every statement quoted is not true with respect to Oregon City and Happy Valley. OTA has not presented any evidence that either City has effectively or actually prohibited the deployment of broadband, nor can it. Oregon City currently has at least five communications companies providing broadband services, and Happy Valley has at least three.
2. The City of Oregon City enacted its Utility Rights of Way Ordinance in 2013 in an effort to "effectively, efficiently, fairly and uniformly manage the City's [rights of way]" by granting licenses to telecommunications providers and other utilities that need access to the rights of way. The Ordinance replaced a system in which entities negotiated franchise agreements with the City. The City of Happy Valley enacted its Utility Rights of Way Ordinance in 2016 with the same purpose quoted for Oregon City. Both Ordinances apply to all utilities (not just telecommunications providers) that own or use facilities in the rights of way to provide service in the City, including City-owned utilities and other governmental entities' utilities.
3. At the time Happy Valley enacted its Ordinance, both CenturyLink and Frontier had been operating without franchise agreements for well over a decade, despite an Ordinance requiring franchises for use of the rights of way. Each company had refused to enter into such agreements, arguing Section 253 preempted the City from requiring franchises. Long after courts rejected this position, both companies had continued to operate without a franchise.
4. Since enacting their Ordinances, neither City has denied a request for a license. In fact, only three of OTA's members have sought a license or franchise with the cities (Frontier, CenturyLink and Clear Creek), all of which were readily granted. OTA's comments provide no support for the proposition that rights of way license ordinances in any way prohibit the provision of services. To the contrary, Oregon City has had the opposite experience. Oregon City has issued four telecommunications licenses since enacting its Ordinance, most of which took less than a week to issue and none took longer than two weeks. (Five other companies continue to operate under franchises that pre-date the Ordinance.)
5. Oregon City's license application fee is $50.00 and is due only with a license application, not annually. (The license term is 5 years.) The fee is expressly limited to the amount

necessary to recover the city's costs related to processing the application for the license and is comparable to other City application fees. Oregon City also has a $50.00 registration requirement, which *does not apply* to any entity that has a license or franchise for use of the rights of way. Registration is required annually for companies that do not have a license or franchise, but there is no revenue-based or other fee beyond the registration application fee referenced in the previous sentence.

6. Happy Valley's license application fee is $250.00 and is due only with a license application, not annually. (The license term is 5 years.) The fee is expressly limited to the amount necessary to recover the city's costs related to processing the application for the license and is comparable to other City application fees. Happy Valley also has a $250.00 registration requirement, which *does not apply* to any entity that has a license or franchise for use of the rights of way. Registration is required annually for companies that do not have a license or franchise, but there is no revenue-based or other fee beyond the registration application fee referenced in the previous sentence.
7. Neither City has a "license fee [that] is a flat fee developed by the city and charged on an annual basis," nor any other annual fee other than as described above.
8. Oregon City's Right of Way Use Fee for communications providers is 5% of gross revenues derived from the operation of the utility system in the City, subject to applicable state and federal law preemptions (discussed below). For entities that do not earn revenue in the City, there is a fee of $2.75 per linear foot of facilities in the rights of way. These fees are the same as the franchise fees the City previously received through franchise agreements. Specifically, the per foot fee is based on negotiations with competitive local exchange carriers, several of which have paid this per foot fee for years without any indication it effectively prohibited them from providing services. The City enacted the Right of Way Use Fee at the same rate these franchisees were paying to avoid placing them at a competitive disadvantage relative to new licensees.
9. Happy Valley's Right of Way Use Fee for communications providers is 7% of gross revenues derived from the operation of the utility system in the City, subject to applicable state and federal law preemptions (discussed below). This rate is the same as the franchise fees the City previously received through franchise agreements. For entities that do not earn revenue in the City, there is a minimum annual fee ranging from $5,000 to $15,000, depending on the extent of the utilities' use of the rights of way.
10. Both cities have an "attachment fee" of $5,000 per attachment that applies to entities whose only facilities in the City are single pole attachments such as wireless antennas; it does not apply to cables and fiber strung between poles and would not be charged in addition to the Right of Way Use Fee.
11. Contrary to OTA's assertion that these ordinances are "revenue generating schemes," in enacting their Ordinances, both Oregon City and Happy Valley found that the Ordinance would not generate new revenue from existing franchisees. Any new revenue would come from entities using the rights of way without a franchise and thus not paying the City for such use. Rather than "scheming" to generate more revenue, the Cities actually moved toward a more equitable and competitively neutral fee structure. Further, Oregon City has done a cost study to calculate the estimated costs of managing the ROWs (not including restoration, repairs and rebuilding), which is attached. The analysis shows that

the City's ROW fees (including franchise fees from franchises that predate the ROW ordinance or are not covered by the ROW ordinance) are about $2.9 million annually, and its ROW-related costs are about $10.5 million annually.

12. Both Cities impose a Right of Way Use Fee on a municipal entity (Clackamas County) that owns a communications network within the Cities.
13. Both Cities' Right of Way Use Fees are subject to applicable state and federal preemptions, including that established in ORS 221.515. OTA's Comments contain misstatements regarding ORS 221.515, a statute that preempts City authority relative to ILECs by limiting the Fees to 7% of revenue from a narrow portion of the ILEC's revenue, exchange access services. OTA states: "Oregon municipalities have concluded that the state law applies only to incumbents and not to competitive local exchange carriers." This is not "municipalities'" conclusion. This is the Oregon Supreme Court's conclusion. *See US West Communications, Inc. v. City of Eugene*, 336 Or. 181 (2003). In fact, LOC has worked to repeal ORS 221.515 to eliminate the distinction between ILECs and CLECs established by this statute, which was introduced and lobbied for by U.S. West, the predecessor of OTA member CenturyLink, in 1989. OTA members have opposed the repeal effort.

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**EXHIBIT 3**

**Declaration of Ryan Bredehoeft**

(appears behind this coversheet – 5 pages)

EXHIBIT G

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

TRI-CITY SERVICE DISTRICT,

Plaintiff,

v.

OREGON CITY, a municipality and public body within the State of Oregon,

Case No. CV 14060280

DECLARATION OF RYAN BREDEHOEFT IN SUPPORT OF DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Ryan Bredehoeft, hereby declare:

1. I am the Business Analyst for City of Oregon City ("City"). I make this declaration based upon my personal knowledge and am competent to testify in the matters herein stated.

2. I am a certified public accountant and have worked for the City of Oregon City for approximately 18 months. As the Business Analyst for the City, my duties include accounting, auditing, and fiscal management; participating in the development of departmental budgets; designing and analyzing financial records and systems; and producing forecasts of business/operating expenses and economic/financial conditions for all City departments.

3. Attached hereto as Exhibit A is a calculation of the City's revenue for use of the rights of way for fiscal years 2012, 2013 and 2014, and the first half of fiscal year 2015. This revenue includes franchise fees and, beginning in calendar year 2014, Right of Way Usage Fees. The total revenue received by the City from the Right of Way Usage Fee and franchise fees for the fiscal year 2014 is $2,892,700.43.



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4. For the calendar year 2014, Tri-City Service District's Right of Way Usage Fee payments totaled $188,300.49.

5. Attached as Exhibit B to this Declaration is a Cost Analysis of the Right of Way ("Cost Analysis"), which I developed for the City. The Cost Analysis reflects the City's estimated annual costs of owning, managing and maintaining its rights of way, which is $10,510,804.00.

6. I developed the cost study by identifying all departments in the City that provide services or have work activities directly related to the rights of way ("ROW Departments"). For each ROW Department, through discussions with appropriate personnel, I determined the percentage of the ROW Department's costs attributable to the rights of way. I applied these percentages to the total costs of each ROW Department, based on each ROW Department's actual costs in fiscal year 2014, to arrive at the total right of way cost for each ROW Department.

7. In addition, I calculated the costs of City departments that do not directly support the rights of way, but which provide support for the ROW Departments ("Support Departments"). This calculation captures costs, such as computer support and vehicle costs, that are not included in the ROW Departments' costs as described in paragraph 6. To calculate this cost, I first calculated the relative percentage of use of the Support Departments by each ROW Department by dividing the labor costs of each ROW Department by the total labor costs of all ROW Departments and Support Departments. (For example, if a ROW Department has 25% of the labor costs, the assumption is 25% of Support Department costs are attributable to that ROW Department.) I applied this percentage to the City's actual costs for fiscal year 2014 for each Support Department (not including costs of a Support Department that are not attributable to the rights of way or a ROW Department) to arrive at the proportion of Support Department costs attributable to each ROW Department. Finally, I multiplied



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the proportion of Support Department costs for each ROW Department by the percentage of ROW Department costs allocated to the rights of way as described in paragraph 6 to calculate the total Support Department costs attributable to the rights of way.

8. I also calculated the depreciation expense and carrying costs of the capital assets of each ROW Department that are in or serve the rights of way ("ROW Assets"), which expenses are not captured in the costs described in paragraphs 6 and 7. To calculate the depreciation expense, I applied the same percentages of costs for each ROW Department as described in paragraph 6 to the actual depreciation expense in fiscal year 2014 for each ROW Asset. To calculate the carrying costs, I multiplied the City's cost of capital by the total ROW Assets.

I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND I UNDERSTAND THEY ARE MADE FOR USE AS EVIDENCE IN COURT AND SUBJECT TO PENALTY FOR PERJURY.

DATED this 26 day of February, 2015.

Ryan Bredehoeft



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# EXHIBIT G

| | 2013 | 2014 | 2015 YTD (thru 12/31/2014) |
|---|---|---|---|
| **300 - GENERAL FUND** | | | |
| *199 - POLICY & ADMIN - NON-DEPARTMENTAL* | | | |
| 300-199-211 - PORTLAND GENERAL ELECTRIC | $ 840,445.18 | $ 847,758.52 | |
| 300-199-212 - TELEPHONE FRANCHISE | $ 81,136.45 | $ 249,501.42 | $ 9,069.34 |
| 300-199-213 - NORTHWEST NATURAL GAS | $ 249,761.39 | $ 268,710.87 | |
| 300-199-214 - CABLE TV | $ 230,284.98 | $ 238,930.59 | $ 60,583.71 |
| 300-199-215 - WATER FUND FRANCHISE FEE | $ 306,756.96 | $ 254,050.14 | $ 154,806.75 |
| 300-199-216 - SEWER FUND FRANCHISE FEE | $ 159,999.96 | $ 218,491.41 | $ 88,888.08 |
| 300-199-217 - STORM DRAIN FUND FRANCHISE FEE | $ 93,024.00 | $ 137,706.24 | $ 57,618.00 |
| 300-199-218 - OTHER FRANCHISES AND ROWS FEES | | $ 12,856.16 | $ - |
| 300-199-220 - RIGHT OF WAY APPLICATION FEES | | $ 1,200.00 | $ 400.00 |
| 300-199-225 - CC INTERIM RIGHT OF WAY | $ 21,000.00 | $ 9,910.00 | |
| 300-199-227 - CC RIGHT OF WAY USAGE | | $ 9,270.00 | $ 3,090.00 |
| 300-199-231 - ROW USAGE-CABLE | | $ 3,421.96 | |
| 300-199-232 - ROW USAGE-TELECOMMUNICATIONS | | $ 17,274.22 | $ 39,477.31 |
| 300-199-233 - ROW USAGE-WATER | | $ 36,713.41 | $ 41,042.41 |
| 300-199-234 - ROW USAGE-SEWER | | $ 84,504.33 | $ 51,012.32 |
| 300-199-235 - ROW USAGE-GAS | | | $ 26,320.75 |
| **315 - CITY CLEANUP FUND** | | | |
| *199 - CLEANUP OPERATIONS* | | | |
| 315-199-231 - GARBAGE FRANCHISE | $ 199,460.59 | $ 208,674.62 | $ 56,172.45 |
| **341 - OREGON CITY ENHANCEMENT FUND** | | | |
| *200 - OREGON CITY ENCHANCEMENT* | | | |
| 341-200-351 - DUMPING FRANCHISE FEE | $ 120,378.50 | $ 133,010.48 | $ 36,235.46 |
| **409 - CABLE TV SYSTEMS IMPROVEMENT F** | | | |
| *200 - CABLE TV OPERATIONS* | | | |
| 409-200-214 - CABLE FRANCHISE FEES | $ 153,523.32 | $ 160,716.06 | $ 40,389.16 |
| | $ 2,455,771.33 | $ 2,892,700.43 | $ 665,105.74 |

COST ANALYSIS of the OREGON CITY ROW

EXHIBIT G

| FUND | DEPARTMENT | a* | ROW allocation % | operations and maintenance: Labor FTE | operations and maintenance: Labor Salaries & Benefits | operations and maintenance: Non-Labor Materials & Services | O&M allocated to ROW | b* | support department costs allocated to user departments | allocated to ROW | Depreciation | allocated to ROW | Net Asset Balance | allocated to ROW |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 300 - GENERAL FUND | 011 - POLICY & ADMIN - CITY COMMISSION | x | 4.29% | | - | 105,520 | $ 4,527 | | $ - | $ - | $ 338,697 | $ 46,095.78 | $ 10,275,354 | $ 1,398,448 |
| | 012 - POLICY & ADMIN - CITY MANAGER | x | 4.29% | 1.00 | 262,127 | 20,411 | $ 12,121 | | $ 28,391 | $ 1,218 | | | | |
| | 013 - POLICY & ADMIN - CITY RECORDER | x | 1.85% | 3.00 | 349,850 | 65,920 | $ 7,692 | | $ 37,892 | $ 701 | | | | |
| | 014 - POLICY & ADMIN - LEGAL | x | 6.23% | | - | 362,441 | $ 22,576 | x | $ - | $ - | | | | |
| | 015 - POLICY & ADMIN - HUMAN RESOURCES | | | 2.19 | 272,896 | 64,703 | | x | $ 29,557 | | | | | |
| | 016 - POLICY & ADMIN - FINANCE | | | 5.72 | 619,032 | 111,833 | | x | $ 67,046 | | | | | |
| | 020 - POLICY & ADMIN - INFORMATION SERVICES | | | 0.50 | 67,091 | 343,731 | | x | $ 7,267 | | | | | |
| | 041 - POLICY & ADMIN - MUNICIPAL COURT | x | 85.57% | 4.44 | 423,983 | 146,029 | $ 487,760 | | $ 45,921 | $ 39,294 | | | | |
| | 071 - POLICE OPERATIONS | x | 20.58% | 50.00 | 5,536,939 | 518,346 | $ 1,246,178 | | $ 599,696 | $ 123,417 | | | | |
| | 073 - POLICE SUPPORT SERVICES | x | 20.58% | - | 809,407 | 250,145 | $ 218,056 | | $ 87,665 | $ 18,042 | | | | |
| | 074 - POLICE COMMUNICATIONS | x | 20.58% | | - | 319,288 | $ 65,709 | | $ - | $ - | | | | |
| | 161 - PARKS MAINTENANCE | x | 0.08% | 11.35 | 832,416 | 389,065 | $ 977 | | $ 90,158 | $ 72 | | | | |
| 321 - DOWNTOWN PARKING FUND | 222 - SHUTTLE OPERATION | x | 0.00% | - | 6,030 | 13,196 | $ - | | $ 653 | $ - | $ 36,655 | $ 32,937 | $ 549,824 | $ 494,059 |
| | 200 - PARKING OPERATIONS | x | 95.00% | 1.33 | 275,785 | 60,175 | $ 319,162 | | $ 29,870 | $ 28,376 | | | | |
| 351 - COMMUNITY DEVELOPMENT | 055 - GIS | x | 40.00% | 1.03 | 133,784 | 42,721 | $ 70,602 | | $ 14,490 | $ 5,796 | $ 8,853 | $ 1,751 | $ 162,008 | $ 32,048 |
| | 061 - PLANNING / DEVELOPMENT REVIEW | x | 17.49% | 4.63 | 566,123 | 990,896 | $ 272,323 | | $ 61,316 | $ 10,724 | | | | |
| 354 - CODE ENFORCEMENT | 200 - CODE ENFORCEMENT | x | 0.41% | 4.00 | 189,608 | 37,431 | $ 931 | | $ 20,536 | $ 84 | $ - | $ - | $ - | $ - |
| 357 - ENGINEERING GROUP FUND | 065 - DEVELOPMENT SERVICES | x | 90.00% | 3.85 | 383,785 | 84,815 | $ 421,741 | | $ 41,567 | $ 37,410 | $ 896 | $ 807 | $ 13,445 | $ 12,101 |
| 401 - STREET FUND | 122 - STREET OPERATIONS | x | 70.00% | 11.26 | 994,204 | 378,265 | $ 960,729 | | $ 107,681 | $ 75,376 | $ 404,506 | $ 283,154 | $ 16,135,888 | $ 11,295,122 |
| | 125 - STREET CAPITAL OUTLAY | x | 70.00% | | - | 107 | $ 75 | | $ - | $ - | | | | |
| | 126 - ELEVATOR | x | 70.00% | | - | 231,827 | $ 162,279 | | $ - | $ - | | | | |
| 415 - TRANSPORTATION UTILITY | 401 - TRANSPORTATION MAINTENANCE | x | 100.00% | | - | 250,900 | $ 250,900 | | $ - | $ - | $ 128,429 | $ 128,429 | $ 5,137,152 | $ 5,137,152 |
| 501 - WATER FUND | 151 - WATER OPERATIONS | x | 0.40% | 13.27 | 1,409,650 | 2,852,568 | $ 17,049 | | $ 152,677 | $ 611 | $ 431,805 | $ 1,727 | $ 25,970,741 | $ 103,883 |
| | 154 - WATER CAPITAL CONSTRUCTION | x | 0.40% | | - | 107 | $ 0 | | $ - | $ - | | | | |
| | 156 - WATER DEBT SERVICE | x | 0.40% | | - | 700 | $ 3 | | $ - | $ - | | | | |
| 502 - SEWER FUND | 181 - SEWER OPERATIONS | x | 0.40% | 8.705 | 808,211 | 791,124 | $ 6,397 | | $ 87,536 | $ 350 | $ 825,529 | $ 3,302 | $ 31,371,302 | $ 125,485 |
| | 182 - TRI-CITY COLLECTIONS | x | 0.40% | | - | 3,310,946 | $ 13,244 | | $ - | $ - | | | | |
| | 184 - SEWER CAPITAL OUTLAY | x | 0.40% | | - | 23,685 | $ 95 | | $ - | $ - | | | | |
| | 185 - DEBT SERVICE | x | 0.40% | | - | 400 | $ 2 | | $ - | $ - | | | | |
| 521 - STORM DRAIN UTILITY | 161 - STORM DRAINAGE OPERATIONS | x | 70.00% | 10.365 | 970,208 | 693,993 | $ 1,164,941 | | $ 105,082 | $ 73,557 | $ 166,407 | $ 116,485 | $ 11,029,325 | $ 7,720,527 |
| | 164 - STORM DRAINAGE CAPITAL OUTLAY | x | 70.00% | | - | 2,269 | $ 1,588 | | $ - | $ - | | | | |
| 563 - UTILITY BILLING FUND | 152 - UTILITY BILLING OPERATIONS | x | 0.93% | 5.70 | 527,553 | 334,907 | $ 8,000 | | $ 57,138 | $ 530 | $ 3,489 | $ 32 | $ 52,337 | $ 485 |
| 411 - STREET SDC | 401 - STREET DEVELOPMENT-SDC | x | 100.00% | | - | 101,198 | $ 101,198 | | $ - | $ - | $ 900,143 | $ 900,143 | $ 36,135,207 | $ 36,135,207 |
| 511 - WATER SDC | 501 - WATER DEVELOPMENT | x | 0.40% | | - | 14,483 | $ 58 | | $ - | $ - | $ 134,054 | $ 536 | $ 8,043,245 | $ 32,173 |
| 512 - SEWER SDC | 502 - SEWER DEVELOPMENT | x | 0.40% | | - | 119,310 | $ 477 | | $ - | $ - | $ 104,948 | $ 420 | $ 4,222,206 | $ 16,889 |
| 522 - STORM DRAIN SDC | 521 - STORM DRAIN DEVELOPMENT | x | 70.00% | | - | 1,865 | $ 1,306 | | $ - | $ - | $ 51,998 | $ 36,399 | $ 3,119,875 | $ 2,183,913 |
| 611 - PARKS SDC | 606 - PARKS DEVELOPMENT-SDC | x | 0.07% | | - | 11,054 | $ 8 | | $ - | $ - | $ 167,233 | $ 117 | $ 9,555,056 | $ 6,689 |
| 559 & 561 - FLEET MAINTENANCE | 131 - FLEET SERVICE & MAINTENANCE | | | | - | 217,250 | | x | $ - | | $ 588,379 | | $ 5,902,283 | |
| | | | | | 15,438,684 | 13,263,624 | $ 5,838,702 | | | $ 415,560 | | $ 1,552,335 | | $ 64,694,180 |
| | | | | | | | | | | | | | | 4.18% |
| | | | | | | | $ 5,838,702 | | | $ 415,560 | | $ 1,552,335 | | $ 2,704,217 |

**a** identified as having work activities directly related to the ROW
**b** identified as having work activities that indirectly support departments that perform ROW activities

Portion of Oregon City's costs (on an annual basis) that are associated with the ownership, management and maintenance of the ROW $ 10,510,814

**EXHIBIT H**

**Joint Comments of the League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities & SCAN NATOA, Inc.**

In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421

[appears behind this coversheet]

EXHIBIT H

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

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| IN THE MATTER OF<br><br>Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Practices<br><br>Mobilitie, LLC Petition for Declaratory Ruling | WT Docket No. 16-421 |

# JOINT COMMENTS OF LEAGUE OF ARIZONA CITIES AND TOWNS, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, NEW MEXICO MUNICIPAL LEAGUE, LEAGUE OF OREGON CITIES & SCAN NATOA, INC.


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EXHIBIT H

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EXHIBIT H

## TABLE OF CONTENTS

EXHIBIT H

EXHIBIT H

## STATEMENT OF INTEREST OF LOCAL GOVERNMENTS

The League of Arizona Cities and Towns, League of California Cities, California State Association of Counties ("CSAC"), New Mexico Municipal League ("NMML"), League of Oregon Cities, and SCAN NATOA, Inc. ("SCAN") (collectively, "Local Governments") offers these comments in response to the Public Notice dated December 22, 2016, which sought comment on small cell siting practices and a Petition for Declaratory Ruling filed by Mobilitie, LLC.[1]

The League of Arizona Cities and Towns is a voluntary membership organization of the 91 incorporated cities and towns across the state of Arizona, from the smallest towns of only a few hundred in population, to the largest cities with hundreds of thousands in population. The League provides vital services and tools to its members, including representing the interests of cities and towns before the legislature and courts.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians.

CSAC is a non-profit corporation whose membership consists of all of California's 58 counties. The mission of CSAC is to represent county government before the California Legislature, U.S. Congress, state and federal agencies and other entities, while educating the public about the value and need for county programs and services.

The NMML is a non-profit, nonpartisan corporation whose members are the incorporated municipalities of the State of New Mexico. All 106 New Mexico incorporated municipalities are

[1] *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (Dec. 22, 2016) [hereinafter "Public Notice"].

members of the New Mexico Municipal League. Its largest member has 10,000 times the population of its smallest, yet each member city casts one delegate vote in setting policy and electing officers. NMML staff and officers frequently appear before state agencies and legislative committees to testify on rules, regulations, and proposed legislation affecting municipalities in New Mexico.

The League of Oregon Cities, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts.

SCAN has a history spanning over 20 years representing the interests of over 300 members primarily consisting of local government telecommunications officers and advisors located in California and Nevada. Accordingly, SCAN's members have a keen interest and stake in this proceeding and its outcome.

## I. INTRODUCTION

The Wireless Telecommunications Bureau (the "Bureau") should refrain from pursuing additional or more restrictive rules in this proceeding arising from Mobilitie's petition.[2] Instead, the Bureau should consider certain simplified reforms that will actually accelerate mobile broadband deployment, such as (1) starting the shot clock upon the tendering of a complete application; (2) dispensing with the 10-day resubmittal period; and (3) removing the limitations on subsequent incomplete notices.

Additionally, the Bureau should decline to interpret the provisions in 47 U.S.C. § 253 as proposed in the Petition and suggested in the Public Notice. Local Governments recommend that the Bureau take steps to encourage and facilitate more collaborative approaches to achieving robust small cell deployment, such as issuing a notice of inquiry and/or establishing joint task force to further consider the issues in this proceeding.

## II. RESTRICTIONS PROPOSED IN THE PETITION AND SUGGESTED IN THE PUBLIC NOTICE WOULD HINDER INNOVATIVE AND COLLABORATIVE SOLUTIONS TO SMALL CELL DEPLOYMENTS

Mobilitie's Petition proposes new limitations on State and local authority over the public rights-of-way and the Bureau's Public Notice seeks comment on whether new limitations on local authority to review permit applications will accelerate wireless deployment. These proposals appear to be based on the erroneous assumption that carriers are not, at least in part, responsible for delays in their deployment. Without a proper distinction between proprietary and regulatory functions, or how applicant conduct contributes to delays, any new regulations by the

[2] *See In the Matter of Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, Petition for Declaratory Ruling, WT Docket No. 16-421 (Nov. 15, 2016) [hereinafter "Petition"].

Commission may limit, instead of encourage, innovative and collaborative solutions to small cell deployments in the public right-of-way.

State and local governments have property interests in (a) the public rights-of-way and (b) government-owned poles and other government-owned improvements within the public rights-of-way. This adds a proprietary dimension to the otherwise regulatory relationship between local governments and wireless carriers. Federal limitations on application review periods and compensation generally do not preempt States or local governments in their proprietary roles.[3] Mobilitie's Petition conflates local governments' proprietary and regulatory functions, and exaggerates Mobilitie's largely self-perceived and self-inflicted plight.

Additionally, significant delays in small cell deployment have arisen from applicant misrepresentations and misconduct. Even wireless industry members publicly acknowledge that aggressive and deceptive tactics by applicants, in particular those employed by Mobilitie, are among the primary impediments to deployment.[4]

New limitations on local regulatory authority will be unlikely to accelerate wireless facility deployment where (a) such limitations would not apply to decisions by State and local governments acting in their proprietary capacity, which is outside the Commission's preemptive authority; and/or (b) delays are caused solely or primarily by wireless applicants. Instead, existing regulations already create perverse incentives for applicants to "game" the shot clock to find shortcuts around local regulatory review altogether. To the extent that the Bureau

[3] *See, e.g.*, *Qwest v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) ("*Portland*") (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2nd Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

[4] Ernest Worthman, *Mini-cell Towers Shouldn't Be Passed as Small Cells*, AGL (Aug. 30, 2016), *available at*: http://www.aglmediagroup.com/mini-cell-towers-shouldnt-be-passed-as-small-cells/.

recommends revisiting the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*, it should seek to eliminate incentives to flaunt legitimate local review.

### A. Mobilitie's Petition and the Bureau's Public Notice Fail to Account for Distinctions between Regulatory and Proprietary Functions and Interests

Small cells and other right-of-way facilities differ from traditional macro cells in more ways than mere size. One difference that neither Mobilitie's Petition nor the Bureau's Public Notice appear to recognize is that State and local governments have property rights in the places and structures where small cells are commonly located – streets, sidewalks, light poles, traffic signals, bus shelters and other similar improvements in the public rights-of-way. As a consequence, State and local governments have an increasingly proprietary role (in addition to their regulatory role) in the deployment process as installations largely move from largely private property to spaces and structures owned by the State or local governments.[5]

Different small cell proposals can implicate different property interests. A proposed installation in the public rights-of-way may implicate the local government's *real property* interest in the land that comprises the public rights-of-way, its *personal property* interest in the government-owned improvements placed within the public rights-of-way or, in some cases, both. For example, if a wireless provider seeks to attach an antenna to a private (investor-owned) electric company's distribution pole, the local government may have a real property interest in generalized access to the streets for a commercial purpose, but would not likely have a personal property interest in that specific pole. On the other hand, the local government might have both a real property interest and a personal property interest if the proposal involved a city-owned streetlight in the public right-of-way.

[5] Although the Bureau's Public Notice describes federal law as it pertains to State and local government regulatory authority over wireless facilities, it does not contain any reference or acknowledgement that wireless facilities in the public rights-of-way often implicate State and local government proprietary interests. *See* Public Notice at 5–7.

Whether and to what extent local government may have a proprietary interest in the public rights-of-way also differs based on state law. Some states, such as Arizona, New Mexico and Oregon, grant municipalities the right to receive compensation from telecommunication service providers that use the municipality's real property, subject to certain limits.[6] Local governments may also be permitted to charge a separate fee for installations on their streetlights and other government-owned structures. Other states, like California, grant so-called "state-wide franchises" that prohibit local franchise fees for access to the real property in the public rights-of-way, but do not prohibit private proprietary agreements with telecommunications providers for attachments to municipally-owned structures within the public rights-of-way.[7]

The failure to appreciate these core distinctions between regulatory and proprietary functions can explain why firms like Mobilitie perceive costs and decisions timelines as unreasonable compared to their past experiences in a pre-small cell world.[8] The Bureau should recognize that the "barriers" alleged in Mobilitie's Petition stem from (a) Mobilitie's failure to recognize State and local property rights in the public rights-of-way; (b) the distinction between local regulatory functions and proprietary ones; and/or (c) the legislative framework that differs on a state-by-state basis.

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[6] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C) (authorizing an annual fee for undergrounded conduit on a linear-foot basis); N.M. STAT. ANN. § 62-1-3 (authorizing counties and municipalities to grant franchises, but limiting county franchise fees to "reasonable and actual costs" to grant and administer the franchise); OR. REV. STAT. § 221.515 (authorizing municipalities to collect up to a seven percent gross-revenues privilege tax).

[7] *See, e.g.*, CAL. PUB. UTILS. CODE § 7901; *Williams Commc'ns, Inc. v. Riverside*, 8 Cal. Rptr. 3d 96, 107–08 (Cal. Ct. App. 2003) (construing § 7901 as "a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration").

[8] See Iain Gillott, *Sprint's New Plan: Network Suicide*, LINKEDIN (Jan. 25, 2016), *available at*: https://www.linkedin.com/pulse/sprints-new-plan-network-suicide-iain-gillott (describing abandoned past attempts to site wireless facilities in the rights-of-way for various reasons related to property ownership).

### 1. Mobilitie's Petition Conflates Regulatory and Proprietary Fees in an Attempt to Invent an Economic Barrier for the Commission to Remove

The Bureau requested comment on Mobilitie's claim that it faces multiple, upfront and recurring fees.[9] Mobilitie improperly frames these costs as purely regulatory fees, and misstates the distinction between *proprietary* fees required to receive value for access to public/government property for its private/commercial use, and *regulatory* fees generally charged to recover the reasonable processing costs the government incurs to review and issue the permit to access the public rights-of-way.

With the proper distinction between proprietary rents and regulatory fees in mind, Mobilitie's attempt to inflate regulatory fees becomes obvious:

***Application Fees.*** Mobilitie mischaracterizes inducements to negotiate and enter a license agreement to use government property with an application fee charged to review a proposed project and issue a permit to use the public rights-of-way. Although Mobilitie alleges that "a California city requested an $8,000 'administration fee,' but [did not] explain how it calculated that fee," the City of Antioch, California, requested a fee in that amount as a one-time sum to offset its costs to negotiate a master license agreement for installations on municipal streetlights, and also provided Mobilitie with invoice summaries from its legal counsel to "explain how it calculated that fee."[10] Under that agreement, the administration fee would not be required for each pole and was totally unrelated to any regulatory application fee. Moreover, the city intended the master license agreement to reduce overall regulatory burdens and accelerate small cell deployment by establishing a pre-approved site design for typical streetlights within that jurisdiction.

[9] *See* Public Notice at 13.
[10] Petition at 16.

Mobilitie also fails to recognize that whatever rights it may have to access or use the public rights-of-way do not also grant it rights to use third parties' personal property within the public rights-of-way. Local governments often own poles, streetlights, traffic signals, ducts, conduit and other chattel that may, in the owner's discretion (*i.e.*, not in their role as a right-of-way regulator), be leased or licensed to telecommunication providers for compensation negotiated at arms-length. On the other hand, the permit fees due for any project in the public rights-of-way are separate, but often still limited to cost.[11]

***Per-Pole Fees.*** Mobilitie complains that "every locality is seeking a separate [per-pole] fee for each and every facility Mobilitie constructs," that "[t]hese fees do not serve to compensate the city for processing Mobilitie's applications" and that these fees "materially impair" its business model.[12] Even taking Mobilitie's statements about per-pole fees at face value, most – if not all – these fees are rents charged in the government's proprietary capacity and not subject to, controlled or limited by § 253.[13]

Mobilitie's assertions are incorrect because many local governments like those within California are prohibited by state law from charging state-certified telephone corporations (like Mobilitie) for access to the public rights-of-way.[14] While cities in California may charge telephone corporations a fee for access to poles owned by the government in its proprietary capacity, those cities do not (and cannot) charge a per-pole fee for attachments to third-party poles or new poles owned by the applicant. California cities could not force Mobilitie to use

[11] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-583(C); CAL. GOV'T CODE § 50030; N.M. STAT. ANN. § 62-1-3.
[12] *See* Petition at 16.
[13] *See, e.g.*, *Portland*, 385 F.3d at 1240.
[14] *See* CAL. PUB. UTILS. CODE § 7901; *T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248, 260 (Cal. Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001) ("[C]ities may not charge franchise fees to telephone corporations for the privilege of installing telephone lines in the public right-of-way.").

government-owned poles – and thereby require a per-pole fee – because state law also prohibits local mandates to site all wireless facilities on property "owned by particular parties within the jurisdiction."[15]

Additionally, Mobilitie's assumption that fees charged for attachments to municipally-owned poles should be related to cost recoupment ignores the regulatory/proprietary distinction. While a "$10,800 annual per-pole fee" may exceed the additional costs imposed on the government in its regulatory capacity to permit and monitor the installation, such fees are proprietary fees that compensate local government for allowing the use of its property.[16] Indeed, if a local government did not charge a fee or receive some other value for the attachment or installation, that action (or inaction) could violate prohibitions on donations to corporations by government entities, found in some State constitutions.[17]

Lastly, market rates for access to municipal property for a commercial purpose does not "materially impair" the ability of entities to provide telecommunication services because service providers have other options within the public rights-of-way. For example, the Pole Attachment Act already enables firms like Mobilitie to attach their facilities to utility poles at cost-based rates.[18] In jurisdictions like California, state law prevents local governments from assessing charges that "exceed the reasonable costs" incurred by the government to issue a permit to construct their own poles.[19] These same options are open to all other providers. To the extent that Mobilitie's business model gambled on rent-free access to use state or local government-owned

[15] CAL. GOV'T CODE § 65964(c).
[16] *See* Petition at 16–17.
[17] *See, e.g.*, ARIZ. CONST., art. IX, § 7; CAL. CONST., art. XVI, § 6; N.M. CONST., art. IX, § 14.
[18] *See* 47 U.S.C. § 224.
[19] *See* CAL. GOV'T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

property residing in the public rights-of-way, some commentators have opined that the economic "barriers" Mobilitie has encountered are self-inflicted.[20]

***Gross-Revenue Fees.*** Mobilitie complains that fees based on its gross revenues "directly affect [its] ability to finance projects in those communities" that charge such fees.[21] With respect to Mobilitie's claims about Oregon and California cities, these claims lack both evidence and merit. Gross-revenue fees charged by Oregon local governments have survived legal challenges as fair and reasonable compensation.[22] The fact that Mobilitie's competitors, other wireless infrastructure providers, have operated in Oregon for years under the same percentage fees strongly weighs against Mobilitie's claim that those fees effectively prohibit telecommunications services.[23] Moreover, Mobilitie's claim about gross-revenue fee assessment in California could not possibly prevent its operations because such fees for access to the public rights-of-way would violate State law.[24]

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[20] *See* Gillott, *supra* note 8 (describing reasons why Sprint and Mobilitie's plan to decommission up to 80% of its macro sites and transition equipment to new and existing structures in the public rights-of-way is likely to fail); Dawn Chmielewski and Ina Fried, *Sprint Finalizes Plan to Trim Network Costs by Up to $1 Billion*, RE/CODE (Jan. 15, 2016, 9:44 AM), *available at*: http://www.recode.net/2016/1/15/11588832/sprint-finalizes-plan-to-trim-network-costs-by-up-to-1-billion (describing Sprint's business plan to cut expenses by transitioning its facilities from leaseholds on private property to streetlights and other government property where it assumed it will pay significantly less).

[21] *See* Petition at 18.

[22] *See, e.g.*, *City of Portland v. Elec. Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1072 (D. Or. 2005) ("Certainly, it is reasonable to base compensation on a percentage of revenue generated . . . ."); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1257–1259 (D. Or. 2002) (holding "the Cities' revenue-based fees are 'fair and reasonable compensation' . . . "), *rev'd on other grounds*, 385 F.3d 1236 (9th Cir. 2004), *aff'd*, *Qwest Corp. v. City of Portland*, No. Civ.01-1005-JE, 2006 WL 2679543 (Sept. 15, 2006).

[23] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271–1272 (10th Cir. 2004) (finding that "fair and reasonable" should be evaluated under a totality of the circumstances test); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624–25 (6th Cir. 2000); *see also Sprint Tel. PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 576–77 (9th Cir. 2008) (*en banc*).

[24] *See* CAL. GOV'T CODE § 50030; *Riverside*, 8 Cal. Rptr. 3d at 107–08.

### 2. Allegedly Unreasonable Delays Conflate Regulatory Decisions with Proprietary Decisions

Just as applicants for a macro cell site (or any other project that requires a permit) generally need to prove an ownership interest or other authorization to file an application, local governments generally resolve whether they will allow a wireless facility on their own poles (or the like) in the public rights-of-way as an independent matter, and before the regulatory review (land use and/or encroachment permitting) process can meaningfully begin. The Petition appears to incorrectly assume that State and local governments make their proprietary decisions (to allow access on their own poles) simultaneously and concurrently with their regulatory decisions (to issue a land use permit). If public agencies, acting in their proprietary capacity, reach agreement to allow a carrier's facilities on their support structures, that agreement does not guarantee that a carrier's proposed facilities will comply with local right-of-way or zoning rules.

A trend among local governments to enter into an agreement with carriers on a general process to streamline regulatory review for wireless facilities placed on government-owned structures in the public rights-of-way is gaining momentum. These agreements often contain "pre-approved designs" or "pre-approved configurations" that require little or no discretionary review.[25] However, the process to reach an agreement can take several months. Local governments often lack resources and/or staff time to devote to these projects, and potential licensees – especially Mobilitie – often display an initial interest, only to disappear for several months (or longer).

To the extent that industry commenters assert there are delays in deployment, the Commission should evaluate whether those perceived delays involved (a) seeking approval to

[25] *See, e.g.*, CINCINNATI, OH., CODE, tit. VII, ch. 719 (permitting over-the-counter approvals for small cells that meet design guidelines developed in collaboration with the wireless industry).

mount antenna on, for example, a government-owned street light (*i.e.*, a proprietary decision); or (b) seeking a permit to construct a wireless facility after the owner consented to the attachment (*i.e.*, a regulatory decision). As the Commission properly recognized in the *2014 Infrastructure Order*, the presumptively reasonable times to act under § 332(c)(7) do not affect proprietary decisions.[26] Accordingly, the Bureau should find that further "clarifications" to its shot clock rules would not accelerate the deliberative or negotiation processes.

### B. Applicants Themselves Often Cause Significant Delays, and Shorter Timeframes Would Likely Encourage Applicants to "Game" the Shot Clock

The Bureau's Public Notice erroneously presumes that the "'presumptive timeframes' established in the *2009 Declaratory Ruling* and the *2014 Infrastructure Order* may be longer than necessary and reasonable to review a small cell" application.[27] In fact, delays in the deployment process often arise from applicant misconduct or flaws in the Commission's rules that encourage such misconduct.

In fact, the same article cited in the Public Notice as authority for the proposition that "it frequently takes two years or more from small cell site acquisition to completion"[28] continues, in the very next sentence, to lay significant responsibility on applicants for the delays:

> "Many markets face incremental challenges driven by the backlash from the aggressive tactics of Mobilitie," Walter Piecyk of BTIG wrote in a research note in July. "We previously noted how the planning commission in San Francisco voted in favor of a code amendment to deal with the proliferation of small cells better and insure their ability to force operators to clean-up shoddy work by

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[26] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865, 12964 ¶ 239 (Oct. 17, 2014) ("Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances.") [hereinafter, "*2014 Infrastructure Order*"].

[27] *See* Public Notice at 11.

[28] *See id.* at 7 (quoting Colin Gibbs, *Small Cells: Still Plenty of Potential Despite Big Challenges*, FIERCEWIRELESS (Sept. 1, 2016), *available at*: http://www.fiercewireless.com/wireless/small-cells-still-plenty-potential-despite-big-challenges).

> requiring permit renewals after 10 years. We suspect that trend to continue in other towns and cities throughout America."
>
> . . .
>
> "And to be clear, Mobilitie shouldn't shoulder all of the blame," Piecyk continued. "As we continue to peel the onion, we are finding examples where Crown Castle's siting practices are aggravating local communities as well . . . ."[29]

Although more guarded, carriers share the sentiment that "some companies are being 'a little too cavalier in some instances and messing up [the industry's] ability to deploy small cells.'"[30] Those approaches cause significant delays that the Commission cannot mitigate by regulating State and local governments.

For example, despite claims from Mobilitie nearly a year ago that it would increase transparency, which included ground-breaking steps such as "us[ing] its *own name* as it works with cities and counties to develop small cell sites,"[31] the firm continues to approach municipalities under misleading pseudonyms both officious (*e.g.*, "California Utility Pole Authority") and ambiguous (*e.g.*, "Interstate Transport and Broadband, LLC," "Broadband Network of New Mexico, LLC," "OR Fiber Network Company, LLC" and "CA Transmission Network, LLC").[32]

Small cell carriers may misrepresent their legal authority, misrepresent their proposed project, disregard local processes and even construct illegal facilities without permits, including

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[29] Gibbs, *supra* note 29.
[30] *See* Martha DeGrasse, *Carrier Small Cells Appear Slowly but Surely*, RCRWIRELESS (May 24, 2016), *available at*: http://www.rcrwireless.com/20160524/carriers/carrier-small-cells-tag4 (quoting Dave Mayo, SVP, T-Mobile, referring to Mobilitie).
[31] *See* Marth DeGrasse, *Mobilitie to Increase Transparency for Jurisdictions*, RCRWIRELESS (May 27, 2016), *available at*: http://www.rcrwireless.com/20160527/network-infrastructure/mobilitie-utility-tag4 (quoting Christos Karmis, President, Mobilitie, LLC) (emphasis added).
[32] *See, e.g.*, Email from Alexander Paul, Interstate Transport and Broadband, LLC for California Transmission Network, LLC, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM); Email from Keith Witcosky, City of Redmond, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 30, 2017, 4:24 PM).

the following (anecdotal) examples since the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*:

***Misrepresenting Legal Authority and/or Proposed Facilities.*** The Commission's rules prohibit applicants from making false or misleading statements to the Commission.[33] "[I]t is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency."[34] Yet, the Commission's rules neither punish nor prohibit false or misleading statements made to local governments.

Although local laws often prohibit such falsehoods and authorize a denial as a consequence, federal bans on effective prohibitions under both § 253 and § 332(c)(7) may allow an applicant who knowingly lied to a State or local government to obtain an order from a federal court to order the permits to be issued. Without real consequences for misrepresentations in permit applications, the review process is often delayed as local governments sift through applications to separate facts from falsehoods.

The following examples illustrate common misrepresentations about the applicant's legal authority and/or proposed facilities:

- Mobilitie notoriously operated under various alter egos with governmental-sounding names. Figure 1 contains annotated project plans presented to the City of Thousand Oaks, California, and depicts the type of alter ego name that Mobilitie has used for plans presented to many cities in various other states.

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[33] *See* 47 C.F.R. § 1.17.
[34] *Schoenbohm v. FCC*, 204 F.3d 243, 247 (D.C. Cir. 2000) (citing *Swan Creek Commc'ns, Inc. v. FCC*, 39 F.3d 1217, 1221–1224 (D.C. Cir. 1994) and *Garden State Broad. Ltd. v. FCC*, 996 F.2d 386, 393–94 (D.C. Cir. 1993)).

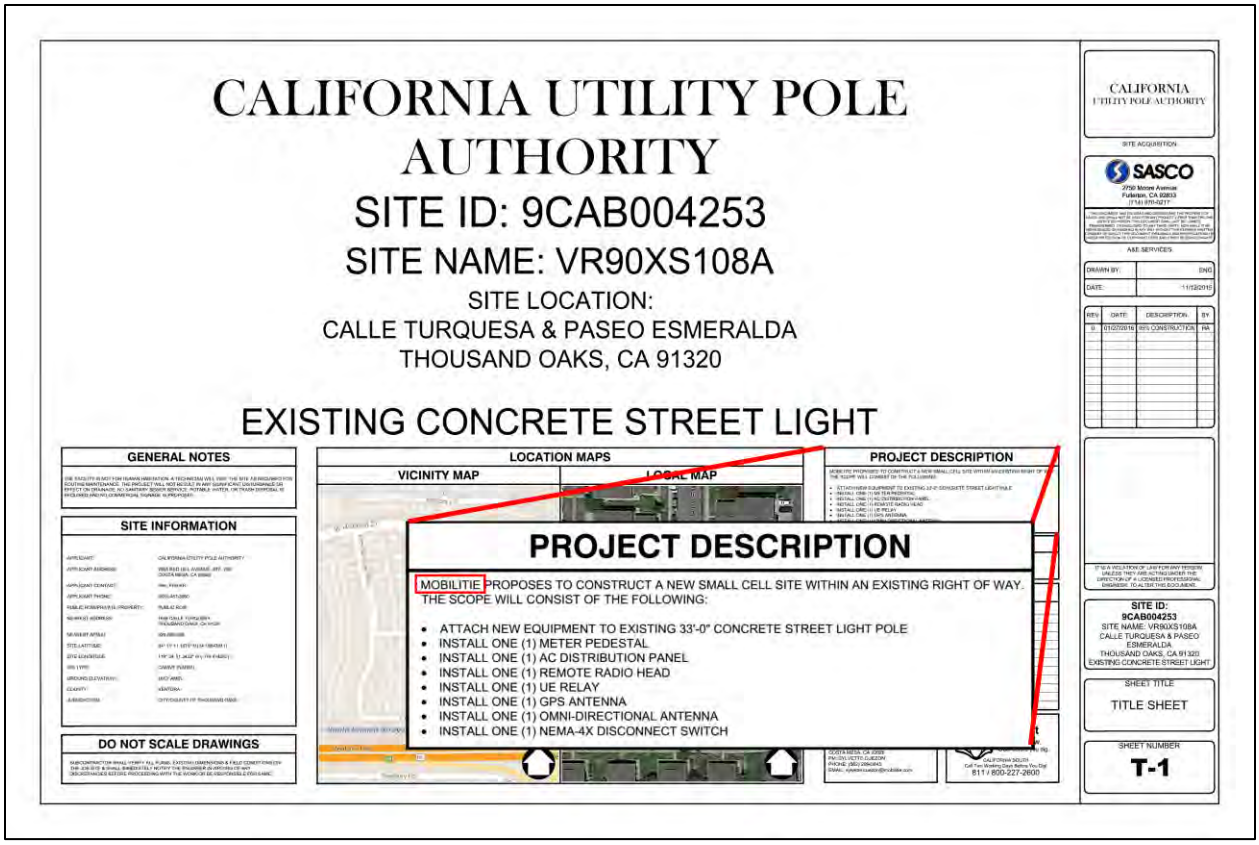


**Figure 1**

One plausible reason why a deregulated, private corporation that installs and operates wireless equipment on utility poles would assume a name like the "California Utility Pole Authority" is that may have hoped to convince some actual governmental authorities to grant special benefits or exemptions, or to perceive that only state-level oversight is required, precluding local jurisdiction approvals.

- Numerous entities, which include Mobilitie, Crown Castle, ExteNet and Verizon Wireless, misrepresent that their status as either a "telephone corporation" or "CLEC" under state law entitles them to the same regulatory treatment as electric, water and natural gas corporations.[35]

[35] *See, e.g.*, Letter from Michael van Eckhardt, AT&T, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (objecting to any concealment requirements for new small cells in the public rights-of-way); Letter from Paul Albritton, Counsel for Verizon Wireless, to John Conley *et al.*, City of Vista, Cal., at 3 (Feb. 8, 2017) (contending that state law prohibits any inquiry into the technical reasons why an applicant desires a new small cell in a particular location); Letter from Michael Shonafelt, Counsel for Crown Castle, to Mayor Clyde Roberson *et al.*, City of Monterey, Cal., at 4 (Oct. 17, 2016) ("Crown Castle's special regulatory status as a CLEC gives rise to a vested right under Public Utilities Code section 7901 to use the ROW . . . [and] . . . Crown Castle contends that a discretionary use permit – like that required by the City in this case – constitutes an unlawful precondition for a CLEC's entry into the ROW") (citing *See T-Mobile W. LLC v. City and Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248 (Ct. App. 2016) (review granted by California Supreme Court on 12/21/16, S238001); Letter from Paul Albritton, Counsel for Verizon Wireless, to Chair Daniel Fletcher *et al.*, City of Monterey, Cal., at 1-2 (Sept. 13, 2006) ("[R]ight-of-way wireless facilities should be permitted through an encroachment permit, not a use permit,

- In August 2016, the Minnesota Department of Commerce sent a letter to Mobilitie demanding that "Mobilitie cease from asserting that PUC authority has exempted it from the regulatory requirements of local government units."[36] News stories about similar misrepresentations to cities and counties seem to follow Mobilitie in several other states, as well.[37]

- In Clayton, California, Mobilitie initially contacted city staff to request information on permitting procedures and a potential right-of-way use agreement.[38] After city staff provided Mobilitie with guidelines and instructions for each process, Mobilitie ended contact with city staff.[39] Several months later, a representative from CA Transmission Network, LLC (one of Mobilitie's corporate alter egos) contacted the city engineer and falsely asserted that CA Transmission Network, LLC was a California Public Utilities Commission-regulated public utility.[40] To date, the California Public Utilities Commission still has not granted CA Transmission Network, LLC's application for a Certificate of Public Convenience and Necessity ("CPCN").[41] Mobilitie's representative further indicated that it would submit construction permit applications for two 120-foot transport poles rather than follow the procedures initially outlined by city staff. When questioned about the proposed locations, staff discovered that the permits that Mobilitie requested from Clayton to deploy a 120-foot transport pole were for a location in an adjacent jurisdiction.[42]

- Mobilitie's representatives falsely claimed to city staff in Pleasanton, California, that it received approvals from the City of Thousand Oaks, California, to install unconcealed facilities on streetlights in a residential neighborhood. Mobilitie also provided project

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because Verizon Wireless, as a telephone corporation, is authorized to use the right-of-way under California Public Utilities Code § 7901."); Letter from David Bronston, counsel for Mobilitie, LLC, to Andrew J. Benelli, City of Fresno, Cal., at 1 (Apr. 8, 2016) ("Applicant has been granted a Certificate of Public Convenience and Necessity by the California Public Utilities Commission and is a utility under the laws of the state. As a public utility, Applicant is entitled to access to the public rights of way.").

[36] Letter from Diane Dietz, Minn. Dept. of Commerce, to Chester Bragado, Mobilitie, LLC (Aug. 4, 2016).

[37] *See, e.g.*, Alyssa Stahr, *Minnesota Utilities Warn Mobilitie About Misrepresentation*, INSIDETOWERS, *available at*: https://insidetowers.com/cell-tower-news-minnesota-utilities-warn-mobilitie-misrepresentation/ (last visited Feb. 27, 2017) (describing controversies in Virginia); *Officials Feel Mobilitie is Disingenuous as Moratoriums Mount Throughout the Nation*, WIRELESSESTIMATOR (Nov. 26, 2016), *available at*: http://wirelessestimator.com/articles/2016/officials-feel-mobilitie-is-disingenuous-as-moratoriums-mount-throughout-the-nation/ (describing controversies in Florida, California and Connecticut); J. Sharpe Smith, *Municipalities, Mobilitie have a Meeting of the Minds*, AGL (Oct. 11, 2016), *available at:* http://www.aglmediagroup.com/municipalities-mobilitie-have-a-meeting-of-the-minds/ (describing controversies in Connecticut).

[38] *See, e.g.*, Email from Savir Punia, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Aug. 31, 2015, 9:48 AM); Email from Mindy Gentry, City of Clayton, Cal., to Savir Punia, Mobilitie, LLC (Sept. 17, 2015, 9:55 AM).

[39] *See* Email from Richard Tang, Mobilitie, LLC, to Mindy Gentry, City of Clayton, Cal. (Oct. 27, 2016, 5:00 PM).

[40] *See* Email from Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, to Rick Angrisani, City of Clayton, Cal. (Mar. 21, 2016, 7:23 AM).

[41] *See In the Matter of the Application of CA Transmission Network, LLC*, Docket No. A1608012 (Aug. 19, 2016).

[42] *See* Email from Rick Angrisani, City of Clayton, Cal., to Alexander Paul, Interstate Transport and Broadband, LLC for CA Transmission Network, LLC (Mar. 21, 2016, 7:30 AM).

plans to Pleasanton city staff for the alleged Thousand Oaks facilities as evidence. When Pleasanton contacted Thousand Oaks, they discovered that Mobilitie had not yet even contacted Thousand Oaks, much less applied for city permits for those facilities. A similar scenario occurred in San Dimas, California, when Mobilitie falsely claimed that other nearby jurisdictions had approved 120-foot poles in the public rights-of-way.

- In La Crosse, Wisconsin, Mobilitie's representatives presented information about Mobilitie's facilities that falsely represented their physical size and scale.[43] The presentation included the slide shown in Figure 2, below.

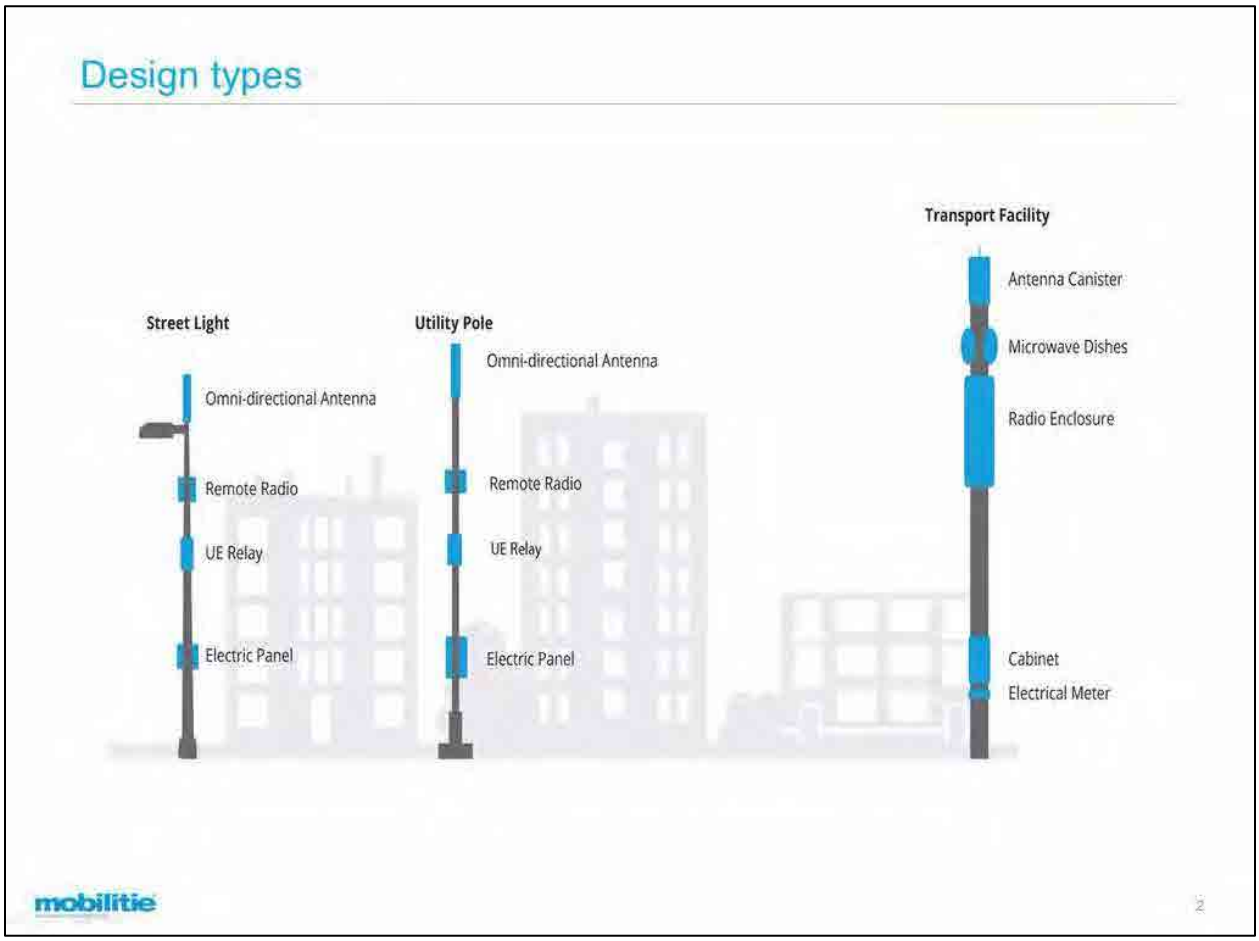


**Figure 2:** Power Point Slide Presented by Mobilitie to La Crosse, Wisconsin, Public Works Board on Jan. 23, 2017.

Figure 2 suggests that all Mobilitie's facilities are approximately the same size. However, as illustrated in the scaled graphic in Figure 3, below, the graphic grossly understates the actual differences between Mobilitie's facilities.

[43] *See* "Mobilitie Presentation" at 10 (Jan. 23, 2017), *available at*: http://cityoflacrosse.legistar.com/LegislationDetail.aspx?ID=2930404&GUID=D4B0E9C5-A313-48D1-97B4-EABD788E7E5B&Options=&Search=.

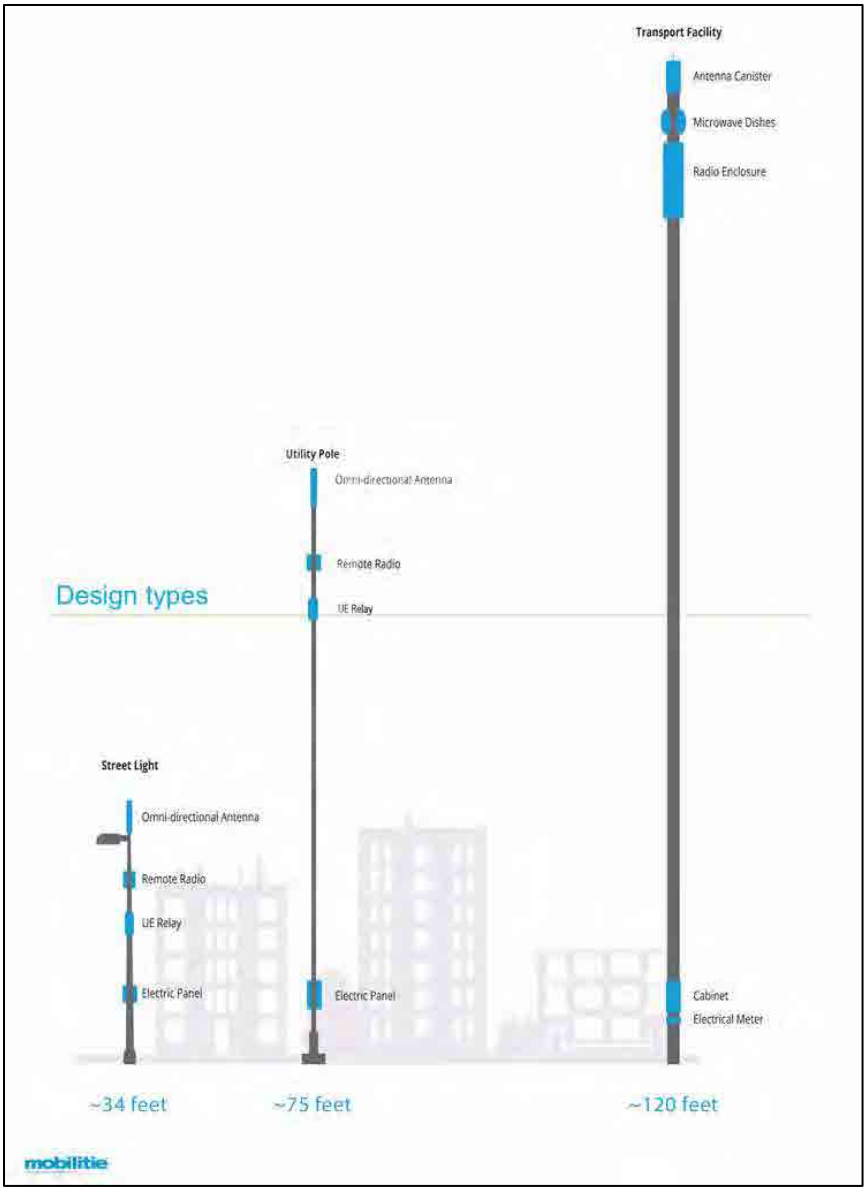


**Figure 3:** Mobilitie Slide Modified to Show Actual Scale Relative to the Street Light Installation.

Even wireless industry members find this misrepresentation "absurd" because the 120-foot transmission towers "dwarf [the] other options . . . ."[44] Misrepresentations of this magnitude justifiably cause local governments to scrutinize Mobilitie's applications.

***Disregarding Local Process and Gaming the Shot Clock.*** A pattern has emerged since the Commission adopted the *2014 Infrastructure Order* in which applicants flaunt local

[44] *See Mobilitie's DAS Marketing Illustrations are Labeled as "Quite Deceptive"*, WIRELESSESTIMATOR (Feb. 17, 2017), *available at*: http://wirelessestimator.com/articles/2017/mobilities-das-marketing-illustrations-are-labeled-as-quite-deceptive/.

processes and submit woefully inadequate "applications" for multiple sites, often to an incorrect department within the municipality. Ambiguous letters from applicants with multiple preliminary site plans often arrive on Friday afternoons or before a long holiday weekend. These applicant behaviors appear to be geared toward gaming the shot clock—submitting just enough to start the clock and then lying in wait for time to expire as the local officials attempt to make heads or tails from a cover letter with multiple site plans that arrived in the mail.

- The California Street Light Association ("CALSLA") compiled comments from its constituent California cities and counties documenting, among other things, that Mobilitie has (1) failed to provide accurate project descriptions or equipment specifications upon request by local officials, (2) submitted incomplete applications, (3) terminated communications with local officials after submitting incomplete applications, (4) erroneously claimed exemptions from permitting procedures, local regulations and state environmental compliance laws and (5) complained of high fees without explaining why the fees would be unreasonable.[45] Their full responses appear in **Exhibit A** to these comments.

- In Albuquerque, New Mexico, Mobilitie approached that city with proposals for small cells on poles without identifying the owner of the poles.[46] After Mobilitie confirmed that it desired to attach to certain city-owned poles, Mobilitie failed to respond to the city's requests that Mobilitie enter into lease negotiations to obtain the required property rights for attachments to city-owned poles.[47]

- Mobilitie's representative hand-delivered to the City of Pleasanton, California, a letter styled as an introduction with 12 plan sets for new facilities attached.[48] Rather than follow the city's publicly-stated application process, Mobilitie treated the letter as a single application filed for all 12 sites. The letter was dated and delivered on a Friday. Under California state law, any application for a wireless installation may be deemed-approved if the local government fails to act within the Commission's presumptively reasonable timeframe for review.[49] The apparent intent behind the letter was to submit an "application" that would trigger the shot clock but not be seriously reviewed by the local government staff, which would likely result in a deemed-approval. The same scenario played out in several other Northern California cities, including Antioch, Brentwood, Concord,

[45] *See* Letter from Jean A. Bonander, CALSLA, to Michael Johnston, Telecom Law Firm PC (Feb. 15, 2017).
[46] *See* Email from Kathleen T. Ahghar, City of Albuquerque, N.M., to Kevin Winner, ITB Utility (May 17, 2016, 1:35 PM).
[47] *See* Email from Jane L. Yee, City of Albuquerque, N.M., to Brenna Moorhead, Goodwin Procter LLP, counsel for Broadband Network of New Mexico, LLC (Jan. 18, 2017, 2:05 PM).
[48] *See* Letter from Richard Tang, Mobilitie, LLC, to Jenny Soo, City of Pleasanton, Cal. (Oct. 14, 2016).
[49] *See* CAL. GOV'T CODE § 65964.1.

Richmond, San Pablo, and Pittsburg. Mobilitie's representative also delivered a letter to the City of Fresno, California, which at that time did not require a special permit for installations on unpaved road shoulders, on a Friday.[50]

- In Richmond, California, Mobilitie's representative submitted encroachment applications for 13 new wireless facilities even though the Richmond Municipal Code expressly required a prior authorization from the Community Development Department.[51] A month later, Mobilitie emailed the city project plans for three additional sites but did not submit any additional applications or fees. Two sites were proposed to be located on city-owned streetlights without prior authorization from the city. City staff also discovered that one site was proposed to be located on private property. Although city staff suggested some potential alternative locations on private electric company poles, Mobilitie ultimately withdrew its applications.

- In Brentwood, California, Mobilitie's representative submitted a letter to the city's Public Works Department with project plans, an insurance certificate and a check for $144, but not an application for a use permit as expressly required by the Brentwood Municipal Code.[52] Again, Mobilitie tendered the "application" on a Friday. Although the letter described the project plans as "construction drawings," the attached plans stated on each page: "PRELIMINARY NOT FOR CONSTRUCTION."[53]

- In Goleta, California, Mobilitie's representative emailed that city project plans for six new wireless facilities, but with no application or fees. The email acknowledged that the city requires a "Right-of-Way Access Agreement" (*i.e.*, a standard document required for all entities that carry on operations in the public rights-of-way that sets out maintenance, insurance, safety and other operational requirements, but does not require any fees), but Mobilitie claimed that "our CPCN which can serve in lieu of a City-specific ROW Access/Franchise Agreement."[54] The email also requested that the city confirm who owns the poles to which Mobilitie wanted to attach their equipment.[55] This email made clear that Mobilitie did not positively know who owned the pole before it submitted applications for attachments.

- In Richmond, California, ExteNet submitted 31 encroachment permit applications for small cells without first obtaining a use permit from the city, which was required by the

[50] *See* Letter from Rebecca Eichinger, Mobilitie, LLC, to Andrew Benelli, City of Fresno, Cal. (Jun. 3, 2016).
[51] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Richmond, Cal. (Aug. 29, 2016). This letter was dated on a Monday, but Mobilitie's representative hand delivered the applications on a Wednesday (the city closes on Fridays due to State budget shortfalls).
[52] *See* Letter from Richard Tang, Mobilitie, LLC, to City of Brentwood, Cal., Public Works Department (Aug. 2, 2016). The letter was received on August 19, 2016, as evidenced by the city's in-take stamp.
[53] *See id.*
[54] *See* Email from Ben Johnson, Mobilitie, LLC, to Marti Milan, City of Goleta, Cal. (Jan. 31, 2017, 4:13 PM).
[55] *See id.*

City's recently adopted ordinance that was effective and published before ExteNet submitted its applications.[56] These applications were received by the city on a Thursday.

- ExteNet submitted 10 applications to Concord, California, for facilities throughout both residential and commercial neighborhoods that it alleged should all be subject to administrative approval, despite local regulations that required public notice with a possible public hearing for highly visible wireless facilities placed in close proximity to residential uses.[57]

- In Gresham, Oregon, Mobilitie submitted a single application for six of its sites without addressing the criteria clearly set out in the local code. Subsequently, a Mobilitie representative acknowledged that the applications were submitted without reviewing the applicable code provisions.[58]

- In Monterey, California, on the day before an appeal to the city council from a permit denial, legal counsel for Crown Castle sent a letter to legal counsel for the city that stated:

  > . . . in the event the City Council departs from the recommendations of the Staff Report [to grant the appeal and approve the permit] and adopts new conditions or otherwise raises concerns that have the potential for a denial of the Appeal, ***Crown Castle hereby requests a continuance of the hearing***. Crown Castle makes this request on the record now . . . . Please include this letter in the administrative record of the Appeal. Crown Castle's representatives will be on hand at tonight's meeting to answer any questions.[59]

  That night, the Monterey city council heard evidence that the proposed site would potentially obstruct view of the historic Cannery Row and decided to schedule a special meeting at the project site to assess first hand whether and to what extent the proposed location might impact historic assets.[60] A different attorney for Crown Castle stood up and objected to the continuance. When the mayor asked whether the attorney knew that its client already requested a continuance for exactly this purpose, the attorney said he did, but that he withdrew consent to the continuance because he claimed that shot clock had expired and wished to pursue a deemed-approved remedy under state law.

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[56] *See* Letter from Yader Bermudez, City of Richmond, Cal., to Matt Yergovich, ExteNet Sys. (Cal.) LLC (Nov. 15, 2016).

[57] In this case, ExteNet's representative submitted both the initial applications and his responses to the city's incomplete notices on Mondays. Although the applications were misfiled and incomplete, it does not appear that their representative attempted to intentionally game the shot clock in the same manner as those who routinely submit on Fridays.

[58] *See* Email from David R. Ris, City of Gresham, Or., to Michael Johnston, Telecom Law Firm PC (Jan. 23, 2017, 3:56 PM).

[59] Letter from Michael Shonafelt, counsel for Crown Castle, to Robert May, counsel for City of Monterey, Cal., at 2 (Oct. 4, 2016) (emphasis in original).

[60] *See* Monterey City Council, Meeting Minutes at 5 (Oct. 4, 2016), *available at*: http://isearchmonterey.org/cache/2/yvx5igkacsotydo441kqyukq/366444022820170918125 44.PDF.

- In early April 2016, Mobilitie submitted four encroachment permit applications to the City of Antioch, California, for installations on city-owned streetlights without any prior authorization from the city to use its streetlights. The applications listed the owner as "N/A."

- In Sacramento, California, Mobilitie requested to meet with Public Works staff and brought 40 incomplete applications, which included applications for fifteen 120-foot steel poles. When staff informed Mobilitie that it could not accept 40 incomplete applications, Mobilitie's representative left the packet on the security desk in the lobby in an apparent attempt to be able to later claim that the shot clock had been started.[61]

- In Yuma, Arizona, after receiving a letter from the city that outlined how Mobilitie's initial application failed to satisfy the city's code for obtaining a city telecommunications license, Mobilitie resubmitted its application with general responses that appeared intended to avert answering the city's questions. After a second letter from the city, Mobilitie's third submission continued to provide vague and inadequate responses to the city's questions on items as basic as what infrastructure Mobilitie intended to install in the city's right-of-way. When the city sent a third letter to Mobilitie explaining the deficiencies, Mobilitie never responded.

***Unpermitted Installations.*** Until recently, local officials would only occasionally discover unpermitted modifications to existing wireless facilities. Totally unpermitted sites were rare. However, as one author predicted, "[t]he scary proposition may be that, in the interest of time-to-market, [Mobilitie] does not ask for permission, but simply puts up the new poles and then deals with the backlash later."[62] This prediction proved to be correct:

- In March 2016, in Baltimore, Maryland, Mobilitie installed a new, "a roughly three-story-tall utility pole" without permits that obstructed access to an ADA sidewalk ramp.[63] The city commenced a code enforcement action and fined Mobilitie for the violation.[64]

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[61] *See* Email from Darin Arcolino, City of Sacramento, to Omar Masry, City of San Francisco (July 7, 2016, 12:35 PM).

[62] *See* Iain Gillott, *Analyst Angle: Sprint Network Plan Equals 'Network Suicide'*, RCRWIRELESS (Jan. 25, 2016), *available at*: http://www.rcrwireless.com/20160125/opinion/analyst-angle-sprints-network-plan-equals-suicide-2-tag9.

[63] *See* Ryan Knutson, *Sprint's Wireless Fix? More Telephone Poles: Wireless Provider's Innovative Plan to Boost Cell Service Runs into Local Hurdles*, WALL ST. J. (Jun. 7, 2016, 6:03 PM), *available at*: https://www.wsj.com/articles/sprints-drive-to-improve-coverage-faces-permit-delays-1465337015.

[64] *See One Company Fined for Not Getting a Small Cell Permit, Another for not Permitting Inspectors*, WIRELESSESTIMATOR (Apr. 4, 2016), *available at*: http://wirelessestimator.com/articles/2016/one-company-fined-for-not-getting-a-small-cell-permit-another-for-not-permitting-inspectors/.

- In Denison, Texas, Mobilitie construed a nearly 90-foot tower in the public rights-of-way without prior approval from the city. Mobilitie sent the city a self-styled application letter (similar to what it provides other cities) with project plans marked "PRELIMINARY NOT FOR CONSTRUCTION," rather than the application form required by the city. The city never issued any permits.

- In Vallejo, California, staff discovered an unpermitted Verizon small cell on a utility pole after Verizon submitted an application for a building permit. When city staff notified Verizon of the unpermitted work, Verizon threatened legal action if the city did not issue a permit within a week.[65]

Wireless carrier tactics like these disrupt and delay the deployment process, and prevent cooperative and collaborative partnerships.[66] As one industry member and observer put it:

> So what makes [Mobilitie's conduct] so different than what other players do? Not really that much. But the tipping point here is if a municipality feels that a wireless company has misrepresented itself or what it is doing, the relationship between the whole wireless industry and the municipality is soured. If you are the company coming in after a wireless company has upset a municipality, don't expect a warm reception. We all have a responsibility to treat municipalities with respect and honesty.[67]

### C. If the Commission Addresses its Rules, it Should Seek to Eliminate Uncertainties and Counterproductive Incentives

To the extent that the Bureau seeks comment on further "clarifications" to the *2009 Declaratory Ruling* and the *2014 Infrastructure Order*, Local Governments offers the following specific recommendations.

#### 1. The Commission Should Define "Duly Filed" as the Time at Which the Applicant Tenders a *Complete* Application

Counterproductive carrier conduct often occurs in the submittal phase because, under the "clarifications" in the *2014 Infrastructure Order*, "the presumptively reasonable timeframe begins to run when an application is first submitted" – no matter how incomplete the first

[65] *See* Email from Teri Killgore, City of Vallejo, Cal., to Michael Johnston, Telecom Law Firm PC (Feb. 7, 2017, 10:40 AM).
[66] *See, e.g.*, Worthman, *supra* note 4.
[67] *Id*.

submittal may be.[68] Despite the Commission's rule that requires local governments to publish their application requirements in advance, woefully incomplete application submittals have become the rule rather than the exception.[69] Given that the Commission's other rules already bar *ex post facto* application requirements, carriers should be expected (and required by the Commission) to tender complete submittals and there should be no excuse for an incomplete application – and certainly no incentive.[70]

At the very least, the Commission should declare that the shot clock does not begin to run when the "submittal" does not even appear on the proper form provided by the jurisdiction. Mobilitie's conduct appears to seek to start the shot clock no matter how incomplete the application, and its representatives often submit a mere letter that states Mobilitie expects to commence construction in the near future.[71]

The Commission has consistently recognized local governments' right to require an application.[72] Allowing applicants to trigger the shot clock with an incomplete application, or in some cases no application at all, encourages attempts to deceive local governments and game the shot clock. Accordingly, the Commission should revise its clarification in the *2014 Infrastructure Order* and declare that the presumptively reasonable time for review begins to run when the applicant tenders a *complete* application.

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[68] *2014 Infrastructure Order* at ¶ 258.
[69] *See id.* at ¶ 260 ("[I]n order to toll the timeframe for review on grounds of incompleteness, a municipality's request for additional information must specify the code provision, ordinance, application instruction, or otherwise publically-stated [sic] procedures that require the information to be submitted.").
[70] *See id.* at ¶¶ 217, 260.
[71] *See generally* Part II.A, *supra*.
[72] *See 2014 Infrastructure Order* at ¶ 211 (Oct. 24, 2014); *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, WT Docket No. 08-165, 24 FCC Rcd. 13994, 13994 (Nov. 18, 2009) (assuming local authority to require an application) [hereinafter "*2009 Declaratory Ruling*"].

### 2. The Commission Should Dispense with the "10-Day Resubmittal" Review Period and the Limitations on Subsequent Incomplete Notices Within the First 30 Days

The 10-day resubmittal review period further encourages applicants to tender resubmittals right before weekends, holidays and other government closures.[73] And the so-called "one-shot" rule that limits subsequent incomplete notices to items specifically delineated in the first incomplete notice,[74] encourages applicants to withhold legitimate requests for additional information based on a minor procedural oversight in the first incomplete notice. The Commission should eliminate these rules.

These complex procedural rules do not coincide with the practical realities involved in wireless facility siting reviews. Although the Commission's rules might seem more reasonable if one person were responsible to review an application, local governments almost always route applications through multiple departments with specialized knowledge over engineering, right-of-way management, land use planning, finance and other disciplines. If one department sends an incomplete notice to the applicant with respect to their narrow review, the applicant can claim that the notice precludes other incomplete notices from the other departments because their concerns would not relate back to the incompleteness cited in the first notice.

The Commission should eliminate the 10-day resubmittal review period and the limitations on subsequent incomplete notices within the first 30 days.

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[73] In this respect, the 10-day resubmittal review period appears to conflict with at least two Commission rules: (a) The holiday-exception procedural rule for replies due within 10 days or less. *See* 47 C.F.R. § 1.4(h) (providing that where "the filing period for a response is 10 days or less, an additional 3 days (excluding holidays) will be allowed to all parties in the proceeding for filing a response"); and (b) The 15-day review period for "[a]ny amendments to an application for renewal of any instrument of authorization . . . ." *See id.* § 73.3578; *see also* § 1.927(h) (providing that amendments to application that "constitute[] a major change shall be treated as a new application" altogether).

[74] *See 2014 Infrastructure Order* at ¶ 218.

## III. THE COMMISSION CANNOT PERMISSIBLY INTERPRET THE PROVISIONS IN § 253 AS PROPOSED IN MOBILITIE'S PETITION

Mobilitie asks the Commission to interpret the safe harbor for "fair and reasonable compensation" for access to the public rights-of-way in § 253(c) as strict cost recoupment, in direct contradiction with Congress' statutory scheme in the Communications Act and express intent in the Congressional record. The Commission should dismiss Mobilitie's Petition and decline to interpret § 253(c).

### A. "Fair and Reasonable Compensation" Refers to Regulatory Fees, and § 253 Does Not Authorize the Commission to Preempt Compensation Paid to States or Local Governments as Market Participants

"Fair and reasonable compensation" refers to fees charged by State and local governments in their regulatory – not proprietary – capacities as consideration for access to the public rights-of-way.[75] Federal preemption prohibits State and local governments "from *regulating* within a protected zone" but does not prohibit proprietary activities within such preempted fields.[76] As the Supreme Court stated:

> [a] State does not regulate . . . simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption . . . because pre-emption doctrines apply only to state *regulation*.[77]

The same principle applies to preemption under the Communications Act.[78] Whatever the Commission's authority may be to interpret the term "fair and reasonable consideration" with respect to regulatory fees, the Commission simply lacks the authority to preempt State or local governments in their proprietary capacity as a market participant. Accordingly, the Commission

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[75] *See Portland*, 385 F.3d at 1240.
[76] *See Bldg. and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226–27 (1993) (emphasis added).
[77] *Id.* (emphasis in original).
[78] *See, e.g., Portland*, 385 F.3d at 1240 (recognizing that Section 253(a) preempts only "regulatory schemes"); *Mills*, 283 F.3d at 421 (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

should reject Mobilitie's plea to have the Commission regulate State or local governments, where states and local governments enter into arm's-length agreements as market participants with the wireless industry.

### B. "Fair and Reasonable Compensation" Does Not Mean Compensation Based on Cost Recoupment Alone

Mobilitie's proposal to limit compensation for commercial telecommunications uses the public rights-of-way conflicts with existing statutes on rate regulation and Congressional intent to preserve local authority to charge rates based on gross revenues. The Commission should reject Mobilitie's proposal.

#### 1. "Fair and Reasonable" Compensation Means Something More than "Just and Reasonable" Compensation

A crucial flaw in Mobilitie's proposal to interpret "fair and reasonable" as cost recoupment is that Congress uses the phrase "just and reasonable" in the Communications Act when it intends to describe a cost-based compensation scheme.[79] "[F]air and reasonable" under § 253(c) cannot mean the same as "just and reasonable" under § 224 or § 251 because different words in the same act have different meanings.[80] Thus, contrary to Mobilitie's claim that the dictionary definition for "compensation" compels the Commission to define this term as "cost,"[81] the plain language in Congress' statutory scheme clearly shows that "fair and reasonable" means something *other than* cost.

Moreover, "fair and reasonable compensation" must mean something *greater than* cost given that Congress did not intend the "fair and reasonable" standard to subsidize for-profit

[79] *See, e.g.*, 47 U.S.C. § 224(d)(1) (establishing a cost-based formula for pole attachment rates); 47 U.S.C. § 251(d)(1)(A)(i) (defining "just and reasonable" rates for interconnection as "based on the cost").
[80] *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").
[81] *See* Petition at 24.

telecommunications providers at the States' or local governments' expense.[82] Despite Mobilitie's argument that Congress chose the word "compensation" over "payments,"[83] at least one federal court has held that:

> Congress chose the term compensation, rather than cost, to further its intent that local municipalities be permitted to recoup revenue in exchange for a telecommunications provider's use of the public streets.[84]

Especially where municipalities act in their proprietary (not regulatory) capacity to lease or license space on their own traffic signals, light poles or the like, their "fair and reasonable" compensation is defined by market value. The Commission should reject Mobilitie's proposal to limit "fair and reasonable compensation" to mere a cost-based fee. To hold otherwise could amount to a regulatory taking, in violation of the Fifth Amendment.[85]

### 2. State and Local Governments May Impose Fees Based on Gross Revenues

In 1996, Congress considered and overwhelmingly rejected (by a 4-to-1 margin) an alternative to the "fair and reasonable compensation" approach that would have required State and local governments to charge all telecommunications service providers the same fees.[86] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[87] One district court has found that neither § 253(c) (as passed by Congress), Congressional history, nor case law limits a city from charging more than their "cost of

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[82] *See* 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).
[83] *See* Petition at 24.
[84] *See Elec. Lightwave*, 452 F. Supp. 2d at 1072.
[85] *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (noting that "it is most reasonable to construe the reference to 'private property' in the Takings Clause . . . as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.'").
[86] *See* 141 CONG. REC. H 8427 (Aug. 4, 1995).
[87] *I.N.S. v. Cardoza–Fonseca*, 480 U.S. 421, 442–43 (1987).

maintaining the rights of way. Nor does it require absolute parity among providers and utilities in setting compensation levels. Rather, those restrictions are an overlay put forth by telecommunications providers . . . and it is not the law in any circuit."[88]

When Congress was considering 1996 Telecommunications Act, a proposal then styled as § 243(e) stated in full:

> PARITY OF FRANCHISE AND OTHER CHARGES.—Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services *that distinguishes between or among providers of telecommunications services*, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit, or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.[89]

In response to concerns that this "parity" requirement would unfairly prevent different fees for different uses that imparted different impacts on the rights-of-way and the public's use, a bipartisan amendment offered by Congressmen Barton and Stupak proposed to completely delete Section 243 and replace it with language substantially similar to the current law.[90] Congressman Stupak stressed that, under the proposed § 243(e), "local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets."[91] Given that many incumbents paid little or no actual compensation under sometimes-ancient franchises, the parity requirement would effectively subsidize new entrants

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[88] *Elec. Lightwave*, 452 F. Supp. 2d at 1074–1075.
[89] 141 CONG. REC. H 8427 (Aug. 4, 1995) (emphasis added).
[90] *See* 141 CONG. REC. H 8460–8461 (Aug. 4, 1995). *See also* Fredrick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism and the Public Right-of-Way*, 26 SEATTLE UNIV. L. REV. 475, 521–23 (2003) (discussing at length the legislative history behind the Stupak Amendment).
[91] 141 CONG. REC. H 8460 (Aug. 4, 1995) (statement of Rep. Stupak).

who would be permitted to use public property at the public's expense.[92] Congressman Barton stated that "[t]he Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way."[93]

The House overwhelmingly adopted the Stupak-Barton amendment and rejected the parity requirement.[94] The amendment confirms that the House (a) intended local governments to determine compensation for access to the rights-of-way and that charges might differ among various users; and (b) rejected in 1996 a proposal similar to Mobilitie's petition in 2017.

Mobilitie's proposed cost-based "compensation" scheme with exemptions from gross-revenue fees seeks to resurrect the "parity" requirement Congress discarded in the Stupak-Barton amendment. Such a construction would be struck down because "it appears from the statute or its legislative history that the [definition] is not one that Congress would have sanctioned."[95]

Although Mobilitie attempts to shoehorn statements by Senator Diane Feinstein that describe rights-of-way management functions into limitations on compensation,[96] Senator Feinstein's statements concerned the Commission's preemptive scope under § 253(d) rather than the permissible "compensation" protected under § 253(c).[97] Senator Feinstein's proposed amendment to limit the Commission's preemptive powers cannot be understood as tacitly endorsing limitations on compensation for access to the public rights-of-way.

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[92] *See id.* at H 8460 (statement of Rep. Stupak). As an example, Congressman Stupak submitted evidence that cities collectively spent more than $100 billion on right-of-way maintenance in 1994, but collected only $3 billion in fees from all rights-of-way users, including gas, water, electric and telecommunications companies. *See id.* (statement of Rep. Stupak).
[93] *Id.* at H 8460 (statement of Rep. Barton).
[94] *See id.* at H 8477 (10 representatives did not vote).
[95] *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).
[96] *See* Petition at 25.
[97] 141 CONG. REC. S 8305–8306 (Aug. 4, 1995).

The Congressional record clearly shows that Congress considered gross-revenue fees to be permissible. Several federal courts agree that § 253(c) does not prohibit compensation based on gross revenues.[98] The Commission should, too.

## IV. THE COMMISSION SHOULD CONSIDER ALTERNATIVES TO RESOLVE THE ISSUES RAISED BY MOBILITIE, BASED ON THE COMMISSION'S OWN PAST PRACTICE

Mobilitie's Petition lacks merit and should be dismissed. However, to the extent that the Bureau desires to address any issues raised in Mobilitie's Petition or the Public Notice, the Bureau should follow the recommendations set forth in the National Broadband Plan and the example set by Chairman Pai in creating the Broadband Deployment Advisory Committee and engage with federal, state, local, tribal and industry stakeholders in a meaningful factual investigation.

Whether the Commission has the legal authority to adopt substantive, legislative-type rules through a declaratory ruling does not guarantee the rules adopted will achieve their intended purpose. For the reasons discussed below, a collaborative, fact-based and consensus-driven approach is needed to accelerate wireless broadband.

[98] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543 (D.P.R. 2003) (holding that "Section 253(c) of the Telecom Act does not explicitly forbid revenue-based fees" and approving of an "approach which does permit a municipality to obtain a reasonable 'rent' for [a carrier's] use of [the municipality's] property"); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257 (concluding that Ninth Circuit precedent "does not stand for the proposition that § 253(a) categorically bars all revenue-based right-of-way fees"). Also, contrary to Mobilitie's assertion of a circuit split on "fair and reasonable compensation," *see* Petition at 26–28, the courts agree that a fee's relationship to cost can be an important – but not dispositive – factor. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006) (finding that a franchise fee need not be limited to cost but should have some relationship to it); *Santa Fe*, 380 F.3d at 1271–1272 (finding that "fair and reasonable" should be evaluated under a totality of the circumstances test, including costs); *Dearborn*, 206 F.3d at 624–25 (same); *Qwest v. City of Portland*, 200 F. Supp. 2d at 1256–1257.

### A. The Commission Should Issue a Notice of Inquiry Rather than Continue to Promulgate Legislative Rules Though Adjudicatory Proceedings

Mobilitie's Petition seeks a declaratory ruling to interpret provisions in § 253(c), and the Public Notice sought comment on "whether the Commission should issue a declaratory ruling to further clarify" the *2009 Declaratory Ruling* or the *2014 Infrastructure Order*.[99] The Bureau's Public Notice appears self-convinced that the best course lies in adjudication rather than rulemaking.[100] Local Governments disagree.

Although the Commission may exercise discretion as to whether to proceed by adjudication or rulemaking, that discretion is not unlimited.[101] New rules and changes to existing ones could amount to substantive, legislative-type rules that may call for compliance with the notice-and-comment requirements in the Administrative Procedures Act. The Commission should explore the issues raised in the Public Notice through a Notice of Inquiry ("NOI"), which could be followed by a Notice of Proposed Rulemaking ("NPRM").

As a practical matter, the Commission lacks a complete and relevant record on the issues raised in the Public Notice. Although the Public Notice appears to suggest that the record from prior proceedings is sufficient, this would mean reliance on stale comments and anecdotes about problems the Commission already addressed in connection with different technologies.[102] Moreover, the Public Notice lacks sufficiently specific propositions to put the public on notice about potential new or changed rules.[103]

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[99] *See* Public Notice at 10.
[100] *See* Public Notice at 6–7.
[101] *See SEC v. Chenery Corp.*, 332 U.S 194, 202–03 (1947); *see also Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976). The Administrative Procedure Act requires that the Commission publish its proposed rule in the Federal Register, give interested persons an opportunity to participate in the proceedings, consider relevant matters presented, state the basis and purpose for the rule and then publish any substantive rule in the Federal Register at least 30 days prior to the effective date. *See* 5 U.S.C. §§ 553(b)-(d); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).
[102] *See* Public Notice at 8–9.
[103] *See Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 168–71 (D.C. Cir. 2013).

To the extent that the Commission desires to investigate ways to improve small cell deployment practices, the Commission should engage with stakeholders to develop an NPRM based on a robust record.

### B. The Commission Should Follow its Staff's Prior Recommendation and Form a "Joint Task Force" to Consider Best Practices for Deployments in the Public Rights-of-Way

State and local government should play a key role in the development of proposed improvements to the small cell deployment process. In the National Broadband Plan issued in 2012, Commission staff recommended that the Commission "should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way."[104] More recently, in January 2017, Chairman Pai announced that he would form a similar task force, the Broadband Deployment Advisory Committee ("BDAC"), to develop an administrative record and recommend best practices to accelerate wireless deployments.[105] The Commission should follow its own recommendation and approach these issues raised in the Public Notice through a joint task force.

The Commission should also note that issuing new or amended regulations at this time would be detrimental to any joint task force or advisory board, especially given that Chairman Pai intends his BDAC to "draft for the Commission's consideration a model code for broadband deployment."[106] Such a task force may not be able to engage in a robust review and discussion if it were formed after the Commission adopts new or amended regulations.

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[104] *See* FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 131 (2012) *available at:* https://www.fcc.gov/general/national-broadband-plan.
[105] *See* Chairman Ajit Pai, *Formation of the Broadband Deployment Advisory Committee (BDAC)* (Jan. 31, 2017), *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0131/DOC-343243A1.pdf [hereinafter "*BDAC Statement*"].
[106] *See BDAC Statement* at 1.

## V. CONCLUSION

For the foregoing reasons, the Bureau should (1) refrain from additional or more restrictive rules that may exacerbate shot-clock gaming by the wireless industry and (2) consider simplified reforms to the initial application completeness review as described in Part II.C to these comments. Alternatively, the Bureau should consider more collaborative approaches to small cell deployment, such as a notice of inquiry and/or a joint task force.

Respectfully submitted,

Dated: March 8, 2017

Robert C. May III
Telecom Law Firm, PC

Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

Counsel for League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities, and SCAN NATOA, Inc.

**EXHIBIT A**

**Additional Comments by the California Street Light Association**

**(appears behind this cover)**

EXHIBIT H

February 15, 2017

TO: Michael Johnston, Legal Counsel, League of California Cities

FROM: Jean A Bonander, Executive Director, California Street Light Association (CALSLA)

SUBJECT: ROW Fee Petition (FCC WT Docket No. 16-421) re: Mobilitie

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Thank you for the opportunity to comment on issues surrounding Mobilitie's attempts to use the public right of way to deploy small cell installations. Per your email, there are three categories of interest. The cities, counties and vendors who have commented at CALSLA about these issues are generally indicating the following concerns.

Unpermitted Work

CALSLA jurisdictions have so far not indicated that Mobilitie has tried to install small cell devices, poles or other infrastructure without permits.

Description of Equipment

CALSLA jurisdictions have indicated that Mobilitie representatives who have scheduled meetings with local government officials have not generally been able to provide the jurisdiction with accurately described or rendered equipment or specifications. In situations where drawings have been provided, e.g., the City of San José, the amount of additional equipment on the pole infrastructure for one carrier is substantial. Please see the attached drawing for clarification.

Misinformation

Several CALSLA jurisdictions have indicated that Mobilitie representatives have made the following kinds of statements about interactions with local governments:

- Mobilitie representatives schedule an initial meeting or inquire about applications and fees, then fail to follow up with a completed application.

- Mobilitie representatives claim to have filed a completed application, and when the jurisdiction questions the allegation and asks for more information, Mobilitie representatives claim that the local government is delaying processing.

- Mobilitie representatives file an application, then fail to complete the process without comment to the local jurisdiction.

- Mobilitie representatives claim that no permit or application is required, that they are exempt from local regulations and on occasion, exempt from CEQA.

- Moblitie representatives have claimed that fees for processing an application are too high, with no further explanation.

Other Issues

The CALSLA Executive Committee, comprised of city and county representatives from around the state, would also like to suggest that the issues listed below are of concern and need additional attention by policy makers at the League of California Cities and the California State Association of Counties.

- Net Neutrality. In this instance, net neutrality means that the various competing private sector telecommunications companies need to come up with a common standard for attachment equipment so that multiple devices can be hosted at one facility location, like a street light pole or a wall-pak mount on a building.

- Migration Regulation. If new right of way infrastructure is required, e.g., an additional pole in the right of way, the telecommunications company shall agree to migrate its attachment device to a common/shared facility as soon as technically possible, and that any decommissioning costs are borne by the telecommunications company.

- Equal Access. Telecommunications companies should expect to be required to place their attachment devices throughout communities, making certain that all members of the community have equivalent access to the services that will be delivered by the company.

- Design Consideration and Quality of Life. If new right of way infrastructure, e.g., an additional pole must be installed in the public right of way, the jurisdiction's design guidelines, right of way access requirements and accessibility requirements must be maintained.

- Aesthetic and Reasonable Use of the Public Right of Way. Most right of way legislation was created in the early 1900's and, as use of the right of way has become more valuable to both communities and private sector vendors, it is important to preserve this asset for the most important and required services and facilities.

- Common Processing Requirements. To the extent possible, local jurisdictions, under the auspices of the League of California Cities and the California State Association of Counties, should quickly develop common application policies, fee schedules, review

guidelines and permitting procedures for small cell attachments to preempt Federal or State authorities from imposing inappropriate standards on local communities.

- Performance Bonds. Any telecommunications company wanting to add devices to the public right of way and/or local government infrastructure facilities shall post a performance bond for clean-up, decommissioning and/or for removal should the telecommunications company file for bankruptcy or otherwise abandon its assets.

- Coordination of Services. As is required of almost all vendors and interjurisdictional participants in projects, the telecommunications companies will coordinate their efforts with local jurisdictions on timing of construction, joint trenching and joint street openings/repairs to achieve economies of scale, minimize disruption to the public, and to expedite comprehensive project management.

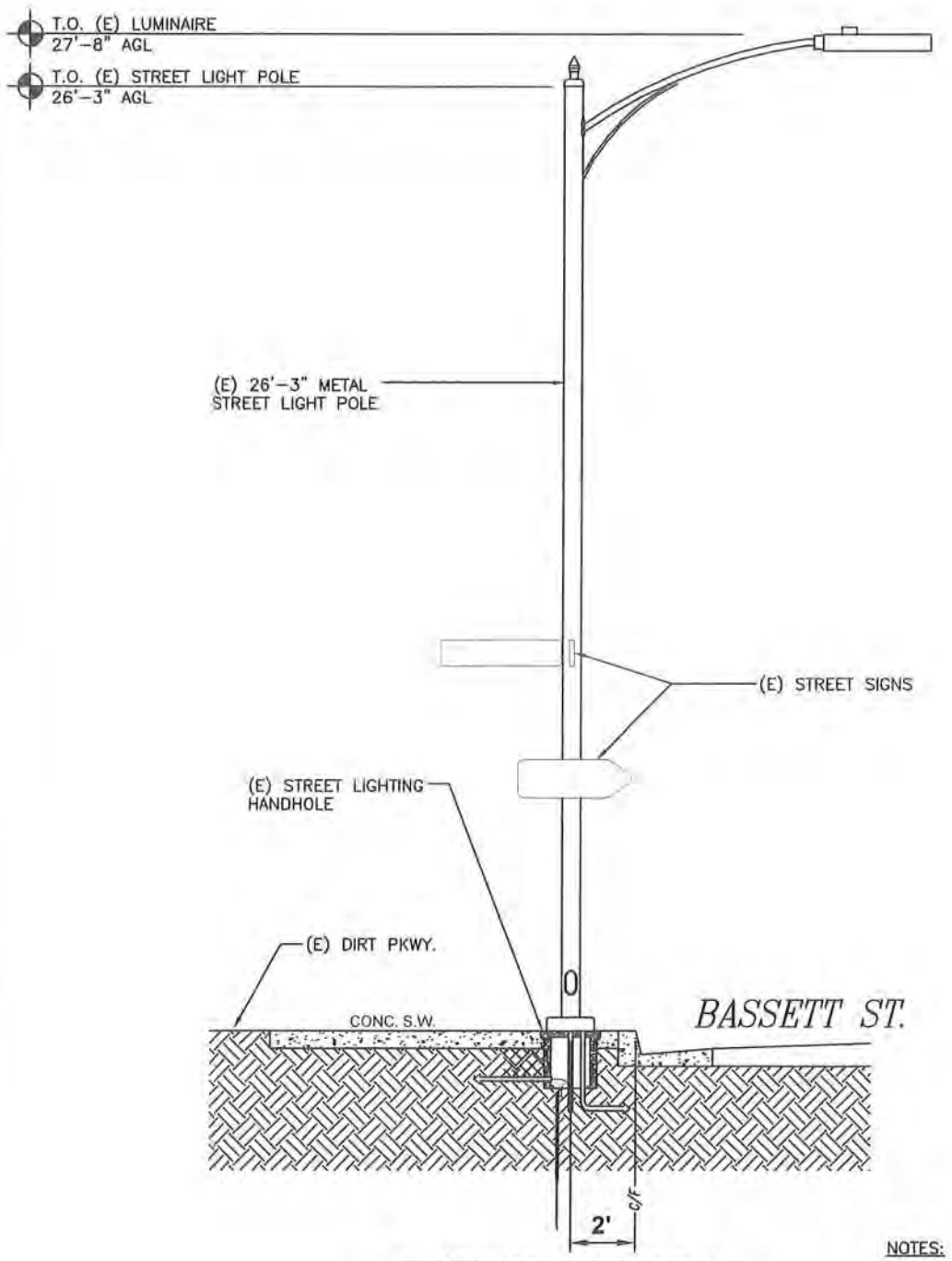
- Understanding of Impacts – Utility Owned Facilities (LS-1) and Customer Owned Facilities (LS-2). The issues of which entity permits, conducts environmental or design review, coordinates the construction/installation, receives revenue or fees, incurs expenses and the handling of decommissioning needs to be clarified between the investor owned utility (IOU) infrastructure and the customer owned (cities, counties, special districts) infrastructure.

I hope you find this information helpful. If CALSLA can be of additional assistance, please contact me.

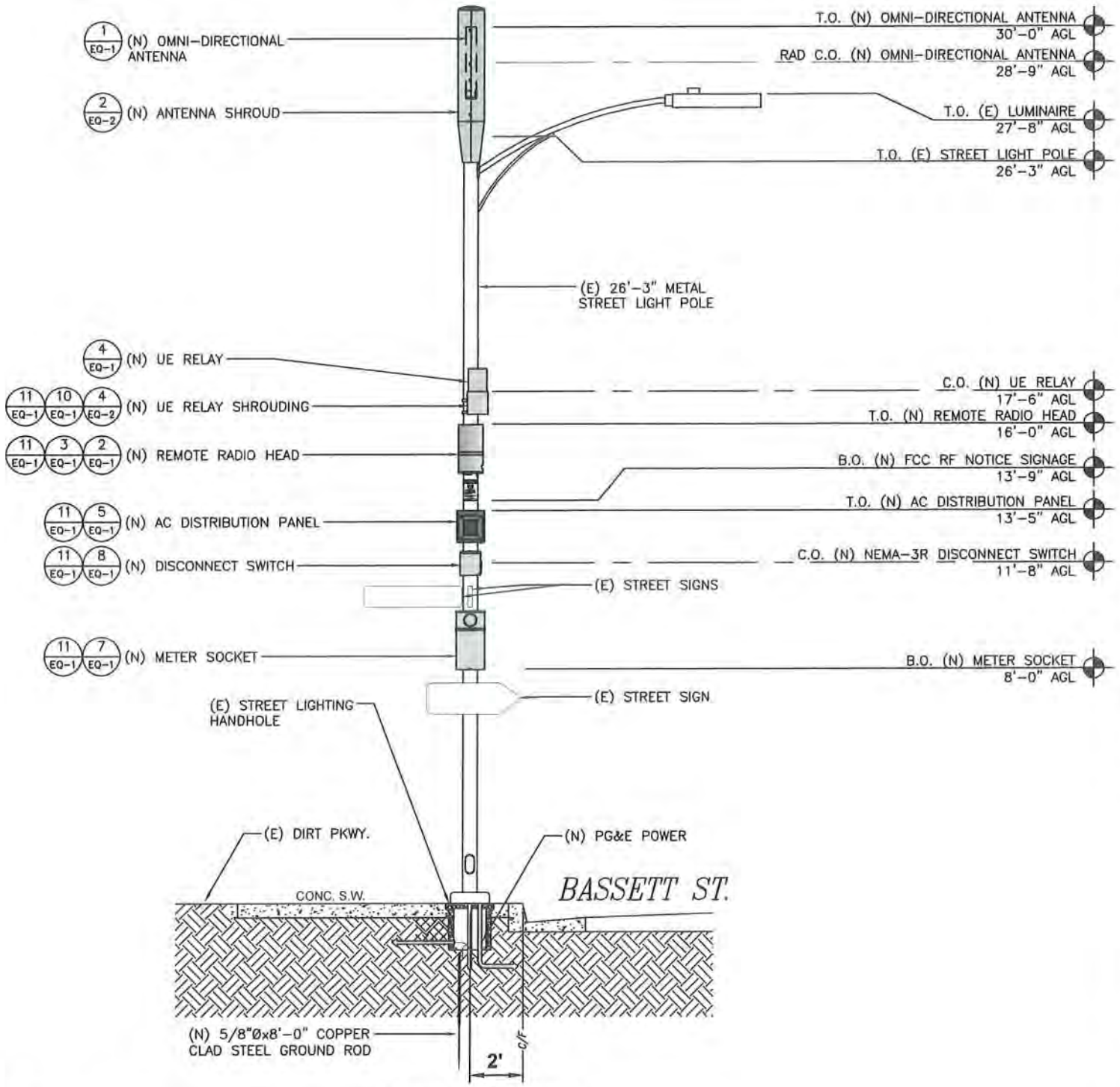
Attachment: City of San José Drawings/Mobilitie

Contact Information:

Jean A Bonander, Executive Director
California Street Light Association (CALSLA)
56 Hacienda Drive
Tiburon CA 94920-1127
jean@calsla.org
415-508-7527




## EXISTING SIDE VIEW




## NEW SIDE VIEW

NOTES:

1. ALL HARDWARE SHALL BE STAINLESS STEEL.
2. ALL CABLES SHALL BE SECURED TO POLE EVERY 36" OR LESS.
3. LIGHTNING RODS SHALL BE INCLUDED AS REQUIRED.
4. STRUCTURAL BACKFILL TO BE COMPACTED IN 6" MAXIMUM LAYERS TO 95% OF CONTENT IN ACCORDANCE WITH ASTM D698. ADDITIONALLY, STRUCTURAL BACKFILL MUST HAVE A MINIMUM COMPACTED UNIT WEIGHT OF 100 POUNDS PER CUBIC FOOT (16kN/m3)

**(E) POLE ELEVATIONS** | 1

SCALE: 1" = 5'

mobilitie
intelligent infrastructure

cable engineering services
PRESCOTT COMMUNICATIONS INC.
10640 Sepulveda Blvd. Suite 1, Mission Hills, CA 91345
Phone No. (818)898-2352 Fax No. (818)898-9185

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| PROJECT NO: | 9CAB013787 |
| DRAWN BY: | AH |
| CHECKED BY: | JM |

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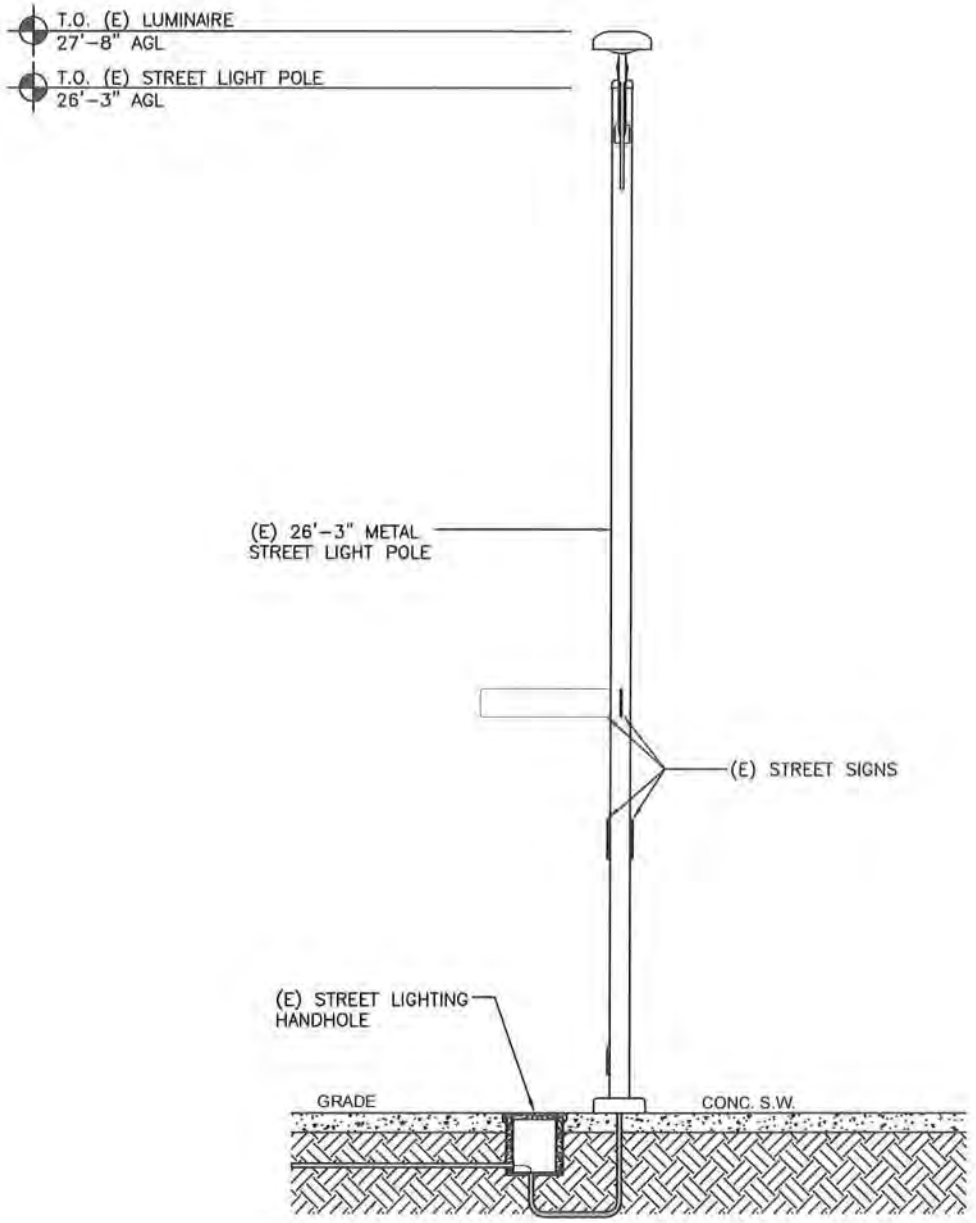
SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

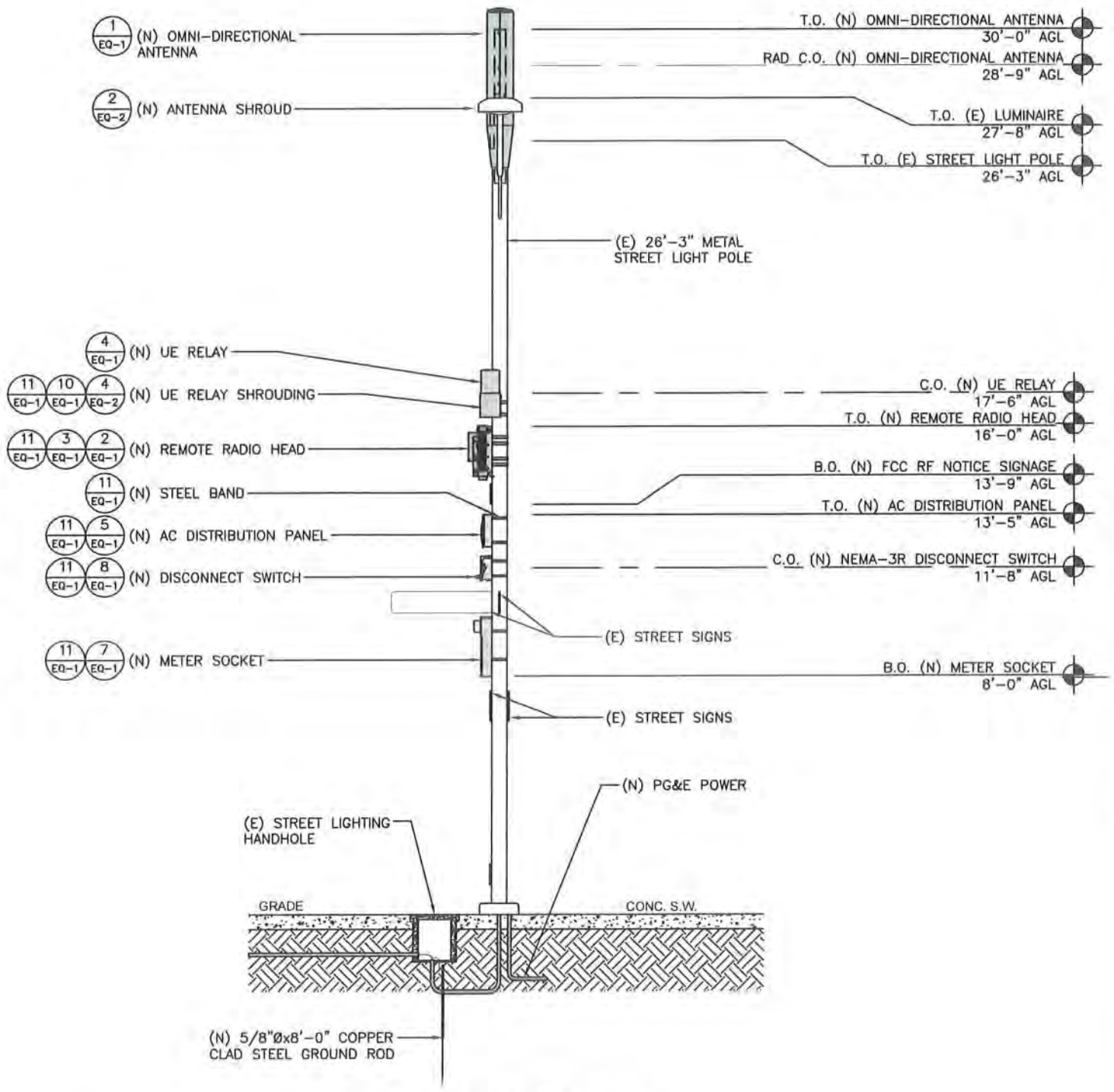
SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-1

EXHIBIT H




## EXISTING FRONT VIEW




## NEW FRONT VIEW

NOTES:

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**(E) POLE ELEVATIONS** — SCALE: 1" = 5' — 1

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SITE ID: 9CAB013787
SAN JOSE, CA 95110
(E) 26'-3" METAL STREET LIGHT

SHEET TITLE
POLE ELEVATIONS

SHEET NUMBER
EV-2

EXHIBIT H

**EXHIBIT I**

**Affidavit of Don Neu**

[appears behind this coversheet]

EXHIBIT I

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
| 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 |

## AFFIDAVIT OF DON NEU

Don Neu declares as follows:

1. I have been employed by the City of Carlsbad for over thirty years and as City Planner for the last twelve years and eight months.
2. My duties as City Planner include supervising the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the City of Carlsbad requires a radio frequency report for local approval before it will consider an eligible facility request. The City of Carlsbad requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The City of Carlsbad does not require the radio frequency report for "local approval." Rather, it requires the radio frequency report in order to determine whether

the eligible facility request comports with federal requirements concerning radio frequency. An eligible facility request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Carlsbad, California, October 28, 2019:

Don Neu
City Planner
City of Carlsbad

**EXHIBIT J**

**Affidavit of Robert Smith**

[appears behind this coversheet]

EXHIBIT J

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
| 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 |

## AFFIDAVIT OF ROBERT SMITH

Robert Smith declares as follows:

1. Since September 1, 2007, I have been employed by Thurston County as a Senior Planner for the Thurston County Community Planning and Economic Development Department.

2. My duties as Senior Planner include the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. Because of my position with Thurston County, I am familiar with the special use permit fees charged by Thurston County in connection with wireless facilities.

5. The WIA petition claims that Thurston County imposes a $1,880.49 special use permit fee for every antenna equipment addition or swap. WIA's petition

also claims that the County's fees for special use permitting is not "cost-based." Both assertions are untrue. The purported fee amount is incorrect, and all land use application fees are supported by a Cost Recovery and User Fee Study, dated March 2007. Thurston County's fees represent the calculated average cost for reviewing particular types of applications.

6. The WIA petition for declaratory ruling alleges that Thurston County requires a radio frequency report for local approval before it will consider an eligible facilities request. The county requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The county does not require the radio frequency report for "local approval." Rather, it requires the radio frequency report in order to determine whether the eligible facilities request comports with federal requirements concerning radio frequency. An eligible facilities request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Thurston County, Washington, on October 25, 2019:

Robert Smith
Senior Planner
Olympia, Washington

**EXHIBIT K**

**Affidavit of Michael Kulish**

[appears behind this coversheet]

EXHIBIT K

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
| | ) | |
| 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 |

## AFFIDAVIT OF MICHAEL KULISH

*Michael Kulish* declares as follows:

1. Since August 1, 2014, I have been employed by King County, Washington ("County") as Real Property Supervisor.

2. My duties as Real Property Supervisor include the intake and review of applications to install new, collocated and modified wireless service facilities in the public right-of-way.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the County requires a radio frequency report for local approval before it will consider an eligible facility request (EFR) application. The County does not require any radio frequency report, nor any "local approval" of such a report, as part of its EFR review process. After an EFR application is processed, the county does require that any authorized facility adhere to the Western Washington

Cooperative Interference Committee (WWCIC) Engineering Standard No. 6 and shall not cause electromagnetic interference to wireless communication systems operated by King County. However, even then, no radio frequency report is required for local approval.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Seattle, Washington, on October 28, 2019:

Michael Kulish
Real Property Supervisor
King County, Washington

**EXHIBIT L**

***Ex Parte* Communication / Notice of Meeting (July 17, 2017)**

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238) *et al.*

[appears behind this coversheet]

EXHIBIT L


# KISSINGER & FELLMAN, P.C.

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BOBBY G. RILEY*
SURBHI GARG*
PAUL D. GODEC,* SPECIAL COUNSEL
**ADMITTED TO PRACTICE IN COLORADO AND TEXAS
*ADMITTED TO PRACTICE IN COLORADO

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8403 COLESVILLE ROAD
SUITE 1100
SILVER SPRING, MD 20910
301-802-8176
+ADMITTED TO PRACTICE IN MARYLAND


July 17, 2014

**VIA ECFS**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

*Re: In the Matter of: Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238); Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59); Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers (RM-11688 (terminated)); 2012 Biennial Review of Telecommunications Regulations (WT Docket No. 13-32)*

- ***Ex Parte Communication / Notice of Meeting***

Dear Ms. Dortch:

This firm represents the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission, the Cities of Tacoma and Seattle, Washington, King County, Washington, the Colorado Municipal League and the Association of Washington Cities. Our clients have filed Comments and Reply Comments in the above referenced docket.

On July 16, 2014, I, along with Arvada, Colorado City Council member Bob Fifer, and Todd Barnes, Communications Director of the City of Thornton, Colorado, and President of CCUA, attended meetings at the Commission with Renee Gregory, Legal Advisor to Chairman Tom Wheeler.

In this meeting, we discussed our clients' positions outlined in their Comments and Reply Comments advocating narrow definitions of key terms addressed in the NPRM, in accordance with the terms' generally understood meanings. We encouraged the Commission not to adopt rules that would restrict opportunities for government and industry to collaborate on creative, innovative solutions to difficult siting challenges. We provided examples of local government efforts to collaborate with industry to promote broadband deployment. We distributed (1) a list

of definitions that are being proposed by our clients, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, and numerous other local governments, and (2) a document with visual examples of creative wireless facilities siting in Colorado and Washington. Both documents are attached to this letter for entry into the record.

We provided examples of how a one-size-fits-all rule with black and white size criteria was inappropriate as a measure of what constitutes a "substantial change in physical dimensions" of a wireless tower or base station. For example:

- A 15 foot increase in height may be an insubstantial change in the physical dimensions of a 160 foot tower, but would be a substantial change in the dimensions of a 35 foot tower located in a residential neighborhood.
- A 2 foot increase in the height of a tower may be insubstantial in the vast majority of cases, but would be substantial if the site were located adjacent to a local airport and the height increase caused the facility to violate FAA regulations.
- Adding an antenna array onto many towers may be unsubstantial, but would be quite substantial if the tower was originally approved as a camouflaged or stealth site, and the antenna array resulted in defeating the purposes of the original conditions of site approval.

We also advocated that the Commission not adopt a "deemed granted" remedy for reasons articulated in more detail in our Comments and Reply Comments. We also suggested that fundamental fairness requires that any alleged violations of new rules adopted by the Commission be addressed in local courts as opposed to the Commission, as many jurisdictions will not have the financial ability to retain special counsel and come to Washington, D.C. to defend local decisions.

Pursuant to Rule 1.1206 of the Commission's Rules, an electronic copy of this letter and the attached summary documents are being filed via the Electronic Comment Filing System (ECFS) in this matter.

Please feel free to contact me with any additional questions or concerns you may have.

Very truly yours,

Kenneth S. Fellman
kfellman@kandf.com

KSF/eaj

cc: Renee Gregory, Legal Advisor to Chairman Tom Wheeler
- (via email: renee.gregory@fcc.gov)

Honorable Bob Fifer, City of Arvada, CO
- (via email: bfifer@arvada.org)

Todd Barnes, President, CCUA
- (via email: todd.barnes@cityofthornton.net)

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Jeff Lueders, City of Tacoma
- (via email: jlueders@ci.tacoma.wa.us)

Geoffrey T. Wilson, General Counsel, Colorado Municipal League
- (via email: gwilson@cml.org)

Victoria Lincoln, Association of Washington Cities
- (via email: victorial@awcnet.org)

EXHIBIT L

**In the Matter of:**
**Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies**
**WT Docket No. 13-238; WC Docket No. 11-59; RM-11688 (terminated);**
**WT Docket No. 13-32**

*Submitted by:*

Colorado Communications and Utility Alliance; Rainier Communications Commission; the Cities of Tacoma and Seattle, Washington; King County, Washington; the Colorado Municipal League and the Association of Washington Cities

## LOCAL GOVERNMENT PROPOSED DEFINITIONS

"Collocation" means the mounting or installation of facilities on or at a legally permitted, existing wireless tower, having existing transmission equipment, for the purpose of providing wireless services.

"Wireless Tower" means any structure built for the sole or primary purpose of supporting FCC licensed or authorized antennas, including the cabling associated with that tower but not installed as part of a base station as defined herein; an "antenna" does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules.

"Transmission Equipment" means the antenna and electronic components of a base station that receive or transmit radio frequency signals for the purpose of providing wireless services.

"Base Station" means an apparatus located on-site at a wireless tower designed for the purpose of emitting and/or receiving radio frequency ("RF") transmissions from a fixed location to mobile stations pursuant to Commission license for the provision of wireless services, including the transmission equipment together with any other on-site equipment, switches, wiring, cabling, primary power sources, shelters or cabinets necessary for that base station to function and installed at a wireless tower as part of the original installation of the base station.

"Substantially Change the Physical Dimensions" means to alter the physical dimensions of a wireless tower or base station in a manner that has a significant impact given the surroundings, characteristics of, and any conditions on, the wireless tower or base station. The change in physical dimensions is compared against the physical dimensions of the wireless tower or base station as initially lawfully constructed.

"Physical Dimensions" include weight, height, width, visibility, depth or density.

"Wireless Services" means "personal wireless services" as defined in 47 U.S.C. §332(c)(7)(C)(i) and wireless "public safety services."

"Public Safety Services" has the same meaning as under 47 U.S.C. 1401(27).

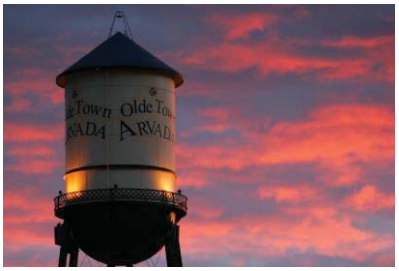
EXHIBIT I

Loveland, CO

Kirkland, WA DAS system


Carr, CO

Arvada, CO



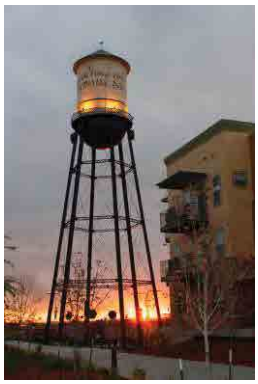



**EXHIBIT M**

**Comments of the Colorado Communications and Utility Alliance, Rainier Communications Commission, Cities of Seattle and Tacoma, Washington, King County Washington, the Jersey Access Group and the Colorado Municipal League**

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

[appears behind this coversheet]

EXHIBIT M

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of: | ) | |
| | ) | |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WT Docket No. 17-79 |
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# COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

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**June 14, 2017**

EXHIBIT M

## SUMMARY

The Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League (referred to as the "Local Governments") collectively represent the interests of local governments that are home to approximately ten million people. Our communities are truly diverse, and range from large and dense urban areas to extremely small, remote rural areas, and almost every other kind of community in between. The Local Governments provide their perspective to the Commission from both the east and west coasts, and the Rocky Mountain Region.

The Local Governments, like most of their counterparts around the country, support the deployment of broadband facilities of all kinds. We understand that deployment of wireless broadband networks is a piece of a much larger puzzle, and local governments generally are working hard to balance the many other responsibilities they are obligated to manage with the responsibility of facilitating the deployment of wireless broadband networks in a reasonable manner.

The information provided by these Local Governments in a recent docket[1] indicates that while many local government codes may not, at present, directly address the new and unique issue of siting wireless broadband in public rights-of-way (ROW), communities *have been proactive* in addressing these deployment issues, whether it involves changing local codes, negotiating ROW

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421; Comments: https://ecfsapi.fcc.gov/file/10308895002297/Local%20Government%20Comments%20(WT%20Doc%20%20No%20%2016-421)%20(Small%20Cell%20Proceeding)%20(FINAL)%20(3-8-17).pdf; Reply Comments: https://ecfsapi.fcc.gov/file/104071412112067/Local%20Government%20Reply%20Comments%20(WT%20Doc%20%20No%20%2016-421)%20(Small%20Cell%20Proceeding)%20(FINAL)%20(4-7-17).pdf.

license agreements and processing permit applications. To the extent that wireless companies are seeking permission to locate facilities in the ROW (and many communities are *not* yet seeing this), the regulatory process is evolving and works relatively well. Many local governments have reached out to the wireless communications industry to assist in revisions to local regulations. Some have worked on model documents for deployment licenses and permitting that can be replicated in other communities. In many cases, the industry applicants have willingly stepped back to allow local governments to amend codes to address wireless broadband deployment issues in a collaborative manner. These local and regional activities have been successful at bringing the parties together to gain a better understanding of each other's legitimate interests.

Our information suggests that there is no national problem calling out for a federal solution with respect to local control over the siting of wireless broadband networks in our communities. It is true that the future deployment of 5G networks will require many more sites for wireless facilities. At the same time, there are literally hundreds of thousands of sites for wireless communications facilities that have already been permitted and deployed throughout the country. As an example, sources (including an industry source) claim between 216,000 and 308,000 sites in 2016.[2] This is not to say that siting cannot be improved. In the experience of these Local Governments there are both industry and government entities that occasionally "push the envelope" and whose activities may delay deployment. However, the total number of these "bad actor" activities is a tiny percentage of the total number of applications that have been processed successfully in the United States. There is no widespread national problem that the

[2] http://www.statisticbrain.com/cell-phone-tower-statistics/ (last visited June 10, 2017); https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf?sfvrsn=2 (last visited June 10, 2017).

Commission needs to step in and fix.

The Local Governments believe the Commission can play a positive role as a facilitator, although it must make a commitment to treat all parties as equals, and respect the longstanding efforts of localities to promote broadband deployment. The Commission must take great care not to pursue policies that pick winners and losers, as it appears to have done from a reading of the NPRM and NOI in this Docket. Further, the Local Governments believe that the Commission has limited legal authority to take regulatory action that limits or preempts local land use or ROW authority in connection with siting issues, and we support the arguments about the scope of that legal authority made by our national associations and other local government entities in their Comments in this Docket.

EXHIBIT M

# TABLE OF CONTENTS

**Page**

EXHIBIT M

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WT Docket No. 17-79 |
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**COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE**

These Comments are filed by the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission ("RCC"), the cities of Tacoma and Seattle, Washington ("Tacoma" and "Seattle"), King County, Washington ("King County"), the Jersey Access Group ("JAG") and the Colorado Municipal League ("CML") (collectively referred to as "the Local Governments"), in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry released April 21, 2017, in the above-entitled proceeding.[3]

## I. INTRODUCTION

A. Background on the Local Governments.

CCUA was formed as a Colorado non-profit corporation in 2012, and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working together since 1992[4] to protect the interests of their communities in all matters related to local

[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 (FCC 17-38) (NPRM and NOI).

[4] The current members of CCUA are Adams County, Adams 12 Five Star Schools, Arapahoe County, Arvada, Aurora, Boulder, Brighton, Broomfield, Castle Pines, Castle Rock, Centennial, Cherry Hills Village, Columbine Valley, Commerce City, Dacono, Delta, Denver, Douglas County, Durango, Edgewater, Englewood, Erie, Federal

telecommunications issues. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, zoning of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

RCC is an intergovernmental entity formed under Washington law, comprised of Pierce County and 9 municipalities located within Pierce County.[5] Mount Rainier is located in the eastern part of Pierce County. To the west, Pierce County includes the Port of Tacoma, and the Narrows Bridge spanning Puget Sound, connecting Pierce County residents on the Gig Harbor Peninsula. RCC jurisdictions comprise an area of approximately 1,806 square miles, and represent a population of approximately 933,000 people. The RCC has existed since 1992 as an advisory body on matters relating to telecommunication for Pierce County and most of the cities and towns in Pierce County.

The City of Seattle, Washington has approximately 652,400 inhabitants on 84 square miles. A number of Seattle's distinct neighborhoods are made up of single-family residential homes. However, much of the population is concentrated in dense urban neighborhoods made up of apartment buildings and condominiums in the downtown area, around the University of Washington, and in other urban centers. Seattle's median annual household income is

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Heights, Fort Collins, Frederick, Glendale, Golden, Grand Junction, Greenwood Village, Lafayette, Lakewood, Littleton, Lone Tree, Longmont, Louisville, Loveland, Montrose, Northglenn, Paonia, Parker, Sheridan, Southwest Colorado Council of Governments (SWCCOG), Thornton, Westminster, and Wheat Ridge.

[5] The members of RCC are Pierce County and the Cities of Sumner, Orting, Puyallup, Fife, DuPont, University Place, Ruston, Steilacoom and Carbonado.

approximately $64,129. Seattle has several lakes and borders two large bodies of water: Puget Sound on the west and Lake Washington on the east. The total water body area within Seattle is 3.42 square miles. Seattle owns its municipal electric, sewer, and water utilities. Seattle has several departments involved in the granting of permits and access to the rights-of-way that are referenced in these Comments. They include: Seattle City Light ("SCL"), Seattle Department of Transportation ("SDOT"), Seattle Public Utilities ("SPU"), the Department of Planning and Development and ("DPD") and the Department of Finance and Administrative Services ("FAS").

The City of Tacoma, Washington is located on the south end of Puget Sound, and is home to the sixth largest container port in North America. Named one of America's most livable communities, Tacoma is comprised of approximately 49 square miles and has a population of over 200,000 people.

Located on Puget Sound in Washington State, and covering 2,134 square miles, King County is nearly twice as large as the average county in the United States. With more than 2 million people, it also ranks as the 14th most populous county in the nation.

The Jersey Access Group (JAG) is a professional advisory organization of New Jersey local governments and school districts that informs, educates, and recommends in the areas of technology, legislation, and regulation that shape and direct the use of multi-communication platforms for content creators and distributors on behalf of municipalities, educational institutions, and other public media facilities. JAG was formed in March of 2000, and has played a dominant role in the development of New Jersey's public, educational, and government (PEG) television stations. As the New Jersey state chapter of NATOA and an affiliate of the New Jersey State League of Municipalities, JAG also educates and advocates on behalf of its members on

broadband and communications issues related to consumer protection, broadband access and funding, public safety spectrum, public rights-of-way management and policies and local government networks.

Founded in 1923, the Colorado Municipal League ("CML") is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing their governments and serving the cities and towns of Colorado. CML is the leading nonpartisan resource for municipal officials in Colorado, providing high quality resources and services that empower municipal governments to sustain strong, healthy, and vibrant cities and towns. CML represents Colorado cities and towns collectively through its advocacy, membership services, training, and research efforts.

B. Concern About the NPRM and NOI's Underlying Premise.

The Local Governments are concerned about the underlying premise of the NPRM and NOI, namely, that local and state government rights-of-way ("ROW") practices, wireless facilities siting regulations and fees charged for the use of the ROW play a significant and sometimes negative role in deployment of broadband facilities. There may in fact be some limited local government practices that negatively impact deployment. Likewise, there may in fact be some limited industry practices that negatively impact deployment. Reading through the NPRM and NOI, one finds dozens of paragraphs that reference alleged or potential negative practices of local government that the Commission should examine, as it decides taking action to limit these activities. There is only one paragraph in the NPRM and NOI where the Commission

acknowledges that there may be negative industry practices that impact deployment.[6] While an NPRM and NOI are the beginning of a process that may lead to Commission action, it cannot be denied that the NPRM and NOI in this Docket has set a table that is steeply tilted against the legitimate and longstanding principals of local control.

In addition, there is a complete lack of recognition of the public health and safety benefits of the local regulatory process. Local governments do not regulate in this area to cause problems for wireless deployment. Regulations lead to safe pathways for children to walk or bike to school and parks. It leads to control of traffic flows through particularly busy times of the day. It protects property adjacent to work areas, both public and private, and requires that entities undertaking that work do so in a responsible manner. And it also serves to strike a balance between promoting network deployment with all other critically important community goals and interests. There seems to be a belief in Washington, D.C. that local government regulation simply results in furthering a "not in my backyard" mentality. In the vast majority of cases, that bias is simply untrue. There is a significant difference between eliminating local authority so as to allow towers of any height in any part of the rights-of-way, regardless of the impact on property owners and property values, versus exercising local authority to, for example, mandate height limits consistent with local zoning regulations for all structures in the neighborhood, and require placement of vertical structures closer to lot lines where they will not impact sight lines from the front door of one's home. These are inherently local decisions. The NPRM and NOI do not seem to recognize that a wider array of community benefits may be lost, should the Commission create preemptory rules to benefit one industry, at the expense of all other community interests.

[6] NPRM and NOI, at ¶7.

## II. RESPONSES TO NPRM

### A. Introduction.

The Commission has asked many questions related to the siting of wireless facilities and the State, local and Tribal oversight and authority to address those issues in their communities. Many of the questions raised are quite similar to the questions raised in the Mobilitie petition and Public Notice.[7] The Local Governments filed Comments and Reply Comments in that docket, and we encourage the Commission to review those pleadings in connection with this Docket. Our Comments and Reply Comments there are attached as Exhibits A and B here. The time provided to respond to the NPRM and NOI does not allow the Local Governments to respond to every issue raised in the Docket related to wireless broadband deployment and local control, so we address here the issues we deem most critical.

### B. Deemed Granted Remedy Issues.

Noting that Section 6409(a) of the Spectrum Act led to shot clock rules,[8] the Commission now asks whether Section 332(c)(7)(A)-(B) of the Telecommunications Act of 1996 (the Act) provides the authority for new shot clock rules.[9] Further, the Commission indicates that it intends to establish a "deemed granted" remedy for applications that relate to wireless facilities that are not covered by the mandatory collocations that Congress referred to in the Spectrum Act.[10] Yet, "[A]llegations that a state or local government has acted inconsistently with Section 332(c)(7) are

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[7] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie Petition for Declaratory Ruling*, WT Doc. 16-421; Petition: https://ecfsapi.fcc.gov/file/122306218885/mobilitie.pdf; Public Notice: https://ecfsapi.fcc.gov/file/12222748726513/DA-16-1427A1.pdf.

[8] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1455(a).

[9] NPRM and NOI ¶5.

[10] NPRM and NOI ¶8.

to be resolved ***exclusively by the courts*** (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than in RF emissions cases, ***the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation***." (Emphasis added) The foregoing statement, taken directly from the Commission's website, has been the Commission's interpretation of Section 332 since the passage of the Act in 1996, through seven Commission chairs, from both political parties.[11] How can that law mean something else today?

The Commission has previously adopted a 90-day shot clock for collocation applications and a 150-day shot clock for other applications that are not mandatory collocations covered by the Spectrum Act and the Commission's 6409 rules.[12] Unlike the Spectrum Act, where Congress *specifically* preempted State and local laws related to a limited class of collocations, there is no authority given to the Commission under Section 332 for adoption of a deemed granted remedy.

To be clear, the "granting" of a land use application or a right of way permit is an inherently local or State decision. The federal government is not a zoning authority. It has no authority to control the terms of access and determine conditions applicable to construction in local rights of way. Even at the federal level, the Commission has no legal authority to grant authority to property owned by other federal agencies. Therefore, for the Commission to insert itself as the final decision maker over local or State land use and/or permitting issues, there must

[11] https://www.fcc.gov/general/tower-and-antenna-siting (last visited June 10, 2017)
[12] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009.

be direct authority granted by Congress to preempt these traditional areas of local and State authority or an ambiguity in the statute that the Commission has authority to interpret.[13]

The three options that the NPRM suggests provide legal authority to adopt a deemed granted remedy[14] will not withstand judicial scrutiny.

1. **Irrebuttable Presumption**: The 2009 Shot Clock Declaratory Ruling created the presumption that shot clock deadlines are reasonable.[15] The Commission suggests it can convert the rebuttable presumption in the shot clock rules into an irrebuttable presumption, and if a State or local government fails to act within the deadline it would result in the application being deemed granted.[16] However, this is not the case of interpreting ambiguous provisions of a federal statute, as was the case when the 2009 shot clock rules were adopted. The *City of Arlington* case does not support the Commission's suggestion here.[17] While the decision in that case is clear – the Commission has authority to adopt rules interpreting ambiguous statutory language – the issue in that case was the meaning of "a reasonable period of time." There is no ambiguity in the statute about what happens if a jurisdiction does not act within a reasonable period of time – the party impact by that failure to act has a specific judicial remedy.[18] Without specific authority from Congress permitting the Commission to step in, create its own remedies, and become the final decision maker in local and State land use and permitting decisions, the Commission may not adopt a deemed granted remedy for these kinds of applications.

[13] *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Wyeth v. Levine*, 555 U.S. 555 (2009).
[14] NPRM and NOI ¶9.
[15] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 38.
[16] NPRM and NOI at ¶10.
[17] *City of Arlington* v. FCC, 133 S. Ct. 1863 (2013).
[18] 47 U.S.C. § 332(c)(7)(B)(v).

The fact that the Fourth Circuit affirmed the 2014 Infrastructure Order and held that "deemed granted" remedy for the Spectrum Act is permissible under the Tenth Amendment,[19] is not relevant to this discussion. The Spectrum Act contained direct language of Congressional preemption, and the Commission simply interpreted under what circumstances that Congressional preemption would occur. There is no express preemption language in Section 332 that is analogous to the statutory authority supporting the Infrastructure Order which would support authority for a deemed granted remedy here.[20]

2. **Lapse of State and Local Authority:** The Commission also claims, without legal authority, that based on Section 332(c)(7)(A), if a locality fails to meet its obligations under Section 332(c)(7)(B)(ii), to act within a reasonable period of time, the State or local government would default its authority on the applications.[21] As noted above, there is a statutory obligation to act within a reasonable period of time and the Commission has determined what constitutes a reasonable period of time. Failure to act allows an applicant to seek a judicial remedy.[22] Even if the Commission could somehow identify what it means for another level of government to "default its authority," the statute already provides a remedy. There is no authorization for the Commission to step in and make a land use or permit decision.

3. **Preemption Rule**: The Commission asserts in the NPRM that Section 201(b) and 303(c) authorize the Commission to adopt rules or issue orders to carry out the substantive

[19] *Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015); NPRM and NOI ¶13.
[20] *Id*.
[21] NPRM and NOI ¶14
[22] *See*, footnote 19, *supra*.

provisions of the Communications Act.[23] Specifically, Section 303(r) directs the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, ***not inconsistent with law***, as may be necessary to carry out the provisions of this Act" (emphasis added). The Commission cannot preempt without clear direction from Congress or unless there is an ambiguous provision in the statute that needs to be interpreted. Under a *Chevron* deference analysis, any attempt to do so would be "inconsistent with law."[24] Here, however, the statute clearly provides a judicial remedy. As noted above, there is no authority for the Commission to insert itself as a zoning and permitting decision maker.

The Commission should carefully consider the unintended consequences of a broad deemed granted remedy, because from a policy standpoint, that remedy would be a terrible decision and result in actions contrary to the intent of the Commission and most State and local governments. A shot clock with a deemed granted essentially gives the wireless industry a special set of unique rules that will require State and local government to move them to the front of the application line. Some of our communities only have one or two planners. Even the larger communities are often in an understaffed position. When an application is made, in the vast majority of cases, the final action occurs within the existing shot clock time periods. But each case is fact specific. If an application comes in while staff is working on a Wal-Mart application, and new housing development, and a proposed highway project, under the existing shot clock rules, local governments usually work well with the industry applicant and mutually agree that a

[23] 47 U.S.C. §§ 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."), 303(r) (directing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"); NPRM and NOI ¶15.

[24] *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*., 467 U. S. 837 (1984).

reasonable amount of additional time can be taken to fairly balance the facts of the situation. With a deemed granted remedy looming, local governments will be encouraged to take an application, where sufficient time is not available to evaluate it, and schedule it for a formal decision of denial, simply to avoid the deemed granted federal remedy. The deemed granted remedy, even if the Commission had the authority to adopt it, would slow deployment, not speed it up.

4. **Deemed Granted Remedy under Sections 253 and 332 (c)(7)**: Neither Section 253 nor Section 332 (c)(7), standing alone or in conjunction with one another, gives the Commission the authority to enforce a deemed granted remedy. As noted in our more detailed discussion about the interaction between, and scope of authority within, Sections 253 and Section 332(c)(7), the Commission does not have the authority to adopt a deemed granted remedy either under the specific, unambiguous language of these sections, or alternatively, under any interpretation of ambiguous statutory language, although we believe none exists.[25]

C. Reasonable Period of Time to Act on Applications.

Noting that in 2009 the Commission decided the reasonable time period under Section 332(c)(7)(B)(ii) was 90 days for collocation applications and that 150 days is reasonable time for any other application to place, construct, or modify wireless facilities,[26] the Commission now suggests it should change the timeframe from 90 to 60 days.[27] Further, the Commission asks whether there should there be different presumptively reasonable time frames for narrowly

[25] *See*, Section III A, *infra*.
[26] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14004, 14012-13, paras. 32, 45-48 (2009) (*2009 Shot Clock Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); NPRM and NOI ¶17.
[27] NPRM and NOI ¶18.

defined classes, such as new structures of 50 feet or less, between 50 and 200 feet, and taller than 200 feet. The Commission also raises questions about whether distinctions should be made for new structures in or near major utility or transportation rights of way, deployments in residential, commercial, or industrial areas, small cell/DAS facilities, and "batch" applications of multiple deployments by a single provider.[28]

We encourage the Commission not to tinker with the reasonable time limits in the shot clock rules for three reasons. First, the shot clock rules have worked reasonably well. During the NPRM that led to those rules, many government commenters, including some of the Local Governments represented here, advocated that there was no need for rules because the vast majority of local governments act within reasonable periods of time.[29] While there are always bad actors that cause problems in the application process – sometimes local governments and sometimes industry applicants – most of the time the process works well and there was no need for federal intervention. While we continue to believe that the 2009 shot clock rules were not necessary, we note there has not been much litigation over violations of those rules and thousands of applications have been approved since their adoption.

Second, the Commission should not aspire to become the national zoning authority, and it is clear that in proposing different standards for facilities of different heights, the Commission does not recognize all of the other land use issues that naturally flow from that kind of categorization. For example, if the Commission considers a different shot clock to address

[28] *Id*.

[29] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*; WT Docket No. 08-165; Comments: https://ecfsapi.fcc.gov/file/6520172718.pdf; Reply Comments: https://ecfsapi.fcc.gov/file/6520175609.pdf.

different structure heights, it will also need to consider the zoning district and the property classifications in which the application is sought. A 200-foot tower in a heavy industrial district may be acceptable as a use by right; in a residential district, it would require more extensive examination. There may be a separate level of review and scrutiny in a commercial retail zone, compared to a mixed-use residential/office/retail zone. Local officials are trained to work in these areas and have years of experience in doing so. The Commission does not possess the expertise or ability to evaluate sub-categories of land use designations that would need to be considered in developing the timing in which actions must be taken for facilities in each of these areas. It is overly simplistic, and contrary to good planning practices to consider only the height or size of a facility in making these decisions.

Third, many state legislatures have adopted or are considering state laws creating siting rules, including shot clocks, for deployments in their states. While these statutes create unified rules within the state, they necessarily differ state to state. After each of these state laws are passed, local government incur time and expense to modify local codes in order to comply with the new state mandates. Given the hundreds, if not thousands of localities that have been updating their codes to comply with new state laws, it would be burdensome and inappropriate for the Commission to impose new costs and expense on localities to change their codes yet again, to accommodate new and potentially conflicting federal rules. In addition, it is not likely that the Commission has the authority to preempt these state laws, especially before giving the states enough time to determine if their new laws are effective.

D. Pre-Application Issues.

The Commission notes that many land use codes provide for pre-application meetings, and suggests that these meetings should impact the application of the shot clocks.[30] These pre-application meetings occur in connection with many different land use matters, and are not in any way limited to broadband infrastructure. The purpose of these meetings is 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.

Sometimes a simple confirmation in a pre-application meeting that drawings need to be submitted on 24" by 36" sheets of paper as opposed to 18" by 24" (which might be the requirement in another jurisdiction) will save time after the application is made by avoiding initial rejection due to submission of incorrectly sized documents. The Commission should understand that these pre-application meetings serve a valuable purpose prior to a formal application being submitted. At times applications are filed shortly after these meetings and at times a prospective applicant may take months after a pre-application meeting before it files its formal application. The Commission should not rule that shot clock time periods commence ***before an application is even filed***. Such a rule would essentially start the time period to act on an application, when there is no application to consider.

[30] NPRM and NOI ¶20.

## III. RESPONSES TO NOI

A. Relationship Between Sections 253 and 332(c)(7).

The Commission asks for comment on the required balance between Congress's "intent to streamline regulations for broadband facilities under Sections 253 and 322(c)(7) of the Telecommunications Act while balancing the long-standing role that State and local authorities play with respect to land-use decisions."[31] While it is arguably the intent of Congress in Sections 253 and 332(c)(7) to ensure comparable treatment of entities seeking access to rights of way, and ensuring that local regulations do not prohibit or have the effect of prohibiting the provision of service, it is a misreading of the statute to claim that the language of these two sections display a Congressional intent to "streamline regulations."

Section 253(a) states that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service."[32] Given the Commission's efforts to reclassify broadband service as a Title I service, and the plain language of Section 253(a) which refers only to "telecommunications service," it is clear that Section 253(a) does not even apply to wireless broadband infrastructure. Wireless broadband service is not (unless it is used as a substitute for land line provider of last resort service), according to the Commission, and according to many states that have deregulated broadband services, a Title II telecommunications service.[33] Section 332(c)(7) generally preserves State and local governments' "authority . . . over

[31] NPRM and NOI ¶87.
[32] 47 U.S.C. § 253(a).
[33] *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-5, ¶ 29.

decisions regarding the placement, construction, and modification of personal wireless service facilities,"[34] and create limited exceptions for federal preemption of that State and local authority.

The Commission asks whether there is a reason to conclude that the substantive obligations of the two Sections differ, and if so, in what way?[35] As noted above, Section 253, appearing in Title II of the Communications Act, by its own terms applies to "telecommunications services." The wireless broadband services that are the subject of this Docket are not, according to the Commission, telecommunications services. In addition, many applicants for rights of way access of not providers of any kind of service – they are simply infrastructure owners, that seek low or no cost access to public property in order to deploy vertical infrastructure to lease to third parties. While they may own wireless facilities and therefore be covered under Section 332 (c)(7), they are not service providers and Section 253 has no application to these entities. Therefore, the answer to the Commission's question as to whether a locality exceeding jurisdiction over access to rights of way by denying a wireless facilities application[36] violates both sections of the statute is 'no,' because the wireless facilities application does not relate to Title II services and Section 253 does not apply.

In addition to the foregoing, the Local Governments here are familiar with the interpretation of these issues promulgated by the League of Arizona Cities and Towns, the League of California Cities and the League of Oregon Cities in their Comments in this Docket, and we commend that position to the Commission.

[34] 47 U.S.C. § 332(c)(7)(A).
[35] [35] NPRM and NOI ¶89.
[36] *Id*.

B. Prohibit or Have the Effect of Prohibiting.

The Commission notes that the courts have not been consistent with how they interpret Sections 253(a) and 332(c)(7).[37] The Local Governments strongly believe that an applicant must show direct and specific evidence that a local regulation has the effect of prohibiting service, before it violates the Act. We commend the Commission to the positions taken by the New York City Department of Technology and Telecommunications in the letter from General Counsel Michael Pastor in WT Docket No. 17-79, filed April 12, 2017.[38] To simply make a theoretical showing that a regulation may, under some potential set of facts that may or may not ever occur, have the effect of prohibiting service, obliterates the Congressional directive in Section 332(c)(7) preserving most State and local land use authority.

C. Aesthetic Considerations.

The Commission asks whether it should provide more specific guidance on how to distinguish legitimate denials based on aesthetic impacts and mere "generalized concerns."[39] For similar reasons as noted above about the Commission being ill-equipped to serve as a national zoning board, the answer is 'no.' Aesthetic concerns often relate to how a potential site impacts view corridors. The view corridor for a wireless site on a seldom traveled, basically flat two-lane road that has a view of the Jersey shore may be evaluated in a different way than the view corridor in mountainous terrain of a scenic viewing area for Mt. Rainier or a popular wildlife habitat viewing area in Estes Park, Colorado outside of Rocky Mountain National Park. And none of those view corridors may be addressed similarly to the views within the Twin Towers Memorial

[37] NPRM and NOI ¶90.
[38] *Id*.
[39] NPRM and NOI ¶92.

in New York City or Pike's Place Market in Seattle. It is simply unreasonable to believe that the Commission can come up with a one-size-fits all rule that would dictate the only federally-approved way that localities can address aesthetic concerns when structures are proposed within their communities.

The Local Governments do have a suggestion for the Commission, if it believes that it should make these kinds of dictates to other governmental entities regarding aesthetic issues. The Commission should first attempt to impose its judgment in this area first on other federal landowners. After developing rules addressing how to deal with aesthetic concerns in connection with siting wireless facilities, the Commission should seek consensus on such a singular approach from agencies likes the Department of the Interior and National Parks Service, the Bureau of Land Management, the Department of Transportation, the Department of Energy, and the Department of Housing and Urban Development. Until a Commission framework is agreed to by these federal agencies, and there has been a reasonable period of time in which to evaluate its effectiveness, the Commission should refrain from making this kind of determination for over 36,000 units of local government and each of the fifty states.

D. Fees.

With respect to whether wireless siting applications pay fees comparable to those paid by other parties for similar applications,[40] the Local Governments can say unequivocally, 'yes' – except in the instances where state laws require local taxpayers to subsidize broadband companies using public rights of way, and allow them to pay ***less*** than what is paid by other parties.

[40]NPRM and NOI ¶93.

Application fees are based upon recovery of costs incurred by localities. These fees usually estimate the staff time involved in addressing an application, and can include time for planning review, public works review, outside experts, drainage studies, traffic studies, parking analysis, etc. Obviously, an application for sites in the rights of way will not involve parking, so in that case, a wireless applicant will pay less than the applicant for a shopping center approval. Depending upon the site, a wireless applicant may or may not need to address costs of a drainage evaluation by an expert. Similarly, a housing development will not need to provide a report from a radio frequency engineer indicating that the project will comply with federal RF emission standards. However, the fees in each case are tied to the costs of review and evaluation.

Some state laws, while recognizing that in other kinds of applications the local government is entitled to charge fees that provide full cost recovery, specifically give a subsidy to broadband providers and restrict local governments to "less than full cost recovery."[41] The questions in the NOI presuppose that local government fees for wireless site applications and rights of way access are always higher than fees imposed on other business in other types of applications. Here again, the Commission demonstrates an assumption that local government is a bad actor negatively impacting deployment, when in fact, the industry has already won for itself special, lower cost treatment from state legislatures. Instead of assuming local governments are the problem, the Commission might study whether there is more deployment and more competition for broadband service in Colorado as a result of the state grant of these special subsidies to one industry in 1996. When compared to other states without such limitations, the

[41] Colo. Rev. Stat. 38-5.5-101, et. seq. *See also*, *Plains Coop. v. Washington Bd. of County Comm'rs*, 226 P.3d 1189 (Colo. App. 2009).

findings would be that there is no measurable additional broadband or more competition due to these special rules for the broadband industry.

E. Recurring Fees on Other Publically Owned Land.

The Commission seeks comment on restrictions imposed by State and local governments on siting wireless facilities on publicly owned land that is not part of the rights of way.[42] It should avoid intrusion into this area. Local and State government has for years had the ability to determine whether to make public property available for lease, and to freely negotiate the value of that property, just as private property owners may do. Any attempt to restrict that authority would be in improper taking of state and local property by the federal government without compensation, in violation of the Fifth Amendment.[43]

Many localities, like Westminster, Colorado, choose to lease property at some of its fire stations for towers to house antennas and related equipment for the provision of wireless services. The Commission has no authority to tell the City what it can charge any more than it can direct the City to make all of its fire stations available for these structures. Similarly, in Breckenridge, Colorado, Comcast holds a franchise to provide cable services and pays a 5% franchise fee – the maximum amount allowable under federal law. In addition, Comcast leases land from the Town for its headend and negotiates commercially appropriate terms for that lease in an arm's length transaction. The Commission cannot tell a town whether to lease property for a cable headend and the lease rates to be charged, and it cannot direct a town whether and how to lease property for siting wireless facilities. In this regard, the Commission's authority is no different than its

[42] NPRM and NOI ¶94.
[43] *Arkansas Game & Fish Commission v. United States of America*, 133 S. Ct. 511 (2013); U.S. CONST. amend. V.

authority to direct private property owners to lease their property to wireless facilities owners at Commission-set fees. Such a directive might speed deployment of wireless broadband networks. There is simply no legal authority for the Commission to engage in these practices.

F. Regulatory versus Proprietary Capacity.

Noting that in the 2014 Infrastructure Order, the Commission opined that the Spectrum Act and rules apply to localities' actions in their capacities as land-use regulators, but not when acting as managers in their proprietary roles,[44] it now asks whether Sections 253(a) and 332(c)(7) impact localities in their proprietary roles, and whether to reaffirm or modify that finding in the 2014 Infrastructure Order. It should not.

A government is acting in its regulatory capacity when it is imposing requirements that are applicable to all similarly situated entities. Entities that want to build in a community are all subject to local zoning. Entities working in the rights of way that need to excavate in the streets are all subject to requirements imposing standards of repair and warranties, insurance, bonds, etc. When government owns property however, the decision to sell, lease, license or grant other possessory rights in that government property is (barring specifically authorized federal preemption under established legal criteria, or state preemption of a state's political subdivisions) a purely local decision. Just as the lease of a private parcel might have been concluded for a fair market price of $1500/month in 2000, a similar property today may be worth $2500/month. Publicly owned lands are no different and the Commission lacks the legal authority to insert itself into these transactions.

[44] NPRM and NOI ¶96, citing *2014 Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 239-40.

With respect to how the Commission should draw a line between the two in the context of properties such as rights of ways, government-owned lampposts or utility conduits, we again suggest that the Commission first work through these issues with federal property owners. Would the Commission dictate to the National Parks Service what it must do in these circumstances? We reiterate the suggestion we made in Exhibits A and B, and that the Commission's Intergovernmental Advisory Committee made in its 2016 report on wireless facilities siting. Educational efforts from the Commission, and collaboration with all affected parties in a manner that respects the legitimate interests of all parties, is the most appropriate legal and policy avenue for Commission action.

G. Unreasonable Discrimination.

The Commission suggests that there may be State or local regulations that target telecom-related deployment more than non-telecom deployments.[45] Rather than address this question in a balanced manner, the Commission proceeds to assume that local regulations are a problem, and asks to what extent localities seek to restrict the deployment of utility or communications facilities above ground and attempt to relocate electric, wireline telephone, and other utility lines in the area to underground conduits.[46] It should be noted first that state laws create unreasonable discrimination by providing broadband companies ***easier access*** to local rights of way,[47] by restricting what local governments can charge while in some cases maintaining for states the rights to impose what charges the state determines,[48] and granting "use by right" status to wireless

[45] NPRM and NOI ¶97.
[46] NPRM and NOI ¶98
[47] Colo. Rev. Stat. 38-5.5.101, et seq.; RCW 35-99; N.J.S.A. 54:30A-124.
[48] Colo. Rev. Stat. 38-5.5-101.

broadband facilities in all zoning districts – a land use privilege not afforded any other property owner.[49] Rather than assuming that the wireless industry is being treated worse by local governments than other property owners, the Commission should take a careful look at these and numerous other state laws that give the wireless industry special privileges not afforded other property owners. The fact that the Commission remains concerned that broadband deployment is not occurring quickly enough (as do the Local Governments) suggests that more subsidies and special rules for the industry is not going to solve that problem.

Finally, with respect to undergrounding, this is another area of traditional State and local control. Good planning principles dictate that in new developments and redevelopments utility infrastructure should be placed underground. The only above ground facilities are usually street lights and traffic signals. In effect, wireless broadband facilities in the rights of way, to the extent new, stand-alone poles are required, runs 180 degrees contrary to good planning principles.

The Local Governments recognize that a balance needs to be struck, and indeed, many of these Local Governments have amended their codes or are in the process of amending their codes, to allow for attachments to existing infrastructure and where appropriate, placement of new, stand-alone poles to house wireless infrastructure. At the same time, whenever a community determines it is appropriate to underground older, unsightly utility poles and wires, it should have the continued ability to do so without federal intrusion. In these cases, localities work with the wireless industry to find alternatives. There is no evidence of a widespread national problem suggesting that local undergrounding policies have had or will have a significant negative impact

[49] Colorado House Bill 17-1193, Approved April 18, 2017, Section 4, amending Colo. Rev. Stat. 29-27-404 by adding a new subsection (3).

on the deployment of wireless networks. Further, in response to the question whether the Communications Act applies to undergrounding,[50] we would suggest that it does not. This is a completely separate area of local authority and intrusion into this area by the Commission is not authorized by the Title 47.

## IV. CONCLUSION

We encourage the Commission to carefully review Exhibits A and B to these Comments. We encourage the Commission to follow the recommendations of its Intergovernmental Advisory Committee, as described in the July 12, 2016 Report on Siting Wireless Communications Facilities.[51] We urge the Commission to tilt the playing field upon which this debate is occurring back to a more level, balanced discussion between the legitimate rights and interests of all interested parties. We ask the Commission to recognize the clear remedies in Section 332 (c)(7), which do not allow the Commission to legislate new remedies not authorized by Congress. Finally, we thank the Commission for considering all of our positions asserted in this Docket.

[50] NPRM and NOI ¶98
[51] https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf

Respectfully submitted this 14th day of June, 2017.

THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF TACOMA AND SEATTLE, WASHINGTON, KING COUNTY, WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

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**EXHIBIT N**

**Comments of the Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County Washington, the Jersey Access Group and the Colorado Municipal League**

In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies

[appears behind this coversheet]

EXHIBIT N

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of: | ) | |
| | ) | |
| Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies | ) | WT Docket No. 16-421 |
| | ) | |
| | ) | |
| Mobilitie, LLC Petition for Declaratory Ruling | ) | |

# COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

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**March 8, 2017**

EXHIBIT N

## SUMMARY

The Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League (referred to as the "Local Governments") collectively represent the interests of local governments that are home to approximately ten million people. Our communities are truly diverse, and range from large and dense urban areas to extremely small, remote rural areas, and almost every other kind of community in between. The Local Governments provide their perspective to the Commission from both the east and west coasts, and the Rocky Mountain Region.

The Local Governments, like most of their counterparts around the country, support the deployment of broadband facilities of all kinds. We understand that deployment of small cell networks are a piece of a much larger puzzle, and local governments generally are working hard to balance the many other responsibilities they are obligated to manage with the responsibility of facilitating the deployment of small cell networks in a reasonable manner.

The information provided by these Local Governments indicates that while many local government codes may not, at present, directly address the new and unique issue of siting small cell facilities in public rights-of-way (ROW), communities *have been proactive* in addressing these deployment issues, whether it involves changing local codes, negotiating ROW license agreements and processing permit applications. To the extent that wireless companies are seeking permission to locate facilities in the ROW (and many communities are *not* yet seeing this), the regulatory process is evolving and works relatively well. Many local governments have reached out to the wireless communications industry to assist in revisions to local regulations. Some have

worked on model documents for deployment licenses and permitting that can be replicated in other communities. In many cases, the industry applicants have willingly stepped back to allow local governments to amend codes to address small cell deployment issues in a collaborative manner. These local and regional activities have been successful at bringing the parties together to gain a better understanding of each other's legitimate interests.

Our information suggests that there is no national problem calling out for a federal solution with respect to local control over the siting of small cell networks in our communities. The Local Governments believe the Commission can play a positive role as a facilitator, although it must make a commitment to treat all parties as equals, and respect the longstanding efforts of localities to promote broadband deployment. The Commission must take great care not to pursue policies that pick winners and losers. Further, the Local Governments believe that the Commission has limited legal authority to take regulatory action that limits or preempts local land use or ROW authority in connection with siting issues, and we support the arguments about the scope of that legal authority made by our national associations and other local government entities in their Comments in this Docket.

EXHIBIT N

**TABLE OF CONTENTS**

**Page**

EXHIBIT N

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies | ) | WT Docket No. 16-421 |
| | ) | |
| Mobilitie, LLC Petition for Declaratory Ruling | ) | |

**COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE**

These Comments are filed by the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission ("RCC"), the cities of Tacoma and Seattle, Washington ("Tacoma" and "Seattle"), King County, Washington ("King County"), the Jersey Access Group ("JAG") and the Colorado Municipal League ("CML") (collectively referred to as "the Local Governments"), in response to the Wireless Telecommunications Bureau's Public Notice released December 22, 2016, in the above-entitled proceeding.[1]

## I. INTRODUCTION

A. Background on the Local Governments.

CCUA was formed as a Colorado non-profit corporation in 2012, and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (WTB 2016) (Public Notice).

together since 1992[2] to protect the interests of their communities in all matters related to local telecommunications issues. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, zoning of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

RCC is an intergovernmental entity formed under Washington law, comprised of Pierce County and 9 municipalities located within Pierce County.[3] Mount Rainier is located in the eastern part of Pierce County. To the west, Pierce County includes the Port of Tacoma, and the Narrows Bridge spanning Puget Sound, connecting Pierce County residents on the Gig Harbor Peninsula. RCC jurisdictions comprise an area of approximately 1,806 square miles, and represent a population of approximately 933,000 people. The RCC has existed since 1992 as an advisory body on matters relating to telecommunication for Pierce County and most of the cities and towns in Pierce County.

The City of Seattle, Washington has approximately 652,400 inhabitants on 84 square miles. A number of Seattle's distinct neighborhoods are made up of single-family residential homes. However, much of the population is concentrated in dense urban neighborhoods made up

[2] The current members of CCUA are Adams County, Adams 12 Five Star Schools, Arapahoe County, Arvada, Aurora, Boulder, Brighton, Broomfield, Castle Pines, Castle Rock, Centennial, Cherry Hills Village, Columbine Valley, Commerce City, Dacono, Delta, Denver, Douglas County, Durango, Edgewater, Englewood, Erie, Federal Heights, Fort Collins, Frederick, Glendale, Golden, Grand Junction, Greenwood Village, Lafayette, Lakewood, Littleton, Lone Tree, Longmont, Louisville, Loveland, Montrose, Northglenn, Paonia, Parker, Sheridan, Southwest Colorado Council of Governments (SWCCOG), Thornton, Westminster, and Wheat Ridge.

[3] The members of RCC are Pierce County and the Cities of Sumner, Orting, Puyallup, Fife, DuPont, University Place, Ruston, Steilacoom and Carbonado.

of apartment buildings and condominiums in the downtown area, around the University of Washington, and in other urban centers. Seattle's median annual household income is approximately $64,129. Seattle has several lakes and borders two large bodies of water: Puget Sound on the west and Lake Washington on the east. The total water body area within Seattle is 3.42 square miles. Seattle owns its municipal electric, sewer, and water utilities. Seattle has several departments involved in the granting of permits and access to the rights-of-way that are referenced in these Comments. They include: Seattle City Light ("SCL"), Seattle Department of Transportation ("SDOT"), Seattle Public Utilities ("SPU"), the Department of Planning and Development and ("DPD") and the Department of Finance and Administrative Services ("FAS").

The City of Tacoma, Washington is located on the south end of Puget Sound, and is home to the sixth largest container port in North America. Named one of America's most livable communities, Tacoma is comprised of approximately 49 square miles and has a population of over 200,000 people.

Located on Puget Sound in Washington State, and covering 2,134 square miles, King County is nearly twice as large as the average county in the United States. With more than 2 million people, it also ranks as the 14th most populous county in the nation.

The Jersey Access Group (JAG) is a professional advisory organization that informs, educates, and recommends in the areas of technology, legislation, and regulation that shape and direct the use of multi-communication platforms for content creators and distributors on behalf of municipalities, educational institutions, and other public media facilities. JAG was formed in March of 2000, and has played a dominant role in the development of New Jersey's public,

educational, and government (PEG) television stations. As the New Jersey state chapter of NATOA and an affiliate of the New Jersey State League of Municipalities, JAG also educates and advocates on behalf of its members on broadband and communications issues related to consumer protection, broadband access and funding, public safety spectrum, public rights-of-way management and policies and local government networks.

Founded in 1923, the Colorado Municipal League ("CML") is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing their governments and serving the cities and towns of Colorado. CML is the leading nonpartisan resource for municipal officials in Colorado, providing high quality resources and services that empower municipal governments to sustain strong, healthy, and vibrant cities and towns. CML represents Colorado cities and towns collectively through its advocacy, membership services, training, and research efforts.

A number of member jurisdictions from each of the Local Government commenters here have provided information for these Comments, and are briefly described in Sections II and III, *infra*.

B. Concern About the PN's Underlying Premise

The Local Governments are concerned about the underlying premise of the PN, namely, that local and state government rights-of-way ("ROW") practices, wireless facilities siting regulations and fees charged for the use of the ROW play a significant and sometimes negative role in deployment of broadband facilities. In these Comments, the Local Governments will describe their own practices and experiences, which demonstrate that ROW and facilities siting

practices as well as proactive activities undertaken by local governments have been directed to facilitate the deployment of wireless facilities in the ROW.

Further, we are particularly concerned with the Commission's representation in the PN that it was summarizing "information gathered from public sources regarding new and emerging wireless technologies and services, and we discuss the progress of deploying infrastructure needed to supply such services and satisfy consumer demand.[4]" The Commission then referenced additional information about local government siting processes which first criticized local processes for delay, citing allegations in materials that do not identify a single local government by name or the specific regulations supporting the basis of the allegations.[5]

In referencing this gathering of information from public sources, the Commission failed to reference its own Intergovernmental Advisory Committee ("IAC"), which was created to facilitate communication, education and sharing of information between the Commission and State, local and Tribal governments. In 2015 and 2016, at the direction of the Commission, the IAC devoted considerable time and effort on developing a white paper addressing the very issues that are identified in the PN. Despite the fact that this IAC work is readily available on the Commission's own website,[6] the PN failed to incorporate any of its information. We hope this was an inadvertent oversight, and urge the Commission to use the IAC's work product as a foundational starting point for the issues being considered here.

[4] PN at pages 2-3.
[5] PN at pages 7-8, notes 44-49.
[6] Report on Siting Wireless Communications Facilities. https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf. Last visited, February 25, 2017.

## II. DETERMINING HOW LOCAL LAND-USE REGULATIONS OR ACTIONS AFFECT WIRELESS DEPLOYMENT

### A. Macro Sites

All of the Local Governments commenting here, with the exception of JAG, filed joint Comments and Reply Comments in the proceeding that the Commission has referred to as the 2014 Infrastructure Order.[7] In that Docket, the Local Governments provided specific examples of how siting for wireless facilities works in their communities. Those Comments and Reply Comments demonstrated that, for these Local Governments and the industry applicants in our communities, the process is reasonable and works well.[8] Rather than repeated those specific examples here, we refer the Commission to our Comments and Reply Comments in the 2014 Infrastructure Order Docket.

### B. Small Cells/Siting in Public Rights-of-Way

#### *1. Demand for Small Cell Sites from Providers*

While some of our jurisdictions have seen a moderate demand for permits to allow the siting of small cell facilities, others have seen no interest at all. Some of our jurisdictions that have been approached by entities seeking to site small cell facilities, have taken proactive steps to facilitate a regulatory framework for this deployment, and then have never heard back from the wireless provider.

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[7] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014), erratum, 30 FCC Rcd 31 (2015), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[8] Local Government Comments: https://www.fcc.gov/ecfs/filing/6017587248; Local Government Reply Comments: https://www.fcc.gov/ecfs/filing/6017603567.

The City of Puyallup is situated at the foot of Mount Rainier in the Puget Sound region of Washington, 10 miles east of Tacoma and approximately 35 miles south of Seattle. It has a population of approximately 36,300. Puyallup was contacted by both Mobilitie and Verizon Wireless, inquiring about the process for permitting. Because the City's then current regulations did not address small cell siting in the ROW, Puyallup took steps in 2016 to begin the process to amend its regulations in order to facilitate these applications. Specifically, the City joined a consortium of other Washington jurisdictions to work collaboratively to develop model code provisions related to small cell deployment. That consortium has had regular discussions with the various industry providers to attempt to address these issues in a proactive manner, and are developing model code provisions that will hopefully have buy in from both local governments and the industry. There has only been one small cell application filed in Puyallup (on February 27, 2017) to date.

The City of Seattle owns and operates its own electric utility, Seattle City Light ("SCL"). SCL has permitted and seen deployment of over 100 facilities completed in the past couple of years, and has in that time period, permitted applications for about 700 other sites that have not yet been constructed. Inquiries and applications have come from Verizon, Crown Castle, T-Mobile, Extenet, WAVE/Astound Broadband, Comcast, CenturyLink, AT&T, Sprint, and more recently, Mobilitie. These requests can also include associated fiber and electric installations, pole replacements and installation of new poles. In addition to permission for attachments to SCL poles, permits are required from the Seattle Department of Transportation for any work done in the ROW. Recent permitting data from Seattle's Department of Construction and Inspections shows applications at least since Spring 2015, through 2016 and into 2017. In addition to this

recent activity, it is important to note that Seattle has been working with industry to site small cell facilities since 2005 when Crown Castle began small cell installations. Seattle currently has agreements in place with Crown Castle, Verizon, Extenet, Mobilite, Zayo, and AT&T.

The City of Wheat Ridge, Colorado, is a first tier suburban community, located just west of Denver, with a population of approximately 31,360. The City was contacted by Mobilitie about its interest in deploying small cells in the ROW in the fall of 2016. The City amended its code in November 2016 to help facilitate deployment of this kind of infrastructure. The City has not heard back from Mobilitie since that time and no applications for siting small cell facilities have been received.

The City of Westminster, Colorado is located north and west of Denver, with a population of approximately 107,000. The City was approached by Mobilitie in May 2016 and Verizon in January 2017. Westminster requested additional information from Mobilitie, including more detailed information about its proposed siting locations, a copy of an agreement it said it had with the Colorado Department of Transportation granting permission to site facilities on state-owned roads located within the City, and copies of the attachment agreement it said it had with the local investor-owned utility, Public Service Company of Colorado. To date, Mobilitie has not returned with the requested information, although it has indicated that it in fact does not have an agreement with Public Service Company to attach to the utility company's light poles. As discussed in more detail below, a concern of both local government and the wireless industry are utility company pole owners that will not permit small cell facility attachments.

The City of Arvada, Colorado is located on the northwest side of Denver, and is home to approximately 115,000 people. Arvada has comprehensive code provisions about siting wireless

facilities, but the code did not specifically address small cells in the ROW. The City began the process to amend its code in late 2015 and completed it in July 2016. In May 2016 it met with Mobilitie and was presented general information about plans to locate facilities in the ROW. The City followed that meeting up with a letter asking follow up questions. The City received some partial answers from Mobilitie shortly thereafter, but Mobilitie has made no further contact with the City about siting small cell facilities in Arvada. In early 2017 Arvada received preliminary communications from Verizon about siting small cell facilities in the ROW and looks forward to engaging in that process with Verizon, beginning with a meeting scheduled for March 9th.

The Town of Bayfield is located in southwestern Colorado, not far from the Four Corners of Colorado, New Mexico, Arizona, and Utah. The Town sits at an elevation of about 6900 feet, is home to approximately 2300 residents and acts as the commercial and cultural center for eastern La Plata County. Bayfield prides itself on its small town atmosphere and long-standing sense of community. Bayfield's experience demonstrates that there are far more important factors to the industry than the local regulatory process and the fees charged, when deployment decisions are made. In fact, Bayfield is an example of how industry deployment is leaving rural America behind, regardless of the local regulatory framework. Bayfield has had no contact from any entity seeking to deploy small cell facilities.

The City of Thornton, Colorado is the largest suburban community due north and east of Denver, with a population of approximately 134,000, and a large amount of undeveloped land that will accommodate significant future growth. In the past year, Thornton has been approached by Mobilitie and Verizon about the possibility of siting small cell facilities in the ROW. Thornton's land use and ROW regulations do not precisely cover these kinds of facilities, so the City has

begun the process to review and draft amendments to its code to facilitate deployment of small cells, with a goal of having the new provisions in place by late Spring.

Located on the south side of the Denver metro area, the City of Lone Tree is home to approximately 13,500 people, and has a focus on regional transportation investments, including the extension of light rail transit, which helps the City achieve a more efficient multimodal network. Its proximity to Interstate 25 and Colorado Highway 470 (the metro area beltway) puts Lone Tree at the center of significant commerce. Like many of its neighbors, Lone Tree's regulations do not specifically address small cell facilities in ROW. Lone Tree was contacted by Mobilitie in July 2016 and Verizon in December 2016 about the possibility of deploying small cell facilities in the City. Lone Tree plans to utilize the updated CCUA model agreement, as well as collaborate with its south metro area neighbors to assist in the timely deployment of small cell facilities in the ROW.[9]

Tacoma, Washington is a community of approximately 200,000 people situated on the Puget Sound in the Pacific Northwest. It has been contacted by four companies about siting small cell facilities over the past year – Extenet in March 2016, Mobilitie and Verizon in August 2016, and Crown Castle in January 2017. The City does have code provisions that provide a process for negotiating access to the ROW for these facilities, and it has been in negotiations with each company since being contacted about deployment options.

Aurora is Colorado's third largest city, covering an area over 150 square miles, with a diverse population of more than 351,000. In 2016 it was contacted first by Mobilitie and then by

[9] *See*, Section III A, *infra*.

Verizon, about siting of small cell facilities in the ROW. Active negotiations with both entities have been underway for the past few months. Aurora is close to completion of a master license agreement with Mobilitie, which will provide a streamlined process for individual site licenses for each individual ROW site requested. Similar negotiations with Verizon are expected to be completed within the next two to three months, and will follow a similar framework, providing a process for obtaining individual site licenses on any site that is being sought for deployment, subject to local code requirements governing matters like building and safety codes, and consistency with zoning district height limitations.

King County, Washington was approached by Mobilitie and Verizon in 2016. The County's regulations are already technology agnostic, addressing all wireless operations including satellite and microwave. Recent regulatory amendments work well for the County, and create a framework for addressing small cell technology as well as other wireless technology. There has not been much forward movement on the inquiries from these two companies in King County, in part due to other pressing obligations of the County's limited staff, but more directly due to the companies' lack of communication on a desire to move forward. When an applicant is ready to move forward in King County, the County will be ready to proceed.

Lafayette, Colorado is a suburban community in Boulder County with a population of approximately 27,000. Interestingly, Lafayette notes that when it was requested to permit wireless antenna attachments in the ROW in 2001 and 2003 from companies known as Metricom and Ricochet, it did so easily and timely. Both companies went bankrupt, leaving shoebox size

attachments abandoned on poles throughout the City.[10] Despite its status as a thriving suburban community in a very high-tech county, no entity has approached Lafayette in the recent past, seeking to place small cell facilities in the ROW.

These examples demonstrate that in the majority of cases, the interest by the industry in siting small cell facilities in the ROW is relatively new. Many communities do not have code provisions in place in which these kinds of facilities cleanly fit. However, as described here and below in Section III, these same local governments are working proactively to modify local regulations to address small cell siting issues in a reasonable manner.

*2. Local Framework for Processing Applications*

i. Fees. Permit fees in each of the Local Government jurisdictions are intended to address cost recovery. State law in Washington, New Jersey and Colorado does not allow for franchise fees or similar compensation for permission to use the ROW for this kind of deployment, although a site-specific charge or an attachment fee to municipal infrastructure may be permitted. In Seattle, there are approximately 110,000 utility poles owned in whole or in part by the City, which are available for attachment for wireless siting. Seattle City Light, which has jurisdiction over the poles, charges a $300 application fee per site for time and materials, and $1,800 annually per site, which is the fair market value of the utility's vertical real estate. For poles in the City's ROW, Seattle's Department of Transportation also requires a street use permit, and charges a nominal issuance fee of $209.

[10] Metricom and Ricochet had similar deployments and similar abandonment of facilities widely throughout metro Denver at that time. Some of the abandoned equipment exists even today.

In Wheat Ridge, the City maintains a building permit fee schedule, and wireless providers follow the same schedule as other kinds of structures and attachments. When special use permits are required (for example, for freestanding towers) there is a $200 application fee and a site plan fees of $200. In Tacoma, a refundable application fee of $5,000 is collected at the time the application is submitted to the City. The application fee is to recover the cost of the Tacoma employee time spent for reviewing, researching, presenting, and processing the application. Any funds remaining are returned to the provider upon completion of the application process. In Grand Junction, Colorado, permit fees are also tied directly to its costs incurred in addressing the application. It is considering a Mobilitie proposal to additionally pay a fee of $200 per pole, per year for its small cell sites. Thornton currently charges a $250 inspection fee and is exploring the most efficient way to identify other city costs in the process and will update their fee schedule going forward. Many of these Local Governments, like Thornton, are examining their fees in the same manner they are examination their review and approval processes, in order to make appropriate adjustments in order to limit the fees charged to recovery of the Local Governments' actual costs in addressing these permits.

ii. Timing. Many of the Local Governments are still in the process of completing a master license or similar agreement with the entities that have approached them and expressed a serious interest in deploying small cells in the ROW. Once these agreements are complete, it is expected that individual site applications will take no longer than a few weeks. Seattle's Department of Construction and Inspections has reviewed approximately 43 applications (of which 7 are pending) for facilities on SCL utility poles in the last 2.5 years. The average time for review and approval for wireless attachments to poles in the City of Seattle ROW is two

months.

iii. Specific Local Government Experiences. The experiences of these Local Governments seem to fall into one of two categories. The first is those few jurisdictions that have code provisions specifically addressing small cell siting and that have worked with the industry to site these facilities for a number of years. Most of the Local Government jurisdictions however, find themselves working sometimes independently and sometimes in collaboration with wireless providers, to enter into master agreements that will create a framework for future siting activity. These experiences, in places like Aurora and Grand Junction, are basically working well. There are admittedly times where the City may take a few weeks more than expected to address the next steps in negotiations, and other times where the provider takes a few weeks more to respond. These gaps are indicative of parties that are busy with multiple obligations, and do not demonstrate an intent by either party to delay activities that will lead to a final agreement. In almost all of these cases, no siting application has formally been made, so there is no shot clock requiring a decision in a specified time. Rather, the parties are taking the time necessary to put the right kind of foundation in place for effective deployment activities in the future.

Seattle's interaction with small cell companies has varied. Mobilitie met with Seattle representatives for several months before it finally submitted a term permit application. The City facilitated meetings with Mobilitie several times to speak with a changing list of Mobilitie contacts, and repeatedly explained the application and permit process. Crown Castle submitted an application on January 28, 2017. The City has also been meeting with Comcast, Verizon and CenturyLink on their system upgrade work that may include small cell technology. Seattle meets with Verizon weekly, and Comcast and CenturyLink as requested.

Tacoma reports that it has experienced multiple providers failing to supply proper information on their applications, resulting in a delay in the review and acceptance process. The City's requests for and ultimate receipt of the proper information has been pursued by the applicants on a piecemeal basis over the course of a number of months. Mobilitie changed staff members multiple times during Tacoma's negotiations and many of the new staff members had no knowledge of parties' prior progress, which caused delays in the on-going negotiations.

## III. PROACTIVE STEPS TAKEN BY LOCAL GOVERNMENTS TO ADDRESS SITING OF SMALL CELLS

### A. Why This is Both a Concern and an Opportunity for Local Governments

As noted above, Local Governments understand the importance of broadband deployment in their communities. Robust wireless and wireline networks are essential to address issues like health care delivery, education, closing the homework gap, job development, and the ability to gather the data necessary to truly become smart communities. Unlike the Commission and the industry, whose primary goal is to see these networks deployed as quickly and at as minimal cost as necessary, local elected officials must balance this critically important goal with the hundreds of other issues they are responsible for – including, transportation, parks, public safety, water and sewer infrastructure and services, education, social services, the arts and many others.

Like industry and like the Commission, local governments have limited staff and budgets. We understand that the industry's capital budgets may be stretched, just as with local government budgets. That explains why, in a suburban community of 115,000 people like Arvada, Colorado, with significant density in the Denver – Boulder corridor, there are many parts of the City that barely get 3G coverage today. It makes it difficult to accept that the Commission is seriously

considering whether to preempt local control in order to facilitate "the promise" of 5G, when we barely have 3G today. Keep in mind that this is the situation in built out suburban communities. In rural Washington, Colorado, New Jersey, and all across rural America, it is much worse.

Problematically, when industry seeks federal restrictions on local authority, as Mobilitie has done in this proceeding and as the Commission suggests may be coming as a follow up to the PN, there is no *quid pro quo*. If the industry was approaching local governments and *promising more network deployment in specific communities*, in return for minimizing fees or speeding up application processes, these discussions might make sense. If the many requests that the wireless industry is making today for state legislative preemption of local authority was coupled with a promise that if such bills are passed, the companies would be legally bound to invest a certain percentage more next year than they did the past year in network deployment, and that a significant percentage of that increased amount would be in rural parts of each state, that would be a discussion worth having. But at this point, state or federal preemption of local authority leads to only one certain outcome – a reduction in the cost of doing business for an industry given special treatment. State preemptory laws may lead to more network deployment, but that deployment may come in another state. State and federal rules that restrict local authority could also result in only minimal increases in the speed of network deployment and significantly larger profits for shareholders. Those are not necessarily bad things for the industry or its shareholders. But for local governments, these debates, which have gone on in similar contexts with the industry for years, are only guaranteed to result in one outcome – restrictions of traditional areas of local authority with no assurance that those local authorities will see a benefit anytime in the near future.

Moreover, while these and many other Local Governments are working proactively to find ways to promote deployment, it is important to understand where the idea of installing new, stand-alone poles in the ROW fits within good land use planning principles. The short answer is nowhere. In almost every new development and redevelopment, utilities are placed underground. The only above ground facilities are street lights and traffic signal poles. Local Governments are very concerned about a proliferation of poles and associated support equipment in the ROW, and therefore we generally support collocation wherever feasible. Problematically, many of the light standards in the United States are not owned by the government. They are owned by private, investor-owned utilities and electric cooperatives. Some of these companies work well in making existing vertical infrastructure available for small cell siting. Others however, have refused to allow small cell facilities on their light poles. Where this occurs, the ability for local officials to plan properly for their communities becomes infinitely more challenging.

It is for these reasons that we will conclude by suggesting that the Commission play a more active educational and advocacy role between wireless industry, electric utilities, and State, local and Tribal governments to address these challenges. Adoption of preemptory rules that have no guaranty of additional network investment in those parts of the country that need it most will not be a helpful way to address our mutual goal of more network deployment.

B. CCUA

Since its inception, CCUA has developed model franchises, model code provisions and model agreements, as recommended documents to be used by its members to save time and resources in their work with the communications industry. The CCUA model cable franchise with Comcast has been utilized by numerous jurisdictions in Colorado and elsewhere. Working

with the model agreement from CTIA, PCIA, NATOA, NLC and NACO, the CCUA developed model code provisions for adoption by Colorado jurisdictions implementing the Commission's rules interpreting the requirements of the Middle Class Tax Relief and Job Creation Act of 2012, 47 U.S.C. § 1455(a)). Recognizing that small cell technology was coming, CCUA developed a model agreement for permitting small cell facilities in the ROW in January 2016. Much of the detail in that model is taken from Verizon's well documented and well received agreement with the City of San Antonio, Texas.

After Mobilitie approached Aurora, Colorado, the City took the CCUA model and incorporated into it a number of its provisions from its standard ROW permit and license document, in order to make a more specific and comprehensive document for licensing small cell facilities in the ROW. That agreement is about 90% complete. Once finalized, the Aurora document will be made generic, and distributed to other communities, to utilize in their discussions with Mobilitie. Similarly, Aurora will be completing its master license agreement with Verizon shortly, and that agreement too will be made generic for use by other CCUA jurisdictions. These model agreements, which no community is required to use, have become very helpful foundational documents, saving time and money for both the local government and the industry, in moving forward with agreements to facilitate small cell deployment.

CCUA members like Arvada and Edgewater, Colorado deserve credit for examining their codes *before* being approached by small cell companies, and developing the framework for efficiently dealing with this emerging infrastructure. When Arvada was amending its code, it specifically invited all of the providers of personal wireless services to attend its public meeting before the code revisions were drafted, in order to provide industry input. It also invited

attendance at its Planning Commission and City Council meetings where those code provisions were reviewed and ultimately approved. None of the providers, except for Verizon, attended and participated. To its credit, while not all of Verizon's suggestions for the code revisions were accepted, some were, and the collaboration between industry and government in that instance made for a better final product.

In Grand Junction, the City developed a Wireless Master Plan with a consultant (CityScape), and to implement that Plan amended the use-specific standards applicable to telecommunications in the Zoning and Development Code. This involved an approximately year-long process with several open houses to which the industry and community were invited to help develop the plan and regulations. The plan and regulations have been so far well received by the community and by the industry. Grand Junction has good working relationships with Verizon and with SBA in connection with their ongoing siting discussions. Mobilitie is a new player for the City, and the parties are working cooperatively on a license agreement.

C. Puyallup, Washington

As noted above, concurrent with Puyallup's efforts to draft code and policies specific to siting small cells in the ROW, Puyallup joined a consortium of cities in Washington dealing with the same issues, and retained outside legal counsel to help the members of the consortium through the process.[11] The new ordinance provisions will be brought forward in Puyallup for approval beginning in late March.

[11] The consortium includes the Washington jurisdictions of Bellevue, Redmond, Kent, Mountlake Terrace, Kirkland, Renton, Issaquah, Puyallup, Walla Walla, Spokane Valley, Gig Harbor, Mukilteo, Mount Vernon, Ellensburg, Richland, Bremerton, Oak Harbor, Bothell, Snohomish, Lake Stevens, Des Moines, Shoreline, Stanwood, Federal Way, and Burien .

D. Seattle

Seattle recently entered into an agreement with Comcast to fund additional staff to compensate for the increased number of permit volumes the City will need to process for their anticipated upgrade work. The City has made similar proposals available to other companies, although to date, only Verizon has indicated a willingness to consider this kind of an arrangement.

E. Tacoma

Tacoma Public Utilities has recently developed a construction standard for small cell installation on power poles. In addition, the City is in the process of developing a master pole attachment agreement specific to wireless attachments and is concurrently in the process of developing a fee schedule. Once all are complete, the City and wireless providers will be able to more efficiently and effectively process permit applications for small cell facilities in the ROW.

## IV. PROACTIVE STEPS THAT CAN BE TAKEN BY THE COMMISSION

A. Work More Closely with the Intergovernmental Advisory Committee

As noted above, the Commission has appointed an Intergovernmental Advisory Committee, comprised of State, local and Tribal officials from all parts of the country, representing jurisdictions of all sizes. The IAC paper on siting wireless facilities should be a valuable source of information for the Commission, yet it was essentially ignored in the PN. In that paper, the IAC noted how the Commission can be more helpful to local governments in their siting decisions if the Commission had data on where facilities were sited and could make a database of potential locations available to all governmental entities as well as the wireless

industry.[12] The IAC also recommended efforts that can be undertaken to minimize the coverage gap,[13] and recommended four principles to guide the Commission's actions in this area.[14] We commend this work to the Commission.

B. Address Issue of Siting Small Cells on Utility Company Infrastructure

While some street light poles and electric distribution poles are owned by local governments like SCL and TPU, many are owned by private investor owned utilities and cooperatives. Of these, some entities owning this infrastructure have been quite cooperative in allowing small cells to be located on their existing vertical assets in the ROW. Others however, have refused. In Colorado for example, a rural cooperative, Sangre de Cristo Electric, informed the undersigned in late 2015 that it had no interest in allowing small cells on its existing poles. The state's largest electric utility, Public Service Company of Colorado, d/b/a Xcel Energy, has been asked by multiple wireless providers for permission to attach small cell facilities on existing street light poles, and has refused. It is our understanding that at the time of the filing of these Comments, Public Service Company is reconsidering its position. The CCUA is hopeful and cautiously optimistic that such agreements can be voluntarily finalized. There is no guaranty however, that a timely and reasonable solution will be forthcoming, and the Commission should explore whether it should mandate pole attachments for small cells as it does for wireline facilities. The Commission can also serve an important role in educating and advocating to these entities to encourage more facilities that are *not* owned and/or controlled by local governments to

[12] *See*, Note 6, *supra*., at pp. 15-16.
[13] *Id*., at p. 18.
[14] *Id*., at pp. 20-21.

be made available for wireless deployment purposes.

## V. FAULTY PREMISES UNDERLYING MOBILITIE'S PETITION

### A. Mobilitie's Initial Problems with its Filings were of its Own Making

We recognize that Mobilitie does not speak for the wireless industry, yet it is Mobilitie's petition that has led to this PN. Mobilitie has made great strides in attempting to work collaboratively with local government entities, since it first began expanding outside of its California footprint. However, many of its initial problems, and the delays caused as a result, were of its own making. Mobilitie created multiple subsidiaries with misleading names which made it look like it brought to prior state or federal approval to its siting applications. These entities had names like Colorado Exchange Facilities Network, LLC and Interstate Transport and Broadband. Mobilitie represented to local jurisdictions, in writing, that they were a regulated public utility, yet they had no certificated authority from the Colorado Public Utilities Commission as such.

Mobilitie initially represented to multiple Colorado jurisdictions that it had a pole attachment agreement in place, allowing it to attach its antennas to street lights owned by Public Service Company of Colorado. It did not. It represented that it had an agreement in place with the Colorado Department of Transportation to locate facilities in State-owned ROW within municipal or county boundaries. It did not. It later represented that such an agreement was "in the works," yet to date, none of the Local Governments from Colorado filing these Comments have received a copy. These kinds of representations resulted in many follow up questions seeking more specific information to back up the claims, which in turn led to delay on Mobilitie's part before it acknowledged the true status of the information being provided for local

government consideration.

In New Jersey, Mobilitie obtained a Certificate of Public Convenience and Necessity from the State's Board of Public Utilities ("BPU"), but questions were raised about the manner in which Mobilitie was seeking permission to locate facilities in various jurisdictions. After meeting with the BPU, in a letter dated December 2, 2016, Mobilitie indicated,

> Mobilitie has decided to obtain a franchise agreement under its CPCN with each jurisdiction in which it seeks to deploy facilities. Mobilitie expects to file the first group of franchise agreements for BPU approval as soon as practicable. We look forward to working with the BPU to expedite approval of these agreements. However, where Mobilitie already has approved agreements/permits in place, Mobilitie anticipates continuing the approved facility deployment while it obtains approval of a franchise agreement. The parties expended time and resources negotiating these agreements and coordinating installation of facilities, so it would be an inefficient use of resources to eliminate these arrangements entirely.

What is interesting about these representations is the attachment to the letter indicating that Mobilitie already had agreements in place with no less than New Jersey 34 municipalities and counties. This belies Mobilitie's claims that localities are delaying the process. Moreover, since that letter, we are unaware of any franchise agreement Mobilitie has proposed for additional jurisdictions in New Jersey. There is no evidence of excessive costs or procedural delays caused by local jurisdictions in connection with Mobilitie's New Jersey siting activities.

As noted above, in most places negotiations with Mobilitie are working better today than when Mobilitie first began its nationwide expansion, and the reasons for the earlier delays cannot in any sense be blamed on local regulatory processes.

B. Any Allegations of Local Government Bad Actors Where the Specific Jurisdictions are not Named in the Mobilitie Petition or in any Comments or Reply Comments, Should be Ignored by the Commission

It has become common practice in many Commission filings complaining about the alleged practices of local governments, to fail to name the specific entities being referenced. These kinds of anecdotal allegations that provide the allegedly offending party no opportunity to respond are offensive to the notions of due process, and should be ignored by the Commission.

It is important to note in Mobilitie's petition just how blatant this failure of due process is. Mobilitie acknowledges that many jurisdictions are in fact, working reasonably and collaboratively with it to promote network deployment. When commenting on jurisdictions that are doing "the right thing" Mobilitie mentions them by name.[15] Mobilitie then proceeds to allege that other localities are charging "exorbitant fees," that they "discriminate against wireless technology," and that the fees are "materially higher than what other rights of way users have been charged."[16] These alleged bad actors cannot respond, because Mobilitie fails to name them. Perhaps there is another side of the story that would portray the real facts in a different light.

Mobilitie then spends three pages of text in its Petition criticizing application fees, new pole fees, attachment fees, and percentage of revenue fees imposed by "a Minnesota locality," "a California city," "a Wisconsin city," "two Oregon cities," "one California city," "two other California cities," "a Texas locality," "an Illinois jurisdiction," "a New York locality," "localities in Oregon and Washington," "jurisdictions in California, Massachusetts, and New York, as well

[15] Mobilitie, LLC Petition for Declaratory Ruling, November 14, 2016, WT Docket No. 16-421, p. 14, naming Los Angeles and Anaheim, California; Minneapolis, Minnesota; Overland Park and Olathe, Kansas; Independence, Missouri; Newark and Union City, New Jersey; Bismarck, North Dakota; Price, Utah; and Racine and Wauwatosa, Wisconsin.
[16] *Id*.

as other jurisdictions in Oregon," "several Texas cities," and the all-inclusive "some localities."[17]

What does Mobilitie fear about giving these communities the opportunity to defend themselves against its allegations? Perhaps an explanation from these communities might actually lead to the data driven record that the Commission has expressed an interest in developing in this docket. In short, all such allegations where an accusing party fails to name the parties it is complaining about should be ignored. Notice and comment means nothing if notice to the parties whose acts are alleged to be the basis for the relief requested is not provided.

## VI. CONCLUSION

The effort to deploy small cell facilities in the ROW is a relatively new phenomenon. For that reason alone, it is far too early for the Commission to consider moving toward federal, one-size-fits-all rules that preempt local authority related to managing the ROW for these facilities. Moreover, state legislatures all across the country have either adopted or are considering new legislation to address how these issues are addressed by the political subdivisions of each state. It remains to be seen what impact state legislation will have on deployment.

There are at least three other reasons that the Commission should not proceed with federal rules governing ROW access for small cells. First, the vast majority of the over 36,000 units of local governments in the United States that have been asked for permission to site these facilities are working cooperatively with the industry to accomplish the requests in a way that meets the legitimate needs of all parties. In the unlikely event that the record in this Docket includes allegations against 300 *specifically named* local governments that do not refute the charges, this would amount to less than one percent of all local governments in the nation. Such evidence

[17] *Id.*, at pp. 16-19.

would be wholly insufficient to support adoption of federal rules that preempt traditional areas of local control.

Second, and as we expect to be addressed by our national local government associations and a number of local government commenters in this Docket, the Commission has limited legal authority to act to preempt local authority and restrict the kinds and amounts of fees that can be charged of private entities that seek to use local government property for their business operations.

Third, the specific evidence the Local Governments have provided in these Comments demonstrate that the industry and local governments are working together well in those communities where small cell siting requests are being made. Where permits are not immediately granted, it often stems from the fact that an interested industry party has not followed up on preliminary inquiries. In many cases, the industry and local government is working together both on individual siting requests and on model agreements that will facilitate deployment on a broader scale. These model agreements are often effective region-wide or in large parts of a state, but there is no evidence that what works best in New Jersey will work equally as well in Washington. The bottom line is that there is no widespread national problem that is calling out for federal rules governing ROW access.

The Commission can continue to play an important role, as it has in recent years, in bringing the parties together, encouraging educational and collaborative efforts, and in doing so, we strongly urge the Commission to rely upon the expertise and advise of its Intergovernmental Advisory Committee. In addition, given the vast number of utility poles that exist in the ROW that are not owned by local governments, to the extent that the Commission does anything

proactive in this area, it should consider ways to make those non-government owned poles made available for wireless deployment. The Commission should not take further action as a follow up to this Docket related to one-size-fits-all federal rules governing access to local ROW for wireless network deployment.

Respectfully submitted this 8th day of March, 2017.

THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF TACOMA AND SEATTLE, WASHINGTON, KING COUNTY, WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

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**EXHIBIT O**

**Letter from Douglas J. DeBord, County Manager, Douglas County, Colorado, to Marlene H. Dortch, Secretary, FCC (Aug. 21, 2018)**

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

[appears behind this coversheet]

EXHIBIT O

DOUGLAS COUNTY
COLORADO
Office of the County Manager
www.douglas.co.us
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August 21, 2018

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
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445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development, WT Docket No. 17-79; In the Matter of Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling, WT Docket No. 16-421*

Dear Ms. Dortch,

Please accept this letter for filing in the above-referenced dockets on behalf of Douglas County, Colorado. Douglas County (the "County") is located in the South Denver-Metro area and is the centerpiece of the Denver/Colorado Springs development corridor. The County prides itself on its ability to work cooperatively and efficiently with business interests for the betterment of the County, and that cooperative relationship has historically included working with the telecom industry to facilitate greater access to wireless communications service throughout the County. While the County has typically found applicants to share its goals of cooperation and expediency, it regretfully found the opposite to be true with respect to a § 6409(a) application submitted by Crown Castle last year. Although the County worked diligently to provide an appropriate avenue for the applicant to secure facility upgrades, and remains willing to do so, Crown Castle's conduct has spurred needless conflict and delay. The County is filing this information to correct misleading information that Crown Castle filed in its letter dated August 10, 2018 regarding its interactions with the County.

Crown Castle and T-Mobile submitted a request for approval of modifications to one of its existing facilities under § 6409(a) in Douglas County in May 2017. The existing facility, which is located near a heavily traveled highway, was initially approved and constructed in 2002 as a stealth design, mirroring existing utility poles in the area. The modifications proposed in 2017 would have more than doubled the width of the upper 10 to 11 feet of the existing 35-foot pole, completely defeating the stealth design of the existing structure.

In June 2017, County staff met with the applicants and informed them that the pending EFR application ***could not be approved*** because it would defeat the stealth element of the pole's

design. At that same meeting, County staff offered multiple suggestions on other avenues, including a site improvement plan, that were available to the applicants to upgrade their facility. Staff's determination, rationale and suggested alternatives were timely issued in writing one week later. Upon receipt of that written determination, the initial application was no longer pending in any respects, and it was up to the applicants to determine if they wanted to proceed with an application under one of the alternative processes suggested by County staff. The applicants chose not to move forward with the proposed alternatives and ceased discussions with the County regarding that facility in July 2017. Under local law, if the applicants wished to challenge the decision of the County to reject the application, they had 30 days from the date of the rejection to do so. No such action was ever filed.

Months later, in late October, County staff received a letter from the applicants' counsel claiming that the County had misconstrued § 6409(a), that the applicants' proposed modifications could not be deemed to defeat the concealment elements of the existing structure, and that the May 2017 application, which was rejected in June 2017, should have been granted. The applicants' counsel disingenuously claimed the letter was being submitted in response to a County request for "additional information" which, in fact, the County never made and would have been untimely even if it had. The applicants' counsel went on to claim that it was "restarting" the 60-day shot clock.

Counsel for the County responded, explaining that there was no pending application for the subject facility that would allow a shot-clock to be "restarted." Shortly thereafter, on December 1, 2017, the applicants' counsel declared their May 2017 application to be deemed granted and insisted that the County file suit if it believed otherwise. Because the applicants' conduct appeared to be a blatantly manufactured attempt to revive the long-elapsed 30-day deadline for challenging staff's June 2017 determination, the County did as the applicants' counsel suggested and filed suit to seek a court determination as to the rights of the parties under these circumstances.

Crown Castle's August 10, 2018 *ex parte* letter is misleading in that it (i) fails to detail the intensity of the "modification" requested and describe how that impacted the County's consideration of whether it would defeat the concealment elements of the approved site (had Crown shared the actual submittal drawings this would have been obvious); (ii) fails to acknowledge that it sat on its rights for four months after the County rejected the application, which under state law terminated its legal ability to challenge the County's action; and (iii) fails to advise the Commission that the County's filing of a declaratory judgment action was not its intention, but rather came as the result of the applicant's counsel's demand that it either accept its twisted and inaccurate description of the facts or file suit.

The County questions how due process requirements are met when Crown Castle can make these misleading allegations against the County as part of its effort to support federal rules

preempting traditional areas of local control without providing the County notice of its claims. Despite Crown Castle's failure to provide notice, the County is providing Crown Castle with notice of this filing. Douglas County, Colorado respectfully suggests that given Crown Castle's misleading claims against the County, and its apparent hope that by failing to advise the County of its claims that the County would be unable to respond, that the Commission refuse to consider those claims in its decision in these dockets. In the case of any jurisdictions that were not provided notice of filings against them alleging actions supporting federal preemption, the County suggests that the Commission reject any preemption ruling unless and until it conducts a more detailed fact-finding effort to ensure that all parties have an opportunity to respond to allegations that are made against them.

Douglas County appreciates the opportunity to set the record straight in connection with Crown Castle's misleading allegations in these dockets.

Sincerely,

Douglas J. DeBord
County Manager

**EXHIBIT P**

**Approval Letter from City of Beaverton, Or., to AT&T (Apr. 9, 2019)**

[appears behind this coversheet]

EXHIBIT P

**CITY OF BEAVERTON**
Community Development Department
Planning Division
12725 SW Millikan Way
Beaverton, OR 97006
General Information- (503) 526-2222 V/TDD
www.BeavertonOregon.gov

# WIRELESS FACILITY ONE NOTICE OF APPROVAL

| | |
|---|---|
| **DATE:** | April 9, 2019 |
| **FILE:** | WF2019-0006 – AT&T Collocate |
| **LOCATION:** | 5250 SW Alger Ave |
| **WASH. CO. TAX LOT:** | Map 1S115DB Tax Lot 00400 |
| **LEGAL DESCRIPTION:** | None Found |
| **ZONE/NAC:** | Industrial (IND) / Vose NAC |

**PROJECT DESCRIPTION:**
Wireless Facility One approval includes removal and replacement of six panel antennas and six existing radioheads, installation of three new radioheads on new mounts, removal of six tower mounted amplifiers, removal and replacement of a surge protector, installation of one fiber feeder, and additional equipment work inside of the existing equipment shelter. Refer to the approved narrative and site plans, on file at City Hall.

Velocitel, LLC
Attn..: Natalie Erlund
4004 Kruse Way Place #220
Lake Oswego, OR 97035

Staff has reviewed the above referenced application and finds that the proposal meets the threshold(s) for a Wireless Facility One as defined in the Beaverton Development Code (BDC), Section 40.96.15.1.A. Further, by meeting all associated conditions of approval, attached herein, the proposal will meet the applicable approval criteria identified in BDC Section 40.96.15.1.C. Please review these conditions of approval.

There is a standard twelve (12) day appeal period as stated in BDC Section 50.60. Attached to this letter is an appeal waiver form. Should the waiver form not be completed, this approval shall not be valid until the appeal period has ended and no appeal has been received.

Reviewed by: Brianna Addotta, Assistant Planner
City of Beaverton
Planning Staff

EXHIBIT P

# CONDITIONS OF APPROVAL
# AT&T Collocate
# WF2019-0006

1. The location of the proposed antennas and ancillary equipment shall be carried out in accordance with the narrative description and plans on file at City Hall. (Planning/BA)

2. Wireless Facility One approval shall be void after one year from the date of approval unless substantial construction pursuant thereto has taken place. (Planning/BA)

3. No external mounting of wiring. All wiring and cabling shall be on the interior of the tower. (Planning/BA)

4. Building permits must be secured prior to construction. For further information regarding building permits and/or related building code issues, please call 503-526-2493. (Planning/SD)

5. Erosion Control Best Practices shall be followed. (Site Development/JDD)

6. Any new service lines or affected overhead service lines to the building shall be undergrounded. (Site Development/JDD)

7. All new antennas and equipment shall be installed and maintained in accordance with the original conditions of approval as specified in all previous approvals for this wireless facility, which are still in effect at this time. (Planning/BA)

EXHIBIT P

**CITY OF BEAVERTON**
Community Development Department
Planning Division
12725 SW Millikan Way / PO Box 4755
Beaverton, OR 97076
General Information- (503) 526-2222 V/TDD
www.BeavertonOregon.gov

# TYPE 1 APPLICATION – APPEAL WAIVER

Pursuant to Section 50.35.4 of the City of Beaverton Development Code, I, _____ (**PRINT NAME**), as the applicant for **WF2019-0006 – AT&T Collocate**, hereby announce my intention to not appeal the decision issued by the City of Beaverton Development Services Division for my Type 1 Application. In announcing this intention, and affixing my signature below, I indicate my full awareness and agreement that I am foregoing my twelve (12) day appeal opportunity **that expires on April 22, 2019**, as specified in Section 50.35.3.E of the City of Beaverton Development Code.

_____

(Signature)*

_____

(Date)

*To be signed and dated in the presence of a Notary Public for the State of Oregon.

*Subscribed and Sworn to before me this ____ day of _____, _____.*

_____

*Notary Public for the State of Oregon*

*My Commission expires:* _____

**EXHIBIT Q**

**Affidavit of Karen Lynch**

[appears behind this coversheet]

EXHIBIT Q

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
| | ) | |
| | ) | |
| 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 |
| | ) | |

## AFFIDAVIT OF KAREN LYNCH

Karen Lynch declares as follows:

1. Since August 10, 1987, I have been employed by the City of San Diego. I began as an Associate Planner, promoted to Senior Planner and in 2007 I became a Development Project Manager 3.

2. My duties as a Development Project Manager include the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the City of San Diego requires a radio frequency report for local approval before it will consider an eligible facility request. The City of San Diego requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The City of

San Diego does not require the radio frequency report for "local approval." Rather, it requires the radio frequency report in order to determine whether the eligible facility request comports with federal requirements concerning radio frequency. An eligible facility request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at San Diego, on October 24, 2019:

Karen Lynch
Development Project Manager
City of San Diego

**EXHIBIT R**

**Affidavit of Joseph Lim**

[appears behind this coversheet]

EXHIBIT R

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
| | ) | |
| | ) | |
| 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 |
| | ) | |

## AFFIDAVIT OF JOSEPH LIM

Joseph Lim declares as follows:

1. Since April 26, 2018, I have been employed by the City of Solana Beach as Director of Community Development.

2. My duties as Director of Community Development include the intake and review of applications for new, collocated and modified personal wireless service facilities.

3. I understand that the Wireless Industry Association (WIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The WIA petition for declaratory ruling alleges that the City of Solana Beach requires a radio frequency report for local approval before it will consider an eligible facility request. The City of Solana Beach requires applicants to submit a radio frequency report with an application that demonstrates the proposed facility will comply with the FCC's guidelines for RF exposure. The City of Solana Beach does not require the radio frequency report for "local

approval." Rather, it requires the radio frequency report in order to determine whether the eligible facility request comports with federal requirements concerning radio frequency. An eligible facility request that comports with federal requirements concerning radio frequency will not be denied based on the radio frequency report.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at City of Solana Beach, on October 23, 2019:

Joseph Lim
Director of Community Development
City of Solana Beach

## Exhibit B

## Western Communities Coalition Reply Comments

[appears behind this coversheet]

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

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | |
| Implementation of State and Local Governments | ) | WT Docket No. 19-250 |
| | ) | |
| | ) | |
| Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | RM-11849 |
| | ) | |
| | ) | |
| Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WT Docket No. 17-84 |
| | ) | |

**JOINT REPLY COMMENTS OF CITY OF SAN DIEGO, CAL.; CITY OF BEAVERTON, OR.; CITY OF BOULDER, COLO.; TOWN OF BRECKENRIDGE, COLO.; CITY OF CARLSBAD, CAL.; CITY OF CERRITOS, CAL.; COLORADO COMMUNICATIONS AND UTILITY ALLIANCE; CITY OF CORONADO, CAL.; TOWN OF DANVILLE, CAL.; CITY OF ENCINITAS, CAL.; CITY OF GLENDORA, CAL.; KING COUNTY, WASH.; CITY OF LACEY, WASH.; CITY OF LA MESA, CAL.; CITY OF LAWNDALE, CAL.; LEAGUE OF OREGON CITIES; LEAGUE OF CALIFORNIA CITIES; CITY OF NAPA, CAL.; CITY OF OLYMPIA, WASH.; CITY OF OXNARD, CAL.; CITY OF PLEASANTON, CAL.; CITY OF RANCHO PALOS VERDES, CAL.; CITY OF RICHMOND, CAL.; TOWN OF SAN ANSELMO, CAL.; CITY OF SAN MARCOS, CAL.; CITY OF SAN RAMON, CAL.; CITY OF SANTA CRUZ, CAL.; CITY OF SANTA MONICA, CAL.; CITY OF SOLANA BEACH CAL.; CITY OF SOUTH LAKE TAHOE, CAL.; CITY OF TACOMA, WASH.; CITY OF THOUSAND OAKS, CAL.; THURSTON COUNTY, WASH.; CITY OF TUMWATER, WASH.**

**Reply Comment Date: November 20, 2019**

## TABLE OF CONTENTS

## INTRODUCTION AND SUMMARY

Petitioners and their industry allies urge the Commission to adopt myriad "clarifications" needed, they say, to resolve unreasonable delays and alleged gamesmanship by mostly unidentified municipalities. But the proposals in these Petitions are neither mere "clarifications" nor do they make the Commission's rules any clearer.

Changes to the shot clock rules would allow applicants to determine when and how they submit requests for approval, even if the submittal contravenes established local processes, and inject ambiguity as to whether any incomplete notices, denials or even approvals were effective. Changes to the substantial-change criteria would dramatically limit concealment elements protected under existing Commission rules and abrogate (or eliminate) commonsense limitations on new equipment cabinets, height extensions and site expansions. As explained in Western Communities Coalition's joint comments and replies, proposals such as these make it difficult or impossible to determine when the shot clock starts, tolls or stops, and just as difficult to determine whether a substantial change would occur.

These proposals are unjustified. Data collected from actual applications shows that municipalities act within the shot clock and work well with applicants to resolve issues that might otherwise be fatal to its eligibility under Section 6409(a). Indeed, the longest delays appear attributable to the applicants who fail to respond to incomplete notices and/or pick up their construction permits in a timely manner.

Some proposals are also unreasonably dangerous. The notion that a deemed-granted remedy automatically authorizes construction "on day 61" exposes the public to unregulated utility construction and excavation on an unprecedented scale. Comments by the Communications Workers of America illustrated the death and property destruction that accidents in utility deployments can cause. Given the Commission's and the industry's expectation that 5G will involve several hundred thousand new deployments in dense deployments and close proximity to where people live, work and travel, it is difficult to understand how the Commission (or the industry) could even consider automatically authorized construction under any circumstances.

Western Communities Coalition respectfully urges the Commission to reject the Petitions. The current rules work reasonably well and the proposed "clarifications" and remedies would only cause confusion, conflict and harm to public health, safety and welfare. If the Commission feels compelled to consider the proposals in the Petitions, Western Communities Coalition respectfully notes that it must do so by the same notice of proposed rulemaking process used to adopt the existing rules.

## COMMENTS

## I. WESTERN COMMUNITIES AGREES WITH NLC ET AL. THAT THE COMMISSION CANNOT ADOPT SUBSTANTIVE AMENDMENTS TO SECTION 6409(A) RULES BY DECLARATORY RULING

### A. The Petitions Seek New Rules and Substantive Amendments to Existing Rules Cloaked as Mere "Clarifications"

Substantive rules "effect a change in existing law or policy or . . . affect individual rights and obligations."[1] In contrast to interpretive rules, which "simply indicates an agency's reading of a statute or a rule," substantive rules carry the "force and effect of law."[2]

No one seriously disputes that the Commission's rules adopted in the *2014 Infrastructure Order* carry the force and effect of law. The Commission adopted these rules in accordance with the procedures for rulemaking laid out in the APA.[3]

Comments in the record by both industry and municipal advocates illustrate how the Petitions would create new rules and substantive changes in the existing law:

- **Shot Clock Commencement:** Whereas the Commission's existing rules preserve local governments' right to require an application for eligible facilities requests, the proposed "clarifications" would allow applicants to bypass any local process either not specifically designed for eligible facilities requests or

[1] *Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006) (quoting *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998)) (internal quotation marks removed).
[2] *See Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2006) (quoting *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998)) (internal quotation marks removed).
[3] *See* 5 U.S.C. § 553. On December 5, 2013, the Commission published a notice of proposed rulemaking in the Federal Register. 78 Fed. Reg. 73144–02 (Dec. 5, 2013). Over a comment period that spanned several months, the Commission received more than 207 timely filed comments and 42 timely filed reply comments. *See 2014 Infrastructure Order* at ¶ 12 n.18. On October 17, 2014, the Commission adopted the *2014 Infrastructure Order* that contains new rules together with their basis and purpose, which was subsequently published on January 8, 2015, in the Federal Register. 80 Fed. Reg. 1238-70 (Jan. 8, 2015).

that the applicant deems inconsistent with Section 6409(a). Instead, the shot clock would commence on *any written request* by an applicant to the local government.

- **Local Findings for Denial:** Neither the statute nor the Commission's regulations contain any requirements for local denials—the proposed "clarifications" would spin new rules from whole cloth. These standards would be more onerous than those required by the U.S. Supreme Court's decision in *T-Mobile South, LLC v. City of Roswell*, which interpreted the standards for a written denial under Section 332(c)(7)(B)(iii).

- **Deemed Granted Remedies:** Existing regulations simply deem applications granted and authorize applicants to seek judicial orders as needed to collect the permits required for construction; the proposed "clarifications" would authorize applicants to commence construction without any local authorization and impose a new limitations period on *local governments* to challenge the deemed granted notice.

- **Limits on Height Increases for Towers:** Whereas the Commission modified the thresholds from the Collocation Agreement to cap cumulative expansion with an ascertainable limit based on the structure's overall height, the proposed "clarifications" would effectively eliminate any ascertainable maximum expansion limits.

- **Concealment Elements:** Existing rules preserve concealment elements on all wireless towers and base stations against future modifications that would defeat the efforts invested by local communities to mitigate adverse aesthetic impacts from the equipment and support structure. The proposed rules would protect only "stealth" facilities, and only those concealment elements on those facilities specifically identified in the original siting approval as such. Moreover, some industry commenters further propose to ignore the express preservations in the original siting approval if it, for example, concerns overall height or would prevent the modification due to structural capacity issues. The end result sought in the Petitions and the industry comments is to do away with protections for concealment elements altogether.

- **RF Compliance Reports:** Existing Commission precedents recognize the legitimate local interest in local authority to check a proposed deployment's compliance with the Commission's RF exposure safety standards. This legitimate interest does not diminish after the initial approval and, in fact, grows stronger as collocations and network densification create ever-denser RF environments in local communities. Yet, the Petitions and some industry commenters urge the Commission to strip away this important step in the local review process.

These are just a few examples that illustrate how proposals in the Petitions and industry comments fundamentally alter or, in some instances, effectively eviscerate the existing rules. More than mere "clarifications," the Petitions urge the Commission to rewrite its existing rules.

### B. To Amend the Rules, the Commission Must Follow the Same Process Used to Adopt Them

Although the Commission may exercise discretion over whether to proceed by rulemaking or adjudication, the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[4]

Here, the Commission must follow the same procedures as it did in the *Infrastructure NPRM* because, as shown above, the proposed "clarifications" in the Petitions are in fact substantive amendments to existing rules. The Commission should reject the proposals in the Petitions and the industry comments. However, if the Commission desires to consider them, it must do so through a notice of proposed rulemaking as it did when it adopted the current regulations in 2014.

### C. The Significant Changes Proposed by Petitioners Must Meet the High Standard Applicable to Retroactive Rules

Legislative rules, such as the new rules and substantive amendments to existing rules proposed in the Petitions, must ordinarily "be given future effect only" and may not be retroactive.[5] As articulated by the D.C. Circuit:

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[4] *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1206 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[5] *Chadmore Comm'cns Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997).

> [i]n the administrative context, a rule is retroactive if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. . . . The critical question is whether a challenged rule establishes an interpretation that changes the legal landscape.[6]

Given their inherent unfairness, both the U.S. Constitution and the APA strongly disfavor retroactive laws except in limited circumstances.[7]

Of course, not every agency action that "*only* upsets expectations based on prior law is retroactive."[8] But, under the secondary retroactivity doctrine, the Commission bears a heavy burden to balance the harm that flows from disrupted expectations against the salutary effects achieved by applying the new standard to preexisting conditions.[9]

Courts engage in a similarly searching review when the agency adopts legislative-type rules by adjudication. As the U.S. Supreme Court noted in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947):

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.[10]

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[6] *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (internal quotations and citations omitted).
[7] *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1998).
[8] *See Nat'l Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (quoting *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (emphasis added) (internal quotations omitted).
[9] *See Nat'l Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).
[10] *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

Quasi-adjudicative powers should be reserved for "specialized problems" and "particular, unforeseeable situations," and "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."[11] Here, the Commission faces at least three retroactivity problems that limit its authority to grant the relief sought by the Petitioners.

First, the Petitioners urge the Commission to adopt retroactive legislative rules. These proposed changes would impact which concealed facilities qualify for protection under Rule 1.6100(b)(7)(v) as well as the procedural steps required to protect all their concealment elements and therefore "attaches a new disability in respect to transactions or considerations already past . . . ."[12] New shot clock rules could alter whether a pending application is complete, incomplete or even duly filed in the first place.[13] Changes to the thresholds for a substantial change and requirements for a denial or conditional approval put recent decisions by local governments in legal jeopardy.[14] New "clarifications" that authorize applicants to proceed with their projects after a purported "deemed granted" notice unless the state or local government seeks an injunction within 30 days threatens to greenlight stale

[11] *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *see also Mason General Hosp. v. Secretary of Dept. of Health and Human Servs.*, 809 F.2d 1220, 1224–1225 (6th Cir. 1987).
[12] *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002).
[13] *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Joint Comments of the City of San Diego, Cal. *et al.* at 22-23 (Oct. 29, 2019) [hereinafter "Western Communities Coalition Comments"].
[14] Western Communities Coalition Comments at 31-32, 37-39.

projects and extinguish claims local officials could not know they needed to make.[15] These, and other proposals, are quintessentially retroactive rules with questionable validity under both the Constitution and APA.

Second, even if some proposals in the Petitions created only secondary retroactive effects, the record shows that the harm to state and local governments (and their public at large) who relied in good faith on the existing rules far exceeds the expected benefits from the "clarifications" applied to existing facilities. Not one comment by the industry shows that failure to qualify as an eligible facilities request spells denial for a proposed modification. To the contrary, comments by

[15] *See* Western Communities Coalition Comments at 13, 16-19. Under the proposed deemed granted rule, applicants could theoretically revive projects that (a) the local agency did not act on and (b) the applicant did not preserve their rights by filing a claim in federal court. Conceivably, an applicant could attempt to provide a retroactive deemed granted notice and seek to modify a site without an application properly before the local agency.

municipalities[16] and industry[17] show their continued willingness to work together through the applicable local process to upgrade and expand existing facilities.

[16] *See* Western Communities Coalition Comments at 3-5, 23, 26; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Nat'l League of Cities *et al.* at 7 (Oct. 29, 2019) [hereinafter "NLC *et al.* Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Beverly Hills, Cal. at 2 (Oct. 16, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Gaithersburg, Md. at 1 (Oct. 28, 2019) [hereinafter "City of Gaithersburg Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Chino Hills, Ca. at 2 (Oct. 28, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250,Comments of the City of Coconut Creek, Fla. at 2 (Oct. 28, 2019) [hereinafter "City of Coconut Creek Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Maryland Municipal League at 1 (Oct. 28, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Town of Kensington, Md. at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Chevy Chase Village, Md. at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Frederick, Md., at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Nat'l Ass'n of Telecomm. Officers and Advisors *et al.* at 3 (Oct. 29, 2019) [hereinafter "NATOA *et al.* Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of New York, N.Y., at 2 (Oct. 29, 2019) [hereinafter "City of New York Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Town of Chesapeake Beach, Md., at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of SCAN NATOA at 1 (Oct. 29, 2019); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Seattle, Wash., at 2 (Oct. 30, 2019) [hereinafter "City of Seattle Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the City of Newport News, Va., at 2 (Nov. 13, 2019).

[17] *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket

Comments by municipalities and the CWA also show that some proposed "clarifications"—especially the automatic authorization to begin construction—would threaten public health and safety.[18] Catastrophic injury and property damage would become more frequent under the new deemed granted remedy as the convoluted amendments to the shot clock rules make it nearly impossible to know when the shot clock starts, pauses or expires – uncertainty that decreases the likelihood that each project will receive the appropriate level of health and safety review, or *any* at all.[19] No marginal increase in deregulatory expedience can justify the extreme and potentially irreversible harms threatened by the proposals in the Petitions.

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No. 19-250, Comments of American Tower Corporation at 2 (Oct. 29, 2019) [hereinafter "American Tower Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Competitive Carriers Association, WT Docket No. 19-250 at p. 2 (Oct. 29, 2019) [hereinafter "CCA Comments"]; Letter from John A. Howe Jr., Government Affairs Counsel WIA – The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 at 3 (filed Oct. 2, 2019) [hereinafter "WIA Oct. 2 *Ex Parte*"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Wireless Infrastructure Association, at 2 (Oct. 29, 2019) [hereinafter "WIA Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of CTIA at 2 (Oct. 29, 2019) [hereinafter "CTIA Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of the Wireless Internet Service Providers Association at 4 (Oct. 29, 2019) [hereinafter "WISPA Comments"]; Letter from John A. Howe Jr., Government Affairs Counsel WIA – The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 at 1-2 (Nov. 18, 2019).

[18] Western Communities Coalition Comments at 13, 16-19; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Comm. Workers, of Am. at 1-4 [hereinafter "CWA Comments"] ; NLC *et al.* Comments at 29-30; NATOA *et al.* Comments at 3-6; City of New York Comments at 3; City of Seattle Comments at 4; City of Gaithersburg Comments at 2.

[19] Western Communities Coalition Comments at 4, 12-13; CWA Comments at 2-3; City of Coconut Creek Comments at 1-2; NATOA *et al.* at 2.

Finally, the Commission cannot grant the retroactive relief requested by the petitions for declaratory ruling because the issues are hardly the special, unforeseeable circumstances that warrant a disregard for the quasi-legislative process. Almost all the relief requested in the Petitions appeared somewhere in the record before the Commission when it adopted the *2014 Infrastructure Order* and its existing Section 6409(a) rules.[20] Industry commenters also requested similar relief in the *RF Procedures Order*,[21] the *2009 Declaratory Ruling*[22] and the *Small Cell Order*.[23]

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[20] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, 30 FCC Rcd. 31 at ¶ 197 (Oct. 17, 2014) [hereinafter "*2014 Infrastructure Order"*] (declining to measure height increases by the last approved change); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of CTIA – The Wireless Association at 14 (Feb. 2, 2014) (asking FCC to determine that "physical dimensions" relates to measurable dimensions only and not visual effect); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of AT&T at 24 (Feb. 2, 2014) (asking FCC to determine that "physical dimensions" relates to measurable dimensions only and not visual effect); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of ExteNet at 6-7 (Feb. 2, 2014) (asking FCC to to clarify standards for application completeness); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of Crown Castle at 10-12 (Feb. 2, 2014) (asking FCC to require state and local governments to use an administrative process to review 6409 requests); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, WT Docket No. 13-238, Comments of PCIA at 42-46 (Feb, 2, 2019) (asking FCC to forbid conditional approvals, clarify concealment and camouflage requirements, and mandate administrative review).

[21] *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Report and Order, WT Docket No. 97-192, 15 FCC Rcd. 22821, at ¶ 2 (Nov. 13, 2000) (declining to grant CTIA's petition to preempt all local government requirements to demonstrate compliance with the Commission's RF exposure standards).

[22] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, WT Docket No. 08-165, 24 FCC Rcd. 13994, at ¶ 39 (declining to impose a deemed granted remedy for failures to act within shot clocks; declining to mandate injunctive relief).

[23] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, 33 FCC Rcd. 9088 at ¶¶ 56, 121-24, 132 (Sep. 27, 2018) [hereinafter "*Small Cell Order*"] (requiring cost-based fees under an effective prohibition analysis; declining to mandate injunctive relief; and requiring local acts required to occur within the shot clock).

These issues are old hat. Neither the Petitions nor the industry comments provide any reason to believe that the "mischief" created by compliance with the existing rules would outweigh the strong aversion to retroactive rules by quasi-adjudication.[24]

If the Commission feels compelled to act on the issues raised in the Petitions, it should broadly leverage its resources to inform its decision making. In addition to public comments in response to a notice of inquiry or proposed rulemaking, the Commission should look to the BDAC for the industry perspective, the IAC for state, tribal and local government perspectives and the newly established bureau of economics for a cost-benefit analysis based on detailed and searching factual analysis.

## II. THE RECORD DOES NOT SUPPORT NEW OR AMENDED RULES

Even if the Commission could proceed by declaratory ruling, which it cannot, the Petitions and industry commenters urge the Commission to adopt new rules and substantive changes to existing rules based on flimsy anecdotes and specious economic arguments.

Contributions to the record by municipal commenters expose the industry's anecdotes as misleading or false and other justifications as unsupported by fact. Put simply, there's no logical connection between the record as a whole and the "clarifications" sought by the Petitions.

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[24] *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Notwithstanding these issues that the Petitions and industry comments allege significantly hamper infrastructure deployment, the Commission recently found that effective competition exists in the market. In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Twentieth Report, WT Docket No. 17-69, FCC 17-126 (Rel. Sept. 27, 2017. Findings that the system works well make it all the more difficult to explain why these tired issues threaten to undermine the statutory design.

### A. Comments by Industry Members and their Allies Largely Regurgitate the Same Baseless or Unverifiable Anecdotes

As shown in comments by Western Communities Coalition and others opposed to the Petitions, the "evidence" offered by WIA and CTIA does not support their proposed rule changes. Most industry comments merely cited the vague, unverifiable or outright false statements in the Petitions without any new factual evidence or verifiable information to bolster WIA's or CTIA's factual allegations.[25]

Even commenters in a position to offer potentially unique perspectives on their interactions with state and local governments, like WISPA, ACT and Nokia, did little more than cross-reference the unsubstantiated allegations in the Petitions.[26] None offered any concrete and verifiable examples when they or any other affiliated entities experienced any delays or other problems like those alleged in the Petitions, and omit

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[25] *See, e.g.*, *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of AT&T at 7-8, 10, 12-13, 16-17, 20 (Oct. 29, 2019) [hereinafter AT&T Comments"]; WISPA Comments at 4–5, 7; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Nokia at 5 (Oct. 29, 2019) [hereinafter "Nokia Comments"] (providing that "Nokia's experience is consistent with WIA's description" yet failing to cite any independent experience); CCA Comments at 5 (claiming "CCA members' experiences confirm that, in some situations, jurisdictions attempt to invoke loopholes and other ambiguities to impede or prevent deployment" yet failing to cite its members' own experience); CCA Comments at 8 (stating "CCA members have encountered similar situations" yet failing to cite *any* situations. All this should be cause for concern at the Commission. In past proceedings, the industry commenters bothered to at least present their own equally vague and unverified anecdotes about municipal misfeasance. The industry's collective willingness to simply cite back to the Petitions as their only factual support signals an expectation in the Commission's indifference to a meaningful evaluation of the record.

[26] *See* WISPA Comments at 4–5 (repeating WIA's and CTIA's claims); *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of ACT at 5-6, 8, 10(Oct. 29, 2019) [hereinafter "ACT Comments"]; Nokia Comments at 2, 4-9.

any reference to delays and other problems created by their own agents and applications, as discussed below.

Although a few industry comments contained some new information, these anecdotes suffer from the same evidentiary defects as those in the Petitions. For example:

- Crown Castle repeatedly refers to alleged bad actors in ways that make identification virtually impossible. For example, the comments describe "a county in Texas," a "city in Michigan" and a "jurisdiction in California," but there are 254 counties in Texas, 276 cities in Michigan and 3,940 "jurisdictions" in California. Crown Castle's comments contain no less than eight such references.[27] These unidentifiable anecdotes as to the jurisdiction and a particular application cannot be verified, much less refuted—especially within the short comment cycle established by the Commission in this proceeding—and should not be considered as evidence by the Commission.

Even when industry commenters name the local governments they accuse, they often misrepresent the facts or assert claims that are outside the scope of Section 6409(a). For example:

- Crown Castle claims that the City of Seattle, Washington, takes "from two to four months" to schedule an appointment to submit an application.[28] As the City of Seattle demonstrated in their comments, this mischaracterization fails to account for the proactive steps the City has taken to accommodate eligible facilities requests. Further, the City notes that it has received no local complaints on its ability to meet shot clock requirements for EFRs, and has even been praised for its achievements in streamlining the processing and permitting of facilities.[29]

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[27] *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of Crown Castle at 5 (Oct. 29, 2019) [hereinafter "Crown Castle Comments"] ("one township in New York"); *id.* ("county in California"); *id.* ("town in Massachusetts"); *id.* at 7 ("jurisdiction in California"); *id.* at 14 (a "city in Michigan"); *id.* at 15 ("town in New York"); *id.* ("town in Utah"); *id.* at 21 n.51 ("county in Texas"); *id.* at 21 n.53 ("city in Virginia").

[28] *Id.* at 21 n.51.

[29] City of Seattle Comments at 2.

- Crown Castle claims that cities such as El Cajon in California "require pre-application appointments"[30] Crown Castle omits to mention a key fact that the preapplication conference in El Cajon is not specifically required for wireless applications and staff may waive the requirement upon the applicant's request.[31]

- WISPA claims that "New Berlin, Wisconsin wanted to charge a WISP $39,000 per year to rent space on a water tank . . . ."[32] WISPA appears to allege that such annual rent is excessive, but rental negotiations over access to municipal structures on private property are not regulatory requirements that could be preempted by Section 6409(a).[33] Moreover, there is no evidence in the record that establishes whether New Berlin's proposed rent is actually excessive or simply consistent with the marketplace for communications facilities.

The Commission requested facts and data.[34] The industry comments supplied rumor and conjecture. Taken together, neither the Petitions nor the comments in support lay out any factual justification for the proposed rules.

### B. The Record Contains No Evidence Whatsoever that Public Health and Safety Reviews Unreasonably Delay Deployment

The Petitioners and industry comments generally support shot clock restrictions on permit reviews for public health and safety.[35] But there is no evidence

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[30] Crown Castle Comments at 21 n.51.

[31] *Planning Permit Application*, City of El Cajon, https://www.cityofelcajon.us/Home/ShowDocument?id=19061 (last visited Nov. 6, 2019) ("The purpose of a pre-application conference is to provide you an opportunity to review your project with City staff in a preliminary form to finalize submittal requirements and receive a cursory identification of potential issues. A pre-application is required unless waived by staff.")

[32] WISPA Comments at 9.

[33] *See 2014 Infrastructure Order* at ¶ 46 (providing that "Section 6409(a) applies only to State and local governments acting in their regulatory role and does not apply to such entities acting in their proprietary capacities.").

[34] *See Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CITA Petition for Declaratory Ruling*, Public Notice, 34 FCC Rcd. 8099, 8100 (Sep. 13, 2019) [hereinafter "Public Notice"].

[35] *See e.g.*, *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of ExteNet at 21 (Oct. 29, 2019) [hereinafter "ExteNet Comments"]; *In the Matter of Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, Comments of T-Mobile at 13 (Oct, 29, 2019) [hereinafter "T-Mobile Comments"].

that these review processes cause unreasonable delay nor any justification for unnecessary limitations on the local review process.

In most jurisdictions with a two-step permitting process. The planning process addresses land use issues. The building department, which then focuses on generally applicable safety code review, does not review or issue permits until the planning department approves the application. When the planning department denies the application, the building department has no request for authorization to approve or deny because the application stops before it reaches the second phase. When planning departments approve applications, the most common cause for delay going forward, as shown in Western Communities Coalition's comments, are incomplete applications or the applicant's failure to pull *approved* permits ready to be issued.[36] The industry proposes unnecessary and untimely burdens on local agencies by requiring the reviews for compliance with generally applicable safety codes to occur before the application is deemed to qualify under Section 6409(a). This is wasteful of limited government resources and counterintuitive.

No industry commenter can provide a single example of a building department that delayed or failed to issue construction permits even though the prerequisite planning authority deemed that Section 6409(a) applied to the application. Whether a building department elects not to issue construction permits because the planning department fails to act or determines that the application is not subject to Section

[36] *See* Western Communities Coalition Comments at 4-5.

6409(a) cannot be resolved by subjecting the building department to a faster shot clock.

### C. Specious Economic Arguments by Some Commenters Cannot Substitute for a Logical Connection between the Facts in the Record and the Rules Adopted

Several commenters attempt to bootstrap economic justifications for the *Small Cell Order* as support for new and substantial amendments to the Section 6409(a) rules.[37] The Commission should reject these apples-to-oranges comparisons.

Crown Castle argues that local permit fees above cost *anywhere* impedes deployment *everywhere*.[38] This is the same voluntary cross-subsidization rationale that has been widely debunked but occasionally resurrects itself inside the Beltway. The Commission should not repeat its mistake of relying on this faulty economic reasoning.

Furthermore, Crown Castle fails to show that any application fee charged by any local government exceeds the actual costs created by the application. Examples from their comments describe deposit and escrow account requirements, which by their nature result in a refund to the applicant for any unused funds.[39] Crown Castle's failure to show that it is required to pay fees above cost should come as no surprise since many states limit permit fees to some cost-based measure.[40]

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[37] *See, e.g.*, Nokia Comments at 9; T-Mobile Comments at 6; Crown Castle Comments at 19, 46; CTIA Comments at 4.
[38] Crown Castle Comments at 36.
[39] *Id.* at 35.
[40] Western Communities Coalition Comments at 89-90.

Additionally, the uncertainty posed by Petitioners' proposed changes to the rules is likely to increase costs, not alleviate them. The proposed "clarifications" advanced by Petitioners are more ambiguous than the existing rules they purport to make clear. For example, the proposal to allow the shot clock to begin upon any "good faith attempt" to submit an application invites disputes over the meaning of this term and case-by-case adjudication of each dispute. The uncertainty that Petitioners propose to inject into the regulatory process would routinely turn applications into shot clock disputes, which in turn increases the financial burden on the industry.

ACT | The App Association ("ACT") asserts the Petitioners' proposal would address the digital divide.[41] The Western Communities Coalition supports the admirable aim of addressing the growing and unconscionable inequality in access faced by citizens across the entire United States but particularly in rural and marginalized urban communities. As local governments and the organizations that represent them, the Western Communities Coalition is in a unique position to recognize the challenges that lack of connectivity provides because we face it ourselves as we serve our citizens and are often the first line of contact for individuals challenged by lack of access. However, ACT, like many other parties before it, fails to recognize a fundamental economic principle in its assertions.

The unfortunate fact is that for-profit commercial enterprises, especially those beholden to shareholders, are economically disincentivized from closing the digital divide (much less reducing) unless required to do so by the Commission. Rational

[41] ACT Comments at 5.

economic actors always seek to maximize profits.[42] Indeed, corporate law principles may prohibit alternative approaches.[43] So-called "must-serve" communities will still see investment dollars long before deployment filters slowly, if at all, to communities where the return over time does not justify the capital expenditure. Other industry members and the Commission have advanced similar digital divide arguments in other proceedings to preempt local authority perceived as barriers but, despite the relief granted by the Commission, the digital divide persists.[44] This justification is both wrongheaded and worn thin.

Petitioners' undeveloped economic arguments are no substitute for the reasoned economic analysis prescribed by the public notice of this proceeding.[45] The Commission lacks the necessary information to determine whether the proposed rules will be consistent with the Commission's own policies. As described above, the FCC now has an office of economic analysis that could undertake the necessary rigorous examination of the role of regulatory costs in deployment. Rather than rely on industry's conclusory assertions as the basis for the proposed changes to the rules, the FCC should conduct a reasoned examination of the economic principles implicated.

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[42] Letter from Tillman L. Lay to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Sep. 19, 2018).
[43] *See, e.g.,* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919). *See also,* Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, Faculty Scholarship Series. 1384 (2008) https://digitalcommons.law.yale.edu/fss_papers/1384.
[44] *See, e.g.*, *Small Cell Order* at ¶ 63.
[45] *See* Public Notice at 8100 (inviting interested parties to submit factual data and economic analysis).

While economic considerations may influence whether the Commission should act, the industry does not seriously address the costs and benefits associated with the proposals in the Petitions. The Commission has resources at its disposal to develop concrete facts from diverse viewpoints through a more thoughtful process. Reliance on the specious and conclusory economic arguments in the industry comments would be misplaced.

### D. Evidence in the Record Exposes the Proposed Rules as Unnecessary and Counter to the Public Interest

Local government comments show that, contrary to the false light cast by the Petitions and reflected in industry comments, local governments understand the existing rules, process eligible facilities requests within a reasonable time and work with applicants who seek modifications not covered by Section 6409(a). In fact, WIA even acknowledges that "most local governments around the U.S. have been helpful and are working with industry to ensure that their constituents can benefit from better broadband connections."[46] Not one industry comment named a local government who refused to process an application because it lacked a specialized process tailored to the Commission's rules. Not one industry comment offered any concrete example in which a local government unreasonably delayed approval or denial. Not one industry comment showed that Section 6409(a)'s scope must be expanded to meet their needs because local governments refuse to approve any modification unless by federal force.

[46] WIA Oct. 2 *Ex Parte*.

Rather, the facts show that the current rules, and the processes employed by local governments to operationalize those rules, work reasonably well. In the limited time afforded to prepare comments and replies in this proceeding, a partial survey among the public agencies and local government associations in this coalition concluded that: (1) local governments rarely deny eligible facilities requests; (2) when applications do not qualify as eligible facilities requests, local officials work with applicants to approve the modifications through the discretionary process; (3) local officials almost always meet shot clock timeframes but approved permits often sit ready to issue for months on end; and (4) the primary factor affecting timely approval or denial is how long it takes an applicant to provide a complete application.

As addressed above, both ACT's and American Tower's references to the impact that these rules supposedly will have on the public interest is grounded in a misunderstanding of fundamental economic principles. The proposals advanced by Petitioners will not serve the public interest, but they will harm localities and their citizens across the country.

Furthermore, local governments understand that connectivity has become a fundamental necessity for participation in public life and have stepped up to the challenge of connecting the unconnected, yet the digital divide remains a fundamental concern. Local governments work with applicants to approve their projects regardless of whether the FCC mandates it because infrastructure investment has the potential to help reduce the impacts of problems like the digital divide. However, the proposals advanced by Petitioners do nothing to ensure that any

underserved areas actually gain service. The proposals advanced by Petitioners will not in any way ensure an increase in service in underserved areas and do not promote the public interest. Indeed, the industry proposals rest upon the assumption that by further preempting local control the Commission will be sprinkling fairy dust on the wireless industry, magically resulting in more deployment in underserved areas. The Commission should not perpetuate this fantasy.

Another aspect of the digital divide not addressed by industry commenters is the community benefits of local perspectives in siting wireless deployment. Local officials are in the best position to address local issues because they are also members of their communities. The principle of local control embraced by this nation since its beginnings recognizes that the people who live, work, and play in a given locality are the best positioned to make local decisions about how to organize and build the places that they call home. Local officials have a unique understanding of where service is most needed and can work with providers to affect change at a neighborhood level. This local knowledge is a key, yet thus far underappreciated component of local control, with significant implications for ensuring that as broadband is extended nationally, no one is left behind. Further, local control allows individual communities to make choices to uplift their communities, ensuring that the quality of life for their residents is positively impacted by proposed facilities.

## III. SHOT CLOCK ISSUES

Clear and sensible shot clock rules are important to streamline modification applications consistent with the statute and local resources. Unfortunately, the

industry commenters stake positions that are counterproductive and dangerous. The Commission should reject the proposed "clarifications" and retain the established rules, timeframes and remedies.

### A. Proposed "Clarifications" to the Section 6409(a) Shot Clock are Counterproductive to Clear and Objective Standards

Industry comments show that the proposed "clarifications" will only make it more difficult for local officials and applicants to agree on when the shot clock begins, tolls and ends. Moreover, these proposals discourage the parties from collaboratively resolving disputes and encourage applicants to engage in self-help rather than address their concerns through the courts.

Crown Castle's comments illustrate how the proposed "clarifications" would exacerbate the conflicts and confusion it purports to avoid.

***Submittal.*** Crown Castle urges the Commission to allow the shot clock to start when the applicant makes a good faith attempt through any reasonable process because, it claims, some local governments fail or refuse to recognize an eligible facilities request notwithstanding the existing rules that require the applicant to identify their project as such in writing. If the local officials described in Crown Castle's comments cannot recognize an eligible facilities request when identified as such through their own processes and on their own forms, how does Crown Castle expect a looser standard to help? The likelihood for confusion is even greater when a dispute arises over whether an application or review process complies with the Commission's rules.

***Incomplete Notices.*** Crown Castle suggests that incomplete notices should contain, in addition to a cross reference to the "code provision, ordinance, application, instruction, or otherwise publicly-sated procedures that require the information," an explanation for why each item deemed incomplete "relate[s] to the EFR determination."[47] Requirements such as these place an outsized burden on local government staff with busywork that will needlessly drive up review costs and delay turnaround times. Moreover, these requirements would ultimately hinder deployments as applicants are required to pay higher pass-through reimbursement costs and wait longer to receive direction on incomplete applications. Thus, the requirements impose obligations on local governments to produce unnecessary work product for which applicants ultimately must pay and wait.

Real solutions to delays in the initial completeness review phase should focus on incentives for applicants to provide complete applications in the first instance. Analysis conducted in response to the public notice shows that localities process complete applications to a decision within an average of 26 days but spend on average 67 days waiting for applicants to respond to incomplete notices. Some localities reported applications that remained incomplete *without a resubmittal from the applicant* for more than 377 days.

***Denials.*** Crown Castle's proposal to disregard denials that do not contain certain details will lead to "gotcha" situations in which the applicant can sit on a denial they find insufficient and then, rather than address their concerns with the

[47] *See* Crown Castle Comments at 24–25.

local government or (as the Act directs) to a court, simply respond with a deemed approved notice and then proceed with their construction. Although Crown Castle claims that the rule is needed to ensure applicants know the reason for the denial, a denial could be due for only one reason: the application does not meet the criteria for an approval under the Commission's codified rules.

***Conditional Approvals.*** Crown Castle's proposal to treat conditional approvals as denials creates a bizarre situation in which an affirmatively approved application licenses the applicant to construct something not authorized by the approval. Conditional approvals serve an important purpose in the local review process. Especially when local officials must act within a constrained timeframe, a conditional approval allows for an approval notwithstanding the fact that the project may contain certain inconsistencies. For example, if an application tendered as an eligible facilities request requires additional concealment to match the existing concealment elements, a condition to paint screens or add faux branches to the project creates a path to approval in a timely manner.

Under Crown Castle's proposal, it would be free to disregard those conditions and deploy its facilities without the necessary concealment merely because the requirement appeared as a condition in the authorization. This makes no sense. This proposal will cause confusion as to what a permit authorizes and create incentives to reflexively deny applications with instructions to the applicant to try again.

Taken together, these "clarifications" make it harder to know when the shot clock starts, when it tolls and when it ends. These proposals and others like them will sow confusion and engender conflict. The Commission should reject them.

### B. The Commission Should Encourage Voluntary Preapplication Conferences, Not Punish Local Governments that Choose to Offer Them

Preapplication conferences provide a structured and focused forum for applicants and staff to hash out their respective concerns and questions about an incipient project. In other words, preapplication conferences provide an opportunity to put the applicant and the local government in the same room, at the same time and on the same page as to which rules apply and how the Commission's limitations, if any, should be applied. This leads to faster and less contentious application reviews.

Some industry commenters argue that the Commission should preempt preapplication conferences as "largely or entirely unnecessary" for eligible facilities requests.[48] However, these same commenters argue that the Commission must issue "clarifications" to resolve controversies and misinterpretations over everything from terms with codified definitions to when the shot clock starts and ends.[49] The rules cannot vacillate between being unambiguous and ambiguous based on when it would serve the industry's argument.

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[48] *See* Crown Castle Comments at 21; *see also* WIA Comments at 8; WISPA Comments at 5; T-Mobile Comments at 17.

[49] *See, e.g.*, Crown Castle Comments at 15–16 (arguing that Rule 1.6100(b)(7)(ii) "should be clarified"); WIA Comments at 10-12 (arguing that Commission must clarify various definitions such as "concealment element"); WISPA Comments at 6 (arguing that Commission should clarify what constitutes a substantial change); T-Mobile Comments at 8 (arguing that Commission should clarify the definition of substantial change).

As the Commission acknowledged in its *2014 Infrastructure Order*, its rules did not aim to cover all possible circumstances.[50] These ambiguities serve important public policy purposes such as the regulatory humility to know when the agency may not be able to anticipate consequences from its actions.[51] Moreover, in instances where the Commission acknowledged potential ambiguities, it encouraged and expected applicants and local authorities to work through the issues together.[52]

Preapplication conferences *implement* this vision for open communication and collaboration. The Commission should not place burdens on this useful process in communities that choose to adopt it.

### C. Deemed Granted Remedy Issues

While some of the industry's proposals are merely unjustified, others are also unreasonably dangerous. The notion that a deemed-granted remedy automatically authorizes construction "on day 61" exposes the public to unregulated utility construction and excavation on an unprecedented scale.[53] Given the Commission's and the industry's expectation that 5G will involve several hundred thousand new deployments in dense deployments and close proximity to where people live, work

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[50] *See 2014 Infrastructure Order* at ¶ 221 ("Beyond the guidance provided in this Report and Order, we decline to adopt the other proposals put forth by commenters regarding procedures for the review of applications under Section 6409(a) or the collection of fees."); *id.* at ¶ 244 ("With regard to certain other issues, after review of the record, we decline to take action at this time.").

[51] *See 2014 Infrastructure Order* at ¶ 261 ("Beyond these procedural requirements, we decline to enumerate what constitutes a "complete" application. We find that, as some commenters note, State and local governments are best suited to decide what information they need to process an application. Differences between jurisdictions make it impractical for the Commission to specify what information should be included in an application.").

[52] *See id.* at ¶ 214 (anticipating "that over time, experience and the development of best practices will lead to broad standardization" in local requirements).

[53] Comments by the Communications Workers of America illustrated the death and property destruction that accidents in utility deployments can cause.

and travel, it is difficult to understand how the Commission (or the industry) could even consider automatically authorized construction under any circumstances.

### 1. Industry Comments Display Alarming Disregard for Critical Public Health and Safety Oversight

The industry's zeal for preemption threatens everyone's health and safety.[54] Dangerous proposals to authorize construction without the local public safety oversight provided by the construction and excavation permit process should alarm the Commission.

Some industry commenters complain that state and local governments require a permit before construction or work in the public rights-of-way may commence.[55] As Western Communities Coalition's comments showed, ministerial permit processes rarely cause a delay in deployments, and often sit ready to issue for months while the permittee is not ready to move forward with their project.[56] These permit requirements protect communications workers and the public at large.

Ministerial permits, like construction permits, excavation permits, traffic control permits and the like, guard against preventable harm from unsafe structures and/or construction activities. In addition to checks for compliance with generally applicable health and safety codes, local officials ensure that the contractors hold required licenses and certifications, provide adequate insurance and adhere to appropriate safety protocols. When the work impacts the public rights-of-way, local

[54] CWA Comments at 1–2 ("Applying the proposed Section 6409(a) shot clock and deemed granted remedies to all authorizations would endanger public and worker safety.").
[55] *See, e.g.*, T-Mobile Comments at 12.
[56] Western Communities Coalition Comments at 4-5.

officials also commonly require traffic control plans to mitigate hazards to other users and performance bonds to ensure that affected areas are properly restored.

Infrastructure deployment often entails dangerous work. Comments by CWA illustrate how job site accidents result in extensive property damage, injuries and even death.[57] These tragedies would likely become more common if providers could skip health and safety review processes altogether.

Risks would not be confined to the construction phase. Although commenters in related proceedings point out that towers infrequently fail, compliance with rigorous engineering standards plays a crucial role in structural stability.[58] Without government oversight, providers and contractors may be tempted to cut corners. Any completed facilities with latent code violations would pose a continual threat to public health and safety, especially if later overloaded with heavy equipment as happened in the 2007 Malibu Canyon Fire.[59]

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[57] *See* CWA Comments at 2. CWA's comments also highlight the elevated risks associated with construction and excavation within the public rights-of-way. Ministerial encroachment permits also create records to locate utilities above and below ground, which in turn helps other users avoid them as they deploy and maintain their own facilities.

[58] *See, e.g.*, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79, Reply Comments of the Wireless Infrastructure Assoc. at 22–23 (Jul. 17, 2017) ("[R]igorous Class II standards already ensure towers have the necessary strength to survive damaging conditions.").

[59] *See* Knowles Adkisson, *$12 million settlement reached in 2007 Malibu Canyon fire*, Malibu Times (Sep. 19, 2012), http://www.malibutimes.com/news/article_e115f3aa-02e3-11e2-811c-0019bb2963f4.html. Utility equipment, including macro facilities, appear to play an increasingly common role in wildfires. *See, e.g.*, Candice Nguyen, *PG&E likely sparked nearly 2,000 CA fires, 30% involved equipment failure*, FOX KTUV (Nov. 12, 2019), https://www.ktvu.com/news/pge-likely-sparked-nearly-2000-ca-fires-30-involved-equipment-failure; Joseph Serna, Southern California Edison strikes $360-million settlement over wildfires and mudslide, LA Times (Nov. 13, 2019), https://www.latimes.com/california/story/2019-11-13/southern-california-edison-settles-public-agencies-wildfires-mudslides; John Gregory and Carlos Granda, *Maria Fire: Blaze near Santa Paula jumps to 9,000, some evacuations lifted*, ABC7 (Nov. 1, 2019), https://abc7.com/some-evacuations-remain-for-maria-fire-near-santa-paula/5663902/.

And these permits do not just address public health and safety issues related to structural stability. Placement of the pole and ancillary equipment boxes need to protect traffic site lines and pedestrian movement patterns. Battery back-up often entails review of the manner in which hazardous materials are handled. Maintenance requirements for the construction site ensures that obstructions are not left in traffic during and after construction. There are many public safety issues that must be addressed through local permitting aside from tower structure issues.

The Commission should reject proposals to authorize construction without all applicable health and safety permits. Marginally faster deployments cannot justify the increased threat to property and human life by unregulated construction and excavation.

### 2. If the Commission Authorizes Unpermitted Construction, It Must Adopt Limitations and Conditions on Such Work to Protect the Public from Unreasonably Dangerous Deployments

To be clear, the Commission should not, under any circumstances, adopt proposals like those in the Petitions that allow for unregulated construction activities. Such an unprecedented authorization to commence construction without prior health and safety review would expose the public to enormous risks.

However, if the Commission authorizes applicants to engage in such hazardous conduct, the Commission *must* take additional steps to ensure that applicants think twice before they act. Additional rules would be necessary to ensure applicants still comply with public health and safety regulations; to hold the applicant responsible for the harms they cause; to ensure compensation is available to those harmed; and

to enable state and local officials and other adversely affected persons or entities to act when unpermitted facilities threaten public health and safety. At a minimum, these additional protections should include:

- ***Non-applicability to ROW Facilities:*** A deemed grant does not authorize an applicant to commence construction in any utility easement or public rights-of-way. Unregulated construction is unreasonably dangerous anywhere, but it is especially so in dynamic environments such as streets and highways, where construction work would be in close proximity to pedestrians, vehicles and other properties.[60]

- ***Assumption of Risk:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be deemed to assume any and all risks (known or unknown, foreseeable or unforeseeable) that may arise in connection with the facility's construction, operation and removal.

- ***Indemnification:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be required to indemnify, protect and defend the state or local government against any and all liabilities or claims of liability that may arise in connection with the facility's construction, operation and removal.

- ***Insurance:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be required to provide the state or local government annual certificates of insurance that list the state or local government as an additional insured. Unregulated construction will eventually cause harm.

- ***Franchise and Lease Requirements:*** The authorization conveyed by the deemed grant does not extend to any franchise or lease obligation for the occupation of rights-of-way. Any applicant that proceeds with construction without the required franchise or lease authorization for such occupation shall be subject to removal as an unlawful encroachment.

- ***Removal Bond:*** Any applicant that proceeds with construction without a permit issued by the state or local government for such work shall be required to provide the state or local government with a performance bond equal to the estimated cost to remove the facility.

[60] One coalition member described the proposal as "stone-cold crazy" as applied to the public rights-of-way, and the authors of these Reply Comments agree.

- ***Attorneys' Fees and Costs:*** The plaintiff in any action against the applicant shall be entitled to recover all its attorneys' fees and other costs if the deemed granted notice is found to be defective or applicant is found to have violated any generally applicable regulations for public health and safety in connection with the construction or operation of the facility.

### D. Local Application Requirements Are Critical Elements for, Not Barriers to, Section 6409(a) Approval

Industry comments generally vent their frustration with local requirements to provide information needed to issue permits for covered requests but not necessarily directly related to whether Section 6409(a) mandates approval.[61] However, such requirements naturally follow from the Commission's own rules. Local governments must act within 60 days but cannot do so without complete information.

Complete information includes documentation required for all phases in the entitlement and permit issuance process—not just for the determination as to whether Section 6409(a) mandates approval or not. The Commission suggested in its *2014 Infrastructure Order* that such requirements would be advisable.[62] Indeed, many industry commenters urge the Commission to expand the shot clock to include these additional permit reviews, which would be impossible without the ability to require complete information up front.

The Commission's existing rules need no clarification and further limitations urged by the industry comments would frustrate state and local government capacity to act within the presumptively reasonable times set by the Commission. The

[61] *See, e.g.*, Crown Castle Comments at 27–30; Nokia Comments at 7; T-Mobile Comments at 17; AT&T Comments at 19.
[62] *See 2014 Infrastructure Order* at ¶ 214 n.595.

following subsections respond to particular requirements assailed in the industry comments.

### 1. RF Compliance Reports

Many industry commenters complain that some local governments require applicants to demonstrate that the facility, once modified, will be compliant with the Commission's RF exposure rules.[63] Industry commenters urge the Commission to preempt local authority to even *ask* about an applicant's planned compliance with these generally applicable health and safety standards.[64]

As noted in Western Communities Coalition's comments, local requirements to demonstrate compliance with the Commission's RF exposure rules are both reasonable and consistent with the Commission's precedents that recognize the legitimate local interest in safety.[65] Moreover, these modest compliance checks are an effective and efficient means to identify instances where proposed modifications—and even some *existing* facilities—do not comply with the Commission's rules. For example:

- ***City of Agoura Hills, California:*** AT&T applied for a Section 6409(a) modification to a rooftop site. The project plans showed an existing microwave backhaul antenna operated by AT&T, but the RF compliance report did not account for those emissions in its calculations.[66] This discrepancy stemmed from the fact that AT&T never sought any prior authorization for the microwave antenna. This not only violated the Agoura Hills Municipal Code[67]

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[63] *See e.g.*, *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* WIA Petition for Declaratory Rulemaking, WT Docket No. 17-79 at 22 (Aug. 27, 2019) [hereinafter "WIA Dec. R. Petition"].
[64] Crown Castle Comments at 29-30.
[65] *See* Western Communities Coalition Comments at 69-72.
[66] *See AT&T Radio Frequency Safety Survey Report Prediction (RFSSRP)*, EBI Consulting (Apr. 30, 2018).
[67] *See* AGOURA HILLS, CAL. CODE § 9661.2.D.

but also illustrates how unpermitted facilities contribute to inaccurate RF exposure compliance assessments.

- ***City of Santa Monica, California:*** AT&T applied for an eligible facilities request to collocate Sirius XM facilities with AT&T's existing facilities. However, the RF compliance report commissioned by AT&T concluded that "AT&T MPE% at this level is *472.73% of General Population Standard*. Mitigation required."[68] AT&T's independent consultant recommended, with concurrence by the city's own independent consultant, that physical barriers be installed around all three antenna sectors to preclude access by general population members were necessary for compliance with the Commission's rules.[69] The *existing* emissions by a single site operator exceeded the maximum permissible exposure by nearly five times the Commission's limits and the proposed collocation would exacerbate such noncompliance but for the city's basic RF evaluation requirement.

- ***City of Thousand Oaks, California:*** An RF compliance report submitted with a Verizon application for an eligible facilities request to add new service bands to its existing rooftop site disclosed that "[a]t the nearest walking/working surfaces to the Verizon antennas, the maximum power density generated by the Verizon antennas is approximately *7,431.95 percent of the FCC's general public limit* (1,486.39 percent of the FCC's occupational limit)."[70]

- ***City of Richmond, California:*** Staff report several instances in which RF compliance reports submitted with eligible facilities requests raised serious public health and safety concerns. Some examples include:

    - An RF compliance report submitted with a T-Mobile application as an eligible facilities request to modify an existing rooftop wireless site concluded that its site created exposures equal to "*2,095.8 percent of the FCC's general public limit*"[71] in areas accessible by general population members. Window washers, HVAC workers, roofers, building maintenance personnel and other non-wireless industry personnel were at particular risk because they could not control their exposure in the areas where their work would naturally take them.

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[68] *See Radio Frequency Emission Compliance Report*, GCB Services (Jan. 15, 2019) (emphasis added).
[69] *See id.*
[70] *Radio Frequency – Electromagnetic Energy (RF-EME) Jurisdictional Report*, EBI Consulting (May 13, 2019) (emphasis added).
[71] *Radio Frequency – Electromagnetic Energy (RF-EME) Compliance Report (L600)*, EBI Consulting (July 26, 2019) (emphasis added).

- An RF compliance report submitted with an AT&T application as an eligible facilities request to modify an existing rooftop wireless site concluded that its site created exposures equal to "*2082.4% FCC General Population MPE Limit*"[72] in areas accessible by members of the general population who cannot control their exposure in the areas where their work would naturally take them.

- An RF compliance report submitted with a different T-Mobile application as an eligible facilities request to modify a different existing rooftop wireless site concluded that the combined emissions from the modified T-Mobile facilities plus all other collocated emitters would create exposures equal to 2,839.1% of the uncontrolled/general population limits at the main roof level.[73]

- An RF compliance report submitted with a Sprint application as an eligible facilities request to modify an existing rooftop wireless site concluded that emissions from the site required mitigations over almost the entire rooftop because the exposures exceeded the *occupational* limits within 11 feet from the antennas.[74] Whereas barriers or floor striping were needed, Sprint had not undertaken such mitigations with its existing deployments on this rooftop.

- ***City of Encinitas, California:*** An RF compliance report submitted by Verizon Wireless in connection with an eligible facilities request to modify a rooftop installation disclosed that the post-modification emissions would be 8,369.0% of the uncontrolled/general limit in areas that can be accessed by members of that class.[75] These emissions would impact areas on the rooftop accessible to general population members, the most vulnerable class.

In all the illustrative cases mentioned above, the cities ultimately approved all the applications because city staff worked with the applicant to determine the appropriate mitigations needed to achieve compliance with the Commission's RF exposure rules. In many instances, the mitigations may be routine signage and access

[72] *Electromagnetic Energy (EME) Exposure Report*, OSC Engineering (June 18, 2018) (emphasis added).
[73] *Radio Frequency – Electromagnetic Energy (RF-EME) Compliance Report (L600)*, EBI Consulting (June 28, 2019).
[74] *Statement of Hammett & Edison, Inc., Consulting Engineers*, Hammett & Edison, Inc. (Sep. 17, 2018).
[75] *Radio Frequency Electromagnetic Fields Exposure Report*, Dtech Communications (Feb. 13, 2019).

control protocols. Indeed, the applicant's own consultants often recommend these mitigations as necessary for compliance. Benefits to public health and safety far outweigh the relatively modest additional burden on applicants.

Unfortunately, these illustrative cases are neither outliers nor anomalies. More and more, local governments see evidence that facilities are either not deployed in accordance with the approved plans or are modified without approval. Even for properly permitted facilities, instances in which the applicant seeks approval with an RF report that affirmatively concludes the modified facility will not comply with the Commission's RF exposure rules signal a dangerous indifference by the industry—both to their compliance obligations to the Commission and to public health and safety at large. Especially with respect to existing noncompliance before any proposed modification, these illustrative cases show that the local review process plays an important role in ensuring that the facilities maintain actual compliance with standards intended to protect the public from excessive exposure to RF emissions.

Finally, the Commission should consider the efficiencies created by local RF compliance requirements. All FCC-licensed or authorized wireless facilities must comply with the Commission's RF exposure rules, but the Commission's staff lacks the resources to individually review all such facilities. Even facilities categorically exempt from routine compliance evaluations may be noncompliant due to localized conditions. By respecting the legitimate local interest in compliance evaluations, the Commission disperses the administrative burden among the public agencies with the motivation and local knowledge best suited for the task. Local governments that

choose to check for compliance with the Commission's rules may do so and, in those jurisdictions, potential issues that arise from local conditions (like multiple-emitter environments or areas made accessible by other development projects) will be more readily mitigated.[76]

Local requirements to demonstrate compliance with the Commission's RF exposure rules serve a legitimate local interest and promote public health and safety through an effective and efficient process. Benefits from these requirements far outweigh any burdens allocated to the applicant. Accordingly, the Commission should decline to preempt local requirements to show compliance with federal RF standards.[77]

**2. Equipment Inventories**

WIA and its industry supporters complain that local governments should not be permitted to require equipment inventories for eligible facilities requests.[78] Yet WIA's own guidance to "jurisdictions needing assistance in complying with Federal timeframes to act on Eligible Facilities Requests" recommends that local

[76] Documented compliance checks also bolsters public confidence in the infrastructure deployment process, which has come under increasing scrutiny. *See, e.g.*, Ianthe J. Dugan and Ryan Knutson, *Cellphone Boom Spurs Antenna-Safety Worries*, WALL ST. J. (Oct. 2, 2014 at 7:37 PM), https://www.wsj.com/articles/cellphone-boom-spurs-antenna-safety-worries-1412293055; Scott James, *Warnings, but Not Really, on Cellphone Antennas*, NYT (Aug. 18, 2011), https://www.nytimes.com/2011/08/19/us/19bcjames.html.

[77] Multiple commenters note that the Commission's inaction on updates to its RF exposure guidelines creates issues on a local level as citizens with questions about the health and safety of these deployments turn to their local representatives for assistance. *See, e.g.*, League of Oregon Cities Ex parte (Oct. 23); Coconut Creek Comments at 1; City of Seattle Comments at 3–4; NLC *et al.* Comments at 9. We therefore respectfully join with NLC *et al.* in requesting that the Commission conduct a meaningful evaluation of these issues. NLC *et al.* Comments at 9 n.33.

[78] WIA Petition for Declaratory Ruling at 22; *see also* Crown Castle Comments at 29-30.

governments ask for equipment specifications.[79] Equipment inventories help state and local governments perform the reviews required for wireless facility deployments within the timeframe mandated by the Commission.

Without an equipment inventory, local officials cannot fully evaluate applications tendered for approval as an eligible facilities request for compliance with Section 6409(a).[80] As a threshold matter, Section 6409(a) does not cover facilities illegally deployed and equipment inventories help local officials compare the facilities approved to those actually deployed.[81] Moreover, the substantial-change analysis requires a comparison between existing and proposed equipment, which requires an equipment inventory and specifications. For instance, Rule 1.6100(b)(7)(iii) asks whether any pre-existing ground cabinets are less than ten percent (10%) larger in height or overall volume than the proposed cabinets. Unless the applicant provides the requisite specifications for the *existing* cabinets, the local government could not possibly determine the relative height or volume for the *proposed* cabinets as required by the rules.[82]

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[79] *See Wireless Facility Siting: Section 6409(a) Checklist*, WIA (Jun. 19, 2015), https://wia.org/wp-content/uploads/Advocacy_Docs/6409a_Siting_Checklist.pdf.

[80] *See, e.g.*, 47 C.F.R. § 1.6100(b)(7)(iii) (requiring reviewing authorities to consider the height and volume of existing equipment cabinets on the ground to those proposed to be added).

[81] As described elsewhere in these and other comments, unauthorized deployments occur and are frequently discovered only after the applicant requests a modification by right under Section 6409(a). *See* Western Communities Coalition Comments at 87-88.

[82] Likewise, some local governments would be rudderless to evaluate whether a proposed eligible facilities request involved more than a "standard number of cabinets" for the technology involved if they could not ask questions about what equipment was needed for what technologies. Whether the provider's "need" for a particular facility matters or not, the Commission should not discourage state or local government officials from inquiries about the facilities necessary to provide a particular service.

Even if the Commission's rules themselves did not effectively mandate an equipment inventory, the proposed shot clock rules and local police powers provide an independent justification to require them. As the Commission recognizes, local governments retain authority to evaluate projects for compliance with building and safety codes and deny non-compliant applications.[83] Whether a project meets these standards may require a structural analysis that accounts for the dimensions and weight of each piece of equipment. Under the Commission's existing Section 6409(a) rules, local governments may not toll the shot clock for incompleteness if the information requested is not a publicly-stated requirement.[84] Moreover, under the industry's proposed rules, local building officials must complete their review within 60 days.[85]

Thus, in order for local officials to (1) evaluate compliance with building and safety codes; (2) preserve authority to request information relevant to this determination; and (3) routinely evaluate projects from start-to-finish in 60 days or fewer, local governments must be allowed to require full equipment inventories.[86]

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[83] *See 2014 Infrastructure Order* at ¶¶ 188, 202, 231.
[84] *See id.* at ¶ 260.
[85] *In re Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment*, CTIA Petition for Declaratory Rulemaking, WT Docket No. 17-79, WC Docket No. 17-84 at 19 (Sep. 6, 2019) [hereinafter "CTIA Petition"].
[86] Tolling agreements do not solve this problem. If local governments cannot inquire about existing equipment, it must rely on other sources, which may not be accurate if the site operator deployed equipment or improvements other than those specified in previously approved plans and/or structural calculations. Moreover, tolling agreements depend on *agreement* between the parties and an applicant's incentive to be reasonable diminishes as its prospects to deploy under a "deemed grant" increases.

Any other rule or interpretation would undermine the Commission's express commitment to public health and safety.[87]

### 3. Property Owner Authorization

As explained in Western Communities Coalition's comments, state and local governments have a legitimate interest in documentation to show an applicant's authorization to receive a development approval that runs with the land.[88] Contrary to Crown Castle's comments, the relationship between the carriers, infrastructure providers and property owners at a communications site on private property is not so unique to the wireless industry that it warrants special treatment.[89]

Many multi-tenant commercial environments are managed and operated by firms with a long-term lease and the right to sublease or license space to third parties. Moreover, just as the property owner typically does not own the tower or transmission equipment, long-term commercial leases often carve out "trade fixtures" as the tenant's personal property rather than improvements to the land.

The routine fact that the applicant, the permittee and the property owner may not be the same persons or entities is reflected in many development codes.[90] These relationships are so commonplace in development projects that most local governments inquire about them on any application—not just for wireless facilities.[91]

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[87] *See 2014 Infrastructure Order* at ¶¶ 188, 202, 214 n.595.
[88] Western Communities Coalition Comments at 88-89.
[89] *See* Crown Castle Comments at 27–28.
[90] *See, e.g.*, SAN DIEGO, CAL., CODE § 112.0102(a); TACOMA, WASH. CODE § 13.05.047.B; PLEASANTON, CAL. CODE § 18.124.020.
[91] *See, e.g.*, *Form DS-3032: General Application*, San Diego Development Services (Jan. 2019), https://www.sandiego.gov/sites/default/files/legacy/development-services/pdf/industry/forms/ds3032.pdf (distinguishing between the property owner, permit holder and applicant); *Master Application Form*, Glendora Planning Dept. (Jan. 1, 2018),

In addition to general misrepresentations about the requirement, some industry commenters misstate material facts in their effort to twist them to suit their narrative. For example, CTIA alleges that a Colorado jurisdiction failed to act on a wireless provider's request to relocate certain equipment on a rooftop by seeking a lease for the airspace above the street where one sector would overhang.[92] Based on the general description by CTIA, the City of Boulder, Colorado, suspects that CTIA's vague allegation refers to an application for a facility within its jurisdiction.[93] If so, the allegation is completely unfounded.

The City of Boulder received an application that matches CTIA's description but determined that Section 6409(a) did not apply because it would involve deployment outside the current site area and approval would effectively compel a lease between the city and the applicant.[94] The applicant's proposed deployment on the building facade would have projected over the property line and into the city's rights-of-way in a manner prohibited by local law.[95] Rather than outright deny the application, city staff notified the applicant within the 60-day shot clock that the application could not be approved as requested and offered to work with the applicant to develop an alternative location on the rooftop to avoid the encroachment issue.[96]

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http://www.cityofglendora.org/home/showdocument?id=5831; *Application Form*, Concord Planning Division (Aug. 2017), https://www.cityofconcord.org/DocumentCenter/View/185/Application-Form-PDF; *Land Use Application Form*, Oxnard Planning Division, https://www.oxnard.org/wp-content/uploads/2016/03/Land_Use_Application_Form_11.13-1.pdf (last visited Nov. 8, 2019).

[92] CTIA Petition at 11. CTIA did not name this jurisdiction.

[93] Aff. of Edward Stafford, Dev. Review Manager for Pub. Works, City of Boulder, Colo. (Oct. 28, 2019).

[94] *Id.*

[95] *Id.*

[96] *Id.*

The city's notice informed the applicant that it lacked the property rights necessary for its project but did not insist that the applicant actually enter into an agreement with the city. The city recently received a submittal from the applicant which is currently under review.[97]

In this case, the actual facts show that the city acted in a timely, lawful and constructive manner. Any delay in the approval for this application stems from the applicant's failure to conform to limitations in Section 6409(a) and/or work with city staff to develop a feasible alternative. Boulder's experience also demonstrates the need for localities to review these applications in the first instance to determine whether they qualify as an eligible facilities request, and that failure to qualify for mandatory approval under Section 6409(a) does not spell certain death for a proposed collocation or modification. In contrast, selectively representing the facts to a federal agency to support further preemption of local authority does not further deployment, it compromises productive working relationships.

### 4. Photo Simulations for Non-camouflaged Facilities

Photo simulations expedite post-construction inspections for all new and modified wireless deployments. Inspections based on construction plans alone can be time-consuming as the plans may not show all equipment that belongs to other collocated carriers. Photo simulations with before-and-after illustrations capture the entire scope and allow inspectors to more efficiently confirm that what the permittee installed matches what the permit authorized. Accordingly, most local governments

[97] *Id.* This submission was received after the affidavit from Mr. Stafford was signed on October 28, 2019, and therefore this information is not included in the signed statement.

require photo simulations and many require them to be incorporated into the final construction plans.

The need for an efficient review process applies with equal force to modifications on concealed and unconcealed facilities. Permittees also share in the benefits because quicker inspections reduce costs that would be passed through to the permittee. Accordingly, the Commission should not preempt photo simulation requirements merely because the modification would occur on a non-camouflaged site.

### 5. Content-Based Restrictions on Comments at a Public Hearing

As discussed in Western Communities Coalition's comments, the Commission cannot—and should not—attempt to preclude a state's or local government's choice to conduct its business through public meetings.[98] If a local government chooses to conduct a public hearing, several industry commenters suggest that the Commission should restrict comments on topics unrelated to the criteria for an eligible facilities request.[99] The Commission should reject this constitutionally objectionable proposal.

When a state or local government conducts a public meeting to conduct its business and receive comments from the public, it establishes a limited public forum in which it generally may not discriminate against speech based on its content.[100]

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[98] *See* Western Communities Coalition Comments at 23-30.
[99] *See, e.g.*, T-Mobile Comments at 17.
[100] *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015) ("[A] government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"); *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 167 (1976).

Any content-based restrictions must be narrowly drawn to effectuate a compelling state interest.[101]

Here, the Commission lacks a compelling state interest. Public comments on factors that may not affect whether a modification meets the criteria for an eligible facilities request could, at most, prolong the meeting by a few minutes per speaker. An interest in efficient meetings, while an innocent motive, cannot justify a content-based restriction on protected speech that does not unreasonably disrupt the meeting.[102]

Moreover, this rule would be virtually impossible to enforce. The line between relevance to the criteria for approval and relevance to the public's interest in the project defies a bright-line distinction. Remedies would be equally dubious. Would the Commission deem an application granted merely because someone at a public meeting said something "irrelevant" to the criteria for an eligible facilities request?

## IV. SUBSTANTIAL CHANGE ISSUES

The Petitions and their industry supporters urge the Commission to substantially change the existing criteria for a substantial change. If adopted, these proposals would abrogate (and, in some instances, eliminate) existing commonsense

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[101] *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

[102] *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2229 (2015) ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."). Although the proposal appears to be motivated by a desire to shield industry members from increasingly frequent criticism directed at them or growing concern over adverse environmental and health effects from RF emissions, the content-based restriction renders the motivation for the restriction irrelevant. *Id.* "The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill v. Colorado*, 530 U.S. 703, 744 (2000) (SCALIA, J., dissenting).

limitations adopted by the Commission in its 2014 Infrastructure Order. Many proposals advanced by the industry have been previously rejected, and the Commission should do so again.

### A. Concealment Issues

Protections for concealment elements in the Commission's existing rules are among the most important for local communities concerned about the potential for blight caused by out-of-character infrastructure. The proposed changes in the rules seek to exclude existing concealment elements from these protections and/or license the applicant to ignore concealment elements it finds inconvenient. The Commission should retain its existing regulations and reject these proposals.

#### 1. Concealment Elements Preserved Under Rule 1.6100(b)(7)(v) Are Not Cabined to "Stealth" Facilities

##### i. "Concealment" Does Not Require an Elaborate Scheme to Hide Equipment from Public View.

Concealment elements are often small adjustments—as small as a well-selected paint or strategically placed equipment cabinet—that mitigate unnecessary aesthetic impacts from unsightly facilities. As the Commission previously recognized "a replacement of exactly the same dimensions could still violate concealment elements if it does not have the same camouflaging paint as the replaced facility."[103] This would be as true for a monopole as it would be for a monopine.

[103] *2014 Infrastructure Order* at ¶ 200 n.543.

To be sure, some towers and base stations can be so architecturally integrated into the natural and built environment that the average person would not even notice the concealment itself. For example:

**Figure 1:** AT&T stealth clock tower, Rio Rancho, NM.

**Figure 2:** Verizon Wireless mono-eucalyptus among natural trees, Oceanside, CA.

**Figure 3:** Verizon Wireless farm silo tower, Arvada, CO.

**Figure 4:** Multi-tenant base station (antennas behind RF-transparent screens within the architectural tower), Temecula, CA.

These examples also include facilities designed not as some ordinary feature ordinarily associated with the location or support structure but as public art. For example:


**Figure 5:** Multi-carrier site by Crown Castle, San Diego, CA.

**Figure 6:** Multi-carrier site in Albuquerque, NM.

Although complete stealth may be a worthwhile objective, it may not be a practicable standard in all situations. Conditions needed to blend the facility may not exist or space required to construct the project may not be available.

In these situations, local governments may still request that applicants conceal certain equipment elements through targeted techniques. Just because the local government does not feel compelled to require all wireless towers to masquerade as trees or clock towers does not make their efforts to mitigate blight from unsightly towers any less a concealment element.

Many jurisdictions require tower-mounted equipment and hardware to be colored to match the support structure:

**Figure 7:** AT&T small cell on existing streetlight in San Diego, CA.

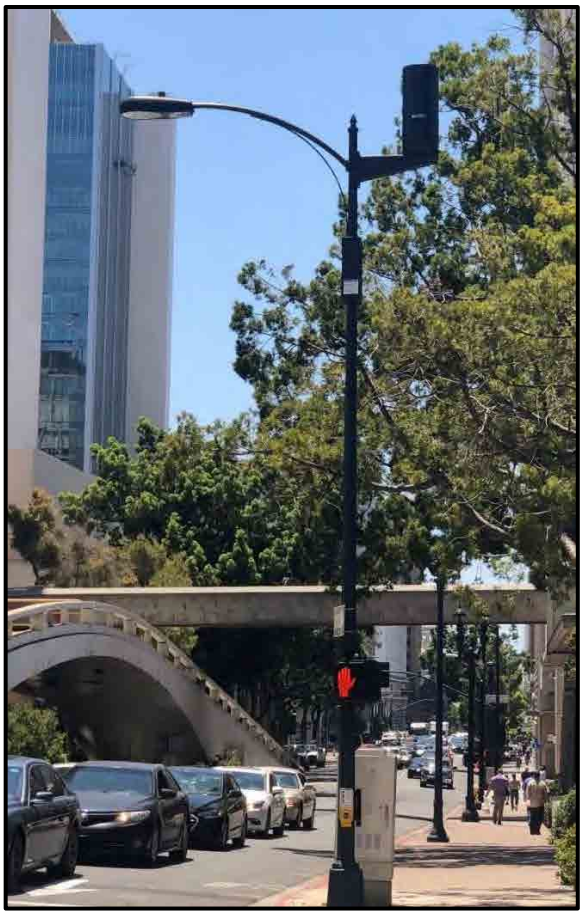

**Figure 8:** Same AT&T small cell colored to match the underlying pole.

**Figure 9:** Macrocell antennas spread over light standards at the Opera House parking lot in Santa Fe, NM.

This concealment element also works well in deployments without any radome or other shroud over the pole-mounted equipment:

**Figure 10:** Small cell painted to match green light standards in Scottsdale, AZ.

**Figure 11:** Small cell painted to match tan streetlight in Fountain Hills, CA.

Without the matched color, the concealment effect diminishes as the equipment stands out in higher visual contrast:

**Figure 12:** Verizon Small Cell in Orange County, CA.

Many cities require applicants to route their cables from the ground equipment to the antennas through risers within the monopole.[104] This approach applies equally to facilities within and outside the public rights-of-way:

[104] *See* Western Communities Coalition Comments at 63 (discussing allegations that the City of Beaverton, Oregon, requires all cables to be routed through internal risers).


**Figure 13:** Mobilitie small cell on streetlight in Los Angeles, CA, with exposed wires.

**Figure 14:** Mobilitie small cell on streetlight in San Diego, CA, without exposed wires.

**Figure 15:** American Tower monopole in Taos, NM, with external cable risers.

**Figure 16:** Monopole in Escondido, CA, with internal cable risers that exit through pole access ports adjacent to each array.

Others require remote radio units, amplifiers and other accessory equipment to be placed behind the antennas, or concealed within the support structure.

**Figure 17:** Two facilities concealed as field-lights in Indian Wells, CA. On the right, modifications over time have caused the concealment panels to be removed, while the concealment on the left has been preserved.

Existing or new landscape features play an increasingly important role in concealment for ground-mounted equipment cabinets, especially in the public rights-of-way.

**Figure 18:** Ground-mounted cabinets behind landscape features in Calabasas, CA.

Similarly, hardscape and other non-landscape features in the public rights-of-way can be used as a concealment element on non-"stealth" facilities:

**Figure 19:** Decorative iron screens used to partially screen ground-mounted equipment associated with a cell site in Scottsdale, AZ.

**Figure 20:** Wireless site doubling as a trail bench shelter on open space property in Arvada, CO.

Industry comments also generally fail to recognize that some concealment techniques aim to blend the equipment into the existing utility ecosystem.[105] Particularly for facilities in or adjacent to utility easements and the public rights-of-way, deliberate efforts to site transmission equipment on poles and in cabinets like those used for electric utilities, wireline communications and traffic control may be less aesthetically disruptive than a faux tree. For example:

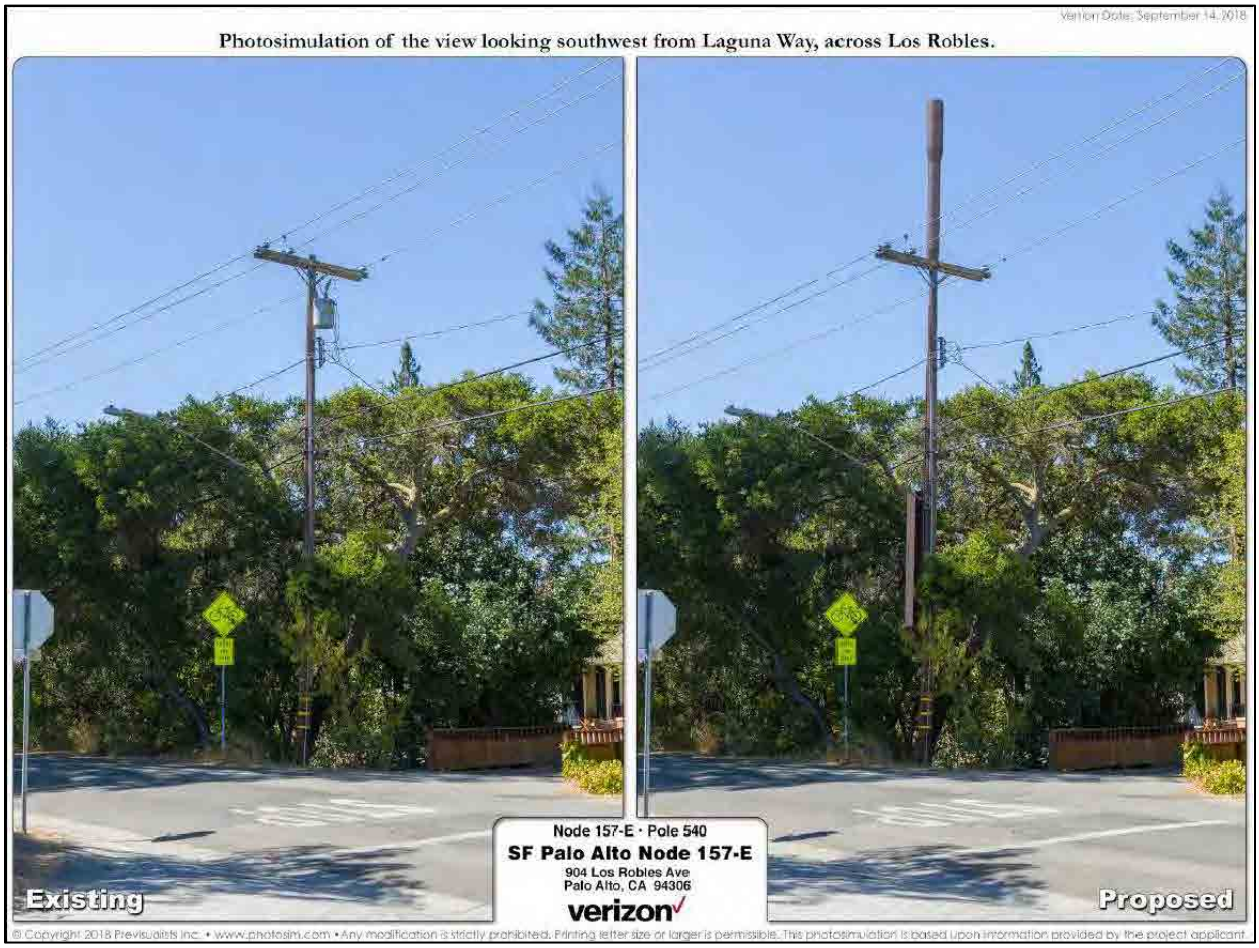


**Figure 21:** Proposed small cell by Verizon in Palo Alto, CA. The equipment has been elongated to more closely match the pole width and painted flat brown to blend with the underlying wood utility pole.

[105] *See, e.g.*, American Tower Comments at 9.


**Figure 22:** DAS node in Rancho Palos Verdes, CA, designed as a replacement for a stop sign on a wood pole. Although the replacement pole requires significantly more height than a normal stop sign, this approach considers that there are no existing above-ground utilities within the area. The concealment balances the technical necessities against the city's desire to avoid unnecessary obstructions in the public rights-of-way.

There are only so many ways to conceal an antenna or equipment cabinet on a pole in a wide-open streetscape. This approach necessarily requires the local government to consider factors such as overall height and equipment volume—the same factors WIA and its allies urge the Commission to prohibit. When an applicant proposes to enlarge, expand or otherwise alter the equipment or support structure in a manner that would cause it to stand out from the other poles, boxes and cables around it, the effect on the concealment elements is no different than if the applicant proposed to extend a faux tree in a manner that would make it stand out from nearby

natural trees.[106] Indeed, the federal court in *Douglas County* reached a similar conclusion when Crown Castle proposed to expand an existing tower designed "to resemble an old fashioned, yet unadorned utility pole" near a state highway.[107]

Whether an elaborate plan to completely conceal the fact that a facility exists or several smaller efforts to improve a visible facility's overall all appearance, any deliberate effort to mitigate unnecessary ugliness qualifies as concealment. To the extent the Commission adopts industry commenters' view, local governments would be incentivized to require *all* new facilities to be completely stealth, which would increase costs and review periods for new deployments. The incentive would be especially strong for facilities in the public rights-of-way due to the large size and number of facilities the Commission and industry anticipates for 5G deployments.[108] For this and other reasons described above, arguments by the industry that only stealth facilities or those intentionally designed to look like something other than a wireless facility should be rejected.

ii. AT&T's Interpretation that Concealment Exceptions Protect Only "Stealth" Facilities Conflicts with Rule 1.6100(b), the *2014 Infrastructure Order* and English Grammar

AT&T suggests that the Commission's own interpretation already "applies only to 'stealth wireless facilities," and only to the stealth 'elements' of such

[106] Brief for Respondent, *Montgomery Cty. v. FCC*, Nos. 15- 1240 and 15-1284, Dkt. No. 60 at 41 (4th Cir. 2015).
[107] *Board of County Commissioners for Douglas County v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, 2019 WL 4257109 at *1 (D. Colo. Sep. 9, 2019).
[108] *See* 47 C.F.R. § 1.6002(l) (defining a small cell to include structures that are 50 feet tall with equipment 28 cubic feet in volume); *Small Cell Order* at ¶ 47 (anticipating hundreds of thousands new facilities).

facilities."[109] The Commission should reject this interpretation as it conflicts with Rule 1.6100(b)'s text and structure and can only be understood by an unnatural and grammatically incorrect construction for a single sentence in the *2014 Infrastructure Order*.

First, Rule 1.6100(b)(7)(v) applies to any modification that would defeat any concealment element on any "eligible support structure."[110] The Commission defines an "eligible support structure" as "[a]ny tower or base station . . ., provided that it is existing at the time the relevant application is filed . . . ."[111] Whereas other criteria for a substantial change specifically distinguish between structure types (towers or base stations) and location (facilities in the public rights-of-way or not), the limitation on modifications that defeat existing concealment elements does not discriminate.[112] Accordingly, Rule 1.6100(b)(7)(v) cannot be read as limited to only "stealth" facilities or stealth "elements" because it preserves concealment elements on any existing tower or base station and nothing in the Commission's rules suggests otherwise.

Second, AT&T's interpretation relies on an untenable construction given to a single sentence in the *2014 Infrastructure Order*:

> We agree with commenters that in the context of a modification request related to concealed or "stealth"-

[109] AT&T Comments at 7.
[110] 47 C.F.R. § 1.6100(b)(7)(v) ("A modification substantially changes the physical dimensions of an eligible support structure if it . . . would defeat the concealment elements of the eligible support structure); *see also 2014 Infrastructure Order* ("a modification constitutes a substantial change in physical dimensions under Section 6409(a) if the change . . . would defeat the existing concealment elements of the tower or base station . . . .").
[111] 47 C.F.R. § 1.6100(b)(4).
[112] *Compare id.* §§ 1.6100(b)(7)(i)–(iii) (establishing different thresholds for changes in height, width and equipment cabinets for towers on private property versus base stations and towers in the public rights-of-way), *with id.* § 1.6100(b)(7)(v) (applying the same standard for concealment preservation to any existing tower or base station without distinction based on location or other factors).

> designed facilities—*i.e.*, facilities designed to look like some feature other than a wireless tower or base station—any change that defeats the concealment elements of such facilities would be considered a "substantial change" under Section 6409(a).[113]

The sentence plainly refers to "concealed *or* stealth-designed facilities".[114] Despite AT&T's emphasis elsewhere in its quotation to distract from the disjunctive list,[115] the Commission referred to more than "stealth" facilities when it described when Rule 1.6100(b)(7)(v) applies.

To achieve its desired meaning, AT&T implies that the clause "*i.e.*, facilities designed to look like some feature other than a wireless tower or base station" modifies both the phrases "concealed" and "'stealth'-designed".[116] In other words, this portion operates as a nonrestrictive clause that modifies all the subjects in the list it follows. Yet AT&T's approach ignores basic grammar and punctuation conventions. Punctuation matters because the Commission, like Congress, is presumed to follow accepted punctuation standards.[117]

The more natural and grammatically correct interpretation is that this is a restrictive clause that modifies only "'stealth'-designed" facilities. Although punctuation around a clause usually signals a nonrestrictive clause, the word "that" cannot be used in a nonrestrictive clause.[118] The abbreviation "*i.e.*" means "that is"[119]

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[113] *2014 Infrastructure Order* at ¶ 200.
[114] *Id.* (emphasis added).
[115] *See* AT&T Comments at 7 (placing emphasis on the words around the "or" but not on the "or" itself).
[116] *Id.*
[117] *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 528–29 (1987).
[118] Tex. Law Review Manual on Usage & Style, 12th Ed., § 1.21, Appendix at 77.
[119] *i.e.*, Merriam-Webster (last visited Nov. 1, 2019), https://www.merriam-webster.com/dictionary/i.e.

and thus cannot be read as nonrestrictive. Under the rule of the last antecedent, a restrictive clause modifies only the noun that most closely precedes it in the sentence.[120] The noun that immediately follows the clause is "'stealth'-designed facilities".[121] Therefore, "facilities designed to look like some feature other than a wireless tower or base station" refers only to "'stealth'-designed facilities" and not to "concealed" facilities.

Finally, the Commission's quotation marks around the word "stealth" indicate that it intended to provide the term with a specialized definition.[122] Thus, a specialized definition such as the one in the restrictive clause most naturally relates to the term highlighted as unusual by the quotation marks.

Accordingly, the Commission should reject AT&T's interpretation as inconsistent with Rule 1.6100(b), the *2014 Infrastructure Order* and proper grammar rules.

### 2. "Existing Concealment Elements" Refer to Those Installed at the Time the Applicant Submits an Eligible Facilities Request

The Commission should reject proposals to restrict "concealment" to only those installed with the initial deployment.[123] Such a construction contravenes the plain

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[120] *See, e.g.*, *Lockhart v. United States*, 136 S.Ct. 958, 962 (2016) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 528–29 (1987) (finding that a restrictive clause following the last item in a list modifies only the last item in the list).

[121] *2014 Infrastructure Order* at ¶ 200.

[122] *See Quotation Marks*, GRAMMAR BOOK, https://www.grammarbook.com/punctuation/quotes.asp (last visited Nov. 1, 2019) ("Quotation marks are often used with technical terms, terms used in an unusual way, or other expressions that vary from standard usage.").

[123] *See, e.g.*, American Tower Comments at 10 ("[T]he Commission should confirm that concealment elements are limited to those imposed during the initial siting process, which would preclude new concealment requirements from being introduced and applied to existing structures to prevent Section 6409 relief.").

language in Section 6409(a) and the *2014 Infrastructure Order* and harms the public interest.

Section 6409(a) contemplates less-than-substantial changes to an "existing wireless tower or base station"—not the tower or base station that existed at one time in the past.[124] Consistent with the statute's present-tense usage, throughout the *2014 Infrastructure Order*, the Commission refers to the "*existing* concealment elements" as those which a proposed modification may not defeat.[125] Although some substantial-change thresholds expressly contemplate that the baseline measurement should be defined by circumstances as they existed in the past, the concealment threshold is not among them.[126] Nothing in the *2014 Infrastructure Order* suggests that "existing concealment" means the concealment that existed immediately after the initial deployment.

Moreover, the proposal to freeze concealment techniques for existing facilities nationwide at the standard that existed in the past—in some cases decades ago—is bad policy. Such a rule would both reverse substantial investments by communities into site rehabilitation and stagnate investments in innovative concealment techniques.

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[124] *See* 47 U.S.C. § 1455(a).

[125] *See 2014 Infrastructure Order* at ¶ 21 (emphasis added); *id.* at ¶ 188 ("it would defeat the *existing* concealment elements of the tower or base station") (emphasis added); *id.* at ¶ 200 ("would defeat the *existing* concealment elements of the tower or base station") (emphasis added).

[126] *See, e.g.*, 47 C.F.R. § 1.6100(b)(7)(i)(A) (defining the baseline for cumulative height increases as the original structure height for base stations and the height that existed the date Congress adopted the Spectrum Act for wireless towers on private property); *2014 Infrastructure Order* at ¶ 197 (declining "to provide that changes in height should always be measured from the original tower or base station dimensions").

First, as Section 6409(a) and the industry commenters acknowledge, wireless infrastructure evolves over time. Concealment for these facilities evolves, too. At appropriate times throughout a facility's lifespan, the local government may require updates to the concealment elements that reflect advances in technology and/or changes in the surrounding area. The proposed interpretation would authorize applicants to disregard those periodic improvements.[127]

An appropriate time to consider updates occurs when the permit for the underlying facility expires as happened in Cerritos, California, when T-Mobile sought to renew an expired permit (originally approved in 2001) for an existing monopine facility at 17326 Edwards Road. Under the city's code in effect at that time, permits for wireless facilities may be renewed in 10-year intervals provided that the permittee requests renewal prior to the expiration and the city makes certain findings.[128] The city also evaluates whether any advancements in concealment techniques should be incorporated into the new permit.[129]

On April 7, 2017, T-Mobile tendered its application as a request to renew an existing permit—not as an eligible facilities request.[130] On May 5, 2017, city staff issued a detailed denial letter that explained the basis for the determination that the

[127] The proposed interpretation would also lead to absurd results in situations where a facility comes into existence concealed as one thing but evolves over time to be concealed as another. *See, e.g.*, Western Communities Coalition Comments at 25-26 (describing a Sprint flagpole that morphed into a smokestack as the carrier needed more room to conceal the equipment than the flagpole could accommodate).
[128] *See* CERRITOS, CAL., CODE § 22.42.370.
[129] *See id*.
[130] *See* Letter from Wyman Wong, Associate Planner, City of Cerritos, to Sonal Thakur, Core Development Services as agent for T-Mobile (Apr. 7, 2017).

proposed modification would defeat the existing monopine concealment.[131] City staff also encouraged T-Mobile to work directly with staff and its consultants to find a design that complied with the city's concealment regulations.[132]

This denial did not occur in a vacuum. Less than 10 months earlier, T-Mobile installed a similar monopine in a similar location (16307 Arthur Street; T-Mobile Site ID: LA33776B) but with significantly less visual impact on the community:

**Figure 23:** Edwards Road Monopine

**Figure 24:** Arthur Street Monopine

[131] *See* Letter from Wyman Wong, Associate Planner, City of Cerritos, to Sonal Thakur, Core Development Services as agent for T-Mobile (May 5, 2017).
[132] *See id*.

Both facilities had similar concealment elements: painted structural support members, faux-pine branches, faux pine covers over tower-mounted equipment and enclosures around the base and other ground-mounted equipment. But one involved techniques and materials from the early 2000's and the other was state-of-the-art for 2017, including fuller and more lifelike faux pine needles, faux bark cladding rather than brown paint on the exposed pole and a more thoughtful taper with a topper that brought the monopine to a natural point.

City staff made it clear that upgrades to the expired tower to match the more recently approved tower would be approved.[133] Ultimately, the city approved the Edwards Road monopine under a plan to re-branch the existing pole with fuller and more lifelike faux pine branches and fit the equipment with similarly improved faux-pine covers.

This real-world example typifies how local governments periodically revisit concealment: the city required modernized, not different or additional, concealment techniques based on more recent deployments in comparable circumstances. The process is a collaborative one that aims to benefit the community in a manner that does not frustrate eligible facilities requests.

Second, the rule would create disincentives for carriers and infrastructure providers to invest in new concealment techniques, which, in turn, would harm communities impacted by unsightly facilities. The harm would extend to other industry members who innovate, fabricate and install new concealment techniques—

[133] *See id.*

suppressing demand for these goods and services would reduce production and likely result in lost employment.

### 3. WIA's Proposal to Require Local Governments to Specifically Describe Each Concealment Element Places an Inefficient Burden on the Review Process Unlikely to Mitigate Controversies

WIA and its supporters allege that the Commission must "clarify that concealment elements are only those expressly designated and permitted as such" or else site operators will suffer from confusion and "gamesmanship" at the local-government level.[134] The Commission should reject this request because, aside from the harmful and unfair retroactive impacts this rule would impose,[135] it would simply waste time and resources.

A picture is worth a thousand words. For this reason, many local governments approve concealment elements by reference to project plans, photo simulations or both. These documents provide clear information about dimensions, size, scale, color, texture, quality and other concealment elements that would be difficult and potentially more contentious if described in minute detail as proposed by WIA.

Diagrams and photo simulations also save time. Although it may be theoretically possible to describe all the concealment elements for each site, the project plans and/or photo simulations provide a much more complete and accessible description for all stakeholders to follow. Local officials would likely still require photo simulations to properly grasp the proposed project—especially for new facilities

[134] *See* WIA Dec. R. Petition at 12.
[135] Western Communities Coalition Comments at 37-39; NATOA *et al.* Comments at 9-10, NLC *et al.* Comments at 18-19.

subject to review by a board, commission or council in a public meeting setting. Thus, the proposed requirement would simply waste everyone's time while local officials translated perfectly useful plans and photo simulations into a detailed concealment-element list.

In any event, the proposed requirement for hyper-technical written findings does not appear likely to avoid controversies over concealment elements. Whether the local government puts the requirement in writing or incorporates photo simulations by reference, some applicants will go to great lengths to ignore local concealment requirements.

In the many jurisdictions who incorporate approved plans and photo simulations into permits, the problems primarily occur when applicants fail to build the facilities as represented in their applications. For example, when Crown Castle applied for a new discretionary permit to maintain operations for a project site in the city (where the original discretionary permit had already lapsed), Crown Castle proposed to re-branch a first-generation, dilapidated existing monopine. Photo simulations were submitted to show local officials how the proposed tower would look after final installation:

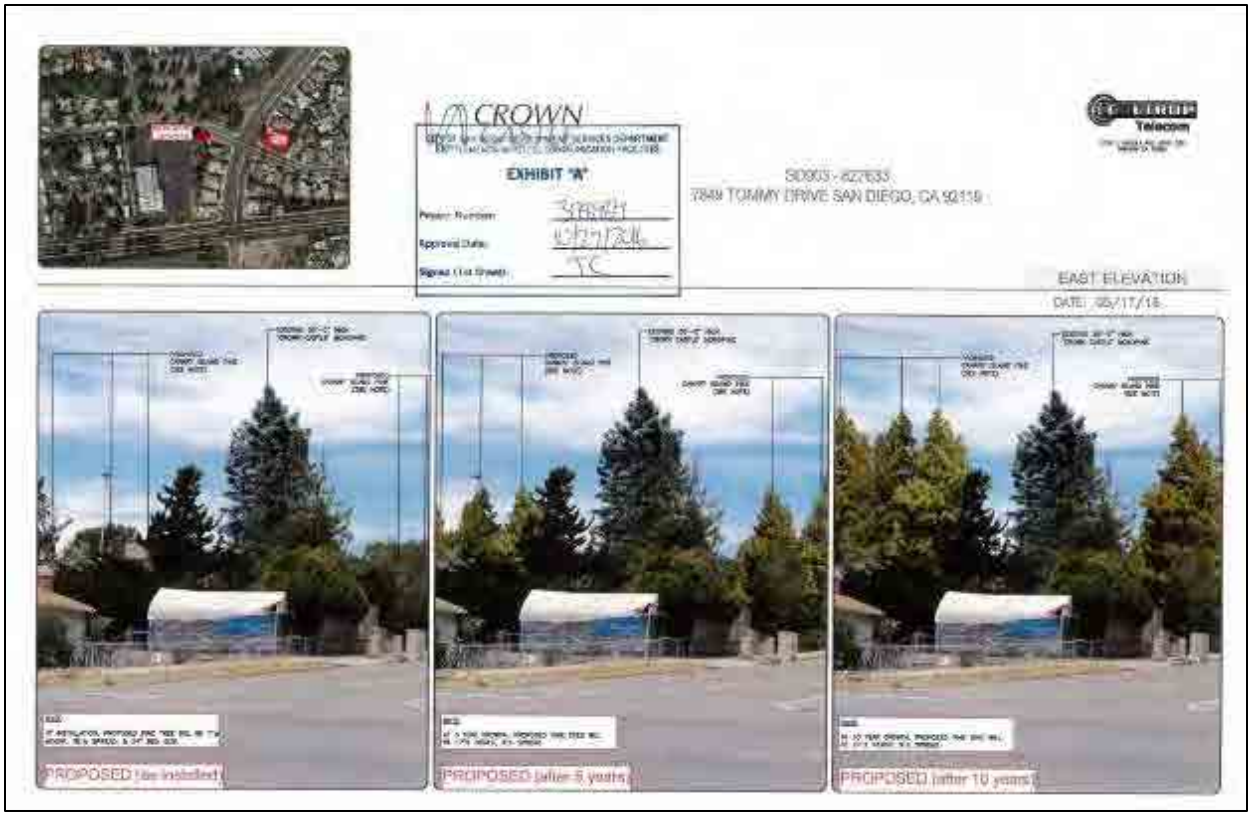


**Figure 25:** Crown Castle photo simulations submitted with a permit application to the City of San Diego, CA.

In reliance on the representations in the photo simulations, the city approved the proposed project over objections by neighbors in October, 2016. Shortly thereafter, in December 2016, Crown Castle submitted a Section 6409(a) application to modify the site. This application was denied because the site was not an existing facility. The development permits approved in October had not been "utilized" by the applicant (meaning the permit was not signed, notarized and recorded; no subsequent building permit had been issued; and the site had not been constructed in accordance with the approved development permit). Further, the original development permit had expired in 2014. Crown Castle was advised of these deficiencies in January 2017. Crown Castle then moved forward without obtaining a building permit, and re-branched the tree. In July of 2017, Crown Castle requested Planning Approval on this unpermitted

re-branching and were reminded that they needed a building permit per the original approval. Crown Castle did not apply for this permit until June 2018, and the submitted materials showed that the "finished" facility appeared significantly different from the quality shown in the approved discretionary application.[136]

[136]Despite the industry's portrayal of local governments as the delay in deployment, it should be noted that this tree still looks like this today. Staff exercised discretion to work with Crown Castle to cure the deficiencies rather than commence a code violation proceeding, but Crown Castle's inability to construct their facility according to the photo simulations that they prepared and submitted is now requiring an application for an Extension of Time to utilize the 2016 Development Permit.

**Figure 26:** Post-installation inspection photo by San Diego Development Services staff.

The re-branched monopine looks nothing like the photo simulations offered with the application—or a pine tree for that matter.

When approached by city staff about the deficiencies in design construction, Crown Castle sought to replace the approved photo simulations (that Crown Castle

originally created and asked the city to rely on) with a different rehabilitation plan based on the following reasoning:

> Before Crown does any additional work at this site, we need to secure the city's agreement as to what is reasonably needed—we believe the attached exhibit should represent an acceptable level of additional work. Once we receive the city's approval, Crown will authorize the additional rebranching work to be completed. No carrier or infrastructure provider can be expected to produce a perfect tree—this is completely unreasonable, unnecessary and unnatural. Crown believes the tree as currently rebranched, looks natural and screens the antennas. Nevertheless, we are willing to complete the additional work recommended by SCI.[137]

To which the city responded:

> We're not looking for a perfect tree, we're just looking for an accurate representation of the approved sims that complies with all other permit conditions. We haven't seen that yet. I've attached your approved Exhibit A. When compared to the exhibit you sent, we can see that the sims do not match – and without seeing the marked up changes as part of a new simulation, I'm not confident that your proposed fix will remedy the situation. At the discretionary stage, Crown Castle showed us sims that were approved by the Planning Commission. By submitting those sims, Crown Castle represented that they could produce that quality of work. If the finished project matches the sims Crown submitted and meets the conditions of the permit that Crown signed, you're fine. This isn't currently the case.[138]

The actions and explanations of Crown Castle detailed above, may cause some to question whether Crown Castle ever intended to install the concealment as they

[137] Email from Jon Dohm, Crown Castle, to Travis Cleveland, San Diego Development Servs. (Sep. 18, 2017 11:59 AM).
[138] Email from Travis Cleveland, San Diego Development Servs., to Jon Dohm, Crown Castle (Sep. 18, 2017 2:14 PM).

proposed and as the city approved. All the time, effort and resources to convert a perfectly good photo simulation provided by the applicant into an exhaustive concealment-element list matters not when some applicants will waste just as much time and effort to avoid their concealment obligations altogether.[139]

A similar scenario occurred between T-Mobile and the City of San Diego over a monopine at a different location. In 2016, Crown Castle received approval for a monopine (that included both AT&T and T-Mobile facilities). The facility, as approved by the city, appears in Figure 27, below:

[139] Additionally, if Crown Castle had simply constructed the facility as they indicated they would do in their proposal, city staff would have had additional time to dedicate to reviewing other projects and moving them along. Requiring detailed written explanations of concealment elements would not have assisted either party with resolving this issue.


**Figure 27:** Crown Castle (AT&T / T-Mobile collocation) monopine as originally constructed in 2016.

In 2019, T-Mobile requested a modification to the monopine under Section 6409(a) and submitted plans that included a 3-D simulation to illustrate the finished concealment plan:

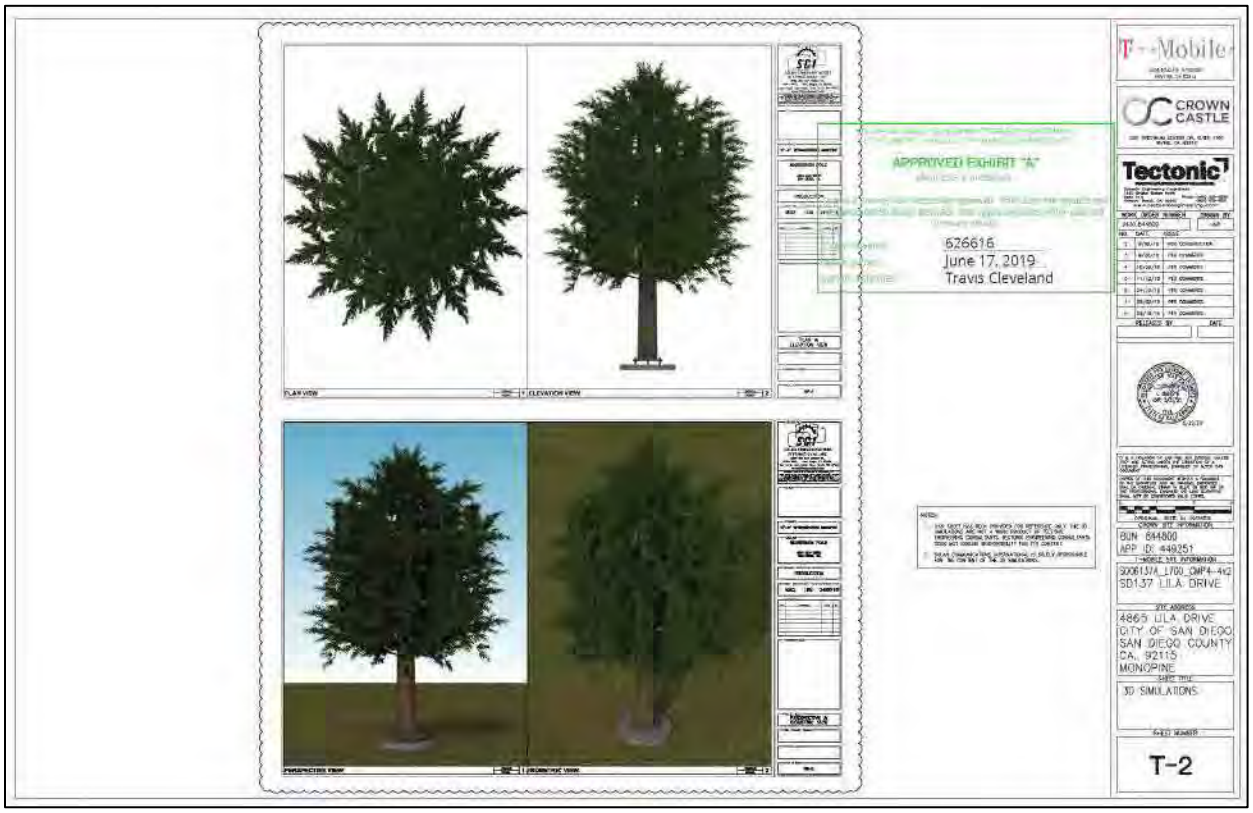


**Figure 28:** 3-D simulation for Crown Castle (Site ID 844800) approved by San Diego Development Services.

However, despite the clear representation and detailed information in the approved site plans, T-Mobile's contractor called for an inspection on what appeared to be only a partially constructed tree where the modification as constructed clearly defeated the concealment elements:

**Figure 29:** Final inspection photo (not approved) by San Diego Development Services staff of Crown Castle (Site ID 844800).

WIA cites Crown Castle as support for its allegation that San Diego "take[s] the position that additions or modifications of antennas on faux trees defeat concealment even if the appearance of the faux tree remains the same,"[140] This statement is false. Not only did San Diego approve this application to modify a faux tree, it has approved approximately 30 other such applications. However, this modification shows how an alleged eligible facilities request drastically alter the sites'

[140] WIA Decl. R. Petition at 10 (citing Letter from Kenneth J. Simon, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 12-13 (Aug. 10, 2018)).

appearance and fail to be consistent with representations in an applicant's own applications to the city.

#### 4. The Commission Should Reject AT&T's Proposal to Excuse Applicants from Concealment Requirements Due to Space Limitations on the Support Structure

Any suggestion that modifications should be exempt from such requirements to the extent that the existing support structure cannot, for example, accommodate additional internal cables or additional RRUs behind the antennas should be rejected.[141] The *2014 Infrastructure Order* recognized the need for at least some cumulative limit on expansions, either expressly through a cumulative height limit or impliedly through an interpretation that replacement structures needed to support the additional equipment were *per se* not covered by Section 6409(a). The same principle applies to concealment: if the applicant proposes a change so large it cannot be concealed in the same manner as the existing wireless tower or base station, the change must be considered substantial.

This is not to say that any such modification would be ultimately prevented. As noted by several commenters, local governments work collaboratively with applicants to find workable solutions to proposed deployments even when Section 6409(a) does not *mandate* approval.

To illustrate this point, consider again the Edwards Road monopine in Cerritos, California.[142] A few months after the city initially declined to renew the monopine in its then-current state, Crown Castle (as agent for T-Mobile) submitted

[141] *See, e.g.*, AT&T Comments at 7.
[142] *See supra* at 59-61.

an eligible facilities request for a modification to the same monopine.[143] After a brief tolling period due to application incompleteness, the city *approved* the modifications on the existing monopine subject to the same concealment conditions originally imposed on the site in 2001.[144] However, Crown Castle complained that compliance with the original conditions would be impossible because the existing monopine could not physically support the additional equipment and the related concealment elements.

Although Crown Castle could have simply replaced the pole under a discretionary review process, city staff offered to work collaboratively with the applicant to avoid burdens associated with full pole replacement but still preserve the original concealment through a re-branching plan. Indeed, the current balance between rights and limitations in Section 6409(a) contributed to the conditions for collaboration because both Crown Castle and the city had an incentive to work with the other.

### B. Increases in Tower Height Without an Absolute Maximum Height Limit Undermines Careful Limits in Rule 1.6100(b)(7)(i)(A)

The Commission should reject proposals by WIA and other industry commenters to "clarify" that Rule 1.6100(b)(7)(i) allows for up to 20 feet between antenna arrays without regard to antenna size. This interpretation conflicts with the Commission's express intent to create an ascertainable maximum height limit for towers modified under Section 6409(a).

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[143] *See* Letter from Justin Davis, Crown Castle, to Cerritos Planning Department (July 22, 2015).
[144] *See* Letter from Wyman Wong, Associate Planner, City of Cerritos, to Justin Davis, Crown Castle (agent for T-Mobile) (Sep. 23, 2015).

Industry commenters point out that this interpretation would be consistent with the Collocation Agreement, which the Commission used as the basis for Rule 1.6100(b)(7)(i). However, these arguments gloss over important and intentional differences between the Collocation Agreement and Rule 1.6100(b)(7)(i).

Unlike the Collocation Agreement, Rule 1.6100(b)(7)(i) includes a cumulative limit on height increases and contains no exception for additional height needed to avoid interference. These distinctions "limit modifications that are subject to mandatory approval to the same modest increments over what the relevant governing authority has previously deemed compatible with local land use values."[145] The Commission emphasized its desire for a fixed maximum height increase when it rejected proposals by WIA and Verizon to measure the cumulative limit from "the last approved change" because it "would provide no cumulative limit at all."[146]

Here, a maximum height increase defined by separation between antennas, like one defined by the last approved change, "would provide no cumulative limit at all."[147] Antennas vary widely in length. Antennas on most wireless towers range from approximately two feet to eight feet in length and tend to get longer with each additional frequency band they can support. Section 6409(a) also applies to other "wireless" facilities that involve much longer antennas. Amateur radio antennas can be several hundred feet long and almost the entire 200-foot broadcast tower itself is an antenna.

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[145] *2014 Infrastructure Order* at ¶ 197.
[146] *See id.*
[147] *See id.*

Moreover, the permissible height increase would be impacted as much by the existing antennas on the tower as it would be by the proposed antennas on the tower extension. WIA's proposal would be for 20 feet *between* the antenna arrays. The permissible height limit would therefore depend on the existing antenna length and position on the tower because the highest point on the existing antennas would set the base line for a 20-foot separation from the lowest point on the new array. As a result, the cumulative height limit would be different for two otherwise identical towers if the antennas on one tower were shorter or installed at a lower height.

Accordingly, under WIA's proposed clarification to Rule 1.6100(b)(7)(i), the maximum height increase for towers would be unascertainable, much larger than the Commission ever intended and primarily dependent on the existing antennas rather than the existing tower. The Commission should reject this unnecessarily complex clarification as inconsistent with its intent to create a simple formula for a maximum limit on height increase to existing towers.

### C. Increases in Base Station Height Without Reference to the Area Approved for Transmission Equipment Would Produce Absurd Results

The proposal to define the substantial change in height by reference to any point on a non-tower structure would result in absurd outcomes.[148] Unlike wireless towers, which are almost uniformly narrow poles or lattice towers on a relatively small footprint, base stations vary widely in shape, size and architectural design and can cover very large areas.

[148] CTIA Petition at 15; AT&T Comments at 10–11.

Consider, for example, a low-slung factory with a smokestack on one end that supports unconcealed antennas. The main structure may be 45 feet tall (approximately three stories) and sprawl over 100,000 square feet (approximately one city block) but the smokestack may be 150 feet tall and less than 75 feet in diameter.


**Figure 30:** Multi-carrier base station, Philadelphia, PA.

**Figure 31:** Multi-carrier base station on power plant in Carlsbad, CA.

Under CTIA's proposal, its members could install an entirely separate extension, up to 10 feet or 10% taller than the existing smokestack (whichever is greater), anywhere on the rooftop merely because the existing smokestack is physically connected to the factory building.[149] Whether the existing facilities were installed on the lower rooftop or the smokestack would not matter, and, if the existing facilities were unconcealed, the new extension could be unconcealed as well. Thus, if

[149] CTIA Petition at 15–16; AT&T Comments at 11.

the Commission adopted CTIA's proposal, its members could erect a new, unconcealed, up-to-120-foot tower on the rooftop without any local input.

This is precisely the outcome the Commission sought to avoid when it modified the Collocation Agreement standard as applied to non-tower structures.[150] Rather than a 20-foot extension in all cases, the Commission adopted a lower threshold based on its assumptions about the parameters for multiple transmitters on a shared structure.[151] Likewise, the Commission set the baseline for cumulative extensions to base stations as its original height because subsequent by-right modifications "may not reflect a siting authority's judgment that the modified structure is consistent with local land use values."[152] Indeed, the Commission apparently did not expect applicants to routinely request height extensions on non-tower structures since the cumulative height limit for base stations presumes that additional antennas would be deployed horizontally.[153]

Moreover, the industry commenters offer no technical justification for this interpretation. The ten-foot "fixed minimum" extension for base stations under Rule 1.6100(b)(7)(i) purportedly serves to avoid either interference among vertically stacked antennas or RF shadowing created when antennas cannot "see" below the

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[150] *See 2014 Infrastructure Order* at ¶ 193.
[151] *See id.*; *see also* 47 C.F.R. § 1.6100(b)(7)(i). Although the current rule leaves open the potential for 20-foot extensions to base stations, this would occur only on non-tower structures over 200 feet tall (i.e., 10% over the original structure height).
[152] *See 2014 Infrastructure Order* at ¶ 197.
[153] *See* 47 C.F.R. § 1.6100(b)(7)(i)(A) ("Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops . . . ."); *2014 Infrastructure Order* at ¶¶ 188, 197 (referring, in each instance, to "buildings" as examples for when antennas would be horizontally separated).

roofline.[154] In the factory example above, the right to install a separate extension anywhere on the structure up to 10 feet or 10% taller than the smokestack would amount to serious overkill with little-to-no justification. Even in less dramatic examples, the Commission's existing rules already take into account conservative estimates for technical necessities.[155]

The best justification industry commenters can muster is that they perceive the text in Rule 1.6100(b) as flexible enough to permit their interpretation.[156] This is, of course, no justification at all, particularly under a standard that requires the agency to explain why the facts that supported its earlier policy are no longer persuasive.[157] The Commission should reject this proposed interpretation.

### D. Equipment Cabinet Issues

Industry-proposed changes to the definition of equipment cabinets create new ambiguities and would be untethered from any reasonable conception of a substantial change. Moreover, some commenters appear to have conjured a "common industry understanding" specifically for this proceeding. The Commission should not find such arguments credible.

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[154] *See 2014 Infrastructure Order* at ¶ 193 ("Without such a minimum, we find that the test . . . may undermine the facilitation of collocation, as vertically collocated antennas often need 10 feet of separation and rooftop collocations may need such height as well.").

[155] The ten-foot vertical separation is an ultraconservative precaution against interference. Most facilities can operate normally within five feet from other transmitters, many can operate normally with less than a five-foot separation and some can accommodate "tip-to-tip" configurations with no separation at all. The ten-foot extension also allows for an eight-foot antenna to be placed up to six feet behind the roofline without a significant shadow (under the rule-of-thumb that one foot in additional elevation is needed for every three feet in setback from the roofline).

[156] *See* CTIA Petition at 16.

[157] *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

### 1. There Appears to Be No "Common Industry Understandings" that Equipment Cabinets Must be Mounted on the Ground

AT&T's proposal to define an "equipment cabinet" by "common industry understandings" threatens to undermine the limitation altogether.[158] At least one court rejected a similar argument by AT&T's contractor when offered as a justification for the right to expand the equipment footprint beyond the leased premises in a dispute with property owner.[159] Like the property owner in that case, state and local governments are not industry members and would lack any basis to understand or dispute whatever the site operator held out as a common industry definition for an equipment cabinet.[160]

In any event, the industry does not appear to share a common understanding about what qualifies as an equipment cabinet. Industry commenters in this proceeding coalesce around the notion that anything attached to a pole could not be an equipment cabinet.[161] By contrast, many equipment manufacturers apparently disagree and offer various prefabricated cabinets intended to be mounted on or affixed to a pole.[162] The manufacturers often point to a cabinet's adaptability to both pole-mounted and ground-mounted deployments as a selling point.

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[158] AT&T Comments at 9.
[159] *See Md7, LLC v. Seidner*, Nos. G042498 and G042755, 2011 WL 141123, *5 (Cal. Ct. App. Jan. 18, 2011) (upholding superior court determination that "industry standards" as to what certain terms in the lease could not bind a commercial landlord who was not an industry member).
[160] *See id*.
[161] *See* WIA Comments at 11; CTIA Comments at 2; Crown Castle Comments at 11; AT&T Comments at 9; T-Mobile Comments at 4; ACT Comments at 6.
[162] *See, e.g.*, *Small Cell Glossary*, RAYCAP, https://www.stealthconcealment.com/wp-content/uploads/2019/04/Small-Cell-Glossary-5.pdf (last visited Nov. 4, 2019) (defining a "[s]hroud/cage" as a "side-mounted enclosures that can be mounted on a pole to hold all radios and other necessary equipment"); *CUBE Low-Profile Small Cell Power Cabinets*, CHARLES INDUS. (2016), http://www.charlesindustries.com/CUBE_ordering_guides/CUBE%20Low%20Profile%20SC_2016.pdf (describing an equipment cabinet that "is attractive to real estate teams and municipalities because

Disagreement among industry members over "common industry understandings" makes the proposed interpretation unworkable and likely to engender further confusion. The Commission should reject this proposal.

### 2. Defining Large, Permanent Equipment Shelters as "Equipment Cabinets" is Absurd

WIA and AT&T expand the Petition's proposed definition of equipment cabinets to apply to brand new equipment shelters. Perhaps in recognition that an entirely new structure is more substantial than a replacement structure, WIA and an industry commenter relegated this proposal to a single footnote.[163] The Commission should reject this proposal.

Equipment shelters are large, permanent structures. Prefabricated concrete structures typically range from 120 to 456 square feet.[164] Some prefabricated shelters

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it 'hugs' the pole"); *FlexSure FLX12-2420*, PURCELL (2014), https://www.purcellsystems.com/core/files/purcellsystems/uploads/files/flexsure-ws/flexsure-flx12-2420-outdoor-gr487-enclosure-specification.pdf (describing pole-mounted options for small-cell equipment cabinet); *Product Search*, WESTCELL, https://www.westell.com/products/search?category%5B%5D=44463&category%5B%5D=2267&subcategory%5B%5D=6759&subcategory%5B%5D=6761&page=2 (last visited Nov. 12, 2019) (offering up to 16 different pole-mounted outdoor equipment cabinets); *Custom Small-Cell Cabinets*, SUN WEST ENGINEERING (Jan. 2015), http://www.sunwesteng.com/documents/products/small-cell-cabinet-flyer.pdf (describing cabinets customizable for "Pole or Pad Mounting as Required"); *Small Cell Concealment Solutions*, RAYCAP, https://www.stealthconcealment.com/wp-content/uploads/2019/07/Small-Cell-Pole-Solution-Overview.pdf (last visited Nov. 4, 2019) (describing boxes attached to "upper-middle of pole" as "enclosures").

[163] WIA Petition at 9 n.32; *see also* AT&T Comments at 31 n.107.

[164] *See Steel Reinforced Pre-Cast Concrete Buildings from Thermo-Bond Buildings*, THERMOBOND BUILDINGS, http://thermobond.com/precast-concrete-shelters/ (last visited Nov. 12, 2019) ("Concrete equipment shelters can range from 6' x 6' to 12' x 38' and can include a separate generator room."); *Equipment Shelters*, Wireless Estimator, http://wirelessestimator.com/content/industryinfo/174 (last visited Nov. 12, 2019); *see also Communications Shelters*, MODULAR CONNECTIONS, https://modularconnections.com/communication-shelters/ (last visited Nov. 12, 2019) ("The size of a building is *virtually unlimited*. Individual modules range from 8'W x 8'L to 13'8"W x 36'L, but multiple modules can be manufactured for larger square foot requirements.") (emphasis added).

can be as large as 4,000 square feet.[165] Enclosures at these dimensions often serve as data centers with interior offices and restrooms rather than cabinets for wireless service equipment.[166] The Commission cannot seriously consider such massive structures as an insubstantial change to the physical dimensions of the existing facility. Moreover, defining an equipment shelter as an equipment cabinet would produce the absurd result that multiple equipment shelters, not to exceed four, would be permitted without local input.

### E. Proposed Site Expansions Are Not Minor, Especially If Permitted to Expand Unchecked

Industry commenters' justifications for site expansions run counter to their other positions. On one hand, industry commenters claim that existing safe harbors for local review hamper deployment and, on the other hand, that limitations on substantial change thresholds need to be relaxed because deployments have been so successful that there's no more room on existing towers and base stations.[167] Industry cannot always have its cake and eat it, too.

The Commission should reject WIA's request for a rulemaking. If the Commission does initiate a rulemaking proceeding, it should propose common-sense limitations on site expansions.

#### 1. Industry Justifications for Site Expansions Fail to Rationalize the Enormous Expansion Space Requested

[165] *See 40' x up to 100' ESI-SPAN*, ESI-SET INDUS., https://precastbuildings.com/images/pages/floor-plans/floor-plans/40x100_easi_span.pdf (last visited Nov. 12, 2019).
[166] *See Shelter Solutions*, OLDCASTLE PRECAST (Nov. 2018), https://oldcastleinfrastructure.com/wp-content/uploads/2018/11/ShelterSolutionsFolder_rev2.pdf.
[167] *See, e.g.*, AT&T Comments at 29.

Industry commenters use many euphemisms to describe the significant deviation from the plain statutory text as currently implemented by the Commission.[168] Whatever the rhetorical minimization, all these commenters fail to acknowledge that some changes—however small—are *per se* substantial. In addition to deployment or excavation outside the site boundaries, the Commission identified at least four other circumstances in which any change would disqualify a modification under Section 6409(a).[169]

Even if the Commission could authorize site expansions, which it cannot, the record lacks a logical connection between the massive space requested by WIA and the reasons it claims to need so much. Industry commenters primarily claim to need the space to harden existing facilities with backup power sources and collocated additional service providers.

Backup power sources often do require some additional space beyond the equipment, but nowhere near the massive expansion requested by WIA and its members. Based on a survey among coalition members, when applicants request approval for a backup generator (either in connection with a new site build or a modification to an existing site), the average area required is approximately 85

[168] *See, e.g.*, AT&T Comments at 30-31 (using the terms "small", "slight", "limited" and "minor" approximately eight times to characterize large expansions); WISPA Comments at 8 (describing compound expansions as "minor"); Nokia Comments at 8 (describing compound expansions as "slight"); CTIA Comments at 15 (describing new ground equipment installation as "just outside" the compound's existing boundaries).

[169] *See* 47 C.F.R. §§ 1.6100(b)(iv)–(vi); *2014 Infrastructure Order* at ¶ 174 (modifications to sites deployed without proper review and approval); *id.* at ¶ 181 (modifications that involve support structure replacement); *id.* at ¶ 202 (modifications that violate "generally applicable laws related to public health and safety").

square feet.[170] In other words, the actual space needed for standby power is approximately 17.6 times smaller than a 30-foot extension to a typical 50' by 50' tower site compound. If the site operator could extend all four sides up to 30 feet, the expansion would be approximately 70.5 times larger than necessary to accommodate a typical generator.

Collocated communications cabinets often require even less space. For a macro site, a typical outdoor equipment cabinet occupies approximately 5.25 square feet and a comparable indoor equipment cabinet occupies slightly more than 3 square feet.[171] Assuming that an additional 50% larger space around the cabinet will be needed for cabinet door swings, footings and other peripheral hardware, the area increases to 7.9 square feet for outdoor cabinets and 4.5 square feet for comparable indoor models.[172] Under the same hypothetical 50' by 50' tower site compound, the expansion space would be anywhere from 190 to 780 times larger than necessary to add a single outdoor cabinet. If the collocation involved four outdoor cabinets and a diesel generator, the expansion space would still be between 12 and 47 times larger than the actual space required for the combined equipment.

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[170] The square footage was taken from construction plans submitted with permit applications and includes any equipment pads, catch basins, fuel storage and other space requested by the applicant and shown on the plans. This includes both diesel and natural gas generators. If natural gas generators are excluded from the dataset, the average increases to approximately 95 square feet.

[171] *See RBS 6000 Series Macro Base Stations*, Ericsson (Mar. 2018), https://www.motorolasolutions.com/content/dam/msi/docs/business/solutions/business_solutions/mission_critical_communications/lte_for_government_and_public_safety/_documents/_static_files/rbs_6000_series_product_spec_sheet_1104-1.pdf.

[172] No similar allowance was needed for the generator analysis above because the area requirements included space around the equipment as requested by the applicants. *See supra* note 170.

Even with a tower compound half as large as the example above, the space requested dwarfs the actual space required. The site operator with the right to expand 30 feet in any direction could accommodate between six and 23 additional collocations, each with four cabinets and a dedicated standby generator.

The expansion space requested bears no relationship to the actual space required for collocation because the 30-foot expansion standard in the NPA has nothing to do with collocations. The NPA concerns tower replacements. To maintain uninterrupted on-air status, the tower operator often builds the new tower on a separate foundation before it removes the old tower. Under these circumstances, a 30-foot latitude bears a reasonable relationship to what the relocation work might require. The Commission recognized this fact in 2014 and should do so again.

#### 2. Disregard for the Original Site Boundaries Would Lead to a "Bloating Tower" Problem Similar to the "Blooming Tower" Problem in the *2014 Infrastructure Order*

The Commission should reject WIA's proposal to measure the expansion space from the current site boundaries at the time an applicant requests approval.[173] Western Communities Coalition agrees with NLC *et al.* that this proposal would contravene the Commission's existing rules and its justifications for those rules offered to the Fourth Circuit in *Montgomery County*.[174]

In addition, the Commission should recognize that it previously rejected a similar proposal by WIA (then known as PCIA) with respect to serial height increases. The potential for a "blooming tower" that could grow under successive by-right

[173] *See* WIA Dec. R. Petition at 18.
[174] *See* NLC *et al.* Comments at 10–12.

modifications troubled the Commission then and the current potential for a "bloating tower" raises nearly identical concerns.

Rule 1.6100(b)(7)(i)(A) establishes a cumulative limit on height extensions by-right under Section 6409(a).[175] At the time the Commission adopted the cumulative limit, it noted that:

> We agree with commenters that our substantial change criteria for changes in height should be applied as limits on cumulative changes; *otherwise, a series of permissible small changes could result in an overall change that significantly exceeds our adopted standards*. Specifically, we find that whether a modification constitutes a substantial change must be determined by measuring the change in height from the dimensions of the "tower or base station" as originally approved or as of the most recent modification that received local zoning or similar regulatory approval prior to the passage of the Spectrum Act, whichever is greater.[176]

The Commission also rejected a proposal by WIA (then known as PCIA) to measure the permissible increase in height "from the last approved change or the effective date of the rules."[177] This decision rested on the commonsense observations that such an illusory baseline would conflict with the Commission's policies and create impractical burdens on both local authorities and applicants:

> [m]easuring from the last approved change in all cases would provide *no cumulative limit at all*. In particular, since the Spectrum Act became law, approval of covered requests has been mandatory and therefore, approved changes after that time may not establish an appropriate baseline because they may not reflect a siting authority's judgment that the modified structure is consistent with local land use values. Because it is impractical to require

[175] *See* 47 C.F.R. § 1.6100(b)(7)(i)(A).
[176] *2014 Infrastructure Order* at ¶ 196 (emphasis added) (internal footnotes omitted).
[177] *Id.* at ¶ 197 (citing PCIA Comments at 36).

> parties, in measuring cumulative impact, to determine whether each pre-existing modification was or was not required by the Spectrum Act, we provide that modifications of an existing tower or base station that occur after the passage of the Spectrum Act will not change the baseline for purposes of measuring substantial change.[178]

Here, WIA proposes the same illusory standard applied to compound expansions rather than tower extensions. Whereas height increases measured from the last approval would allow for a "blooming" tower, site expansions measured from the current site boundaries would allow for a "bloating" tower compound.

Indeed, the standard could produce even greater harm to the legitimate local interest in discretion over the original deployment because the "site" boundaries (*i.e.*, the "leased or owned area") could be increased after the approval without the local government's knowledge. This creates an added and impractical burden on local officials and applicants to determine precise boundary lines around leasehold estates. Just as the Commission found it "impractical" to determine whether Section 6409(a) covered prior height increases as baseline, it should also find that the proposal to measure expansions from the current site boundaries creates unreasonable burdens.[179]

### 3. If the Commission Grants WIA's Petition for a Rulemaking, Any Expansions Must Be Subject to Commonsense Limitations

[178] *2014 Infrastructure Order* at ¶ 197.

[179] Although local governments could shift the burden to applicants with a property-line survey requirement, which would be reasonably related to whether the expansion fit within a threshold from the "current" site boundaries, such surveys require additional time and money to produce. Such delays and costs associated with this proposal's implementation should be considered yet another reason to maintain the existing standards.

To be clear, the Commission should reject WIA's Petition for a Rulemaking. However, if the Commission grants the petition, any proposed amendments to the rules should include some commonsense limitations, which includes without limitation all the following:

- ***Expansions Should be Narrowly Tailored Based on the Actual Space Reasonably Required for Collocations:*** As explained above, the 30-foot expansion standard from the NPA bears no rational relationship to the space needed for collocated wireless facilities. Although any expansion should be considered a substantial change, a more rational measure for expansion space would be square footage and the maximum should be determined by the equipment site operators normally install for standby power and collocations.

- ***Expansions Should be Measured from the Original Site Boundaries to Avoid "Bloating Tower" Problems:*** As explained above, WIA's proposal to disregard the original site boundaries is as untenable and impractical as its prior proposal to disregard the original structure height.

- ***Expansions Should Be Limited to Equipment Compounds and Should Not Include Utility and Access Easements:*** Utility and access easements connect the equipment compound to the public rights-of-way. An average utility easement is between six and ten feet wide; access easements average between 12 and 30 feet wide. Moreover, these nonexclusive pathways may be long and indirect when the tower sits on large or densely developed properties. Any right to expand to these areas would increase the likelihood for conflicts with other uses on the property and could lead to noncontiguous compounds. Consistent with the existing rules, this proposed limitation would not prevent the site operator from excavations or new deployments within existing utility or access easements, as may be necessary to support the additional transmission equipment within the compound.[180]

- ***Expansion Space Must be Physically Contiguous with the Original Site Boundaries:*** Section 6409(a) applies only to changes to *existing* wireless towers or base stations.[181] A rule that allowed for expansion space detached from the current site boundaries would effectively authorize a new site for transmission equipment.

[180] *See* 47 C.F.R. § 1.6100(b)(7)(iv).
[181] *See* 47 U.S.C. § 1455(a); 47 C.F.R. § 1.6100(b)(5); *2014 Infrastructure Order* at ¶ 174.

- ***Expansions Must be Limited to Existing Towers Not Located within the Public Rights-of-Way:*** The Commission has previously recognized that physical changes in facilities sited on utility infrastructure or within the public rights-of-way must be treated differently. In almost all respects, the thresholds for a substantial change are stricter for utility structures and ROW facilities. As noted in our comments, the proposed rule would allow new equipment and ground disturbance to occur clear across the street in many common ROW scenarios.[182] Thus, any additional rights to expand should not be applicable to base stations on private property or any facilities located in any utility easements or public rights-of-way.[183]

- ***Expansions Must Not be Permitted to Encroach into Any Setbacks Applicable to the Underlying Property or Proposed Use:*** WIA and its allies complain that some unnamed communities expand their setbacks to create noncompliance. However, in an expansion scenario, the roles are reversed, and the site operator pushes into an existing setback. Without a limitation on expansions into setbacks, the Commission would effectively invite site operators to violate otherwise valid regulations.

- ***Local Authorities Must Retain Reasonable Discretion to Require Extended and/or Additional Concealment for Compound Expansions:*** Where the expansion occurs matters. Many local governments carefully and thoughtfully consider the site location and configuration to mitigate unnecessary adverse impacts on other uses. The proposed rule would effectively undo those efforts and defeat legitimate local interests. Without the opportunity to ensure that the expansion area comports with the existing site, we are likely to see "Frankenstein" sites with mixed materials and construction techniques.

Additional limitations and/or refinements to the proposed limitations above should be considered in a notice of inquiry or notice of proposed rulemaking issued by the Commission.

## V. LEGAL NON-CONFORMING STATUS DOES NOT INCLUDE STRUCTURES OR PROPERTIES WITH HEALTH AND SAFETY VIOLATIONS

[182] Western Communities Coalition Comments at 53-55.

[183] *See, e.g.*, Nokia Comments at 8–9 (arguing that the need for expansion is primarily associated with "[t]ower sites"); Crown Castle Comments at 32 (referencing state laws that address requirements for "modifications to existing towers"); CTIA Comments at 15-16 (discussing how the "tower model" has changed as a justification); WIA Comments at 6 (requesting rule change in the context of a "tower site boundary").

The Commission should reject arguments by industry commenters that the exception for legal non-conforming structures in the *2014 Infrastructure Order* exempts site operators from compliance with updates to generally applicable health and safety regulations.[184]

Legal non-conforming status does not cover changes to structures and properties with conditions that violate health and safety regulations. Whether a health and safety requirement existed before or after a site's initial construction date is irrelevant.

Changes in health and safety regulations reflect new understandings about potential harms and how to mitigate the risk. For example, after several devastating wildfire seasons, California amended its state law to require clearances between vegetation and occupied structures in high fire hazard zones.[185] If local officials refused to approve an eligible facilities request on an existing tower that violated the new fire safety setback, would the Commission preempt the code's application to the facility merely based on its adoption date? Of course not.

Structures that violate generally applicable public health and safety laws are nuisances subject to abatement. If the noncompliance cannot (or will not) be cured, the structure is ordinarily condemned. From the local government perspective, applications to intensify existing uses on a structure that may be condemned waste everyone's time and resources.

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[184] *See, e.g.*, Crown Castle Comments at 15.

[185] *See* S.B. 833, 2009-2010 Leg., Reg. Sess. (Cal. 2009) (amending Cal. Gov. Code § 51182(a)(1) to create a fixed "defensible space of 100 feet" from each side and from the front and rear of the structure).

## VI. FEE ISSUES

### A. Section 6409(a) Does Not Invite the Commission to Impose Restrictions on Fees or Other Charges by Local Governments

Several industry commenters argue fees and other charges by local governments in connection with eligible facilities requests conflict with Section 6409(a)'s mandate to approve covered requests.[186] These arguments misread the statute and overstate the Commission's authority.

Section 6409(a) says nothing about fees or other charges in connection with an eligible facilities request.[187] The statute preempts state and local authority to deny certain applications but not what may be charged to review and process those applications. If Congress intended to limit fees associated with eligible facilities requests, it presumably would have included limitations on the application process like those contained in Section 6409(c)(3).[188]

At least one industry commenter also appears confused about the distinction between regulatory fees to process permit applications and proprietary charges for access to government property. ACT complains that proprietary discretion:

> creates confusion in the market and results in unreasonable denials of EFR status to tower owners, thus, excluding those applicants from various Section 6409(a) protections. Without such protections, some state and local agencies have enforced requirements increasingly unconnected to the public interest, which, at times, serve as a measure to extract maximum revenue from those deploying broadband infrastructure. Some egregious examples include state and municipal authorities

[186] *See* WISPA Comments at 9; ACT Comments at 8; WIA Comments at 8.
[187] *See* 47 U.S.C. § 1455(a).
[188] *See id*. § 1455(c)(3).

> requiring tower owners to pay additional fees for nominal compound expansions (sometimes as minor as five feet).[189]

Yet the Commission already made clear "that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities."[190] The statute does not "protect" potential collocators from landlords that, as a rational economic actor, require additional rent for additional space under a ground lease.

Perhaps in acknowledgment that the statute provides no basis to limit fees in connection with eligible facilities requests, some commenters attempt to draw comparisons to other instances where the Commission limited fees imposed by local authorities. But comparisons to Commission regulations on fees in its actions under the *Small Cell Order* are misplaced.

Contrary to comments by AT&T and others, there is no corollary between fees for eligible facilities requests and fees for small wireless facilities.[191] The Commission's limitations on fees in the *Small Cell Order* followed from its assumption that, given the massive small-cell deployments and anticipated capital costs, any fees above actual cost would result in an effective prohibition.[192] No such record exists before the Commission in this proceeding. In fact, some industry commenters boast about how successful their Section 6409(a) deployments have been.[193]

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[189] ACT Comments at 8.
[190] *2014 Infrastructure Order* at ¶ 239.
[191] *See* AT&T Comments at 33.
[192] *See Small Cell Order* at ¶ 47-48, 60, 65.
[193] *See, e.g.*, AT&T Comments at 29.

Moreover, the proposed limitation would cover fees for collocated facilities not covered by Sections 253 or 332(c)(7). In the *Small Cell Order*, the Commission purported to draw its authority for the limitations on fees from the bar against "effective prohibitions" in Sections 253(a) and 332(c)(7)(B)(i)(II).[194] However, the facilities and services covered by these provisions are not necessarily the same as those covered by Section 6409(a). For example, if a private mobile radio service sought to collocate on an existing broadcast tower, Section 6409(a) might be applicable but Sections 253 and 332 would not.[195]

Nokia also cites to the *Second Report and Order*[196] as support for the Commission's authority to preempt state and local fees.[197] However, the D.C. Circuit recently invalidated the Commission's attempt to eliminate certain tribal review processes for small wireless facilities as arbitrary and capricious.[198] Although the court upheld the Commission's determination that upfront payments to tribes for

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[194] *See Small Cell Order* at ¶ 46. The Commission should not rely on its rationale for fee limitations in the *Small Cell Order* given its current status under judicial review. Although the Tenth Circuit denied a motion to stay, that motion did not gainsay the petitions' merits. Moreover, the Ninth Circuit's recent order granting expedited oral argument could only be granted if the court perceived both irreparable harm to the petitioners and a likelihood that the *Small Cell Order* should be invalidated in whole or in part. At best, it would be imprudent for the Commission to limit fees for eligible facilities requests based on a rationale that could be invalidated in the near future.

[195] *See, e.g.*, WISPA Comments at 3 ("Providers of fixed wireless broadband services are covered by Section 6409(a), but may not be covered by other sections of the Communications Act that address state and local siting authority."). Although WISPA attempts to draw a parallel between fixed wireless providers and small-cell providers, no comparisons between the two groups can overcome the simple fact that neither Section 6409(a) nor the *Small Cell Order* provides a statutory basis for limitations on fees for facilities not covered by Section 253 or Section 332(c)(7). *See* WISPA Comments at 3.

[196] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, 2018 WL 1559856 (F.C.C.) (Mar. 22, 2018).

[197] Nokia Comments at 3 n.5.

[198] *See United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728, 740 (D.C. Cir. 2019).

consultation are voluntary, it specifically noted that the *Second Report and Order* did not attempt to prohibit tribes from attempting to collect fees.[199] Thus, the Commission should not rely on the *Second Report and Order* as support for the Commission's authority to limit state and local fees for eligible facilities requests.

### B. The Commission Should Not Deem Granted Permits Withheld Due to Unpaid Fees

WIA's proposal to authorize construction notwithstanding a disputed fee is out-of-step with normal practice for disputes over development fees. Like many fees or other impositions by federal, state and local governments, development and permit fees must be paid prior to approval. If a dispute arises, the fees may be paid under protest.[200]

The Commission should consider how this rule will work in practice. State and local governments generally require applicants to pay permit fees in advance at the time the application is initially filed.[201] Fees for ministerial permits may also be charged at the time the applicant arrives to physically receive its permit. If an applicant "disputes" a fee and refuses to tender payment, the local government will not be able to fund the application review (or issue the approved permit) and the applicant will ultimately claim the application was deemed granted.

### C. Escrow and Deposit Accounts Serve Important Interests for both Local Governments and Applicants

[199] *Id.* at 747–48.
[200] *See* CAL. GOV. CODE § 66020.
[201] *See e.g.*, Western Communities Coalition Comments at 62.

Contrary to the industry's comments, escrow accounts are a common feature in development projects that ensure cost-based fees. The escrow allows local government staff to draw down funds as it incurs actual costs. Compared to a flat application fee, an escrow account protects against both underpayments and overpayments. Flat application fees too low to cover the actual costs directly caused by an application turn local governments into subsidizers for the deployment or unsecured creditors who must chase down reimbursement.

Escrow accounts are particularly useful when the applicant intends to undertake large and/or serial projects. In these situations, the actual cost may be difficult to calculate in advance because, for example, the project scope may change or the parties may discover unanticipated efficiencies.

Nokia suggests that escrow accounts should be limited to costs associated with local review to determine whether Section 6409(a) applies or not.[202] This makes little sense given that local governments will incur costs to perform other review and permit issuance services after the initial determination. The limitation suggested by Nokia would merely add additional process for both the local government and the applicant as they switch from one fee-payment mechanism to another.

[202] *See* Nokia Comments at 9.

## CONCLUSION

For all the reasons stated above, the Commission should reject the petitions for declaratory ruling filed by WIA and CTIA and the petition for rulemaking filed by WIA.

November 20, 2019

Respectfully submitted,

*s/ Robert C. May III*
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California; City of San Ramon,
California; City of Santa Cruz,
California; City of Santa Monica,
California; City of Solana Beach
California; City of South Lake Tahoe,
California; and City of Thousand Oaks,
California.

**EXHIBIT A**

**Affidavit of Edward Stafford**

[appears behind this coversheet]

EXHIBIT A

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of State and Local Governments Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 | ) | WT Docket No. 19-250 |
| | ) | RM-11849 |
| 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 |

## AFFIDAVIT OF EDWARD STAFFORD

Edward Stafford declares as follows:

1. Since January 23, 2014, I have been employed by the City of Boulder as the Development Review Manager for Public Works.

2. My duties as Development Review Manager for Public Works include the intake and review of applications for new, collocated and modified personal wireless service facilities.

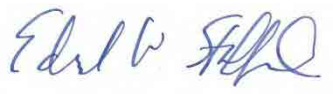
3. I understand that the CTIA – The Wireless Association (CTIA), recently petitioned the Federal Communications Commission for rulemaking and petitioned for a declaratory ruling to further reduce local government authority when reviewing expansions to existing wireless facilities.

4. The CTIA petition for declaratory ruling alleges that a Colorado jurisdiction failed to act on a wireless provider's request for slight relocation of and additional screening for sectors on a rooftop by seeking a lease for the airspace above the street where one sector is being façade mounted.

5. I have reason to believe based on my experience with processing applications for personal wireless service facilities that this is referencing an application for a facility in Boulder.

6. In March of 2018 a wireless provider submitted an application to the City of Boulder for an Eligible Facility Request for a property located at 2060 Broadway in Boulder Colorado. The review of the application determined that the current installation had not been lawfully permitted and was therefore not an Eligible Facility Request. The application was withdrawn in October of 2019 and the wireless provider then proceeded with obtaining permits to make the current facility lawfully established. In July 2019 a subsequent application for an Eligible Facility Request was submitted to the city and the application included a relocation of an antennae to the east face of the building, projecting over the property line into the city's right-of-way. The applicant did not have a right to occupy the city right-of-way and such encroachment is prohibited by the Boulder Revised Code. City staff have worked with the applicant to develop an option to locate the antennae on the roof of the building so that it occupies only the area the applicant has a leased interest in. As of October 25, 2019, the city has not received revised plans for this option.

I declare that the foregoing is true and correct to the best of my knowledge. Executed at Boulder, Colorado, on October 28, 2019:



Edward Stafford
Development Review Manager –
Public Works
City of Boulder, Colorado

**Exhibit C**

**Western Communities Coalition *Ex Parte* dated April 27, 2020**

[appears behind this coversheet]

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April 27, 2020

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Submission, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*; WC Docket No. 17-84; *Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, RM-11849

Dear Ms. Dortch:

This submission is made on behalf of the Western Communities' Coalition, which is comprised of local governments and local government associations that filed Comments and Reply Comments in this Docket.[1] After the comment period in the above-captioned proceeding closed, industry commenters made several *ex parte* filings with statements and information that warrant correction. These filings misconstrue critical tools of responsible governance, grossly understate the petitions' adverse impacts and suggest that some local governments are incapable of fulfilling their obligations during the COVID-19 pandemic.

Western Communities' Coalition rejects the proposition that local governments cannot maintain the continuity of government services during this pandemic. Local governments nationwide have risen to the occasion as the COVID-19 emergency expands into its second month. Any suggestion that the crisis evidences a need for federal preemption lacks factual

[1]The members of the Western Communities' Coalition that join this *ex parte* are the City of Beaverton, Oregon; City of Carlsbad, California; City of Cerritos, California; City of Coronado, California; Town of Danville, California; City of Lawndale, California; League of California Cities; City of Napa, California; City of Oxnard, California; City of Pleasanton, California; City of Rancho Palos Verdes, California; City of Richmond, California; Town of San Anselmo, California; City of San Diego, California; City of San Marcos, California; City of San Ramon, California; City of Santa Cruz, California; City of Santa Monica, California; City of Solana Beach, California; City of South Lake Tahoe, California; City of Thousand Oaks, California; City of Boulder, Colorado; Town of Breckenridge, Colorado; Colorado Communications and Utility Alliance; King County, Washington; City of Lacey, Washington; City of Olympia, Washington; City of Tacoma, Washington; Thurston County, Washington; and City of Tumwater, Washington.

support and reveals the same conceit that underlies the industry's declaratory ruling petitions: that alleged misconduct by a small number of jurisdictions justifies sweeping federal action.

The record in this proceeding and the facts on the ground do not support preemption.

## I. Local Governments Are Rising to the Challenge

Robust and reliable communications networks provide critical services during any public health crisis. For precisely this reason, and having been involved in emergency management planning for years, local governments across the country continue to process applications to modify, upgrade and deploy communications infrastructure, whether remotely or by appointment.[2] These steps and many others show that local governments are rising to the challenge, which makes industry complaints about temporary delays more puzzling.[3] COVID-19 completely disrupted normal economic activity and, on the recommendation of public health officials, required public and private sectors to take drastic measures to impede transmission of the virus. A review of how local governments have responded and implemented new operations, including those related to permitting, while mitigating the spread of this virus demonstrates that intrusive federal action is unnecessary.

### A. The Commission is Aware of State, Local and Tribal Work in Planning for Emergencies

As the Commission knows, its own Intergovernmental Advisory Committee (IAC) spent considerable time in 2019 working on emergency response issues, resulting in the adoption of a series of Advisory Recommendations, including IAC ADVISORY RECOMMENDATION No: 2019-3, In the Matter of Intergovernmental Disaster Response Coordination

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[2] *See, e.g.,* Steve Taylor, *Cell tower approved at Seckman High campus*, LEADER PUBLICATIONS, (Apr. 6, 2020), *available at:* https://www.myleaderpaper.com/news/cell-tower-approved-at-seckman-high-campus/article_eef4cb60-75e8-11ea-9f43-377a433112ad.html (describing Jefferson County Council approval of conditional-use permit by telephone conference); Bruce A. Scuton, *Freeholders meet by phone, has audience participation*, NEW JERSEY HERALD (Mar. 26, 2020), *available at:* https://www.njherald.com/news/20200326/freeholders-meet-by-phone-has-audience-participation (board approved a new agreement for a cell tower in meeting held over the telephone); Leah Wankum, *Sprint cell tower in Shawnee getting 5-foot extension to make room for more antennas*, SHAWNEE MISSION POST (Mar. 18. 2020), *available at:* https://shawneemissionpost.com/2020/03/18/sprint-cell-tower-in-shawnee-getting-5-foot-extension-to-make-room-for-more-antennas-88741/ (planning commission approved plans in meeting predominately conducted via teleconference); *see also* Francis Scarcella, *Shikellamy School District board members approve wireless network upgrades*, THE DAILY ITEM (Apr. 16, 2020), *available at:* https://www.dailyitem.com/news/local_news/shikellamy-school-district-board-members-approve-wireless-network-upgrades/article_5a500771-7bad-5367-a222-ec8679ceedb8.html (school board approves plan to upgrade wireless networks in the district via zoom meeting).

[3] *See* Letter from John A. Howes, Jr., Government Affairs Counsel, WIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-250 at 3-4 (Mar. 30, 2020) [hereinafter "*WIA March Letter*"].

("Recommendation").[4] This Recommendation includes best practices for coordination and for addressing critical communications infrastructure before, during and after disasters. Among other things, it discusses collaboration between carriers, government, subcontractors, municipalities, and other industry participants in order to address telecommunication issues and coordinate a unified response to emergencies.

As described below, local governments have taken to heart the recommendation to streamline permitting processes to allow critical infrastructure providers expeditious access to restore services. Local governments appreciate that the Recommendation notes:

> disasters always occur at the local level. The citizens in the area where the event occurs, their local governments, and voluntary agencies are the first to have to cope with the damage. States recognize that local governments have the first line of responsibility in the preparation for, response to, and recovery from most emergencies and disasters. Actions by the state are always in support of local government. Strengthening the capabilities of local government will help prevent the loss of life and property during disasters, deliver assistance to victims most expediently, and reduce costs.[5]

As Chairman Pai noted regarding this Recommendation and others filed concurrently by the IAC, the reports "offer valuable insights and recommendations that will help inform the work of the FCC and that of our state, local, Tribal, and territorial government partners."[6] Federal and state authorities agree that local governments know best what their communities need in times of crisis.

B. <u>On a National and Local Level, Local Governments and the Industry Have Demonstrated Effective Collaboration During this Crisis</u>

1. *National*

On April 14, 2020, CTIA, a trade association for the wireless industry, released a document titled "Working Together to Ensure Americans are Wirelessly Connected".[7] To its credit, CTIA notes that local governments are already working diligently to address deployment

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[4] *See In the Matter of Intergovernmental Disaster Response Coordination*, Intergovernmental Advisory Committee to the FCC, Advisory Recommendation No. 2019-3 (Nov. 7, 2019).
[5] *Id.* at 10.
[6] *FCC Issues Public Safety and Telehealth Reports from Its Intergovernmental Advisory Committee*, Press Release (Nov. 7, 2019), *available at:* https://docs.fcc.gov/public/attachments/DOC-360696A1.pdf.
[7] CTIA, *Working Together to Ensure Americans are Wirelessly Connected During COVID-19*, *available at:* https://api.ctia.org/wp-content/uploads/2020/04/COVID_Wireless-Connectivity-Final.pdf (last visited April 20, 2020).

issues during this crisis. CTIA's "best practice" suggestions, which include transitioning to online permitting, waiving requirements for original documentation until after emergency conditions pass, conducting meetings online, following DHS guidance where possible, and utilizing tolling agreements where needed, are already being undertaken by numerous local governments nationwide, including many that are represented in this *ex parte* filing. Also to its credit, CTIA notes that "the wireless industry is committed to working with state and local partners to keep constituents connected during these unprecedented times."[8]

As local governments have been advocating for years, and demonstrating through their actions, respectfully discussing the legitimate needs of each side accomplishes more than seeking federal regulatory actions that restrict local authority to address important issues. CTIA's best practices document supports the position that Commission intervention to further preempt local permitting authority during the COVID-19 crisis is unnecessary. Individual problems can and should be dealt with on an individual basis through pre-existing mechanisms. And this document demonstrates the kind of best practices that are useful in this situation: collaborative solutions based on getting the necessary documentation to localities in a reasonable timeframe using technology as a solution without sacrificing public safety.

The Wireless Industry Association (WIA) has also requested discussions and collaboration with the local government community to address how the wireless infrastructure industry and local governments are working together to ensure that we can keep Americans connected during the COVID-19 crisis.

Local governments have stepped up.

A key consideration in these discussions has been the distinction between an "emergency" and conditions that warrant special treatment for communications deployment. Not all deployments will ameliorate the emergency. The careful distinction between maintaining or restoring critical services and approving future projects that will not directly benefit the public during the emergency helps all stakeholders prioritize critical infrastructure efforts. To be sure, some deployments may be needed to provide additional capacity for underserved areas. But local governments are in the best position to work with their industry partners to identify and prioritize these projects relative to all other non-communication infrastructure projects that also deserve due consideration.[9]

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[8] *Id*.

[9] In some instances, temporary cell-on-wheels (or "COWs") are being deployed to address high priority capacity and critical public safety needs. *See, e.g.*, Zacks Equity Research, *Verizon Provides Tech Support to Naval Ship Combating COVID-19*, YAHOO! FINANCE, *available at:* https://finance.yahoo.com/news/verizon-provides-tech-support-naval-132201548.html (last visited Apr. 22, 2020); Stephanie Kanowitz, *Telecom networks keeping up, stepping up*, GCN (Apr. 3, 2020), *available at:* https://gcn.com/articles/2020/04/03/telecom-carriers-responders-network-demand.aspx.

2. *Local*

During the COVID-19 crisis, there have been multiple examples amongst our members and our local government colleagues nationwide where wireline and wireless infrastructure companies have approached individual local governments, seeking collaborative and streamlined approaches to permitting in order to install new infrastructure to meet unprecedented demands on communications networks. Local governments like Boulder and Fort Collins, Colorado have been approached by a variety of providers, and each city has successfully collaborated with its industry partners to develop new processes to meet the legitimate needs of each party in these incredibly challenging times.

Other communities like Erie, Colorado, a suburban community located in Boulder and Weld Counties in the north metro area, despite implementing work-at-home protocols, have modified practices to allow for electronic applications, review and approval, and continue to provide for on-site inspection to protect public safety. Still others like Denver, Colorado and Arvada, Colorado, a suburban city of 120,000 located between Denver and Boulder, have implemented online application processes prior to the crisis, and inspections are being scheduled and occurring without delay during the crisis. These communities understand the importance of protecting public safety through effective safety code inspections even in these challenging times. It does the public little good if in the rush to build new telecommunications infrastructure we forego safety inspections and the result is damage to gas and water or sewer lines, leaving the public without a different set of critical public services.

Douglas County, Colorado, with a population of over 300,000, is located south of Denver and north of Colorado Springs. In 2016 Douglas County ranked as a top Digital County in the United States. And like many local governments, Douglas County has risen to the challenge of expediting broadband deployment. During the COVID-19 crisis, the County has not missed a beat with applications, permits, and inspections and are currently processing many eligible facilities requests and other wireless site applications. Even prior to the crisis the County has provided for electronic submittal, review, and payments for permits. The County has determined that inspections and traffic control are necessary for public safety, and while it has not waived these requirements, the County's permitting inspections proceeds fairly quickly – usually one to three days turnaround for approved plans. The COVID-19 crisis has not impacted the County's permitting and inspection abilities or timelines.

Collaboration, mutual respect and understanding between local government, the industry, and state and federal regulatory authorities is the tonic that will most successfully address network deployment issues during this and future crises. Indeed, the Colorado Municipal League has informed us of contact it recently received from two major providers, noting that

municipalities and counties are doing the best they can under the current circumstances and express gratitude for this work. [10]

Examples from other communities demonstrate that local governments have ably met the moment. For example, WIA's filing named Atlanta as a city that suspended development applications as part of the initial public health response.[11] Since that time, Atlanta launched a new online portal that "leapfrogged the normal electronic submittal launch architecture, so [the city] could get something going quickly."[12] South Lake Tahoe, California is another city rising to the challenge by accepting applications electronically and processing them while planners are working from home. Moreover, the City's building inspectors are still in the field with appropriate personal protective equipment and social distancing protocols in place. Many cities are even holding public meetings online and setting up remote work capabilities for staff, all while managing security risks from "Zoombombs" and other cyberattacks.[13] Still others must navigate these challenges in the context of state sunshine laws that may not have been suspended during the crisis.[14]

Another example is Fort Collins, Colorado where in mid-March a major provider contacted the City to convey its immediate construction needs to enhance connectivity during this crisis. The City recognized its obligation to address the needs of its citizens, the specific time-sensitive needs of this provider, and the importance of doing so in a manner that was competitively neutral and non-discriminatory towards all providers. City staff reports that the provider "will be sending us a list of locations they anticipate [deploying], and we will work with

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[10] Email message from Brandy DeLange, Legislative and Policy Advocate, Colorado Municipal League, to Ken Fellman (Apr. 27, 2020). The Colorado Municipal League is the voice of Colorado's cities and towns, counting more than 97 percent of the state's municipalities as members. Founded in 1923, the League is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing their governments and serving the cities and towns of Colorado.

[11] *See WIA March Letter* at 3 (citing the City of Atlanta's decision to temporarily suspend plan submittals in order for the city to implement remote working and social distancing protocols).

[12] Update from Commissioner Tim Keane, *Dep't of City Planning COVID-19 Response*, CITY OF ATLANTA, Ga. (Apr. 10, 2020), *available at:* https://www.atlantaga.gov/government/departments/city-planning.

[13] *See, e.g.,* John LaConte, *Avon council gets hacked, forced to reschedule meeting*, VAILDAILY (Mar. 25, 2020), *available at:* https://www.vaildaily.com/news/avon-council-gets-hacked-forced-to-reschedule-meeting/; Kristen Setera, *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic,* FBI BOSTON (Mar. 30, 2020), *available at:* https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic; Shannon Bond, *A Must For Millions, Zoom Has A Dark Side —And An FBI Warning*, NPR (Apr. 3, 2020), *available at:* https://www.npr.org/2020/04/03/826129520/a-must-for-millions-zoom-has-a-dark-side-and-an-fbi-warning.

[14] *See* Stephen Piepgrass, et al., *Public Meeting Requirements in the Age of COVID-19*, LAW360 (Apr. 14, 2020), *available at:* https://www.law360.com/articles/1258008/public-meeting-requirements-in-the-age-of-covid-19 ("Each state has sunshine laws that govern public access to governmental records and meetings. These laws are recognized as pivotal to public participation in our democracy.").

others around the City for permitting. Overall, it was great call and highlights the City's continued collaboration in working with others to find solutions."[15]

Other cities share success stories after overcoming the initial challenge. The City of Boulder was not equipped at the start of the crisis to address the need to make so much of its permitting and inspection services online. This is not an issue unique to telecommunications – there are many kinds of construction that are essential and need to continue without delay, including affordable housing. Boulder took quick action at the outset of the crisis to make many of its services available online, including the ability to conduct some inspections virtually. As a result, broadband providers are just one category of essential services that have been able to continue to enhance their operations within the City, despite the unprecedented challenges that this pandemic has caused.

As another example, Olympia, Washington processes three separate types of wireless permit applications through an online permit portal: (1) macro facilities; (2) eligible facilities requests; and (3) small cells in the rights-of-way. While the City is clearly equipped to handle permit applications electronically, it has not received applications for wireless facilities since the online portal was established in January.[16] However, Olympia demonstrates that local governments do not require federal intervention to develop sensible permitting procedures.

Accounting for emergency circumstances is a local issue that requires a local response. State and local governments are best positioned to allocate resources and collaborate with broadband providers as opposed to additional federal preemption of local authority.[17] Indeed, the evidence to date shows that local officials and providers have effectively worked together to move projects forward and that any delays have been borne out of a public health necessity, not for lack of effort to move deployment forward. Similar measures focusing on protection of public health taken by the private sector or the Commission are not viewed as problems that warrant regulatory intervention. There is no reason to subject local governments to a double

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[15] Email from Chad Crager, City Engineer, Fort Collins, Colo., to Jeff Mihelich, Deputy City Manager, Fort Collins, Colo. (Mar. 24, 2020).

[16] Olympia's work to position itself to meet residents' and wireless industries' needs online during Governor Jay Inslee's stay-at-home order due to the COVID-19 State of Emergency was recently recognized in the online newsletter of Dude Solutions, Olympia's vendor for the SmartGov online permitting system. *See Olympia, WA Utilizes SmartGov to Move Permitting Online & Improve Data Integrity* (Apr. 21, 2020), *available at:* https://www.dudesolutions.com/resource/Olympia-WA-Client-Success-Story.

[17] Although the *WIA March Letter* does not explicitly call for preemption during this crisis, Western Communities Coalition is puzzled that the suggestion that some local governments are not doing enough was filed in a docket that aims to further preempt local authority.

standard.[18] Ultimately, this pandemic will not "somehow render [ ] states and localities unable to figure out what was best for their communities."[19]

## II. The Commission Cannot Attribute Any Weight to T-Mobile's Specious Allegations Against the City of Colorado Springs

Perhaps no one example better describes the unique localism involved and required in wireless siting than the dispute in this docket between T-Mobile and the City of Colorado Springs, Colorado. T-Mobile criticized actions of Colorado Springs in its Reply Comments, and the City submitted an affidavit adding additional facts that T-Mobile omitted. T-Mobile subsequently submitted an *ex parte* letter further alleging that Colorado Springs was not providing all relevant facts to the Commission.[20]

While T-Mobile's most recent filing misconstrues what the City supposedly "demanded" on certain dates, T-Mobile never acknowledges the most important fact related to these discussions – that at the time of these discussions it had not filed an application, there was no specific request for the City to act upon and there was no shot clock running. T-Mobile spent months sending letters and debating whether it was going to submit an application. However, there is no eligible facilities request until there is an application. The timeline in T-Mobile's filing is deceiving by its omission; it does not include the date of T-Mobile's actual application and approval by the City, which occurred over a short period in March and April of 2019. Moreover, once it had final approval from the City, T-Mobile waited more than three months to file for a building permit with the Pikes Peak Regional Building Department – a separate, regional entity that manages building permits.

In sum, the City does not dispute that in preliminary discussions about what was required by the City Code, there were differences of opinion between the parties that needed to be worked out. It does not criticize T-Mobile for raising those issues as a factor that needed to be addressed in connection with this particular site. What is wrong about the manner in which T-Mobile presented this matter to the Commission is that the City is somehow being blamed for

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[18] *See Auction 106 Postponed, Delay of Auction of FM Broadcast Construction Permits Initially Scheduled to Begin on April 28, 2020*, Public Notice, AU Docket No. 19-290 (Mar. 25, 2020) (providing that the Commission has indefinitely postponed the auction of construction permits in the FM broadcast service that was expected to begin on April 28, 2020); *see also* Monica Alleven, *3GPP delays 5g standards due to COVID-19*, FIERCEWIRELESS (Mar. 25, 2020), *available at:* https://www.fiercewireless.com/tech/3gpp-delays-5g-standards-due-to-covina-19 (providing that the 5G standards-setting body has delayed the finalization of some 5G standards by three months).

[19] *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* Report and Order, Dissenting Statement of Comm. Mignon L. Clyburn, WC Docket No. 17-84, 32 FCC Rcd. 11128, 11239 (Nov. 29, 2017).

[20] *See* Reply Comments of T-Mobile USA, Inc., WT Docket No. 19-250, at 13 (Nov. 20, 2019); Statement for the Record of Benjamin Bolinger, Senior Attorney Colorado Springs, Colorado, FCC, WT Docket No 19-250 (Mar. 4, 2020); Letter from Cathleen A. Massey, Vice President Federal Regulatory Affairs T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No 19-250 (Mar. 11, 2020).

unreasonable delay in T-Mobile's ability to deploy network facilities. Once preliminary issues were worked out, the timing between the submittal and approval was well within the shot clock requirements. And T-Mobile's unilateral decision to wait more than three months after approval to seek a building permit belies any claim that the City was the cause of a delay.

## III. Applications Misrepresented as Eligible Facilities Requests Cause Delays and Public Safety Issues

Only existing sites may qualify as an eligible facilities request. The Commission's Section 6409 regulations establish that an existing site has a physical existence and a legal existence.[21] Facilities that were not reviewed and approved by the applicable permitting authority are not legally existing for purposes of Section 6409. Applicants often fail in addressing this threshold question in an effort to save time and money and shift the responsibility to the local agency to perform the applicant's due diligence. Because applicants assume any modification to an existing facility qualifies for Section 6409 approval, project plans omit information relevant to this evaluation.

More importantly, local governments cannot approve applications without accurate information. Some project plans may have been drafted without a site walk, which makes it impossible to know whether the plans accurately depict the equipment at the site. An application submitted in Thousand Oaks, California is illustrative. There, AT&T submitted a signed application through its vendor Eukon Group that contained plans sealed by a registered professional engineer that showed extensive camouflaging measures that were not actually deployed at the site. The applicant even indicated to the City's representative that AT&T would not pay to field verify the actual site conditions.[22]

Illegally deployed sites and applications that misrepresent deployed equipment that in fact do not qualify for Section 6409 sow lasting seeds of doubt as to whether the permitting agency can and should trust fundamental aspects of an application. In each of the described examples, the permits were ultimately approved showing that disqualification from Section 6409 is not a death knell to an orderly and honest Section 6409 process. These events are especially concerning as multi-carrier collocations continue to grow under Section 6409 modifications and right-of-way infrastructure becomes more densified. Corner-cutting practices naturally lead to delays when the project plans submitted by the applicant do not match the deployments shown in the existing permits.

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[21] *See* 47 C.F.R. § 1.6100(b)(5) (providing that the tower or base station must be constructed and reviewed and approved under the applicable zoning or siting process).

[22] On a separate occasion in a different jurisdiction, AT&T submitted a Section 6409 request supported by design plans through Eukon Group. Both the application and plans omitted a wholly-unpermitted four-foot microwave antenna at a rooftop site. The jurisdiction later approved the project and AT&T removed the unpermitted microwave antenna.

Engineers also need accurate information to produce reliable structural calculations and RF compliance evaluations. Notwithstanding problems from unreliable plans affecting the eligible facilities request analysis, inaccurate plans have downstream effects on the structural analysis given that it can only account for the equipment shown on the plans and provided to the structural engineer.[23] Moreover, plans that omit RF-transmitting equipment suffer from similar issues as they undermine the conclusions and mitigation measures needed to promote compliance with the Commission's RF exposure regulations.

To the extent that plans do not match existing permits, local governments can spot those problems and legitimately raise concerns about process and public safety. In other instances involving unpermitted equipment that is not disclosed on the existing permits or proposed plans, such latent defects cannot be detected at plan check. A regulatory regime that values speed above all else is reflected in the quality of the construction drawings. And as long as the Commission's rules continue to incentivize shoddy engineering, incomplete submittals and flawed reports, while also undermining the tools local governments use to ensure compliance, future Section 6409 modifications will pose unreasonable safety risks.

## IV. Conditional Approvals Benefit Applicants and Promote Good Governance

At a recent *ex parte* meeting with Commission staff, Crown Castle lamented that conditional approvals cause uncertainty and delay.[24] Contrary to Crown Castle's claims, conditional approvals exist for legitimate purposes and provide greater certainty. They provide a clear record of the standards that apply, ensure similar treatment for similar applications even as regulations change over time, and make efficient use of local and applicant resources by providing a pathway for approval rather than denial.

When a local agency issues a conditional approval, the permit expressly provides the rules that apply to the project at the time of the approval. However, local regulations are not static. Rules that may have been appropriate for legacy facilities in 2000 might not be for a new facility in 2020. In the intervening decades, a jurisdiction could have updated its insurance or indemnification requirements to limit risks that injured plaintiffs will seek recovery from the

[23] In some cases, plans contain a note that the depiction of the existing site is based on prior permit records, which may be many years old and do not accurately reflect the current conditions. This is especially true on shared rooftop sites. Moreover, a building owner or tenant could have added new equipment such as HVAC units, or collocated carriers may have added equipment without a permit. As the cumulative conditions change, each new piece of equipment not reflected in prior approved plans creates a cascading effect that requires local officials to review Section 6409 modifications with a healthy dose of skepticism. Public safety concerns are especially acute when structural calculations based on plans provided by the carrier that have not verified the actual physical conditions at the site.

[24] *See* Letter from Monica Gambino, VP Legal, Crown Castle, to Marlene H. Dortch, Secretary, FCC at 2 (Jan. 24, 2020) [hereinafter "*Crown Castle January Letter*"].

agency that approved the installation. These disputes are not imagined. They occur in the routine administration of local governments across the country, and there is nothing discriminatory about applying updated conditions to applications approved pursuant to rules adopted before the approval.[25]

Even as local regulations evolve over time, conditional approvals ensure that similar projects are subject to similar standards. Take the insurance and indemnification requirements discussed above: whether the application proposes a new facility or a second collocator seeks approval for new equipment to a roof-mounted site, the locality's ability to fairly allocate risk cannot be controlled by a permit issued decades earlier. Under the industry's view, a benign conditional approval would be preempted unless it ties back to a building or safety code.[26] This cannot be the intended policy because it would expose local governments to immeasurable risk simply by retaining their legitimate powers to oversee the development process.[27]

Not only do conditional approvals benefit local governments, they also benefit applicants. Rather than deny a defective application, appropriate conditions can avoid an applicant starting back at square one. Take for example a local government that conditioned a facility to be finished grey to conceal the equipment against the backdrop of the underlying building.[28] Subsequently, another applicant provides plans to add new equipment with a yellow finish.[29] Under Section 6409, failing to use the same finish would defeat concealment and be sufficient grounds for denial. However, rather than deny the project, the permitting authority would likely impose a condition of approval to provide a path forward and avoid wasting additional time and resources. A straightforward application of the industry's position reveals that such conditions would be preempted, and in this example, the application would need to be denied.

In this case and many others, the industry's proposals prevent reasonable people from taking reasonable actions. Strictly construed, the industry's opposition to conditional approvals

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[25] This is not to suggest that that local governments could apply new conditions that are incompatible with the Commission's substantial change thresholds. Rather, not all new conditions should be deemed preempted merely because they did not appear on the face of the original permit, or are not manifestly related to building and safety codes. Standardized conditions of approval related to legitimate municipal functions and authority must be preserved pursuant to local police powers.

[26] *See Crown Castle January Letter* at 2.

[27] To be clear, Western Communities Coalition is not advocating for a narrow carve-out of risk-related conditions in addition to building and safety conditions. All conditions not expressly preempted by the substantial change thresholds are retained pursuant to local police powers.

[28] *See* 47 C.F.R. § 1.6100(b)(7)(vi).

[29] Another one of the industry's double-edged requests for "clarification" is evident here. *See* WIA – The Wireless Infrastructure Association, Petition for Declaratory Ruling, WT Docket No. 17-79 at 12 (Aug. 27, 2019) (requesting that only concealment conditions expressly provided in the original approval should be preserved). The original approval might not contain an express condition of approval that all the equipment match the color of the structure. Instead, the applicant might have provided a note on the approved buildings plans that "ALL EQUIPMENT PAINTED TO MATCH." In the industry's view, future attempts to memorialize concealment conditions that appear on the face of site or original plans, but not written down in a condition, should be preempted.

will lead to more denials, not faster deployment. In response, the industry might claim that these are not the types of conditions that Section 6409 preempts or for which the applicant would claim preemption. But the fact of the matter is that these *are* conditions that would be preempted on grounds that they are unrelated to building and safety codes. Thus, the petitions merely seek greater leverage to strongarm local agencies into removing certain conditions that do not confer benefits to the applicant. Such a policy would not be the product of reasoned decision-making.

## V. The Expanded Deemed Granted Remedy Would Reverse Decades of Collective Regulatory Wisdom

Duly issued building permits serve different purposes that the industry's deemed granted remedy undermines. Permits ensure that engineers and contractors do not cut corners, notify the community of work being performed, and provide clear records of local authorization.[30] A rule that automatically authorizes construction even if no permits have been issued unreasonably puts these interests at risk, and industry commenters offer no convincing counterargument to this point.

Crown Castle continues to look past the central issue that causes such concern over the proposed remedy: there may be justifiable reasons for an application to take more than 60 days to review.[31] Additionally, a deemed granted application presumptively has not undergone a complete review to determine whether the project complies with applicable laws. In these and other cases, post-installation inspections or general notes in construction drawings would be inadequate.[32] Crown Castle's argument to the contrary – that inspections and construction notes are a panacea that can replace a completed permit review – is irredeemably flawed.

Post-installation inspections cannot mitigate harms caused during construction because the defect must be detected before breaking ground.[33] Additionally, local officials cannot afford to assume the project notes are accurate and that the actual design is compliant with the applicable codes listed in the notes. Applicants make mistakes; plans and structural reports submitted by applicants are not always compliant. The daily experience of building and public works officials proves the opposite. Indeed, evidence in this record and prior proceedings establishes that applicants often rely on permit reviews to check their work.[34] Under these

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[30] *See Comments of the National League of Cities, et al.*, WT Docket No. 19-250 at 29-30 (Oct. 29, 2019).
[31] *See, e.g.*, *supra* Section III.
[32] *See* Letter from Joshua S. Turner, counsel for Crown Castle, to Marlene Dortch, Secretary, FCC, WT Docket No. 19-250 at 2 (Mar. 19, 2020) [hereinafter "*Crown Castle March Letter*"] .
[33] For instance, applications for right-of-way facilities that do not provide accurate boundaries between the right-of-way and private property create potential inverse condemnation concerns. Additionally, underground utility strikes cannot be detected by an inspection or contractor notes.
[34] *See Joint Comments of League of Ariz. Cities and Towns et al.*, WT Docket No. 16-421 at 10-21 (Mar. 8, 2017) (providing examples of materially incomplete or error-ridden applications that require substantial review and corrections).

circumstances, if the application is deemed granted and construction begins, the risk to public safety could be catastrophic.

Rather than address this reality, Crown Castle holds out Phoenix and Pittsburgh as exemplar cities and suggests that failing to process all permits within 60 days simply reflects a failure of local process.[35] The Commission cannot rely on this unsupported assumption as a basis to change the current rule. The proposed remedy creates a dangerous incentive and insinuates that local governments cannot adopt the right process without the threat of federally-authorized construction without permits.[36] Nothing in the record shows this to be true.

Notwithstanding the fact that applicants are often the source of delay,[37] authorization to construct on day 61 removes any incentive to toll the shot clock or wait the few extra days for permits to be issued. To the extent that the deemed granted remedy is intended to speed deployment by requiring localities to act, the threat of litigation for local governments is more than adequate to achieve that goal. Whether Phoenix and Pittsburgh regularly complete the entire process within 60 days does not mitigate the risk to public safety that one deemed granted, unpermitted facility would have.[38] Moreover, the parties will be less likely to toll applications that raise unique Section 6409 questions or contain latent defects. A proposed remedy that circumvents local oversight reduces incentives to cooperate.

The industry's position also ignores the impact of its preferred remedy in the new deployment environment. By the Commission's own acknowledgement, hundreds of thousands of small cells will be due for modifications in the coming years.[39] One deemed granted application that creates safety risks is bad enough, but the massive increase in modification applications will necessarily increase the incidence of deemed granted applications. In turn, more unpermitted work in the right-of-way heightens the risk of catastrophic failure. In the face of such uncertainty, and especially given that the industry record supporting such preemption is no more than paper thin, redefining the deemed granted remedy would be especially dangerous policy. The status quo already strikes a reasonably safe balance.

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[35] *See* Letter from Joshua S. Turner, counsel for Crown Castle, to Marlene Dortch, Secretary, FCC, WT Docket No. 19-250 at 1 (Feb. 21, 2019); *Crown Castle March Letter* at 2.

[36] *See Crown Castle March Letter* at 2 (claiming that "there is no practical barrier to conducting all necessary reviews . . . . and with the right process local jurisdictions can easily issue all necessary approvals for construction within the requisite time period.").

[37] *See Joint Comments of City of San Diego et al.*, WT Docket No. 19-250 at 5 (Oct. 29, 2019). Additionally, Denver, Colorado notes that when directly comparing some applicants to others over the past three years, City data clearly shows that a minority of applicants continue to have the most problems on a repetitive basis, after years of regular collaboration attempts and trainings, indicating systemic company-wide issues that these entities bear a greater responsibility as the cause of delay nationwide.

[38] *See Crown Castle February Letter* at 1; *Crown Castle March Letter* at 1-2.

[39] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, 33 FCC Rcd. 9088, 9111-12 at ¶ 47 (Sep. 27, 2018).

## VI. Conclusion

For the reasons described above and the evidence in this record, the Commission should decline to grant the relief requested in the industry's petitions. Moreover, the current public health crisis has proven that local governments are eminently capable of working in partnership with industry stakeholders to dedicate resources where they are needed most. The Commission should celebrate these success stories and not view this moment as an opportunity to further preempt local authority.

Respectfully submitted,

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