**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

| | | |
|---|---|---|
| **CITY OF NORTH LITTLE ROCK, ARKANSAS,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES,** | ) | |
| | ) | |
| **Petitioners,** | ) | |
| | ) | Case No. _____ |
| vs. | ) | |
| | ) | **MOTION FOR STAY** |
| | ) | **PENDING APPEAL OF** |
| **FEDERAL COMMUNICATIONS COMMISSION,** | ) | **FCC RULING AND ORDER** |
| | ) | |
| **and** | ) | |
| | ) | |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| Respondents. | ) | |

Petitioners, City of North Little Rock, Arkansas ("City") and Missouri Association of Municipal Utilities ("MAMU") (collectively the "Municipal Parties") move for a stay pending appeal of the Federal Communications Commission's ("Commission") *Declaratory Ruling, and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to*

*Infrastructure Investment,*(*"Order"*),[1] pursuant to 5 U.S.C. § 705 and Federal Rule of Appellate Procedure 18(a). The Municipal Parties have filed, concurrently with this Motion, their Petition for Review and are committed to pursuing this appeal.

## INTRODUCTION AND BACKGROUND

The City is located in Pulaski County, Arkansas, United States, across the Arkansas River from Little Rock in the central part of the state. The population was 62,304 at the 2010 census. In 2017 the estimated population was 65,911, making it the seventh-most populous city in the state. It operates its own electric utility. As such, the City will be required to comply with the Commission's Order.

MAMU is a Missouri state-wide trade organization open for membership to any municipality owning and operating its own utility, including electric, natural gas, water, wastewater, and broadband services. MAMU is a 501(c)(6) non-profit association. MAMU provides communication, education, training, and other self-help activities on a cooperative basis for community-owned utilities in order to help member utilities increase effectiveness as individual operating utilities. All of MAMU's members who operate electric utilities are similarly situated with the City and will be required to comply with the Order.

---

[1] WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (*"Order"*). The Order and new regulations were published in the Federal Register on October 15, 2018. *See* 83 Fed. Reg. 51867. A copy of the Order is attached as Exhibit 1 hereto.

In the Order, the Commission approved sweeping regulations for 5G wireless infrastructure, significantly curtailing the authority of states and localities in how this infrastructure is constructed and deployed. The ultimate result is that the provisions of this Order will significantly and negatively impact local governments' ability to protect and serve public property, safety and welfare.

Importantly, the Order creates uncertainty as to whether the City can rely on and enforce its current pole attachment ordinance, which has been a traditional means for numerous cities and local governments to specify basic safety and other standards which protect both life and property. As shown below, a telecommunications provider is already attacking the City's ordinance, alleging that it does not comply with the Order.

In addition, since the Order no longer recognizes the distinction between a City's proprietary interests versus its governmental regulatory interests, the City will lose its proprietary right to use and exercise control over its City-owned property and assets, leaving the local authority and its citizens subject to the whims of telecommunication providers. Due to the time and expense involved in constructing the necessary infrastructure for these devices, it is improbable that once installed any of them will be removed in the near future regardless of this Court's ruling on the Petition for Review.

Pursuant to Rule 18(a)(2)(A)(i) and 28 USC Sec. 2112(a)(4), the Municipal Parties seek a stay initially from this Court, because it "would be impracticable" to seek a stay from the FCC since the Declaratory Ruling has been issued and the Order will take effect January 14, 2019. Further, City has already received demands from a wireless carrier to comply with the Order.[2] Consequently, there is insufficient time to prevent the implementation of the Commission's Order, and the resulting irreparable harm, prior to a rapid deployment of small cell wireless attachments within the electrical space of the Municipal Parties facilities.

LEGAL STANDARD

The Supreme Court set out the requirements for a stay pending appeal in *Hilton v. Braunskill*, 481 U.S. 70, 76, 95 L. Ed. 2d 724, 107 S. Ct. 2113 (1987). This Court discussed the same requirements in *James River Flood Control Assoc. v Watt*, 680 F2d 543,544 (8th Cir. 1982):

> The party seeking a stay pending appeal must show (1) that it is likely to succeed on the merits; (2) that it will suffer irreparable injury unless the stay is granted; (3) that no substantial harm will come to other interested parties; and (4) that the stay will do no harm to the public interest.

Although this Court did not issue a stay, in *Dataphase Sys., Inc. v. C.I. Sys., Inc.*[3], it carefully articulated the weighing of these four factors in determining whether injunctive relief is appropriate stating:

---

[2] Exhibit C of Affidavit of Joe Smith, Exhibit 2 attached hereto.

[3] *Dataphase Sys., Inc. v. C.I. Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981.)*

> In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.[4]

As shown below, the injuries to the Municipal Parties vastly outweigh the likely injury to other parties, and this Court should grant a stay.

## ARGUMENT

### 1. CITY'S APPEAL HAS SUBSTANTIAL LIKLIHOOD OF SUCCESS

The Commission committed serious legal errors in issuing the Order, each sufficient alone to demonstrate that the Municipal Parties are likely to succeed on the merits of the appeal.

First, the Commission lacks the statutory authority under the Communications Act of 1934[5] to regulate attachments to public power utility poles. As the Commission has consistently recognized, the FCC "does not have authority to regulate attachments to poles that are municipally or cooperatively

[4] *Id.*

[5] The Communications Act of 1934, 47 U.S.C. § 151 *et seq*.

owned."[6] The clear statutory exemption, set forth in 47 U.S.C. § 224, imposes federal pole attachment requirements only upon entities that meet the definition of "utility" in Section 224(a)(1). The term "utility" is defined to *exclude* local governments, cooperatives, and railroads:

> The term "utility" means any person whose rates or charges are regulated by the Federal Government or State and who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, for any wire communications. *Such term does not include* any railroad, any person who is cooperatively organized, or *any person owned by* the federal government or *any State*.[7]

Section 224(a)(3), in turn, defines "State" as "any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof." Public power utilities are governmentally owned, and include entities such as municipal utilities, public utility districts, irrigation districts, and state-created entities.

The law is clear that municipal utilities are explicitly excluded from FCC pole attachment regulations, and the Commission exceeded its authority in including them in the Order. Even assuming, for purposes of argument only, that the Order is otherwise within the authority of the Commission to issue, it still should not apply to municipal utilities like the City or MAMU member cities.

---

[6] See, e.g., *Report and Order, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Appendix B, ¶ 46, released April 7, 2011.
[7] 47 U.S.C. § 224(a)(1) (emphasis added).

Second, the FCC exceeds its statutory authority by interfering with the proprietary rights of public power utilities. In the Order, the Commission relies on Section 253 for its conclusion that it can regulate municipal utilities. However, Section 253 only applies to local and state governments acting in a governmental, regulatory capacity, so the Commission has no authority to regulate municipal utilities when they operate in a proprietary capacity.

Recognizing the regulatory versus proprietary distinction, the Commission and courts have previously concluded that these section 253 provisions relate to state and local governments when they are acting in their regulatory capacity – e.g., issuing permits for the use of the public right of ways – as opposed to when they are acting in a proprietary capacity, such as when they lease or rent utility facilities or property.[8] Further, the Commission recognizes this distinction as evidenced by one of its prior decisions in 2014, when it stated that neither §253 or §332 apply to the "non-regulatory decisions of a state or locality acting in its proprietary capacity."[9]

---

[8] *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d 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").

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

Given that the Commission ignores the plain language of the relevant statutes and its own prior rulings, the Municipal Parties have a substantial likelihood of success on the merits of the appeal. This Court should grant a stay in this case.

**2. THE STAY WILL PREVENT IRREPARABLE HARM**

The City will suffer immediate, permanent, and irreparable injury if it is not granted injunctive relief because the Order creates uncertainty as to whether the city can enact reasonable standards to protect life and property, and because a telecommunications provider is already demanding the City comply with the Order rather than its ordinance. The Commission's Order makes it clear that the effect of its ruling is not limited to new ordinances and attachment agreements but could also apply to preempt portions of existing agreements that are found to contain terms or conditions that are contrary to the findings of the Order. In effect, the Order ignores the fact that local authorities are in the best position to insure the safety of their system and employees.

Municipal utilities have traditionally utilized ordinances and attachment agreements to ensure adequate safety for workers and the public. The City Council of North Little Rock adopted the "Small Wireless Communication Facility Regulation," ("ordinance") on July 23, 2018.[10] This ordinance created a process to

[10] Affidavit of Joe Smith, paragraph 3 and Exhibit A thereto, Exhibit 2 hereto.

allow licensed telecommunication service providers to attach small cell devices to city-owned poles.[11] The ordinance was developed in cooperation with a neighboring city.[12] It was based upon substantial comments from telecommunication service providers.[13]

The ordinance was intended to improve the wireless communication services offered to the City's citizens without compromising: (a) the safety of city employees; (b) the integrity of city infrastructure; or (c) the appearance of the community.[14] It was also important that the ordinance would assess sufficient fees to avoid subsidizing private business.

Importantly, small cell devices are currently being installed pursuant to the ordinance. The current system is working, even without the Commission's Order.

Now, the Order is not yet in effect, but a telecommunications provider is already challenging the City's ordinance, alleging that it violates the new Order.[15] Further, the telecommunications provider indicates that it wants to develop its network at a "greater pace" and wants the City to revise its ordinance to comply with the Order.[16]

---

[11] Id.
[12] Id.
[13] Id.
[14] Id. at paragraph 4.
[15] Id. Exhibit C, thereto.
[16] Id.

It is uncertain if the City will have to renegotiate with all of the other providers to whom it has granted permits. If it does, that could create a significant administrative burden on the City. Because of the uncertainty that the Order creates, this Court should issue a stay. A stay will allow and encourage the City and telecommunication providers to continue to collaborate as they do now.

**3. A STAY WILL NOT SUBSTANTIALLY HARM OTHERS**

The equities strongly weigh in favor of granting the stay. While, as shown above, the City will suffer harm, others will suffer very little or no harm in the wake of a stay. As for the telecommunication providers, it has been the practice in Arkansas and Missouri for municipalities to work with telecommunication providers to develop pole attachment agreements that set out reasonable and mutually agreeable standards and requirements for small cell wireless facilities, as well as develop the best siting locations that benefit both the City and the providers. If the Commission is allowed to implement the Order without a stay, the collaboration that now occurs on a regular basis will be endangered.

However, by granting the stay, the status quo will be maintained, which allows all parties, including the telecommunication providers, to avoid significant expenditures of time and money to conform to an entirely different regulatory scheme that at present is uncertain for all involved. Even the Commission itself acknowledges that "[m]any states and localities have acted to update and

modernize their approaches to small cell deployments. They are working to promote deployment and balance the needs of their communities."[17] The stay will maintain that status quo, and is not a moratorium on the deployment of small cell wireless attachments. The deployment of such facilities will continue, just as it has for the last several years.

The equities in this case support a stay of the order pending appeal.

**4. THE PUBLIC INTEREST FAVORS GRANTING A STAY**

Granting a stay will help alleviate the current uncertainty that has been created by the Order, and is in the public interest to alleviate such uncertainty. As noted above, the current status quo, which continues to work for both the City and the telecommunications providers with whom it has been working, is challenged by the Order. The current ordinance and permit process utilized by the city adequately addresses safety standards and other important provisions. The uncertainty caused by the Order negatively impacts the ability of the City to adequately protect the safety and property of the City.

A stay will ensure that the deployment of small cell wireless facilities will proceed with the appropriate safety standards, requirements, and overall benefit for everyone. The alternative is moving forward with much uncertainty, which will be to the detriment to all.

[17] See Order at ¶5.

WHEREFORE, the Municipal Parties request that this Court issue a stay enjoining Respondents from implementing the FCC's *Declaratory Ruling, and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,*(*"Order"*), WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133, until a full hearing on the merits of the Municipal Parties' Petition for Review may be heard. This Court can establish a briefing schedule that will protect the interests of all the participants, avoid unnecessary and misdirected compliance costs, and the uncertainty that the Order has created in the market.

Respectfully submitted,

/s/Terry M. Jarrett
Terry M. Jarrett
Penny Speake
Peggy Whipple
HEALY LAW OFFICES, LLC
514 E. High St., Suite 22
Jefferson City, MO 65101
Telephone: (573) 415-8379
Facsimile: (573) 415-8379
Email: terry@healylawoffices.com
penny@healylawoffices.com
peggy@healylawoffices.com

*Counsel for Petitioners*
*City of North Little Rock, Arkansas*
*Missouri Association of Municipal Utilities*

September 5, 2018

**FCC FACT SHEET**[1]

**Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment;**
**Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment**

Declaratory Ruling and Third Report and Order
WT Docket No. 17-79; WC Docket No. 17-84

**Background:** To meet rapidly increasing demand for wireless services and prepare our national infrastructure for 5G, providers must deploy infrastructure at significantly more locations using new, small cell facilities. Building upon streamlining actions already taken by state and local governments, this *Declaratory Ruling and Third Report and Order* is part of a national strategy to promote the timely buildout of this new infrastructure across the country by eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless services to the public.

**What the Declaratory Ruling and Third Report and Order Would Do:**

- Clarify the scope and meaning of the effective prohibition standard set forth in Sections 253 and 332(c)(7) of the Communications Act as they apply to state and local regulation of wireless infrastructure deployment.
- Conclude that Sections 253 and 332(c)(7) limit state and local governments to charging fees that are no greater than a reasonable approximation of their costs for processing applications and for managing deployments in the rights-of-way.
- Identify specific fee levels for small wireless facility deployments that presumably comply with the relevant standard.
- Provide guidance on certain state and local non-fee requirements, including aesthetic and undergrounding requirements.
- Establish two new shot clocks for small wireless facilities (60 days for collocation on preexisting structures and 90 days for new builds) and codify the existing 90 and 150 day shot clocks for non-small wireless facility deployments that were established in the *2009 Declaratory Ruling*.
- Make clear that all state and local government authorizations necessary for the deployment of personal wireless service infrastructure are subject to those shot clocks.
- Conclude that a failure to act within the new small wireless facility shot clock constitutes a presumptive prohibition on the provision of services. Accordingly, we would expect local governments to provide all required authorizations without further delay.

[1] This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WT Docket No. 17-79 and WC Docket No. 17-84, which may be accessed via the Electronic Comment Filing System (https://www.fcc.gov/ecfs/). Before filing, participants should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR § 1.1200 *et seq*.

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

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

**DECLARATORY RULING AND THIRD REPORT AND ORDER***

**Adopted: []** **Released: []**

By the Commission:

**TABLE OF CONTENTS**

Heading Paragraph #



* This document has been circulated for tentative consideration by the Commission at its September 2018 open meeting. The issues referenced in this document and the Commission's ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC's ex parte rules apply, and presentations are subject to "permit-but-disclose" ex parte rules. *See, e.g.*, 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR §§ 1.1200(a), 1.1203.

## I. INTRODUCTION

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

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

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

4. To date, regulatory obstacles have threatened the widespread deployment of these new services and, in turn, U.S. leadership in 5G. The FCC has lifted some of those barriers, including our decision in March 2018, which excluded small cells from some of the federal review procedures designed

[1] Accenture Strategy, *Accelerating Future Economic Value From the Wireless Industry* at 2 (2018), https://ecfsapi.fcc.gov/file/10719049775997/Accenture-Strategy-Wireless-5G-Accelerating-Economic-Value-POV-July-2018.pdf.

for those larger, 200-foot towers. But as the record here shows, the FCC must continue to act in partnership with our state and local leaders.

5. Many states and localities have acted to update and modernize their approaches to small cell deployments. They are working to promote deployment and balance the needs of their communities. At the same time, the record shows that problems remain. In fact, many state and local officials have urged the FCC to continue our efforts in this proceeding and adopt additional reforms. Indeed, we have heard from a number of local officials that the excessive fees or other costs associated with deploying small scale wireless infrastructure in large or otherwise "must serve" cities are materially inhibiting the buildout of wireless services in their own communities.

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

7. By building on state and local ideas, today's action boosts the United States' standing in the race to 5G. Our action would eliminate around $2 billion in unnecessary costs, which would stimulate around $2.5 billion of additional buildouts. And that new service would be deployed where it is needed most: 97 percent of new deployments would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide.[2]

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

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

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

11. Second, we note, as numerous courts and prior FCC cases have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision.[3] Namely, fees are only permitted to the extent

[2] *See* Letter from Thomas J. Navin, Counsel to Corning, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 29, 2018), Attach.A. at 3.

[3] "Small Wireless Facilities," as used herein and consistent with Rule 1.1312(e)(2), encompasses facilities that meet the following conditions:

(1) The structure on which antenna facilities are mounted—

(i) is 50 feet or less in height, or

(continued….)

that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs. In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation over fees.

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

13. Next, we issue a Report and Order that addresses the "shot clocks" governing the review of wireless infrastructure deployments. We take three main steps in this regard. First, we create a new set of shot clocks tailored to support the deployment of Small Wireless Facilities. In particular, we read Sections 253 and 332 as allowing 60 days for reviewing the attachment of a Small Wireless Facility to an existing structure and 90 days for the construction of new qualifying facilities. Second, while we do not adopt a "deemed granted" remedy for violations of our new shot clocks, we clarify that failing to issue a decision up or down during this time period is not simply a "failure to act" within the meaning of applicable law. Rather, missing the deadline also constitutes a presumptive prohibition. We would thus expect any locality that misses the deadline to issue any necessary permits or authorizations without further delay. We also anticipate that a provider would have a strong case for quickly obtaining an injunction from a court that compels the issuance of all permits in these types of cases. Third, we clarify a number of issues that are relevant to all of the FCC's shot clocks, including the types of authorizations subject to these time periods.

## II. BACKGROUND

### A. Legal Background

14. In the Telecommunications Act of 1996 (the 1996 Act), Congress enacted sweeping new provisions intended to facilitate the deployment of telecommunications infrastructure. As U.S. Courts of Appeals have stated, "[t]he [1996] Act 'represents a dramatic shift in the nature of telecommunications regulation.'"[4] The Senate floor manager, Senator Larry Pressler, stated that "[t]his is the most comprehensive deregulation of the telecommunications industry in history."[5] Indeed, the purpose of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."[6] The conference report on the 1996 Act similarly indicates

(Continued from previous page)

(ii) is no more than 10 percent taller than other adjacent structures, or

(iii) is not extended to a height of more than 50 feet or by more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities; and

(2) Each antenna associated with the deployment (excluding the associated equipment) is no more than three cubic feet in volume; and

(3) All antenna equipment associated with the facility (excluding antennas) are cumulatively no more than 28 cubic feet in volume; and

(4) The facility does not require antenna structure registration under part 17 of this chapter; and

(5) The facility is not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in Rule 1.1307(b).

[4] *Sprint Telephony PCS LP v. County of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (*County of San Diego*) (quoting *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999).

[5] CONG. REC. S8188–04, S8197 (daily ed. June 12, 1995).

[6] H.R. Conf. Rep. No. 104–458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (100 Stat. 5) 124.

that Congress "intended to remove all barriers to entry in the provision of telecommunications services."[7] The 1996 Act thus makes clear Congress's commitment to a competitive telecommunications marketplace unhindered by unnecessary regulations, explicitly directing the FCC to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[8]

15. Several provisions of the 1996 Act speak directly to Congress's determination that certain state and local regulations are unlawful. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[9] Courts have observed that Section 253 represents a "broad preemption of laws that inhibit competition."[10]

16. The Commission has issued several rulings interpreting and providing guidance regarding the language Congress used in Section 253. For instance, in the 1997 *California Payphone* decision, the Commission, under the leadership of then Chairman William Kennard, stated that, in determining whether a state or local law has the effect of prohibiting the provision of telecommunications services, it "consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[11]

17. Similar to Section 253, Congress specified in Section 332(c)(7) that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[12] Clause (B)(ii) of that section further provides that "[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request."[13] Section 332(c)(7) generally preserves state and local authority over the "placement, construction, and modification of personal wireless service facilities" but with the important limitations described above.[14] Section 332(c)(7) also sets forth a judicial remedy, stating that "[a]ny person adversely affected by any final action or failure to act by a State or local government" that is inconsistent with the requirements of Section 332(c)(7) "may, within 30 days after such action or failure to act, commence an action in any

---

[7] S. Rep. No. 104-230, at 126 (1996) (Conf. Rep.).

[8] Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) (noting that the 1996 Act "fundamentally restructures local telephone markets" to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) ("The Telecommunications Act was an unusually important legislative enactment . . . designed to promote competition").

[9] 47 U.S.C. § 253(a).

[10] *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 11 n.7 (1st Cir. 1999).

[11] *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*).

[12] 47 U.S.C. § 332(c)(7)(B)(i).

[13] 47 U.S.C § 332(c)(7)(B)(ii).

[14] 47 U.S.C. § 332(c)(7)(A) (stating that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities"). The statute defines "personal wireless services" to include CMRS, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. § 332(c)(7)(C). In 2012, Congress expressly modified this preservation of local authority by enacting Section 6409(a), which requires local governments to approve certain types of facilities siting applications "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law." Spectrum Act, 47 U.S.C. § 6409(a)(1).

court of competent jurisdiction."[15] The provision further directs the court to "decide such action on an expedited basis."[16]

18. The Commission has previously interpreted the language Congress used and the limits it imposed on state and local authority in Section 332. For instance, in interpreting Section 332(c)(7)(B)(i)(II), the Commission has found that "a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)."[17] In adopting this interpretation, the Commission explained that its "construction of the provision achieves a balance that is most consistent with the relevant goals of the Communications Act" and its understanding that "[i]n promoting the construction of nationwide wireless networks by multiple carriers, Congress sought ultimately to improve service quality and lower prices for consumers."[18] The Commission also noted that an alternative interpretation would "diminish the service provided to [a wireless provider's] customers."[19]

19. In the *2009 Declaratory Ruling*, the Commission acted to speed the deployment of then-new 4G services and concluded that, "[g]iven the evidence of unreasonable delays [in siting decisions] and the public interest in avoiding such delays," it should offer guidance regarding the meaning of the statutory phrases "reasonable period of time" and "failure to act" "in order to clarify when an adversely affected service provider may take a dilatory State or local government to court."[20] The Commission interpreted "reasonable period of time" under Section 332(c)(7)(B)(ii) to be 90 days for processing collocation applications and 150 days for processing applications other than collocations.[21] The Commission further determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days.[22] In litigation involving the 90-day and 150-day time frames, the locality may attempt to "rebut the presumption that the established timeframes are reasonable."[23] If the agency fails to make such a showing, it may face "issuance of an injunction granting the application."[24] In its *2014 Wireless Infrastructure Order*,[25] the Commission clarified that the time

---

[15] 47 U.S.C. § 332(c)(7)(B)(v).

[16] 47 U.S.C. § 332(c)(7)(B)(v).

[17] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863, 569 U.S. 290 (2013).

[18] *2009 Declaratory Ruling*, 24 RCC Rcd at 14017-18, para. 61.

[19] *Id*.

[20] *Id.* at 14008, para. 37; *see also id.* at 14029 (Statement of Chairman Julius Genachowski) ("the rules we adopt today . . . will have an important effect in speeding up wireless carriers' ability to build new 4G networks--which will in turn expand and improve the range of wireless choices available to American consumers").

[21] *Id.* at 14012, para. 45.

[22] *Id.* at 14005, 14012, paras. 32, 45.

[23] *Id.* at 14008-10, 14013-14, paras. 37-42, 49-50.

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

[25] Specifically, the Commission determined that once a siting application is considered complete for purposes of triggering the Section 332(c)(7) shot clocks, those shot clocks run regardless of any moratoria imposed by state or local governments, and the shot clocks apply to DAS and small-cell deployments so long as they are or will be used to provide "personal wireless services." *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12966, 12973, paras. 243, 270, (2014) (*2014 Wireless Infrastructure Order*), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015); *see also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed

(continued….)

frames under Section 332(c)(7) are presumptively reasonable and begin to run when the application is submitted, not when it is found to be complete by a siting authority.[26]

20. In 2012, Congress adopted Section 6409 of the Middle Class Tax Relief and Job Creation Act (the Spectrum Act), which provides further evidence of Congressional intent to limit state and local laws that operate as barriers to infrastructure deployment. It states that, "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified as 47 U.S.C. § 332(c)(7)] or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[27] Subsection (a)(2) defines the term "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.[28] In implementing Section 6409 and in an effort to "advance[e] Congress's goal of facilitating rapid deployment,"[29] The Commission adopted rules to expedite the processing of eligible facilities requests, including documentation requirements and a 60-day period for states and localities to review such requests.[30] The Commission further determined that a "deemed granted" remedy was necessary for cases in which the reviewing authority fails to issue a decision within the 60-day period in order to "ensur[e] rapid deployment of commercial and public safety wireless broadband services."[31] The Fourth Circuit, affirming that remedy, explained that "[f]unctionally, what has occurred here is that the FCC—pursuant to properly delegated Congressional authority—has preempted state regulation of wireless towers."[32]

21. Consistent with these broad federal mandates, courts have recognized that the Commission has authority to interpret Sections 253 and 332 of the Act to further elucidate what types of state and local legal requirements run afoul of the statutory parameters Congress established.[33] For instance, the Fifth Circuit affirmed the *2009 Declaratory Ruling* in *City of Arlington*. The court concluded that the Commission possessed the "authority to establish the 90– and 150–day time frames" and that its decision was not arbitrary and capricious.[34] More generally, as the agency charged with administering the Communications Act, the Commission has the authority, responsibility, and expert judgement to issue interpretations of the statutory language and to adopt implementing regulations that clarify and specify the scope and effect of the Act. Such interpretations are particularly appropriate where the statutory language is ambiguous, or the subject matter is "technical, complex, and dynamic," as it is in

(Continued from previous page)
Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3339, para. 22 (2017) (*Wireless Infrastructure NPRM/NOI*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, FCC 18-111, paras. 140-68 (rel. Aug. 3, 2018) (*Moratoria Declaratory Ruling*).

[26] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 258. ("Accordingly, to the extent municipalities have interpreted the clock to begin running only after a determination of completeness, that interpretation is incorrect.").

[27] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6409(a)(2), 126 Stat. 156 (2012).

[28] *Id*.

[29] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12872, para. 15.

[30] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12922, 12956-57, paras. 135, 214-15.

[31] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12961-62, paras. 226, 228.

[32] *Montgomery County v. FCC*, 811 F.3d at 129.

[33] *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229, 253-54 (5th Cir. 2012) (*City of Arlington*); *County of San Diego*, 543 F.3d at 578; *RT Comms. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000).

[34] *City of Arlington*, 668 F.3d at 254, 260-61.

the Communications Act, as recognized by the Supreme Court.[35] Here, the Commission has ample experience monitoring and regulating the telecommunications sector. It is well-positioned, in light of this experience and the record in this proceeding, to issue a clarifying interpretation of Sections 253 and 332(c)(7) that accounts both for the changing needs of a dynamic wireless sector that is increasingly reliant on Small Wireless Facilities and for state and local oversight that does not materially inhibit wireless deployment.

22. The congressional and FCC decisions described above point to consistent federal action, particularly when faced with changes in technology, to ensure that our country's approach to wireless infrastructure deployment promotes buildout of the facilities needed to provide Americans with next-generation services. Consistent with that long-standing approach, in the 2017 *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether the FCC should again update its approach to infrastructure deployment to ensure that regulations are not operating as prohibitions in violation of Congress's decisions and federal policy.[36] In August 2018, the Commission concluded that state and local moratoria on telecommunications services and facilities deployment are barred by Section 253(a).[37]

### B. The Need for Commission Action

23. In response to the opportunities presented by offering new wireless services, and the problems facing providers that seek to deploy networks to do so, we find it necessary and appropriate to exercise our authority to interpret the Act and clarify the preemptive scope that Congress intended. The introduction of advanced wireless services has already revolutionized the way Americans communicate and transformed the U.S. economy. Indeed, the FCC's most recent wireless competition report indicates that American demand for wireless services continues to grow exponentially. It has been reported that monthly data usage per smartphone subscriber rose to an average of 3.9 gigabytes per subscriber per month, an increase of approximately 39 percent from year-end 2015 to year-end 2016.[38] As more Americans use more wireless services, demand for new technologies, coverage and capacity will necessarily increase, making it critical that the deployment of wireless infrastructure, particularly Small Wireless Facilities, not be stymied by unreasonable state and local requirements.

24. 5G wireless services, in particular, will transform the U.S. economy through increased use of high-bandwidth and low-latency applications and through the growth of the Internet of Things.[39] While the existing wireless infrastructure in the U.S. was erected primarily using macro cells with relatively large antennas and towers, wireless networks increasingly have required the deployment of small cell systems to support increased usage and capacity. We expect this trend to increase with next-generation networks, as demand continues to grow, and providers deploy 5G service across the nation. It is precisely "[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies" that the Commission has acknowledged "an urgent need to remove any unnecessary barriers to such deployment, whether

---

[35] *Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 328 (2002); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (recognizing "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated"); s*ee also*, *e.g.*, *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-986 (2005) (Commission's interpretation of an ambiguous statutory provision overrides earlier court decisions interpreting the same provision).

[36] *See generally Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-39, paras. 4-22.

[37] *See generally Moratoria Declaratory Ruling*.

[38] *See 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, 32 FCC Rcd 8968, 8972, para. 20 (2017) (*Twentieth Wireless Competition Report*).

[39] *See Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 1.

caused by Federal law, Commission processes, local and State reviews, or otherwise."[40] As explained below, the need to site so many more 5G-capable nodes leaves providers' deployment plans and the underlying economics of those plans vulnerable to increased per site delays and costs.

25. Some states and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure, looking to bring greater connectivity to their communities through forward-looking policies. Leaders in these states are working hard to meet the needs of their communities and balance often competing interests. At the same time, outlier conduct persists. The record here suggests that the legal requirements in place in other state and local jurisdictions are materially impeding that deployment in various ways.[41] Crown Castle, for example, describes "excessive and unreasonable" "fees to access the [rights-of-way] that are completely unrelated to their maintenance or management." It also points to barriers to market entry "for independent network and telecommunications service providers," including municipalities that "restric[t] access to the [right-of-way] only to providers of commercial mobile services" or that impose "onerous zoning requirements on small cell installations when other similar [right of way] utility installations are erected with simple building permits."[42] Crown Castle is not alone in describing local regulations that slow deployment. AT&T states that localities in Maryland, California, and Massachusetts have imposed fees so high that it has had to pause or decrease deployments.[43] Likewise, AT&T states that a Texas city has refused to allow small cell placement on any structures in a right-of-way (ROW).[44] T-Mobile states that the Town of Hempstead, New York requires service providers who seek to collocate or upgrade equipment on existing towers that have been properly constructed pursuant to Class II standards to upgrade and certify these facilities under Class III standards that apply to civil and national defense and military facilities.[45] Verizon states that a Minnesota town has proposed barring construction of new poles in rights-of-way and that a Midwestern suburb where it has been trying to get approval for small cells since 2014 has no established procedures for small cell approvals.[46] Verizon states that localities in New York and Washington have required special use permits involving multiple layers of approval to locate small cells in some or all zoning districts.[47]

26. Further, the record in this proceeding demonstrates that many local siting authorities are not complying with our existing Section 332 shot clock rules.[48] WIA states that its members routinely

---

[40] *See Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 2.

[41] *See, e.g.,* Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 10, 2018) ("Unfortunately, many municipalities are unable, unwilling, or do not make it a priority to act on applications within the shot clock period." ); Letter from Keith Buell, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Aug. 13, 2018) (Sprint Aug. 13, 2018 *Ex Parte* Letter); Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) ("[L]ocal permitting delays continue to stymie deployments."); Letter from Kenneth J. Simon, Crown Castle, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018); Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 30, 2018).

[42] Crown Castle Comments at 7.

[43] Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 6, 2018) (AT&T Aug. 6, 2018 *Ex Parte* Letter).

[44] AT&T Comments at 6-7.

[45] T-Mobile Reply Comments at 7-9; *see also* CCA Reply Comments at 12; CTIA Reply Comments at 18; WIA Reply Comments at 22-23.

[46] *See* Verizon Comments at 7.

[47] *See* Verizon Comments at 35.

[48] *See, e.g.*, T-Mobile Comments at 8 (stating that "roughly 30% of all of its recently proposed sites (including small cells) involve cases where the locality failed to act in violation of the shot clocks."). According to WIA, one of its members "reports that 70% of its applications to deploy Small Wireless Facilities in the public ROWs during a two-
(continued….)

face lengthy delays and specifically cite localities in New Jersey, New Hampshire, and Maine as being problematic.[49] Similarly, AT&T identified an instance in which it took a locality in California 800 days to process an application.[50] GCI provides an example in which it took an Alaska locality nine months to decide an application.[51] T-Mobile states that a community in Colorado and one in California have lengthy pre-application processes for all small cell installations that include notification to all nearby households, a public meeting, and the preparation of a report, none of which these jurisdictions view as triggering a shot clock.[52] Similarly, Lightower provides examples of long delays in processing siting applications.[53] Finally, Crown Castle describes a case in which a "town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even 'deem complete' Crown Castle's application."[54]

27. Our Declaratory Ruling and Third Report and Order are intended to address these issues and outlier conduct. Our conclusions are also informed by findings, reports, and recommendations from the FCC Broadband Deployment Advisory Committee (BDAC), including the Model Code for Municipalities, the Removal of State and Local Regulatory Barriers Working Group report, and the Rates and Fees Ad Hoc Working Group report, which the Commission created in 2017 to identify barriers to deployments of broadband infrastructure, many of which are addressed here.[55] We also considered input

(Continued from previous page)
year period exceeded the 90-day shot clock for installation of Small Wireless Facilities on an existing utility pole, and 47% exceeded the 150-day shot clock for the construction of new towers." WIA Comments at 7. A New Jersey locality took almost five years to deny a Sprint application. *See Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d 381, 383, 387 (D.N.J. 2014), *aff'd*, 606 Fed. App'x 669 (3d Cir. 2015). Another locality took almost three years to deny a Crown Castle application to install a DAS system. *See Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 WL 3357169, *6-8 (S.D.N.Y. 2013), *aff'd*, 552 Fed. Appx. 47 (2d Cir. 2014).

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

[50] *See* WIA Comments at 9 (citing and discussing AT&T's Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

[51] GCI Comments at 5-6.

[52] T-Mobile Comments at 21.

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

[54] WIA Comments at 8 (citing and discussing Crown Castle's Comments in 2016 Streamlining Public Notice, WT Docket No. 16-421).

[55] BDAC Report of the Removal of State and Local Barriers Working Group, https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-01232018.pdf (approved January 10, 2018) (BDAC Regulatory Barriers Report); Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC, https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-rates-fees-wg-report-07242018.pdf (July 26, 2018) (Draft BDAC Rates and Fees Report); BDAC Model Municipal Code (Harmonized), https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-harmonization-wg-model-code-muni.pdf (approved July 26, 2018) (BDAC Model Municipal Code). The Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC was presented to the BDAC on July 26, 2018 but has not been voted by the BDAC as of the adoption of this Declaratory Ruling.

from numerous state and local officials, about their concerns and how they have approached wireless deployment, much of which we took into account here. Our action is also consistent with congressional efforts to hasten deployment, including bi-partisan legislation pending in Congress like the STREAMLINE Small Cell Deployment Act and SPEED Act. The STREAMLINE Small Cell Deployment Act proposes to streamline wireless infrastructure deployments by requiring siting agencies to act on deployment requests within specified time frames and by limiting the imposition of onerous conditions and fees.[56] The SPEED Act would similarly streamline federal permitting processes.[57] In the same vein, the Model Code for Municipalities adopts streamlined infrastructure siting requirements while other BDAC reports and recommendations emphasize the negative impact of high fees on infrastructure deployments.[58]

28. As do members of both parties of Congress and experts on the BDAC, we recognize the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G. State government officials also have urged us to act to expedite the deployment of 5G technology, in particular, by streamlining overly burdensome regulatory processes to ensure that 5G technology will expand beyond just urban centers. These officials have expressed their belief that reducing high regulatory costs and delays in urban areas would leave more money and encourage development in rural areas.[59] "[G]etting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies – allowing more modern rules for modern infrastructure."[60] State officials have acknowledged that current regulations are "outdated" and "could hinder the timely arrival of 5G throughout the country," and urged the FCC "to push for more reforms that will streamline infrastructure rules from coast to coast."[61]

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

## III. DECLARATORY RULING

30. In this Declaratory Ruling, we note that a number of appellate courts have articulated different and often conflicting views regarding the scope and nature of the limits Congress imposed on state and local governments through Sections 253 and 332. In light of these diverging views, Congress's

[56] *See, e.g.*, STREAMLINE Small Cell Deployment Act, S.3157, 115th Congress (2017-2018).

[57] *See, e.g.*, Streamlining Permitting to Enable Efficient Deployment of Broadband Infrastructure Act of 2017 (SPEED Act), S. 1988.

[58] *See* BDAC Model Municipal Code; Draft BDAC Rates and Fees Report; BDAC Regulatory Barriers Report.

[59] Letter from Montana State Senator Duane Ankney to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Duane Ankney July 31, 2018 *Ex Parte* Letter) .

[60] Letter from LaWana Mayfield, City Council Member, Charlotte, NC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (LaWana Mayfield July 31, 2018 *Ex Parte* Letter); *see also* Letter from South Carolina State Representative Terry Alexander to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed August 7, 2018) ("[P]olicymakers at all levels of government must streamline complex siting stipulations that will otherwise slow down 5G buildout for small cells in particular."); Letter from Sal Pace, Pueblo County Commissioner, District 3, CO, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 30, 2018) (Sal Pace July 30, 2018 *Ex Parte* Letter) ("[T]he FCC should ensure that localities are fully compensated for their costs . . . Such fees should be reasonable and non-discriminatory, and should ensure that localities are made whole. Lastly, the FCC should set reasonable and enforceable deadlines for localities to act on wireless permit applications. . . . The distinction between siting large macro-towers and small cells should be reflected in any rulemaking.")

[61] Letter from Dr. Carolyn A. Prince, Chairwoman, Marlboro County Council, SC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter)

vision for a consistent, national policy framework, and the need to ensure that our approach continues to make sense in light of the relatively new trend towards the large-scale deployment of Small Wireless Facilities, we take this opportunity to clarify and update the FCC's reading of the limits Congress imposed. We do so in three main respects.

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

32. Second, in Part III.B, we note, as numerous courts have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can effectively prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253 and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when to comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they represent a reasonable approximation of the local government's objectively reasonable costs, and are non-discriminatory.[62] In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation, while recognizing that it is the standard itself, not the particular, presumptive fee levels we articulate, that ultimately will govern whether a particular fee is allowed under Sections 253 and 332. So fees above those levels would be permissible under Sections 253 and 332 to the extent a locality's actual, reasonable costs (as measured by the standard above) are higher.

33. Finally, in Part III.C, we focus on a subset of other, non-fee provisions of state and local law that could also operate as prohibitions on service. We do so in particular by addressing state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities.

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

34. In Sections 253(a) and 332(c)(7)(B) of the Act, Congress determined that state or local requirements that prohibit or have the effect of prohibiting the provision of service are unlawful and thus preempted.[63] Section 253(a) addresses "any interstate or intrastate telecommunications service," while Section 332(c)(7)(B)(i)(II) addresses "personal wireless services."[64] Although the provisions contain

[62] Fees charged by states or localities in connection with Small Wireless Facilities would be "compensation" for purposes of Section 253(c). This Declaratory Ruling interprets Section 253 and 332(c)(7) in the context of three categories of fees, one of which applies to all deployments of Small Wireless Facilities while the other two are specific to Small Wireless Facilities deployments inside the ROW. (1) "Event" or "one-time" fees are charges that providers pay on a non-recurring basis in connection with a one-time event, or series of events occurring within a finite period. The one-time fees addressed in this Declaratory Ruling are not specific to the ROW. For example, a provider may be required to pay fees during the application process to cover the costs related to processing an application building or construction permits, street closures, or a permitting fee, whether or not the deployment is in the ROW. (2) Recurring charges for a Small Wireless Facility's use of or attachment to property inside the ROW owned or controlled by a state or local government, such as a light pole or traffic light, is the second category of fees addressed here, and is typically paid on a per structure/per year basis. (3) Finally, ROW access fees are recurring charges that are assessed, in some instances, to compensate a state or locality for a Small Wireless Facility's access to the ROW, which includes the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property (including when such property is government-owed). A ROW access fee may be charged even if the Small Wireless Facility is not using government owned property within the ROW. *See* Draft BDAC Rates and Fees Report at p. 15-16. Unless otherwise specified, a reference to "fee" or "fees" herein refers to any one of, or any combination of, these three categories of charges.

[63] 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

[64] *Id.*

identical "effect of prohibiting" language,[65] the Commission and different courts over the years have each employed inconsistent approaches to deciding what it means for a state or local legal requirement to have the "effect of prohibiting" services under these two sections of the Act. This has caused confusion among both providers and local governments about what legal requirements are permitted under Section 253. For example, despite Commission decisions to the contrary, some courts have held that a denial of a wireless siting application will "prohibit or have the effect of prohibiting" the provision of a personal wireless service under Section 332(c)(7)(B)(i)(II) only if the provider can establish that it has a significant gap in service coverage in the area and a lack of feasible alternative locations for siting facilities.[66] Other courts have held that evidence of an already-occurring or complete inability to offer a telecommunications service is required to demonstrate an effective prohibition under Section 253(a).[67] Conversely, still other courts like the First and Second Circuits have both endorsed prior Commission interpretations of what constitutes an effective prohibition and recognized that, under that analytical framework, a legal requirement can constitute an effective prohibition of services even if it is not an insurmountable barrier.[68] In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*, namely, that a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[69] We then explain how this "material inhibition" standard applies in the context of state and local fees and aesthetic requirements. In doing so, we confirm the First and Second Circuits' understanding that under this analytical framework, a legal requirement can "materially inhibit" the provision of services even if it is

[65] *Id*.

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

[67] *See, e.g.*, *County of San Diego*, 543 F.3d at 579-80; *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533-34 (8th Cir. 2007) (*City of St. Louis*).

[68] *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (*Municipality of Guayanilla*); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (*City of White Plains*).

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

not an insurmountable barrier.[70] We also resolve the conflicting court interpretations of the 'effective prohibition' language so that continuing confusion on Section 253 does not materially inhibit the critical deployments of Small Wireless Facilities and our nation's drive to deploy 5G.[71]

35. As an initial matter, we note that our Declaratory Ruling applies with equal measure to the effective prohibition standard that appears in both Sections 253(a) and 332(c)(7).[72] This ruling is consistent with the basic canon of statutory interpretation that identical words appearing in neighboring provisions of the same statute should be interpreted to have the same meaning.[73] Moreover, both of these

[70] *See, e.g.*, *City of White Plains*, 305 F.3d at 76; *Municipality of Guayanilla*, 450 F.3d at 18; *see also, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 12. Because the clarifications in this order should reduce uncertainty regarding the application of these provisions for state and local governments as well as stakeholders, we are not persuaded by some commenters' arguments that an expedited complaint process is required. *See, e.g.*, AT&T Comments at 28; CTIA Reply at 21. Nor do we address, at this time, requests for clarification and/or action on other issues raised in the record beyond those expressly discussed in this order. These other issues include arguments regarding other statutory interpretations that we do not address here. *See, e.g.*, CTIA Reply at 23 (raising broader questions about the precise interplay of Section 253 and Section 332(c)(7)); Crown Castle June 7, 2018 *Ex Parte* Letter at 16-17 (raising broader questions about the scope of "legal requirements" under Section 253(a)). Consequently, this order should not be read as impliedly taking a position on those issues.

[71] *See, e.g.*, Crown Castle June 7, 2018 *Ex Parte* Letter at 11-12 (arguing that "[d]espite the Commission's efforts to define the boundaries of federal preemption under Section 253, courts have issued a number of conflicting decisions that have only served to confuse the preemption analysis sunder section 253" and that "the Commission should clarify that the *California Payphone* standard as interpreted by the First and Second Circuits is the appropriate standard going forward"); *see also* BDAC Regulatory Barriers Report at p. 9 ("The Commission should provide clarity on what actually constitutes an "excessive" fee for right-of-way access and use. The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not "fair and reasonable." The Commission should specifically clarify that "fair and reasonable" compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.").

[72] *See infra* Part III.A, B.

[73] *See County of San Diego*, 543 F.3d at 579 ("We see nothing suggesting that Congress intended a different meaning of the text 'prohibit or have the effect of prohibiting' in the two statutory provisions, enacted at the same time, in the same statute. * * * * * As we now hold, the legal standard is the same under either [Section 253 or 332(c)(7)]."); *see also, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S.Ct. 1938, 1946 (2016) (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning) and *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam) ("[S]imilarity of language . . . is . . . a strong indication that the two statutes should be interpreted *pari passu*"); Verizon Comments at 9-10; AT&T Reply at 3-4; Crown Castle June 7, 2018 *Ex Parte* Letter at 15.

provisions apply to wireless telecommunications services[74] as well as to commingled services and facilities.[75]

36. As explained in *California Payphone* and reaffirmed here, a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service.[76] This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities.[77] Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the

[74] Common carrier wireless services meet the definition of "telecommunications services," and thus are within the scope of Section 253(a) of the Act. *See, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, para 142 n.523; *see also, e.g.*, League of Minnesota Cities Comments at 11; Verizon Reply at 9-10. While some commenters cite certain distinguishing factual characteristics between wireline and wireless services, the record does not reveal why those distinctions would be material to whether wireless telecommunications services are covered by Section 253 in the first instance. *See, e.g.*, City of San Antonio *et al*. Comments, Exh. A at 13; Virginia Joint Commenters Comments at 5; *id*., Exh. A at 45-46. To the contrary, Section 253(e) expressly preserves "application of section 332(c)(3) of this title to commercial mobile service providers" notwithstanding Section 253—a provision that would be meaningless if wireless telecommunications services already fell outside the scope of Section 253. 47 U.S.C. § 253(e). For this same reason, we also reject claims that the existence of certain protections for personal wireless services in Section 332(c)(7) demonstrate that wireless telecommunications services must fall outside the scope of Section 253. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at iii, 45-46.

[75] *See, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, para 145 n.531; *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 425, para. 190 (2018); *see also, e.g.*, *Coastal Communications Service v. City of New York*, 658 F.Supp.2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to Section 253(a) where the advertising was a material factor in the provider's ability to provide the payphone service itself). The fact that facilities are sometimes deployed by third parties not themselves providing covered services also does not place such deployment beyond the purview of Section 253(a) or Section 332(c)(7)(B)(i) insofar as the facilities are used by wireless service providers on a wholesale basis to provide covered services (among other things). *See, e.g.*, T-Mobile Comments at 26. Given our conclusion that neither commingling of services nor the identity of the entity engaged in the deployment activity changes the applicability of Section 253(a) or Section 332(c)(7)(B)(i)(II) where the facilities are being used for the provisioning of services within the scope of the relevant statutory provisions, we reject claims to the contrary. *See, e.g.*, Colorado Communications and Utility Alliance *et al*. Comments at 15-16; City of San Antonio *et al*. Comments, Exh. A at 12; *id*., Exh. C at 13-15.

[76] By "covered service" we mean a telecommunications service or a personal wireless service for purposes of Section 253 and Section 332(c)(7), respectively.

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

improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.[78]

37. Our reading of Section 253(a) and Section 332(c)(7)(B)(i)(II) reflects and supports a marketplace in which services can be offered in a multitude of ways with varied capabilities and performance characteristics consistent with the policy goals in the 1996 Act and the Communications Act. To limit Sections 253(a) and 332(c)(7)(B)(i)(II) to protecting only against coverage gaps or the like would be to ignore Congress's contemporaneously-expressed goals of "promot[ing] competition[,] . . . secur[ing] . . . higher quality services for American telecommunications consumers and encourage[ing] the rapid deployment of new telecommunications technologies."[79] In addition, as the Commission recently explained, the implementation of the Act "must factor in the fundamental objectives of the Act, including the deployment of a 'rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges' and 'the development and rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays[, and] efficient and intensive use of the electromagnetic spectrum.'"[80] These provisions demonstrate that our interpretation of Section 253 and Section 332(c)(7)(B)(i)(II) is in accordance with the broader goals of the various statutes that the Commission is entrusted to administer.

38. *California Payphone* further concluded that providers must be allowed to compete in a "fair and balanced regulatory environment."[81] As reflected in decisions such as the Commission's *Texas PUC Order*, a state or local legal requirement can function as an effective prohibition either because of the resulting "financial burden" in an absolute sense, or, independently, because of a resulting competitive disparity.[82] We clarify that "[a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the

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

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

[80] *Accelerating Wireless Broadband Deployment By Removing Barriers To Infrastructure Investment*, Second Report and Order, FCC 18-30, para. 62 (rel. Mar. 30, 2018) (*Wireless Infrastructure Second R & O*) (quoting 47 U.S.C. §§ 151, 309(j)(3)(A), (D)).

[81] *California Payphone*, 12 FCC Rcd at 14206, para. 31.

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

disfavored facilities will experience prohibition."[83] This conclusion is consistent with both Commission and judicial precedent recognizing the prohibitory effect that results from a competitor being treated materially differently than similarly-situated providers.[84] We provide our authoritative interpretation below of the circumstances in which a "financial burden," as described in the *Texas PUC Order*, constitutes an effective prohibition in the context of certain state and local fees.

39. As we explained above, we reject alternative readings of the effective prohibition language that have been adopted by some courts and used to defend local requirements that have the effect of prohibiting densification of networks. Decisions that have applied solely a "coverage gap"-based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace.[85] Those cases, including some that formed the foundation for "coverage gap"-based analytical approaches, appear to view wireless service as if it were a single, monolithic offering provided only via traditional wireless towers.[86] By contrast, the current wireless

[83] Crown Castle June 7, 2018 *Ex Parte* Letter at 13.

[84] *See, e.g.*, *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81; *Federal-State Joint Board On Universal Service; Western Wireless Corporation Petition For Preemption Of An Order Of The South Dakota Public Utilities*, Declaratory Ruling, 15 FCC Rcd 15168, 15173, paras. 12-13 (2000) (*Western Wireless Order*); *Pittencrieff Communications, Inc. For Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act Of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, para. 32 (1997); *City of White Plains*, 305 F.3d at 80.

[85] Some courts have expressed concern about alternative readings of the statute that would lead to extreme outcomes—either always requiring a grant under some interpretations, or never preventing a denial under other interpretations. *See, e.g.*, *Willoth*, 176 F.3d at 639-41; *APT*, 196 F.3d at 478-79; *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (*City Council of Virginia Beach*); *see also, e.g.*, Greenling Comments at 2; City and County of San Francisco Reply at 16. Our interpretation avoids those concerns while better reflecting the text and policy goals of the Communications Act and 1996 Act than coverage gap-based approaches ultimately adopted by those courts. Our approach ensures meaningful constraints on state and local conduct that otherwise would prohibit or have the effect of prohibiting the provision of personal wireless services. At the same time, our standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities, as explained below. *See infra* III.B, C.

[86] *See, e.g.*, *Willoth*, 176 F.3d at 641-44; *360 Degrees Commc'ns Co. v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86-88 & n.1 (4th Cir. 2000) (*Albermarle County*); *see also, e.g.*, ExteNet Comments at 29; T-Mobile Comments at 42; Verizon Comments at 18; WIA Comments at 38-40. Even some cases that implicitly recognize the limitations of a gap-based test fail to account for those limitations in practice when applying Section 332(c)(7)(B)(i)(II). *See, e.g.*, *Second Generation Properties v. Town of Pelham*, 313 F.3d 620, 633 n.14 (4th Cir. 2002) (discussing scenarios where a carrier has coverage but insufficient capacity to adequately handle the volume of calls or where new technology emerges and a carrier would like to use it in areas that already have coverage using prior-generation technology). Courts that have sought to identify limited set of characteristics of personal wireless services covered by the Act essentially allow actual or effective prohibition of many personal wireless services that providers wish to offer with additional or more advanced characteristics. *See, e.g.*, *Willoth*, 176 F.3d at 641-43 (drawing upon certain statutory definitions); *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) (*Borough of Ho-Ho-Kus*) (concluding that it should be up to state or local authorities to assess and weigh the benefits of differing service qualities); *Albermarle County*, 211 F.3d at 87 (citing 47 CFR §§ 22.99, 22.911(b) as noting the possibility of some 'dead spots'); *cf. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006) (describing as a "dubious proposition" the argument that a denial of a request to construct a tower resulting in "less than optimal" service quality could be an effective prohibition). An outcome that allows the actual or effective prohibition of some covered services is contrary to the Act. Section 253(a) applies to any state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing "any" interstate or intrastate telecommunications service, 47 U.S.C. § 253(a). Similarly, Section 332(c)(7)(B)(i)(II) categorically precludes state or local regulation of the placement, construction, or modification of personal wireless service facilities that prohibits or has the effect of prohibiting the provision of personal wireless "services." 47 U.S.C. § 332(c)(7)(B)(i)(II). We find the most natural

(continued….)

marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies.[87] As Crown Castle explains, coverage gap-based approaches are "simply incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage."[88] Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings.[89]

40. Likewise, we reject the suggestion of some courts like the Eighth and Ninth Circuits that evidence of an existing or complete inability to offer a telecommunications service is required under 253(a).[90] Such an approach is contrary to the material inhibition standard of *California Payphone* and the

(Continued from previous page)
interpretation of these sections is that any service that meets the definition of "telecommunications service" or "personal wireless service" is encompassed by the language of each provision, rather than only some subset of such services or service generally. The notion that such state or local regulation permissibly could prohibit some personal wireless services, so long as others are available, is at odds with that interpretation. In addition as we explain above, a contrary approach would fail to advance important statutory goals as well as the interpretation we adopt. Further, the approach reflected in these court decisions could involve state or local authorities "inquir[ing] into and regulat[ing] the services offered—an inquiry for which they are ill-qualified to pursue and which could only delay infrastructure deployment." Crown Castle June 7, 2018 *Ex Parte* Letter at 14. Instead, our effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.

[87] *See generally, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 8968; *see also, e.g.*, T-Mobile Comments at 42-43; AT&T Reply at 4-5; CTIA Reply at 13-14; WIA Reply at 23-24; Crown Castle June 7, 2018 *Ex Parte* Letter at 15. We do not suggest that viewing wireless service as if it were a single, monolithic offering provided only via traditional wireless towers would have reflected an accurate understanding of the marketplace in the past, even if it might have been somewhat more understandable that courts held such a simplified view at that time. Rather, the current marketplace conditions highlight even more starkly the shortcomings of coverage gap-based approaches, which do not account for other characteristics and deployment strategies. *See, e.g.*, *Twentieth Wireless Competition Report*, 32 FCC Rcd at 8974-75, para. 12 (observing that "[p]roviders of mobile wireless services typically offer an array of mobile voice and data services," including "interconnected mobile voice services"); *id*. at 8997-97, paras. 42-43 (discussing various types of wireless infrastructure deployment to, among other things, "improve spectrum efficiency for 4G and future 5G services," "to fill local coverage gaps, to densify networks and to increase local capacity").

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

[89] *See* WIA Comments at 39; T-Mobile Comments at 43-44.

[90] *See, e.g.*, *County of San Diego*, 543 F.3d at 577, 579-80; *City of St. Louis*, 477 F.3d at 533-34; *see also, e.g.*, Virginia Joint Commenters Comments, Exh. A at 39-41. Although the Ninth Circuit in *County of San Diego* found that "the unambiguous text of §253(a)" precluded a prior Ninth Circuit approach that found an effective prohibition (continued….)

correct recognition by courts "that a prohibition does not have to be complete or 'insurmountable'" to constitute an effective prohibition.[91] The "effectively prohibit" language must have some meaning independent of the "prohibit" language, and we find that the interpretation of the First, Second, and Tenth Circuits reflects that principle, while being more consistent with the *California Payphone* standard than the approach of the Eighth and Ninth Circuits.[92]

### B. State and Local Fees

41. Federal courts have long recognized that the fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed in the effective prohibition standard embodied in Sections 253 and 332.[93] In *Municipality of Guayanilla*, for example, the First Circuit addressed whether a city could lawfully charge a 5 percent gross revenue fee. The court found that the "5% gross revenue fee would constitute a substantial increase in costs" for the provider, and that the ordinance consequently "will negatively affect [the provider's] profitability."[94] The fee, together with other requirements, thus "place a significant burden" on the provider.[95] In light of this analysis, the First Circuit agreed that the fee "'materially inhibits or limits the ability'" of the provider "'to compete in a fair and balanced legal and regulatory environment.'"[96] The court thus held that the fee does not survive scrutiny under Section 253. In doing so, the First Circuit also noted that the inquiry is not limited to the impact that a fee would have on deployment in the jurisdiction that imposes the fee. Rather, the court noted the aggregate effect of fees when totaled across all relevant jurisdictions.[97] At the same time, the First Circuit did not decide whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or, at the very least, related to the actual use of the ROW.[98]

42. In *City of White Plains*, the Second Circuit likewise faced a 5 percent gross revenue fee,

(Continued from previous page)
based on broad governmental discretion and the "mere possibility of prohibition," that holding is not implicated by our interpretations here. *County of San Diego*, 543 F.3d at 578; *cf. City of St. Louis*, 477 F.3d at 532. Consequently, those decisions do not preclude the Commission's interpretations here, *see, e.g.*, Verizon Reply at 7, and we reject claims to the contrary. *See, e.g.*, Smart Communities Comments at 60.

[91] *City of White Plains*, 305 F.3d at 76 (citing *RT Commc'ns*, 201 F.3d at 1268); *see also, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 18 (quoting *City of White Plains*, 305 F.3d at 76 and citing *City of Santa Fe*, 380 F.3d at 1269); Crown Castle June 7, 2018 *Ex Parte* Letter at 12.; Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 5 (filed Aug. 10, 2018) (Verizon Aug. 10, 2018 *Ex Parte* Letter).

[92] *See supra* note 85. We discuss specific applications of the *California Payphone* standard in the context of certain fees and non-fee regulations in the sections below, and leave others to be addressed case-by-case as they arise or otherwise are taken up by the Commission or courts in the future.

[93] The Commission also has recognized the potential for fees to result in an effective prohibition. *See, e.g.*, *Pittencrieff Communications, Inc. For Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act Of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, para. 37 (1997) (observing that "even a neutral [universal service] contribution requirement might under some circumstances effectively prohibit an entity from offering a service").

[94] *Municipality of Guayanilla*, 450 F.3d at 18-19.

[95] *Id*. at 19.

[96] *Id*. (quoting *City of White Plains*, 305 F.3d at 76).

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

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

which it found to be "[t]he most significant provision" in a franchise agreement implementing an ordinance that the court concluded effectively prohibited service in violation of Section 253.[99] While the court noted that "compensation is . . . sometimes used as a synonym for cost,"[100] it ultimately did not resolve whether fair and reasonable compensation "is limited to cost recovery, or whether it also extends to a reasonable rent," relying instead on the fact that "White Plains has not attempted to charge Verizon the fee that it seeks to charge TCG," thus failing Section 253's "competitively neutral and nondiscriminatory" standard.[101] But the court did observe that "Section 253(c) requires compensation to be reasonable essentially to prevent monopolist pricing by towns."[102]

43. In another example, the Tenth Circuit in *City of Santa Fe* addressed a $6,000 per foot fee set for Qwest's use of the ROW.[103] The court held "that the rental provisions are prohibitive because they create[d] a massive increase in cost" for Qwest.[104] The court recognized that Section 253 allows the recovery of cost-based fees, though it ultimately did not decide whether to "measure 'fair and reasonable' by the City's costs or by a 'totality of circumstances test'" applied in other courts because it determined that the fees at issue were not cost-based and "fail[ed] even the totality of the circumstances test."[105] Consequently, the fee was preempted under Section 253.

44. At the same time, the courts have adopted different approaches to analyzing whether fees run afoul of Section 253, at times failing even to articulate a particular test.[106] Among other things, courts have expressed different views on whether Section 253 limits states' and localities' fees to recovery of their costs or allows fees set in excess of that level.[107] We articulate below the Commission's

---

[99] *City of White Plains*, 305 F.3d at 77.

[100] *City of White Plains*, 305 F.3d at 77. In this context, the court stated that the term "compensation" is "flexible" and capable of different meanings depending on the context in which it is used. *Id.*

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

[102] *City of White Plains*, 305 F.3d at 79.

[103] *City of Santa Fe*, 380 F.3d at 1270-71.

[104] *Id*. at 1271.

[105] *Id*. at 1272 (observing that "[t]he City acknowledges . . . that the rent required by the Ordinance is not limited to recovery of costs").

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

[107] For example and as noted above, in *Municipality of Guayanilla* the First Circuit reserved judgment on whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or if it was sufficient if the compensation was related to the actual use of rights of way. *Municipality of Guayanillia*, 450 F.3d at 22. Other courts have found reasonable compensation to require cost-based fees. *XO Missouri v. City of Maryland Heights*, 256 F.Supp.2d 987, 993-95 (E.D. Mo. 2003) (*City of Maryland Heights*); *Bell Atlantic–Maryland, Inc. v. Prince George's County*, 49 F.Supp.2d 805, 818 (D. Md. 1999) (*Prince George's County*) vacated on other grounds, 212 F.3d 863 (4th Cir. 2000). Still other courts have applied a test that weighs a number of considerations when evaluating whether compensation is fair and reasonable. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (*City of Dearborn*) (considering "the amount of use contemplated . . . the amount that other providers

(continued….)

interpretation of Section 253(a) and the standards we adopt for evaluating when a fee for Small Wireless Facility deployment is preempted, regardless how the fee is challenged. We also clarify that the Commission interprets Section 332(c)(7)(B)(i)(II) to have the same substantive meaning as Section 253(a).

45. *Record Evidence on Costs Associated with Small Wireless Facilities.* Keeping pace with the demands on current 4G networks and upgrading our country's wireless infrastructure to 5G require the deployment of many more Small Wireless Facilities.[108] For example, Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades.[109] Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years.[110] A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is "roughly double the number of macro cells built over the last 30 years."[111]

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

47. Cognizant of the changing technology and its interaction with regulations created for a previous generation of service, the *2017 Wireline Infrastructure NPRM/NOI* sought comment on whether government-imposed fees could act as a prohibition within the meaning of Section 253, and if so, what fees would qualify for 253(c)'s savings clause.[112] The *2017 Wireless Infrastructure NPRM/NOI* similarly sought comment on the scope of Sections 253 and 332(c)(7) and on any new or updated guidance the Commission should provide, potentially through a Declaratory Ruling.[113] In particular, the Commission sought comment on whether it should provide further guidance on how to interpret and apply the phrase

(Continued from previous page)
would be willing to pay . . . and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it now was challenging as unfair").

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

[109] *See* Verizon Comments at 3; AT&T Comments at 1.

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

[111] Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 1 & Attach. at 6 (filed July 19, 2018) (CTIA July 19, 2018 *Ex Parte*).

[112] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3266, 3296-97, paras. 100 -101 and 3298-99, paras. 104-105 (2017) (*Wireline Infrastructure NPRM/NOI*).

[113] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3360, para. 87. In addition, in 2016, the Wireless Telecommunications Bureau released a public notice seeking comment on ways to expedite the deployment of next generation wireless infrastructure, including providing guidance on application processing fees and charges for use of rights of way. *See Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360 (WTB 2016).

"prohibit or have the effect of prohibiting."[114]

48. We conclude that ROW access fees, and fees for the use of government property in the ROW,[115] such as light poles, traffic lights, utility poles, and other similar property suitable for hosting Small Wireless Facilities, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities inside and outside the ROW, violate Sections 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs,[116] (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.[117]

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

---

[114] *Wireless Infrastructure NPRM/NOI,* 32 FCC Rcd at 3362, para. 90.

[115] We do not find these fees to be taxes within the meaning of Section 601(c)(2) of the 1996 Act. *See, e.g.*, Smart Cities Coal. Reply at 36 (quoting the savings clause for "State or local law pertaining to taxation" in Section 601(c)(2) of the 1996 Act). It is ambiguous whether a fee charged for access to ROWs should be viewed as a tax for purposes of Section 601(c)(2) of the 1996 Act. *See, e.g.*, *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) (distinguishing "the price paid to rent use of public right-of-ways" from a "tax" and citing similar precedent). Given that Congress clearly contemplated in Section 253(c) that states' and localities' fees for access to ROWs could be subject to preemption where they violate Section 253—or else the savings clause in that regard would be superfluous—we find the better view is that such fees do not represent a tax encompassed by Section 601(c)(2) of the 1996 Act. We do not address whether particular fees could be considered taxes under other statutes not administered by the FCC, but we reject the suggestion that tests courts use to determine what constitute "taxes" in the context of such other statutes should apply to the Commission's interpretation of Section 601(c)(2) here in light of the statutory context for Section 601(c)(2) in the 1996 Act and the Communications Act discussed above. *See, e.g.*, *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 & n.3 (9th Cir. 2006) (holding that particular fees at issue there were taxes for purposes of the Tax Injunction Act and stating in dicta that had the Tax Injunction Act not applied it would agree with the conclusion of the district court that it was covered by Section 601(c)(2) of the 1996 Act); *MCI Communications Services, Inc. v. City of Eugene*, 359 F. Appx. 692, 696 (9th Cir. 2009) (asserting without analysis that the same test would apply to determine if a fee constitutes a tax under both the Tax Injunction Act and Section 601(c)(2) of the 1996 Act).

[116] By costs, we mean those costs specifically related to and caused by the deployment. These include, for instance, the costs of processing applications or permits, maintaining the ROW, and maintaining a structure within the ROW. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005), *aff'd*, 450 F.3d 9 (1st Cir. 2006) ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)).

[117] We explain above what we mean by "fees." *See supra* note 62. Contrary to some claims, we are not asserting a "general ratemaking authority." Virginia Joint Commenters Comments at 6. Our interpretations in this order bear on whether and when fees associated with Small Wireless Facility deployment have the effect of prohibiting wireless telecommunications service and thus are subject to preemption under Section 253(a), informed by the savings clause in Section 253(c). While that can implicate issues surrounding how those fees were established, it does so only to the extent needed to vindicate Congress's intent in Section 253. We do not interpret Section 253(a) or (c) to authorize the regulation or establishment of state and local fees as an exercise in itself. We likewise are not persuaded by undeveloped assertions that the Commission's interpretation of Section 253 in the context of fees would somehow violate constitutional separation of powers principles. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 52.

50. *Text and Structure.* We start our analysis with a consideration of the text and structure of Section 253. That section contains several related provisions that operate in tandem to define the roles that Congress intended the federal government, states, and localities to play in regulating the provision of telecommunications services. Section 253(a) sets forth Congress's intent to preempt state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[118] Section 253(b), in turn, makes clear Congress's intent that state and local "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" are not preempted.[119] Of particular importance in the fee context, Section 253(c) reflects a considered policy judgment that "[n]othing in this section" shall prevent states and localities from recovering certain carefully delineated fees. Specifically, Section 253(c) makes clear that fees are not preempted that are "fair and reasonable" and imposed on a "competitively neutral and nondiscriminatory basis," for "use of public rights-of-way on a "nondiscriminatory basis," so long as they are "publicly disclosed" by the government.[120] Section 253(d), in turn, provides one non-exclusive mechanism by which a party can obtain a determination from the Commission of whether a specific state or local requirement is preempted under Section 253(a)—namely, by filing a petition with the Commission.[121]

51. In reviewing this statutory scheme, the Commission previously has construed Section 253(a) as "broadly limit[ing] the ability of state[s] to regulate," while the remaining subsections set forth "defined areas in which states may regulate."[122] We reaffirm this conclusion, consistent with the view of most courts to have considered the issue—namely, that Sections 253(b) and (c) make clear that certain state or local laws, regulations, and legal requirements are not preempted under the expansive scope of Section 253(a).[123] Our interpretation of Section 253(a) is informed by this statutory context,[124] and the observation of courts that when a preemption provision precedes a narrowly-tailored savings clause, it is reasonable to infer that Congress intended a broad preemptive scope.[125] We need not decide today whether Section 253(a) preempts all fees not expressly saved by Section 253(c) with respect to all types of deployments. Rather, we conclude, based on the record before us, that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on

---

[118] 47 U.S.C. § 253(a).

[119] 47 U.S.C. § 253(b).

[120] 47 U.S.C. § 253(c).

[121] 47 U.S.C. § 253(d).

[122] *Texas PUC Order*, 13 FCC Rcd at 3481, para. 44.

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

[124] *See, e.g.*, *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2442 (2014).

[125] *See, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44-45 (1987); *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 189-90 (2d Cir. 2010); *Frank v. Delta Airlines, Inc*., 314 F.3d 195, 199 (5th Cir. 2002); *cf. United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (justifying a broad reading of a statute given that Congress "narrowly defin[ed] exceptions and affirmative defenses against a backdrop of broad applicability").

deployment,[126] particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment.[127] Against this backdrop, and in light of significant evidence, set forth herein, that Congress intended Section 253 to preempt legal requirements that effectively prohibit service, including wireless infrastructure deployment, we view the substantive standards for fees that Congress sought to insulate from preemption in Section 253(c) as an appropriate ceiling for state and local fees that apply to the deployment of Small Wireless Facilities in public ROWs.[128]

52. In addition, notwithstanding that Section 253(c) only expressly governs ROW fees, we find it appropriate to look to its substantive standards as a ceiling for other state and local fees addressed by this *Declaratory Ruling*.[129] For one, our evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment—and we see no reason why the Act would tolerate a greater prohibitory effect in the case of application or review fees than for ROW fees.[130] In addition, elements of the substantive standards for ROW fees in Section 253(c) appears at least analogous to elements of the *California Payphone* standard for evaluating an effective prohibition under Section 253(a). In pertinent part, both incorporate principles focused on the legal requirements to which a provider may be fairly subject,[131] and seek to guard against competitive disparities.[132] Without resolving the precise interplay of those concepts in Section 253(c) and the *California Payphone* standard, their similarities support our use of the substantive standards of Section 253(c) to inform our evaluation of fees at issue here that are not directly governed by that provision.

53. From the foregoing analysis, we can derive the three principles that we articulate in this Declaratory Ruling about the types of fees that are preempted. As explained in more detail below, we also interpret Section 253(c)'s "fair and reasonable compensation" to refer to fees that represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being

---

[126] *See infra* paras. 62-63.

[127] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, para. 64.

[128] *See, e.g.*, Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9-10. We therefore reject the view of those courts that have concluded that Section 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based. *See, e.g.*, *Qwest v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006) ("we decline to read" prior Ninth Circuit precedent "to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue"). At the same time, our interpretation does not take the broader view of the preemptive scope of Section 253 adopted by the Sixth Circuit, which interpreted Section 253(c) as an independent prohibition on conduct that is not itself prohibited by Section 253(a). *City of Dearborn*, 206 F.3d at 624.

[129] *See supra* note 62.

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

[131] For ROW compensation to be saved under Section 253(c) it must be "fair and reasonable," while the *California Payphone* standard looks to whether a legal requirement "materially limits or inhibits" the ability to compete in a "fair" legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.

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

passed on are themselves objectively reasonable.[133] Although there is precedent that "fair and reasonable" compensation could mean not only cost-based charges but also market-based charges in certain instances,[134] the statutory context persuades us to adopt a cost-based interpretation here. In particular, while the general purpose of Section 253(c) is to preserve certain state and local conduct from preemption, it includes qualifications and limitations to cabin state and local action under that savings clause in ways that ensure appropriate protections for service providers. The reasonableness of interpreting the qualifications and limitations in the Section 253(c) savings clause as designed to protect the interests of service providers is emphasized by the statutory language. The "competitively neutral and nondiscriminatory" and public disclosure qualifications in Section 253(c) appear most naturally understood as protecting the interest of service providers from fees that otherwise would have been saved from preemption under Section 253(c) absent those qualifiers. Under the *noscitur a sociis* canon of statutory interpretation, that context persuades us that the "fair and reasonable" qualifier in Section 253(c) similarly should be understood as focused on protecting the interest of providers.[135] As discussed in greater detail below, while it might well be fair for providers to bear basic, reasonable costs of entry,[136] the record does not reveal why it would be fair or reasonable from the standpoint of protecting providers to require them to bear costs beyond that level, particularly in the context of the deployment of Small Wireless Facilities. In addition, the text of Section 253(c) provides that ROW access fees must be imposed on a "competitively neutral and nondiscriminatory basis." This means, for example, that fees charged to one provider cannot be materially higher than those charged to a competitor for similar uses.[137]

54. Other considerations support our approach, as well. By its terms, Section 253(a) preempts state or local legal requirements that "prohibit" or have the "effect of prohibiting" the provision of services, and we agree with court precedent that "[m]erely allowing the [local government] to recoup its processing costs . . . cannot in and of itself prohibit the provision of services."[138] The Commission has long understood that Section 253(a) is focused on state or local barriers to entry for the provision of service,[139] and we conclude that states and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the

[133] *See infra* paras. 68-74; *see also, e.g.*, *City of Maryland Heights*, 256 F.Supp.2d at 993-95; *Bell Atlantic–Maryland*, 49 F.Supp.2d at 818.

[134] *See, e.g.*, *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) (statute did not unambiguously require the SEC to interpret "fair and reasonable" to mean cost-based, and the SEC's reliance on market-based rates as "fair and reasonable" where there was competition was a reasonable interpretation).

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

[136] *See infra* para. 55.

[137] *See, e.g.*, *City of White Plains*, 305 F.3d at 80.

[138] *City of Santa Fe*, 380 F.3d at 1269; *see also* Verizon Comments at 17.

[139] *See, e.g.*, *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5878, 5882-83, paras. 1, 13; *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8; Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707, para. 18 (*Minnesota Order*); *Hyperion Order*, 14 FCC Rcd at 11070, para. 13; *Texas PUC Order*, 13 FCC Rcd at 3480, para. 41; *TCI Cablevision Of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21399, para. 7 (1997) (*TCI Order*); *California Payphone*, 12 FCC Rcd at 14209, para. 38; *see also, e.g.*, *AT&T Comm'ns of the Sw. v. City of Dallas*, 8 F.Supp.2d 582, 593 (N.D. Tx. 1998) (*AT&T v. City of Dallas*) ("[A]ny fee that is not based on AT&T's use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry."); Verizon Comments at 11-12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7. Because we view the *California Payphone* standard as reflecting a focus on barriers to entry, we decline requests to adopt a distinct, additional standard with that as an explicit focus. *See, e.g.*, T-Mobile Comments at 35.

market.[140] We decline to interpret a government's recoupment of such fundamental costs of entry as having the effect of prohibiting the provision of services, nor has any commenter argued that recovery of cost by a government would prohibit service in a manner restricted by Section 253(a).[141] Reasonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for communications services by protecting property rights and guarding against conflicting deployments that could harm or otherwise interfere with others' use of property.[142] By contrast, fees that recover more than the state or local costs associated with facilities deployment—or that are based on unreasonable costs, such as exorbitant consultant fees or the like—go beyond such governmental recovery of fundamental costs of entry. In addition, interpreting Section 253(a) to prohibit states and localities from recovering a reasonable approximation of reasonable costs could interfere with the ability of states to exercise the police powers reserved to them under the Tenth Amendment.[143] We therefore conclude that Section 253(a) is circumscribed to permit states and localities to recover a reasonable approximation of their costs related to the deployment of Small Wireless Facilities.

55. *Commission Precedent*. We draw further confidence in our conclusions from the Commission's *California Payphone* decision, which we reaffirm here, finding that a state or local legal requirement would violate Section 253(a) if it "materially limits or inhibits" an entity's ability to compete in a "balanced" legal environment for a covered service.[144] As explained above, fees charged by a state or locality that recover the reasonable approximation of reasonable costs do not "materially inhibit" a

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

[141] For example, Verizon states that "[a]lthough *any* fee could be said to raise the cost of providing service," Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9, "[t]he Commission should interpret . . . Section 253(a) to allow cost-based fees for access to public rights-of-way and structures within them, but to prohibit above-cost fees that generate revenue in excess of state and local governments' actual costs." *Id*., Attach. at 6.

[142] *See, e.g.*, *TCI Order*, 12 FCC Rcd at 21441, para. 103; *see also, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). States' or localities' regulation premised on addressing effects of deployment besides these costs caused by facilities deployment are distinct issues, which we discuss below. *See infra* Part III.C.

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

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

provider's ability to compete in a "balanced" legal environment. To the contrary, those costs enable localities to recover their necessary expenditures to provide a stable and predictable framework in which market participants can enter and compete. On the other hand, in the *Texas PUC Order* interpreting *California Payphone*, the Commission concluded that state or local legal requirements such as fees that impose a "financial burden" on providers can be effectively prohibitive.[145] As the record shows, excessive state and local governments' fees assessed on the deployment of Small Wireless Facilities in the ROW in fact materially inhibit the ability of many providers to compete in a balanced environment.[146]

56. *California Payphone* and *Texas PUC* separately support the conclusion that fees cannot be discriminatory or introduce competitive disparities, as such fees would be inconsistent with a "balanced" regulatory marketplace. Thus, fees that treat one competitor materially differently than other competitors in similar situations are themselves grounds for finding an effective prohibition—even in the case of fees that are a reasonable approximation of the actual and reasonable costs incurred by the state or locality. Indeed, the Commission has previously recognized the potential for subsidies provided to one competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a).[147] We reaffirm that conclusion here.

57. *Legislative History*. While our interpretation follows directly from the text and structure of the Act, our conclusion finds further support in the legislative history, which reflects Congress's focus on the ability of states and localities to recover the reasonable costs they incur in maintaining the rights of way.[148] Significantly, Senator Dianne Feinstein, during the floor debate on Section 253(c), "offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including [to] 'require a company to pay fees to *recover an appropriate share of the increased street repair and paving costs* that result from repeated excavation.'"[149] Representative Bart Stupak, a sponsor of the legislation, similarly explained during the debate on Section 253 that "if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it *imposes a different burden* on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings," making clear that the compensation described in the statute is related to the burden, or cost, from a provider's use of the ROW.[150] These statements buttress our interpretation of the text and structure of Section 253 and confirm Congress's apparent intent to craft specific safe harbors for states and localities, and to permit recovery of reasonable costs related to the ROW as "fair and reasonable compensation," while preempting fees above a reasonable approximation of cost that improperly inhibit service.[151]

58. *Capital Expenditures.* Apart from the text, structure, and legislative history of the 1996 Act, an additional, independent justification for our interpretation follows from the simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether

[145] *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81.

[146] *See infra* paras. 58-63.

[147] *See, e.g.*, *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.

[148] *See, e.g.*, WIA Comments, Attach. 2 at 70.

[149] WIA Comments, Attach. 2 at 70 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added)); *see also, e.g.*, Verizon Comments at 15 (similar); *City of Maryland Heights*, 256 F.Supp.2d at 995-96.

[150] 141 Cong. Rec. H8460-01, H8460 (daily ed. Aug. 4, 1995).

[151] We reject other comments downplaying the relevance of legislative statements by some commenters as inconsistent with the text and structure of the Act. *See, e.g.*, League of Arizona Cities *et al.* Joint Comments at 27-28; NATOA Comments, Exh. A at 26-28; Smart Cities Coal. Reply at 57-58; Cities of San Antonio et al. Reply at 20-21; *see also, e.g.*, *City of Portland v. Electric Lightwave, Inc.*, 452 F.Supp.2d 1049, 1071-72 (D. Or. 2005).

the reduction takes place on a local, regional or national level.[152] We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid)[153] amount of resources to use for the deployment of infrastructure. This does not mean that these resources are limitless, however. We conclude that fees imposed by localities, above and beyond the recovery of localities' reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere.[154] This and regulatory uncertainty created by such effectively prohibitive conduct[155] creates an appreciable impact on resources that materially limits plans to deploy service. This record evidence emphasizes the importance of evaluating the effect of fees on Small Wireless Facility deployment on an aggregate basis. Consistent with the First Circuit's analysis in *Municipality of Guayanilla*, the record persuades us that fees associated with Small Wireless Facility deployment lead to "a substantial increase in costs"—particularly when considered in the aggregate—thereby "plac[ing] a significant burden" on carriers and materially inhibiting their provision of service contrary to Section 253 of the Act.[156]

59. The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees.[157] As AT&T explains, "[a]ll providers have limited capital dollars to invest, funds that are quickly depleted when drained by excessive ROW fees."[158] AT&T added that "[c]ompetitive demands will force carriers to deploy small cells in the largest cities. But, when those largest cities charge excessive fees to access ROWs and municipal ROW structures, carriers' finite capital

[152] At a minimum, this analysis complements and reinforces the justifications for our interpretation provided above. While the relevant language of Section 253(a) and Section 332(c)(7)(B)(i)(II) is not limited just to Small Wireless Facilities, we proceed incrementally in our Declaratory Ruling here and address the record before us, which indicates that our interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment.

[153] For example, the precise amount of these resources might shift as a service provider encounters unexpected costs, recovers costs passed on to subscribers, or earns a profit above those costs.

[154] As Verizon observes, "[a] number of states enacted infrastructure legislation because they determined that rate relief was necessary to ensure wireless deployment," and thus could be seen as having "acknowledged that excessive fees impose a substantial barrier to the provision of service." Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7-8.

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

[156] *Municipality of Guayanilla*, 450 F.3d at 19.

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

[158] AT&T Aug. 6, 2018 *Ex Parte* Letter at 2.

dollars are prematurely depleted, leaving less for investment in mid-level cities and smaller communities. Larger municipalities have little incentive to not overcharge, and mid-level cities and smaller municipalities have no ability to avoid this harm."[159] As to areas that might not be sufficiently crucial to deployment to overcome high fees, AT&T identified jurisdictions in Maryland, California, and Massachusetts where high fees have directly resulted in paused or decreased deployments.[160] Limiting localities to reasonable cost recovery will "allow[] AT&T and other providers to stretch finite capital dollars to additional communities."[161] Verizon similarly explains that "[c]apital budgets are finite. When providers are forced to spend more to deploy infrastructure in one locality, there is less money to spend in others. The leverage that some cities have to extract high fees means that other localities will not enjoy next generation wireless broadband services as quickly, if at all."[162] Sprint, too, affirms that, because "all carriers face limited capital budgets, they are forced to limit the number and pace of their deployment investments to areas where the delays and impediments are the least onerous, to the detriment of their customers and, ultimately and ironically, to the very jurisdictions that imposed obstacles in the first place."[163] Sprint gives a specific example of its deployments in two adjacent jurisdictions – the City of Los Angeles and Los Angeles County – and describes how high fees in the county prevented Sprint from activating any small cells there, while more than 500 deployments occurred in the city, which had significantly lower fees.[164] Similarly, Conterra Broadband states that "[w]hen time and capital are diverted away from actual facility installation and instead devoted to clearing regulatory roadblocks, consumers and enterprises, including local small businesses, schools and healthcare centers, suffer."[165] Based on the record, we find that fees charged by states and localities are causing *actual* delays and restrictions on deployments of Small Wireless Facilities in a number of places across the country in violation of Section 253(a).[166]

60. Our conclusion finds further support when one considers the aggregate effects of fees imposed by individual localities, including, but not limited to, the potential limiting implications for a nationwide wireless network that reaches all Americans, which is among the key objectives of the statutory provisions in the 1996 Act that we interpret here.[167] When evaluating whether fees result in an effective prohibition of service due to financial burden, we must consider the marketplace regionally and nationally and thus must consider the cumulative effects of state or local fees on service in multiple geographic areas that providers serve or potentially would serve. Where providers seek to operate on a regional or national basis, they have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider's capital budget for a given

[159] *Id.*

[160] *Id.* (pausing or delaying deployments in Citrus Heights, CA, Oakland, CA and three Maryland counties; decreasing deployments in Lowell, MA and decreasing deployments from 98 to 25 sites in Escondido, CA).

[161] *Id*.

[162] Verizon Aug. 10, 2018 *Ex Parte* Letter at 5, Attach. at 2-4.

[163] Sprint Comments at 17.

[164] Sprint Aug. 13, 2018 *Ex Parte* Letter at 1-2.

[165] Conterra Broadband *et al*. Comments at 6.

[166] Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed August 10, 2018) (Crown Castle Aug. 10, 2018 *Ex Parte* Letter).

[167] *New England Public Comms. Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19717, para. 9 (1996) (1996 Act intent of "accelerat[ing] deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition."); *see also* Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 7.

period of time is often set in advance.[168] In such cases, the resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.[169] The text of Section 253(a) is not limited by its terms only to effective prohibitions within the geographic area targeted by the state or local fee. Where a fee in a geographic area affects service outside that geographic area, the statute is most naturally read to encompass consideration of all affected areas.

61. A contrary, geographically-restrictive interpretation of Section 253(a) would exacerbate the digital divide by giving dense or wealthy states and localities that might be most critical for a provider to serve the ability to leverage their unique position to extract fees for their own benefit at the expense of regional or national deployment by decreasing the deployment resources available for less wealthy or dense jurisdictions.[170] As a result, the areas likely to be hardest hit by excessive government fees are not necessarily jurisdictions that charge those fees, but rather areas where the case for new, expanded, or improved service was more marginal to start—and whose service may no longer be economically justifiable in the near-term given the resources demanded by the "must-serve" areas. To cite some examples of harmful aggregate effects, AT&T notes that high annual recurring fees are particularly harmful because of their "continuing and compounding nature."[171] It also states that, "if, as S&P Global Market Intelligence estimates, small-cell deployments reach nearly 800,000 by 2026, a ROW fee of $1000 per year …would result in nearly $800 million annually in forgone investment." [172] Yet another commenter notes that, "[f]or a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible," and "far exceed[ing] any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure."[173] Endorsing such a result would thwart the purposes underlying Section 253(a). As Crown Castle observes, "[e]ven where the fees do not result in a direct lack of service in a high-demand area like a city or urban core, the high cost of building and operating facilities in these jurisdictions consume [sic] capital and revenue that could otherwise be used to expand wireless infrastructure in higher cost areas. This impact of egregious fees is prohibitory, and should be taken into account in any prohibition analysis."[174]

62. Some municipal commenters endorse a cost-based approach to "ensure that localities are fully compensated for their costs [and that] fees should be reasonable and non-discriminatory, and should ensure that localities are made whole"[175] in recognition that "getting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources."[176] Commenters from smaller municipalities recognize that "thousands and thousands of small cells are needed for 5G… [and]

---

[168] *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2.

[169] *See, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 17 ("Given the interconnected nature of utility services across communities and the strain that the enactment of gross revenue fees in multiple municipalities would have on PRTC's provision of services, the Commonwealth-wide estimates are relevant to determining how the ordinance affects PRTC's 'ability . . . to provide any interstate or intrastate telecommunications service'" under Section 253(a)).

[170] *See, e.g.,* Letter from Sam Liccardo, Mayor or San Jose, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, Attachment at 1-2 (filed Aug. 2, 2018) (describing payment by providers of $24 million to a Digital Inclusion Fund in order to deploy small cells in San Jose on city owned light poles).

[171] AT&T Comments at 19.

[172] AT&T Comments at 19-20.

[173] Mobilitie Comments at 3.

[174] Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 2.

[175] Sal Pace July 30, 2018 *Ex Parte* Letter at 1.

[176] LaWana Mayfield July 31, 2018 *Ex Parte Letter* at 1.

old regulations could hinder the timely arrival of 5G throughout the country"[177] and urge the Commission to "establish some common-sense standards insofar as it relates to fees associated with the deployment of small cells [due to] a cottage industry of consultants [] who have wrongly counseled communities to adopt excessive and arbitrary fees."[178] Representatives from non-urban areas in particular caution that, "if the investment that goes into deploying 5G on the front end is consumed by big, urban areas, it will take longer for it to flow outwards in the direction of places like Florence, [SC]."[179] "[R]educing the high regulatory costs in urban areas would leave more dollars to development in rural areas [because] most of investment capital is spent in the larger urban areas [since] the cost recovery can be made in those areas. This leaves the rural areas out."[180] We agree with these commenters, and we further agree with courts that have considered "the *cumulative effect* of future similar municipal [fees ordinances]" across a broad geographic area when evaluating the effect of a particular fee in the context of Section 253(a).[181]

63. Applying this approach here, the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated Small Wireless Facility deployment.[182] The record reveals that these effects can take several forms. In some cases, the fees in a particular jurisdiction will lead to reduced or entirely forgone deployment of Small Wireless Facilities in the near term for that jurisdiction.[183] In other cases, where it is essential for a provider to deploy in a given area, the fees charged in that geographic area can deprive providers of capital needed to deploy elsewhere, and lead to reduced or forgone near-term deployment of Small Wireless Facilities in other geographic areas.[184] In both of those scenarios the bottom-line outcome on the national development of 5G networks is the same—diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks.[185]

64. *Relationship to Section 332*. While the above analysis focuses on the text and structure of the Act, legislative history, Commission orders, and case law interpreting Section 253(a), we clarify that the statutory phrase "prohibit or have the effect of prohibiting" in Section 332(c)(7)(B)(i)(II) has the

[177] Dr. Carolyn A. Prince July 31, 2018 *Ex Parte* Letter at 2.

[178] Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to Commr. Brendan Carr, WT Docket No. 17-79 at 1 (filed June 8, 2018).

[179] Representative Terry Alexander Aug. 7, 2018 *Ex Parte* Letter at 1.

[180] Senator Duane Ankney July 31, 2018 *Ex Parte* Letter at 1; *see also* Letter from Elder Alexis D. Pipkins, Sr. to the Hon. Brendan Carr, Commissioner, FCC at 1 (filed July 26, 2018) ("the race to 5G is global…instead of each city or state for itself, we should be working towards aligned, streamlined frameworks that benefit us all.").

[181] *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 111–12 (D.P.R. 2005), aff'd, 450 F.3d 9 (1st Cir. 2006) (emphasis added).

[182] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64. In addition, although one could argue that, in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service in a particular instance, the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus.

[183] *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2.

[184] AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2; CCA July 16, 2018 *Ex Parte* Letter at 2-3.

[185] *See, e.g.,* Letter from Thomas J. Navin, Counsel to Corning, Inc. to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan 25, 2018), Attach. at 6-7 (comparing different effects on deployment between a base case and a high fee case, and estimating that pole attachment fees nationwide assuming high fees would result in 28.2M fewer premises passed, or 31 percent of the 5G Base case results, and an associated $37.9B in forgone network deployment).

same meaning as the phrase "prohibits or has the effect of prohibiting" in Section 253(a). As noted in the prior section, there is no evidence to suggest that Congress intended for virtually identical language to have different meanings in the two provisions.[186] Instead, we find it more reasonable to conclude that the language in both sections should be interpreted to have the same meaning and to reflect the same standard,[187] including with respect to preemption of fees that could "prohibit" or have "the effect of prohibiting" the provision of covered service. Both sections were enacted to address concerns about state and local government practices that undermined providers' ability to provide covered services, and both bar state or local conduct that prohibits or has the effect of prohibiting service.

65. To be sure, Sections 253 and 332(c)(7) may relate to different categories of state and local fees. Ultimately, we need not resolve here the precise interplay between Sections 253 and 332(c)(7). It is enough for us to conclude that, collectively, Congress intended for the two provisions to cover the universe of fees charged by state and local governments in connection with the deployment of telecommunications infrastructure. Given the analogous purposes of both sections and the consistent language used by Congress, we find the phrase "prohibit or have the effect of prohibiting" in Section 332(c)(7)(B)(i)(II) should be construed as having the same meaning and governed by the same preemption standard as the nearly identical language in Section 253(a).[188]

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

[186] We reject the claims of some commenters that Section 332(c)(7)(B)(i)(II) must be interpreted differently than Section 253(a) because Section 332(c)(7)(B)(i)(II) is limited exclusively to decisions on individual requests. *See, e.g.*, City and County of San Francisco Comments at 24-26. Even assuming *arguendo* that position reflects the appropriate interpretation of the scope of Section 332(c)(7)(B)(i)(II), the record does not reveal why a distinction between broadly-applicable requirements and decisions on individual requests would call for a materially different analytical approach, even if it arguably could be relevant when evaluating the application of that analytical approach to a particular preemption claim. In addition, although some commenters assert that such an interpretation "would make it virtually impossible for local governments to enforce their zoning laws with regard to wireless facility siting," they provide no meaningful explanation why that would be the case. *See, e.g.*, City and County of San Francisco Reply at 16. While some local commenters note that the savings clauses in Section 253(b) and (c) do not have express counterparts in the text of Section 332(c)(7)(B)(i), *see, e.g.*, City and County of San Francisco Comments at 26, we are not persuaded that this compels a different interpretation of the virtually identical language restricting actual or effective prohibitions of service in Section 253(a) and Section 332(c)(7)(B)(i)(II), particularly given our reliance on considerations in addition to the savings clauses themselves when interpreting the 'effective prohibition' language. *See supra* paras. 55-63.

[187] *See, e.g.*, *County of San Diego*, 543 F.3d at 579; *see also, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S.Ct. 1938, 1946 (2016); Verizon Comments at 9-10; AT&T Reply at 3-4; Crown Castle June 7, 2018 *Ex Parte* Letter at 15.

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

excavation permits.

67. Applying the principles established in this Declaratory Ruling, a variety of fees not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7) in the context of Small Wireless Facility deployments.[189] For example, we agree with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW,[190] and where that is the case, are preempted under Section 253(a). In addition, although we reject calls to preclude a state or locality's use of third party contractors or consultants, or to find all associated compensation preempted,[191] we make clear that the principles discussed herein regarding the reasonableness of cost remain applicable. Thus, fees must not only be limited to a reasonable approximation of costs, but in order to be reflected in fees the *costs themselves* must also be reasonable. Accordingly, any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual "cost" to the government. If a locality opts to incur unreasonable costs, Sections 253 and 332(c)(7) do not permit it to pass those costs on to providers. Fees that depart from these principles are not saved by Section 253(c), as we discuss below.

68. *Interpretation of Section 253(c) in the Context of Fees.* In this section, we turn to the interpretation of several provisions in Section 253(c), which provides that state or local action that otherwise would be subject to preemption under Section 253(a) may be permissible if it meets specified criteria. Section 253(c) expressly provides that state or local governments may require telecommunications providers to pay "fair and reasonable compensation" for use of public ROWs but requires that the amounts of any such compensation be "competitively neutral and nondiscriminatory" and "publicly disclosed."[192]

69. We interpret the ambiguous phrase "fair and reasonable compensation," within the statutory framework we outlined for Section 253, to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs. We conclude that an appropriate yardstick for "fair and reasonable compensation," and therefore an indicator of whether a fee violates Section 253(c), is whether it recovers a reasonable approximation of a state or local government's objectively reasonable costs of, respectively, maintaining the ROW, maintaining a structure within the ROW, or processing an application or permit.[193]

---

[189] We acknowledge that a fee not calculated by reference to costs might nonetheless happen to land at a level that is a reasonable approximation of objectively reasonable costs, and otherwise constitute fair and reasonable compensation as we describe herein. If all these criteria are met, the fee would not be preempted.

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

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

[192] 47 U.S.C. § 253(c).

[193] *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005), aff'd, 450 F.3d 9 (1st Cir. 2006) ("fees charged by a municipality need to be related to the degree of actual use of the public rights-of way" to constitute fair and reasonable compensation under Section 253(c)); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F.Supp.2d 631, 638 (D. N.J. 2001) (*New Jersey Payphone Ass'n*) ("Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry.")

70. We disagree with arguments that "fair and reasonable compensation" in Section 253(c) should somehow be interpreted to allow state and local governments to charge "any compensation" and we give weight to BDAC comments that "[a]s a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment."[194] Several commenters argue, in particular, that Section 253(c)'s language must be read as permitting localities latitude to charge any fee at all[195] or a "market-based rent."[196] Many of these arguments seem to suggest that Section 253 or 332 have not previously been read to impose limits on fees, but as noted above courts have long read these provisions as imposing such limits. Still others argue that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies' use of public resources.[197] We find little support in the record, legislative history, or case law for that position.[198] Indeed, our approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure.

---

[194] BDAC Regulatory Barriers Report, Appendix C, p. 3 (a "[ROW] burden-oriented [fee] standard is flexible enough to suit varied localities and network architectures, would ensure that fees are not providing additional revenues for other localities purposes unrelated to providing and maintaining the ROW, and would provide some basis to challenge fees that, on their face, are so high as to suggest their sole intent is to maximize revenue.")

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

[196] Draft BDAC Rates and Fees Report, p. 10 (listing "Local Government Perspectives").

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

[198] As discussed more fully above, Congress intended through Section 253 to preempt state and local governments from imposing barriers in the form of excessive fees, while also preserving state and local authority to protect specified interests through competitively neutral regulation consistent with the Act. Our interpretation of Section 253(c) is consistent with Congress's objectives. Our interpretation of "fair and reasonable compensation" in Section 253(c) is also consistent with prior Commission action limiting fees, and easing access, to other critical communications infrastructure. For example, in implementing the requirement in the Pole Attachment Act that utilities charge "just and reasonable" rates, the Commission adopted rules limiting the rates utilities can impose on cable companies for pole attachments. Based on the costs associated with building and operation of poles, the rates the Commission adopted were upheld by the Supreme Court, which found that the rates imposed were permissible and not "confiscatory" because they "provid[ed] for the recovery of fully allocated cost, including the actual cost of capital." *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Here we adopt an analogous approach in interpreting the statutory requirement in Section 253(c) that state and local governments be permitted to recover only "fair and reasonable compensation" for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities.

71. The existence of Section 253(c) makes clear that Congress anticipated that "effective prohibitions" could result from state or local government fees, and intended through that clause to provide protections in that respect, as discussed in greater detail herein.[199] Against that backdrop, we find it unlikely that Congress would have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments.[200] Our interpretation of Section 253(c), in fact, is consistent with the views of many municipal commenters, at least with respect to one-time permit or application fees, and the members of the BDAC Ad Hoc Committee on Rates and Fees who unanimously concurred that one-time fees for municipal applications and permits, such as an electrical inspection or a building permit, should be based on the cost to the government of processing that application.[201] The Ad Hoc Committee noted that "[the] cost-based fee structure [for one-time fees] unanimously approved by the committee accommodates the different siting related costs that different localities may incur to review and process permit applications, while precluding excessive fees that impede deployment.[202] We find that the same reasoning should apply to other state and local government fees such as ROW access fees or fees for the use of government property within the ROW.[203]

72. We recognize that state and local governments incur a variety of direct and actual costs in connection with Small Wireless Facilities, such as the cost for staff to review the provider's siting application, costs associated with a provider's use of the ROW, and costs associated with maintaining the ROW itself or structures within the ROW to which Small Wireless Facilities are attached.[204] We also recognize that direct and actual costs may vary by location, scope, and extent of providers' planned deployments, such that different localities will have different fees under the interpretation set forth in this Declaratory Ruling.

73. Because we interpret fair and reasonable compensation as a *reasonable approximation* of costs, we do not suggest that localities must use any specific accounting method to document the costs they may incur when determining the fees they charge for Small Wireless Facilities within the ROW. Moreover, in order to simplify compliance, when a locality charges both types of recurring fees identified above (i.e., for access to the ROW and for use of or attachment to property in the ROW), we see no reason for concern with how it has allocated costs between those two types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved.[205] Fees that cannot

[199] *See supra* Part III.A, B.

[200] *See, e.g., City of White Plains*, 305 F.3d at 78–79; *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005), *aff'd*, 450 F.3d 9 (1st Cir. 2006). We disagree with arguments that competition between municipalities, or competition from adjacent private landowners, would be sufficient to ensure reasonable pricing in the ROW. *See e.g.*, Smart Communities Comments, Exh. 2, The Economics of Government Right of Way Fees, Declaration of Kevin Cahill, Ph.D at para. 15. We find this argument unpersuasive in view of the record evidence in this proceeding showing significant fees imposed on providers in localities across the country. *See, e.g.*, AT&T Comments at 18; Verizon Comments at 6-7; *see also* BDAC Regulatory Barriers Report, Appendix. C, p. 2.

[201] *See, e.g.,* Smart Communities Comments Cahill 2A at 2-3 (noting that "…a common model is to charge a fee that covers the costs that a municipality incurs in conducting the inspections and proceedings required to allow entry, fees that cover ongoing costs associated with inspection or expansion of facilities ..."); Colorado Comm. and Utility All. *et al.* Comments at 19 (noting that "application fees are based upon recovery of costs incurred by localities."); Draft BDAC Rates and Fees Report, p. 15-16.

[202] *See* Draft BDAC Rates and Fees Report, p. 15-16. Although the BDAC Ad Hoc Rates and Fees Committee and municipal commenters only support a cost-based approach for one-time fees, we find no reason not to extend the same reasoning to ROW access fees or fees for the use of government property within the ROW, when all three types of fees are a legal requirement imposed by a government and pose an effective prohibition.

[203] *See supra* para. 48.

[204] *See*, *e.g.*, Colorado Comm. and Utility All. *et al*. Comments at 18-19 (discussing range of costs that application fees cover).

[205] *See supra* note 62 (identifying three categories of fees charged by states and localities).

ultimately be shown by a state or locality to be a reasonable approximation of their costs, such as high fees designed to subsidize local government costs in another geographic area or accomplish some public policy objective beyond the providers' use of the ROW, are not "fair and reasonable compensation…for *use* of the public rights-of-way" under Section 253(c).[206] Likewise, we agree with both industry and municipal commenters that excessive and arbitrary consulting fees or other costs should not be recoverable as "fair and reasonable compensation,"[207] because they are not a function of the provider's "use" of the public ROW.

74. In addition to requiring that compensation be "fair and reasonable," Section 253(c) requires that it be "competitively neutral and nondiscriminatory." The Commission has previously interpreted this language to prohibit states and localities from charging fees on new entrants and not on incumbents.[208] Courts have similarly found that states and localities may not impose a range of fees on one provider but not on another[209] and even some municipal commenters acknowledge that governments should not discriminate on the fees charged to different providers.[210] The record reflects continuing concerns from providers, however, that they face discriminatory charges.[211] We reiterate the Commission's previous determination that state and local governments may not impose fees on some providers that they do not impose on others. We would also be concerned about fees, whether one-time or recurring, related to Small Wireless Facilities, that exceed the fees for other wireless telecommunications infrastructure in similar situations, and to the extent that different fees are charged for similar use of the public ROW.[212]

75. *Fee Levels Likely to Comply with Section 253***.** Our interpretation of Section 253(a) and "fair and reasonable compensation" under Section 253(c) provides guidance for local and state fees charged with respect to one-time fees generally, and recurring fees for deployments in the ROW. Following suggestions for the Commission to "establish a presumptively reasonable 'safe harbor' for

---

[206] 47 U.S.C. § 253(c) (emphasis added). Our interpretation is consistent with court decisions interpreting the "fair and reasonable" compensation language as requiring fees charged by municipalities relate to the degree of actual use of a public ROW. *See, e.g, P.R. Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543-44 (D.P.R. 2003); *see also Municipality of Guayanilla*, 450 F.3d at 21-24; *City of Maryland Heights*, 256 F. Supp. 2d at 984.

[207] *See* Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to Commr. Brendan Carr, WT Docket No. 17-79 at 1 (filed June 8, 2018); *see also*, Illinois Municipal League Comments at 2 (noting that proposed small cell legislation in Illinois allows municipalities to recover "reasonable costs incurred by the municipality in reviewing the application.").

[208] *TCI Cablevision of Oakland County*, Memorandum Opinion and Order, 12 FCC Rcd. 21396, 21443 para.108 (1997).

[209] *City of White Plains*, 305 F.3d 80.

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

[211] *See, e.g.*, CFP Comments at 31-33 (noting that the City of Baltimore charges incumbent Verizon "less than $.07 per linear foot for the space that it leases in the public right-of-way" while it charges other providers "$3.33 per linear foot to lease space in the City's conduit). Some municipal commenters argue that wireless infrastructure occupies more space in the ROW. *See* Smart Communities Reply Comments at 82 ("wireless providers are placing many of those permanent facilities in the public rights-of-way, in ways that require much larger deployments. It is not discrimination to treat such different facilities differently, and to focus on their impacts"). We recognize that different uses of the ROW may warrant charging different fees, and we only find fees to be discriminatory and not competitively neutral when different amounts are charged for similar uses of the ROW.

[212] Our interpretation is consistent with principles described by the BDAC's Ad Hoc Committee on Rates and Fees. Draft BDAC Rates and Fees Report at 5 (Jul. 24, 2018) (listing "neutral treatment and access of all technologies and communication providers based upon extent/nature of ROW use" as principle to guide evaluation of rates and fees).

certain ROW and use fees,"[213] and to facilitate the deployment of specific types of infrastructure critical to the rollout of 5G in coming years, we identify in this section three particular types of fee scenarios and supply specific guidance on amounts that are presumptively not prohibited by Section 253. Informed by our review of information from a range of sources, we conclude that fees at or below these amounts presumptively do not constitute an effective prohibition under Section 253(a) or Section 332(c)(7), and are presumed to be "fair and reasonable compensation" under Section 253(c).

76. Based on our review of the Commission's pole attachment rate formula, which would require fees below the levels described in this paragraph, as well as small cell legislation in twenty states, local legislation from certain municipalities in states that have not passed small cell legislation, and comments in the record, we presume that the following fees would not be prohibited by Section 253 or Section 332(c)(7): (a) $500 for a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, and (b) $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.[214]

77. By presuming that fees at or below the levels above comply with Section 253, we assume that there would be almost no litigation by providers over fees set at or below these levels. Likewise, our review of the record, including the many state small cell bills passed to date, indicate that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253. In those limited circumstances, a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the limits imposed by Section 253—that is, that they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory. Allowing localities to charge fees above these levels upon this showing recognizes local variances in costs.

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

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

79. As discussed above, a state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair

---

[213] BDAC Regulatory Barriers Report, Appendix C, p. 3.

[214] 47 CFR § 1.1409; National Conference of State Legislatures, Mobile 5G and Small Cell Legislation, (May 7, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx (providing description of state small cell legislation); Little Rock, Ark. Ordinance No. 21,423 (June 6, 2017); NCTA August 20, 2018 *Ex Parte* Letter, Attachment; *see also* H.R. 2365, 2018 Leg. 2d Reg. Sess. (Ariz. 2018) ($100 per facility for first 5 small cells in application; $50 annual utility attachment rate, $50 ROW access fee); H.R. 189 149th Gen. Assemb. Reg. Sess. (Del. 2017) ($100 per small wireless facility on application; fees not to exceed actual, direct and reasonable cost); S. 21320th Gen. Assemb. Reg. Sess. (Ind. 2017) ($100 per small wireless facility); H.R. 1991, 99th Gen. Assemb. 2nd Reg. Sess. (Missouri, 2018) ($100 for each facility collocated on authority pole; $150 annual fee per pole); H.R. 38 2018 Leg. Assemb. 2d Reg. Sess. (N.M. 2018) ($100 for each of first 5 small facilities in an application; $20 per pole annually; $250 per facility annually for access to ROW); S. 189, 2018 Leg. Gen. Sess. (Utah 2018) ($100 per facility to collocate on existing or replacement utility pole; $250 annual ROW fee per facility for certain attachments). *See also* Letter from Kara R. Graves, Dir. Reg. Affairs and D. Zachary Champ, Dir. Govt. Affairs to Marlene Dortch, Secretary, FCC WT Docket No. 17-79 (filed Aug. 10, 2018) Attach. (listing fees in twenty state small cell legislations) (CTIA/WIA Aug. 10, 2018 *Ex Parte* Letter). We recognize that certain fees in a minority of state small cell bills are above the levels we presume to be allowed under Section 253. Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.

and balanced legal and regulatory environment."[215] Our interpretation of that standard, as set forth above, applies equally to fees and to non-fee legal requirements. And as with fees, Section 253 contains certain safe harbors that permit some legal requirements that might otherwise be preempted by Section 253(a). Section 253(b) saves "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.[216] And Section 253(c) preserves state and local authority to manage the public rights-of-way.[217]

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

81. *Aesthetics.* The *Wireless Infrastructure NPRM/NOI* sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how Sections 253 and 332(c)(7) should be applied to them.[218] Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize burdensome requirements to deploy facilities using "stealth" designs or other means of camouflage,[219] as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details.[220] Providers also assert that the procedures some localities use to evaluate the appearance of proposed facilities and to decide whether they comply with applicable land-use requirements are overly restrictive.[221] Many providers are particularly critical of the use of unduly vague or subjective criteria

[215] *California Payphone*, 12 FCC Rcd at 14206, para. 31; *see supra* paras. 34-40.

[216] 47 U.S.C. § 253(b).

[217] 47 U.S.C. § 253(c).

[218] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3362-66, paras. 90-92, 95, 97-99.

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

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

[221] *See, e.g.,* Crown Castle Comments at 14-15 (criticizing San Francisco's aesthetic review procedures that discriminate against providers and criteria and referring to extended litigation); CTIA Reply Comments at 17 ("San Francisco imposes discretionary aesthetic review for wireless ROW facilities."); T-Mobile Comments at 40; *but see* San Francisco Comments at 3-7 (describing aesthetic review procedures). *See also* AT&T Comments at 13-17;

(continued….)

that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning and adding to the time necessary to deploy facilities.[222] At the same time, we have heard concerns in the record about carriers deploying unsightly facilities that are significantly out of step with similar, surrounding deployments.

82. State and local governments add that many of their aesthetic restrictions are justified by factors that the providers fail to mention. They assert that their zoning requirements and their review and enforcement procedures are properly designed to, among other things, (1) ensure that the design, appearance, and other features of buildings and structures are compatible with nearby land uses; (2) manage ROW so as to ensure traffic safety and coordinate various uses; and (3) protect the integrity of their historic, cultural, and scenic resources and their citizens' quality of life.[223]

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

84. Like fees, compliance with aesthetic requirements imposes costs on providers, and the impact on their ability to provide service is just the same as the impact of fees. We therefore draw on our analysis of fees to address aesthetic requirements. We have explained above that fees that merely require providers to bear the direct and reasonable costs that their deployments impose on states and localities should not be viewed as having the effect of prohibiting service and are permissible.[224] Analogously, aesthetic requirements that are reasonable in that they are reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment.

(Continued from previous page)
Extenet Comments at 37; CTIA Comments at 21-22; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8.

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

[223] *See, e.g.,* NLC Comments, WT Docket No. 16-421 at 8-10; Smart Communities Comments, WT Docket No. 16-421 at 35-36; New York City Comments at 10-15; New Orleans Comments at 1-2, 5-8; San Francisco Comments at 3-12; CCUA Reply Comments at 5; Irvine (CA) Comments at 2; Oakland County (MI) Comments at 3-5; Florida Coalition of Local Gov'ts Reply Comments at 6-12 (justifications for undergrounding requirements); *id.* at 16-21 (justifications for municipal historic-preservation requirements); *id.* at 22-16 (justifications for aesthetics and design requirements).

[224] *See supra* paras. 53-4.

85. Finally, in order to establish that they are reasonable and reasonably directed to avoiding aesthetic harms, aesthetic requirements must be published in advance. "Secret" rules that require applicants to guess at what types of deployments will pass aesthetic muster substantially increase providers' costs without providing any public benefit or addressing any public harm. Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site.

86. *Undergrounding requirements.* We understand that some local jurisdictions have adopted undergrounding provisions that require infrastructure to be deployed below ground based, at least in some circumstances, on the locality's aesthetic concerns. A number of providers have complained that these types of requirements amount to an effective prohibition.[225] In addressing this issue, we first reiterate that while undergrounding requirements may well be permissible under state law as a general matter, any local authority to impose undergrounding requirements under state law does not remove the imposition of such undergrounding requirements from the provisions of Section 253. In this sense, we note that a requirement that *all* wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals. In this sense, we agree with the U.S. Court of Appeals for the Ninth Circuit when it observed that "[i]f an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services."[226] Thus undergrounding requirements can amount to effective prohibitions by materially inhibiting the deployment of wireless service.

87. *Minimum spacing requirements.* Some parties complain of municipal requirements regarding the spacing of wireless installations—*i.e.*, mandating that facilities be sited at least 100, 500, or 1,000 feet, or some other minimum distance, away from other facilities, ostensibly to avoid excessive overhead "clutter" that would be visible from public areas.[227] We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements. Therefore, such requirements should be evaluated under the same standards as other aesthetic requirements.[228]

---

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

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

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

[228] Another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an "in-kind" service or benefit to the municipality, such as installing a communications network dedicated to the municipality's exclusive use. *See, e.g.*, Comcast Comments at 9-10 Verizon Comments at 7, Crown Castle Comments at 55-56. Such requirements impose costs, but rarely, if ever, yield benefits directly related to the deployment. Additionally, where such restrictions are not cost-based, they inherently have "the effect of prohibiting" service, and thus are preempted by
(continued….)

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

88. We confirm that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as light poles, traffic lights, and similar property suitable for hosting Small Wireless Facilities.[229] As explained below, for two alternative and independent reasons, we disagree with state and local government commenters who assert that, in providing or denying access to government-owned structures, these governmental entities function solely as "market participants" whose rights cannot be subject to federal preemption under Section 253(a) or Section 332(c)(7).[230]

89. First, this effort to differentiate between such governmental entities' "regulatory" and "proprietary" capacities in order to insulate the latter from preemption ignores a fundamental feature of the market participant doctrine.[231] As the Ninth Circuit has observed, at its core, this doctrine is "a presumption about congressional intent," which "may have a different scope under different federal statutes."[232] The Supreme Court has likewise made clear that the doctrine is applicable only "[i]n the absence of any express or implied indication by Congress."[233] In contrast, where state action conflicts with express or implied federal preemption, the market participant doctrine does not apply, whether or not the state or local government attempts to impose its authority over use of public rights-of-way by permit or by lease or contract.[234] Here, both Sections 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct.[235]

(Continued from previous page)
Section 253(a). *See also* BDAC Regulatory Barriers Report, Appendix E at 1 (describing "conditions imposed that are unrelated to the project for which they were seeking ROW access" as "inordinately burdensome"); BDAC Model Municipal Code at 19, § 2.5a.(v)(F) (providing that municipal zoning authority "may not require an Applicant to perform services . . . or in-kind contributions [unrelated] to the Communications Facility or Support Structure for which approval is sought").

[229] *See supra* paras. 48-66. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.

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

[231] The market participant doctrine establishes that, unless otherwise specified by Congress, federal statutory provisions may be interpreted as preempting or superseding state and local governments' activities involving regulatory or public policy functions, but not their activities as "market participants" to serve their "purely proprietary interests," analogous to similar transactions of private parties. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 229, 231 (1993) (*Boston Harbor*); *see also Wisconsin Dept. of Industry, Labor, and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (*Gould*).

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

[233] *See Boston Harbor*, 507 U.S. at 231.

[234] *See American Trucking Ass'n v. City of Los Angeles,* 569 U.S. 641, 650 (2013) (*American Trucking*).

[235] At a minimum, we conclude that Congress's language has not unambiguously pointed to such a distinction. *See* Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Aug. 23, 2018) (Verizon Aug. 23, 2018 *Ex Parte* Letter). Furthermore, we contrast these statutes with those that do not expressly or impliedly preempt proprietary conduct. *Compare*, *e.g.*, *American Trucking*, 569 U.S. 641 (finding that FAA Authorization Act of 1994's provision that
(continued….)

90. Specifically, Section 253(a) expressly preempts certain state and local "legal requirements" and makes no distinction between a state or locality's regulatory and proprietary conduct. Indeed, as the Commission has long recognized, Section 253(a)'s sweeping reference to "state [and] local statute[s] [and] regulation[s]" and "other State [and] local legal requirement[s]" demonstrates Congress's intent "to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services."[236] Section 253(b) mentions "requirement[s]," a phrase that is even broader than that used in Section 253(a) but covers "universal service," "public safety and welfare," "continued quality of telecommunications," and "safeguard[s for the] rights of consumers." The subsection does not recognize a distinction between regulatory and proprietary. Section 253(c), which expressly insulates from preemption certain state and local government activities, refers in relevant part to "manag[ing] the public rights-of-way" and "requir[ing] fair and reasonable compensation," while eliding any distinction between regulatory and proprietary action in either context. The Commission has previously observed that Section 253(c) "makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way;"[237] we conclude here that, as a general matter, "manage[ment]" of the ROW includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary.[238] This reading, coupled with Section 253(c)'s narrow scope, suggests that Congress's omission of a blanket proprietary exception to preemption was intentional and thus that such conduct can be preempted under Section 253(a). We therefore construe Section 253(c)'s requirements, including the requirement that compensation be "fair and reasonable," as applying equally to charges imposed via contracts and other arrangements between a state or local government and a party engaged in wireless facility deployment.[239] This interpretation is consistent with Section 253(a)'s reference to "State

(Continued from previous page)
"State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" expressly preempted the terms of a standard-form concession agreement drafted to govern the relationship between the Port of Los Angeles and any trucking company seeking to operate on the premises), *and Gould*, 475 U.S. at 289 (finding that NLRA preempted a state law barring state contracts with companies with disfavored labor practices because the state scheme was inconsistent with the federal scheme), *with Boston Harbor*, 507 U.S. at 224-32. In *Boston Harbor*, the Supreme Court observed that the NLRA contained no express preemption provision or implied preemption scheme and consequently held:

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

*Id.* (internal citations omitted).

[236] *See Minnesota Order*, 14 FCC Rcd at 21707, para. 18. We find these principles to be equally applicable to our interpretation of the meaning of "regulation[s]" referred to under Section 332(c)(7)(B) insofar as such actions impermissibly "prohibit or have the effect of prohibiting the provision of personal wireless services." *Supra* paras. 34-40.

[237] *See Minnesota Order*, 14 FCC Rcd at 21728-29, para. 60, quoting H. R. Rep. No. 104-204, U.S. Congressional & Administrative News, March 1996, vol.1, Legislative History section at 41 (1996).

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

[239] *Cf. Minnesota Order*, 14 FCC Rcd at 21729-30, para. 61-62 (internal citations omitted) ("Moreover, Minnesota has not shown that the compensation required for access to the right-of-way is 'fair and reasonable.' The compensation appears to reflect the value of the exclusivity inherent in the Agreement[, which provides the developer with exclusive physical access, for at least ten years, to longitudinal rights-of-way along Minnesota's
(continued….)

or local legal requirement[s]," which the Commission has consistently construed to include such agreements.[240] In light of the foregoing, whatever the force of the market participant doctrine in other contexts,[241] we believe the language, legislative history, and purpose of Sections 253(a) and (c) are incompatible with the application of this doctrine in this context. We observe once more that "[o]ur conclusion that Congress intended this language to be interpreted broadly is reinforced by the scope of section 253(d)," which "directs the Commission to preempt any statute, regulation, or legal requirement *permitted* or imposed by a state or local government if it contravenes sections 253(a) or (b). A more restrictive interpretation of the term 'other legal requirements' easily could permit state and local restrictions on competition to escape preemption based solely on the way in which [State] action [is] structured. We do not believe that Congress intended this result."[242]

91. Similarly, and as discussed elsewhere,[243] we interpret Section 332(c)(7)(B)(ii)'s references to "any request[s] for authorization to place, construct, or modify personal wireless service facilities" broadly, consistent with Congressional intent. As described below, we find that "any" is unqualifiedly broad, and that "request" encompasses anything required to secure all authorizations necessary for the deployment of personal wireless services infrastructure. In particular, we find that Section 332(c)(7) includes authorizations relating to access to a ROW, including but not limited to the "place[ment], construct[ion], or modif[ication]" of facilities on government-owned property, for the purpose of providing "personal wireless service." We observe that this result, too, is consistent with Commission precedent such as the *Minnesota Order*, which involved a contract that provided exclusive access to a ROW. As but one example, to have limited that holding to exclude government-owned property within the ROW even if the carrier needed access to that property would have the effect of diluting or completely defeating the purpose of Section 332(c)(7).[244]

92. Second, and in the alternative, even if Section 253(a) and Section 332(c)(7) were to permit leeway for States and localities acting in their proprietary role, the examples in the record would be excepted because they involve States and localities fulfilling regulatory objectives.[245] In the

(Continued from previous page)
interstate freeway system,] rather than fair and reasonable charges for access to the right-of-way. Nor has Minnesota shown that the Agreement provides for 'use of public rights-of-way on a nondiscriminatory basis.'")

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

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

[242] *Minnesota Order*, 14 FCC Rcd at 21707, para. 18 (internal citations omitted) (emphasis omitted).

[243] *See infra* Part IV.C.1 (Authorizations Subject to the "Reasonable Period of Time" Provision of Section 332(c)(7)(B)(ii)).

[244] *See also infra* para. 132 and cases cited therein. Precedent that may appear to reach a different result can be distinguished in that it resolves disputes arising under Section 332 and/or 253(a) without analyzing the scope of Section 253(c). Furthermore, those situations did not involve government-owned property or structures within a public ROW. *See*, *e.g.*, *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (declining to find preemption under Section 332 applicable to terms of a school rooftop lease); *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195-96, 200-01 (9th Cir. 2013) (declining to find preemption under Section 332 applicable to restrictions on lease of parkland).

[245] In this regard, also relevant to our interpretations here is courts' admonition that government activities that are characterized as transactions but in reality are "tantamount to regulation" are subject to preemption, *Gould*, 475 U.S. (continued….)

proprietary context, "a State acts as a 'market participant with no interest in setting policy.'"[246] We contrast state and local governments' purely proprietary actions with states and localities acting with respect to managing or controlling access to property within public ROW, or to decisions about where facilities that will provide personal wireless service to the public may be sited. As several commenters point out, courts have recognized that states and localities "hold the public streets and sidewalks in trust for the public" and "manage public ROW in their regulatory capacities."[247] These decisions could be based on a number of regulatory objectives, such as aesthetics or public safety and welfare, some of which, as we note elsewhere, would fall within the preemption scheme envisioned by Congress. In these situations, the State or locality's role seems to us to be indistinguishable from its function and objectives as a regulator.[248] To the extent that there is some distinction, the temptation to blend the two roles for purposes of insulating conduct from federal preemption cannot be underestimated in light of the overarching statutory objective that telecommunications service and personal wireless services be deployed without material impediments.

93. Our interpretation of both provisions finds ample support in the record of this proceeding. Specifically, commenters explain that public ROW and government-owned structures within such ROW are frequently relied upon to supply services for the benefit of the public, and are often the best-situated locations for the deployment of wireless facilities.[249] However, the record is also replete with examples of states and localities refusing to allow access to such ROW or structures, or imposing onerous terms and conditions for such access.[250] These examples extend far beyond governments' treatment of single structures;[251] indeed, in some cases it has been suggested that states or localities are using their

(Continued from previous page)
at 289, and that government action disguised as private action may not be relied on as a pretext to advance regulatory objectives. *See*, *e.g.*, *Coastal Communications Service v. City of New York*, 658 F.Supp.2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to section 253(a) where the advertising was a material factor in the provider's ability to provide the payphone service itself).

[246] *See*, *e.g.*, *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008).

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

[248] Indeed, the Commission has long recognized that, in enacting Sections 253(c) and 332(c)(7), Congress affirmatively protected the ability of state and local governments to carry out their responsibilities for maintaining, managing, and regulating the use of ROW and structures therein for the benefit of the public. *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21441, para. 103 (1997) ("We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way."); *Moratoria Declaratory Ruling*, para. 142 (same); *Classic Telephone*, Petition for Preemption, Declaratory Ruling, and Injunctive Relief, 11 FCC Rcd 13082, 13103, para. 39 (1996) (same). We find these situations to be distinguishable from those where a State or locality might be engaged in a discrete, *bona fide* transaction involving sales or purchases of services that do not otherwise violate the law or interfere with a preemption scheme. *Compare*, *e.g.*, *Cardinal Towing & Auto Repair, Inc., v. City of Bedford*, 180 F.3d 686, 691, 693-94 (5th Cir. 1999) (declining to find that the FAA Authorization Act of 1994, as amended by the ICC Termination Act of 1995, preempted an ordinance and contract specifications that were designed only to procure services that a municipality itself needed, not to regulate the conduct of others), *with NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308 (N.D.N.Y., Dec. 10, 2004) (crediting allegations that a city's actions, such as issuing a request for proposal and implementing a general franchising scheme, were not of a purely proprietary nature, but rather, were taken in pursuit of a regulatory objective or policy). This action could include, e.g., procurement of services for the State or locality, or a contract for employment services between a State or locality and one of its employees. We do not intend to reach these scenarios with our interpretations today.

[249] *See, e.g.,* Verizon Aug. 23, 2018 *Ex Parte* Letter at 4-5.

[250] *See supra* para. 25.

[251] *Cf. Sprint Spectrum L.P. v. Mills*, 283 F.3d 404.

proprietary roles to effectuate a general municipal policy disfavoring wireless deployment in public ROW.[252] We believe that Section 253(c) is properly construed to suggest that Congress did not intend to permit states and localities to rely on their ownership of property within a ROW as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted.[253] Our interpretations here are intended to facilitate the implementation of the scheme Congress intended and to provide greater regulatory certainty to states, municipalities, and regulated parties about what conduct is preempted under Section 253(a). Should factual questions arise about whether a state or locality is engaged in such behavior, Section 253(d) affords state and local governments and private parties an avenue for specific preemption challenges.

### E. Responses to Challenges to Our Interpretive Authority and Other Arguments

94. We reject claims that we lack authority to issue authoritative interpretations of Sections 253 and 332(c)(7) in this Declaratory Ruling. As explained above, we act here pursuant to our broad authority to interpret key provisions of the Communications Act, consistent with our exercise of that interpretive authority in the past.[254] In this instance, we find that issuing a Declaratory Ruling is necessary to remove what the record reveals is substantial uncertainty and to reduce the number and complexity of legal controversies regarding certain fee and non-fee state and local legal requirements in connection with Small Wireless Facility infrastructure. We thus exercise our authority in this Declaratory Ruling to interpret Section 253 and Section 332(c)(7) and explain how those provisions apply in the specific scenarios at issue here.[255]

95. Nothing in Sections 253 or 332(c)(7) purports to limit the exercise of our general

---

[252] *See NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308; *Coastal Communications Service v. City of New York*, 658 F.Supp.2d at 441-42.

[253] We contrast this instance to others in which we either declined to act or responded to requests for action with respect to specific disputes. *See*, *e.g.*, *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240; *Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201, 13220, para. 43 (2006) (observing, in the context of a different statutory and regulatory scheme, that "[g]iven that the Commission intended to preempt restrictions [regarding restrictions on Continental's use of its Wi-Fi antenna] in private lease agreements, however, Massport would be preempted even if it is acting in a private capacity with regard to its lease agreement with Continental."); *Connect America Fund*, Memorandum Opinion and Order, FCC 17-85, para. 14 (July 3, 2017) (rejecting argument that argument that Section 253(a) is inapplicable where it would affect the State's ability to "deal[] with its real estate interests . . . as it sees fit," such as by granting access to "rights-of-way over land that it owns); *Minnesota Order*, 14 FCC Rcd at 21706-08, paras. 17-19; *cf. Amigo.Net Pet. for Decl. Ruling*, Mem. Op. and Order, 17 FCC Rcd 10964, 10967 (WCB 2002) (Section 253 did not apply to carrier's provision of network capacity to government entities exclusively for such entities' internal use); *T-Mobile West Corp. v. Crow*, 2009 WL 5128562 (D. Ariz., Dec. 17, 2009) (Section 332(c)(7) did not apply to contract for deployment of wireless facilities and services for use on state university campus). We clarify here that such prior instances are not to be construed as a concession that Congress did not make preemption available, or that the Commission lacked the authority to support parties' attempts to avail themselves of relief offered under preemption schemes, when confronted with instances in which a state or locality is relying on its proprietary role to skirt federal regulatory reach. Indeed, these instances demonstrate the opposite – that preemption is available to effectuate Congressional intent – and merely illustrate application of this principle. Also, we do not find it necessary to await specific disputes in the form of Section 253(d) petitions to offer these interpretations. In the alternative and as an independent means to support the interpretations here, we clarify that we intend for our views to guide how preemption should apply in fact-specific scenarios.

[254] *See, e.g.*, *Moratoria Declaratory Ruling*, FCC 18-111, paras. 161-68; *2009 Declaratory Ruling*, 24 FCC Rcd at 14001, para. 23.

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

interpretive authority.[256] Congress's inclusion of preemption provisions in Section 253(d) and Section 332(c)(7)(B)(v) does not limit the Commission's ability pursuant to other sections of the Act to construe and provide its authoritative interpretation as to the meaning of those provisions.[257] Any preemption under Section 253 and/or Section 332(c)(7)(B) that subsequently occurs will proceed in accordance with the enforcement mechanisms available in each context. But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in Section 253 or Section 332(c)(7) prevents the Commission from declaring that a category of state or local laws is inconsistent with Section 253(a) or Section 332(c)(7)(B)(i)(II) because it prohibits or has the effect of prohibiting the relevant covered service.[258]

96. Although some commenters contend in general terms that differences in judicial approaches to Section 253 are limited and thus there is little need for Commission guidance,[259] the

[256] We also reject claims that Section 601(c)(1) of the 1996 Act constrains our interpretation of these provisions. *See, e.g.*, NARUC Reply at 3; Smart Cities Coal. Reply at 33, 35-36. That provision guards against implied preemption, while Section 253 and Section 332(c)(7)(B) both expressly restrict state and local activities. *See, e.g.*, *Texas PUC Order*, 14 FCC Rcd at 3485-86, para. 51. Courts also have read that provision narrowly. *See, e.g.*, *In re: FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014); *Qwest Corp. v. Minnesota Pub. Utilities Comm'n*, 684 F.3d 721, 730-31 (8th Cir. 2012); *Farina, v. Nokia Inc.*, 625 F.3d 97, 131 (3d Cir. 2010). Although the Ninth Circuit in *County of San Diego* asserted that there is a presumption that express preemption provisions should be read narrowly, and that the presumption would apply to the interpretation of Section 253(a), *County of San Diego*, 543 F.3d at 548, the cited precedent applies that presumption where "the State regulates in an area where there is no history of significant federal presence." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir.2005). Whatever the applicability of such a presumption more generally, there is a substantial history of federal involvement here, particularly insofar as interstate telecommunications services and wireless services are implicated. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003); *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490–92 (2d Cir. 1968); 47 U.S.C., Title III (1934).

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

[258] Consequently, we reject claims that relying on our general interpretative authority to interpret Section 253 and Section 332(c)(7) would render any provisions of the Act mere surplusage, *see, e.g.*, Smart Cities Coal. Reply at 34-35, or would somehow "usurp the role of the judiciary." Washington State Cities Reply at 14. We likewise reject other arguments insofar as they purport to treat Section 253(d)'s provision for preemption as more specific than, or otherwise controlling over, other Communications Act provisions enabling the Commission to authoritatively interpret the Act. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43. To the contrary, "[t]he specific controls but only within its self-described scope." *Nat'l Cable & Telecomm's Ass'n v. Gulf Power*, 534 U.S. 327, 336 (2002). In addition, concerns that the Commission might interpret Section 253(c) in a manner that would render it a nullity or in a manner divorced from relevant context—things we do not do here—bear on the reasonableness of a given interpretation and not on the existence of interpretive authority in the first instance, as some contend. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43-44.

[259] *See, e.g.*, City of San Antonio *et al*. Comments, Exh. B at 26-27; Fairfax County Comments at 20; Smart Cities Coal. Comments at 61. Some commenters assert that there are reasonable, material reliance interests arising from past court interpretations that would counsel against our interpretations in this order because "localities and providers have adjusted to the tests within their circuits" and "reflected those standards in local law." Smart Communities Comments, WT Docket No. 16-141 at 67 (filed Mar. 8, 2017) cited in City of Austin Comments at 2 n.3. Arguments such as these, however, merely underscore the regulatory patchwork that inhibits the development of a robust nationwide telecommunications and private wireless service as envisioned by Congress. By offering (continued….)

interpretations we offer in this Declaratory Ruling are intended to help address certain specific scenarios that have caused significant uncertainty and legal controversy, irrespective of the degree to which this uncertainty has been reflected in court decisions. We also reject claims that a Supreme Court brief joined by the Commission demonstrates that there is no need for the interpretations in this Declaratory Ruling.[260] To the contrary, that brief observed that some potential interpretations of certain court decisions "would create a serious conflict with the Commission's understanding of Section 253(a), and [] would undermine the federal competition policies that the provision seeks to advance."[261] The brief also noted that, if warranted, "the Commission can restore uniformity by issuing authoritative rulings on the application of Section 253(a) to particular types of state and local requirements."[262] Rather than cutting against the need for, or desirability of, the interpretations we offer in this Declaratory Ruling, the brief instead presaged them.[263]

97. Our interpretations of Sections 253 Section 332(c)(7) are likewise not at odds with the Tenth Amendment and constitutional precedent, as some commenters contend.[264] In particular, our interpretations do not directly "compel the states to administer federal regulatory programs or pass legislation."[265] The outcome of violations of Section 253(a) or Section 332(c)(7)(B) of the Act are no more than a consequence of "the limits Congress already imposed on State and local governments"

(Continued from previous page)
interpretations of the relevant statutes here, we intend, thereby, to eliminate potential regional regulatory disparities flowing from differing interpretations of those provisions. *See, e.g.*, WIA Reply at 19-20.

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

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

[262] *Id*. at 18.

[263] Contrary to some claims, the need for these clarifications also is not undercut by prior determinations that advanced telecommunications capability is being deployed in a reasonable and timely fashion to all Americans. *See, e.g.*, Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) (NATOA June 21, 2018 *Ex Parte* Letter) (citing *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket N. 17-199, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, 1707-08, para. 94 (2018) (*2018 Broadband Deployment Report*)). These commenters do not explain why the distinct standard for evaluating deployment of advanced telecommunications capability, *see 2018 Broadband Deployment Report*, 33 FCC Rcd at 1663-76, paras. 9-39, should bear on the application of Section 253 or Section 332(c)(7). Further, as the Commission itself observed, "[a] finding that deployment of advanced telecommunications capability is reasonable and timely in no way suggests that we should let up in our efforts to foster greater deployment." *Id*. at 1664, para. 13.

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

[265] *Montgomery County v. FCC*, 811 F.3d at 128; *see Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). These provisions preempting state law thus do not "compel the States to enact or administer a federal regulatory program," *Printz*, 521 U.S. at 900, or "dictate what a state . . . may or may not do." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1478 (2018).

through its enactment of Section 332(c)(7).[266]

98. We also reject the suggestion that the limits Section 253 places on state and local rights-of-way fees and management will unconstitutionally interfere with the relationship between a state and its political subdivisions.[267] As relevant to our interpretations here, it is not clear, at first blush, that such concerns would be implicated.[268] Because state and local legal requirements can be written and structured in myriad ways, and challenges to such state or local activities could be framed in broad or narrow terms, we decline to resolve such questions here, divorced from any specific context.

## IV. THIRD REPORT AND ORDER

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

### A. New Shot Clocks for Small Wireless Facility Deployments

100. In 2009, the Commission concluded that we should use shot clocks to define a presumptive "reasonable period of time" beyond which state or local inaction on wireless infrastructure siting applications would constitute a "failure to act" within the meaning of Section 332.[269] We adopted a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations. The record here suggests that our two existing Section 332 shot clocks have increased the efficiency of deploying wireless infrastructure. Many localities already process wireless siting applications in less time than required by those shot clocks and a number of states have enacted laws requiring that collocation applications be processed in 60 days or less.[270] Some siting agencies acknowledge that they have worked to gain efficiencies in processing siting applications and welcome the

---

[266] *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. The Communications Act establishes its own framework for oversight of wireless facility deployment—one that is largely deregulatory, *see, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 63; *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480-81, para. 182 (1994)—and it is reasonable to expect state and local governments electing to act in that area to do so only in a manner consistent with the Act's framework. *See, e.g.*, *Murphy*, 138 S.Ct. at 1470-71, 1480. Thus, the application of Section 253 and Section 332(c)(7)(B) is clearly distinguishable from the statute the Supreme Court struck down in *Murphy*, which did not involve a preemption scheme but nonetheless prohibited state authorization of sports gambling. *Id*. at 1481. The application here is also clearly distinguishable from the statute in *Printz*, which mandated states to run background checks on handgun purchases, *Printz*, 521 U.S. at 904–05, and the statute in *New York*, which required states to enact state laws that provide for the disposal of radioactive waste or else take title to such waste. *New York*, 505 U.S. at 151–52.

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

[268] For example, where a state or local law or other legal requirement simply sets forth particular fees to be paid, or where the legal requirement at issue is simply an exercise of discretion that governing law grants the state or local government, it is not clear that preemption would unconstitutionally interfere with the relationship between a state and its political subdivisions.

[269] *2009 Declaratory Ruling*, 24 FCC Rcd at 13994.

[270] *See infra* para. 102.

addition of new shot clocks tailored to the deployment of small scale facilities.[271] Given siting agencies' increased experience with existing shot clocks, the greater need for rapid siting of Small Wireless Facilities nationwide, and the lower burden siting of these facilities places on siting agencies in many cases, we take this opportunity to update our approach to speed the deployment of Small Wireless Facilities.[272]

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

101. In this section, using authority confirmed in *City of Arlington*, we adopt two new Section 332 shot clocks for Small Wireless Facilities – 60 days for collocation of Small Wireless Facilities on preexisting structures and 90 days for new construction of such facilities. These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority "within a reasonable period of time… taking into account the nature and scope of the request."[273] Further, our decision is consistent with the Model Code for Municipalities recommended by the FCC's Broadband Deployment Advisory Committee, which utilizes this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures.[274] Our actions will modernize the framework for wireless facility siting by taking into consideration that states and localities should be able to address the siting of Small Wireless Facilities in a more expedited review period than needed for larger facilities.[275]

102. We find compelling reasons to establish a new presumptively reasonable Section 332 shot clock of 60 days for collocations of Small Wireless Facilities on existing structures. The record demonstrates the need for, and reasonableness of, expediting the siting review of these collocations.[276]

---

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

[272] *See* Letter from LaWana Mayfield, City Council of Charlotte, North Carolina, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 ("However, getting this infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies – allowing more modern rules for modern infrastructure."); Letter from John Richard C. King, House of Representatives, South Carolina, to Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 ("A patchwork system of town-to-town, state-to-state rules slows the approval of small cell installations and delays the deployment of 5G. We need a national framework with guardrails to streamline the path forward to our wireless future"); Letter from Andy Thompson, State Representative, Ohio House District 95, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 ("In order for 5G to arrive as quickly and as effectively as possible, relevant infrastructure regulations must be streamlined. It makes very little sense for rules designed for 100-foot cell towers to govern the path to deployment for modern equipment called small cells that can fit into a pizza box.").

[273] 47 U.S.C. § 332(c)(7)(ii).

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

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

[276] CTIA Comments, WT Docket No 16-421, at 33 (filed Mar. 8, 2017); Letter from Juan Huizar, City Manager of the City of Pleasanton Texas, to Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed June 4, 2018) (continued….)

Notwithstanding the implementation of the current shot clocks, more streamlined procedures are both reasonable and necessary to provide greater predictability for siting applications nationwide for the deployment of Small Wireless Facilities. The two current Section 332 shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted nine years ago. Since 2009, localities have gained significant experience processing wireless siting applications.[277] Indeed, many localities already process wireless siting applications in less than the required time[278] and several jurisdictions require by law that collocation applications be processed in 60 days or less.[279] With the passage of time, siting agencies have become more efficient in processing siting applications.[280] These facts demonstrate that a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable.[281]

103. As we found in 2009, collocation applications are generally easier to process than new

(Continued from previous page)
(describing the firsthand benefit of small cells and noting that communications infrastructure is a critical component of local growth); Letter from Sara Blackhurst, President, Action 22, to Brendan Carr, Commissioner, FCC, WT Docket 17-79, at 2 (filed May 18, 2018) ("While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.").

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

[278] Alaska Dep't of Natural Resources Comments at 2 ("[W]e are currently meeting or exceeding the proposed timeframe of the "Shot Clock."); *see also* Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 5 (filed Aug. 30, 2018) ("Eleven states – Delaware, Florida, Indiana, Kansas, Missouri, North Carolina, Rhode Island, Tennessee, Texas, Utah, and Virginia – recently adopted small cell legislation that includes 45-day or 60-day shot clocks for small cell collocations.").

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

[280] Chicago Comments at 7 ("the City has worked to achieve efficient processing times even for applications where no federal deadline exists."); New Orleans Comments at 3 ("City supports the concept proposed by the Commission . . . to establish . . . more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class); Letter from Sara Blackhurst, President, Action 22, to Brendan Carr, Commissioner, FCC, WT Docket 17-79, at 2 (filed May18, 2018) ("While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.").

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

construction because the community impact is likely to be smaller.[282] In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community.[283] The size of Small Wireless Facilities poses little or no risk of adverse effects on the environment or historic preservation.[284] Indeed, many jurisdictions do not require public hearings for approval of such attachments, underscoring their belief that such attachments do not implicate complex issues requiring a more searching review.[285]

104. Further, we find no reason to believe that applying a 60-day time frame for Small Wireless Facility collocations under Section 332 creates confusion with collocations that fall within the scope of "eligible facilities requests" under Section 6409 of the Spectrum Act, which are also subject to a 60-day review.[286] The type of facilities at issue here are distinctly different and the definition of a Small Wireless Facility is clear. Further, siting authorities are required to process Section 6409 applications involving the swap out of certain equipment in 60 days, and we see no meaningful difference in processing these applications than processing Section 332 collocation applications in 60 days. There is no reason to apply different time periods (60 vs. 90 days) to what is essentially the same review: modification of an existing structure to accommodate new equipment.[287] Finally, adopting a 60-day shot clock will encourage service providers to collocate rather than opting to build new siting structures which has numerous advantages.[288]

105. Some municipalities argue that smaller facilities are neither objectively "small" nor less obtrusive than larger facilities.[289] Others contend that shorter shot clocks for a broad category of "smaller" facilities would fail to take into account the varied and unique climate, historic architecture, infrastructure, and volume of siting applications that municipalities face.[290] We take those considerations into account by clearly defining the category of "Small Wireless Facility" in our rules and allowing siting agencies to rebut the presumptive reasonableness of the shot clocks based upon the actual circumstances

[282] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 40.

[283] TIA Comments at 4.

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

[285] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46.

[286] DESHPO Comments at 2 ("opposes the application of separate time limits for review of facility deployments not covered by the Spectrum Act, as it would lead to confusion within the process for all parties involved (Applicants/Carrier, Consultants, SHPO)").

[287] Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 6 (filed Aug. 30, 2018).

[288] Letter from Richard Rossi, Senior Vice President, General Counsel, U.S. Tower, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (filed Aug. 10, 2018) ("The reason to encourage collocation is straightforward, it is faster, cheaper, more environmentally sound, and less disruptive than building new structures.").

[289] League of Az Cities and Towns Comments at 13, 29 (arguing that many small cells or micro cells can be taller and more visually intrusive than macro cells).

[290] Philadelphia Comments at 4-5 (arguing that shorter shot clocks should not be implemented because "cities are already resource constrained and any further attempt to further limit the current time periods for review of applications will seriously and adversely affect public safety as well as diminish the proper role, under our federalist system, of state and local governments in regulating local rights of way"); Smart Cities Coal. Comments, Docket 16-421, at 13 (filed Mar. 8, 2017) (included by reference by Austin's Comments); Alaska Dept. of Trans. Comments at 2. *See, e.g.,* TX Hist. Comm. Comments at 2 (current shot clocks are appropriate and that further shortening these shot clocks is not warranted); Arlington, TX Comments at 2.

they face. For similar reasons, we disagree that establishing shorter shot clocks for smaller facilities would impair states' and localities' authority to regulate local rights of way.[291]

106. While some commenters argue that additional shot clock classifications would make the siting process needlessly more complex without any proven benefits,[292] any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.[293] We also reject the assertion that revising the period of time to review siting decisions would amount to a nationwide land use code for wireless siting.[294] Our approach is consistent with the Model Code for Municipalities that recognizes that the shot clocks that we are adopting for the review of Small Wireless Facility deployment applications correctly balance the needs of local siting agencies and wireless service providers.[295] Our balance of the relevant considerations is informed by our experience with the previously adopted shot clocks, the record in this proceeding, and our predictive judgment about the effectiveness of actions taken here to promote the provision of personal wireless services.

107. For similar reasons as set forth above, we also find it reasonable to establish a new 90 day Section 332 shot clock for new construction of Small Wireless Facilities. Ninety days is a presumptively reasonable period of time for localities to review such siting applications. Small Wireless Facilities have far less visual and other impact than the facilities we considered in 2009, and should accordingly require less time to review.[296] Indeed, some state and local governments have already adopted 60-day maximum reasonable periods of time for review of *all* small cell siting applications, and, even in the absence of such maximum requirements, several are already reviewing and approving small-cell siting applications within 60 days or less after filing.[297] Numerous industry commenters advocated a 90-day shot clock for all non-

[291] League of Az Cities and Towns *et al.* Comments at 26-27, 29-35; Cities of San Antonio *et. al* Comments at 8; Philadelphia Comments at 4.

[292] T-Mobile Comments at 22; Florida Coalition Comments at 9 (Creating new shot clocks would result in "too many 'shot clocks' and both the industry and local governments would be confused as to which shot clock applied to what application").

[293] While several parties proposed additional shot clock categories, we believe that the any benefit from a closer tailoring of categories to circumstances is not outweighed by the administrative burden on siting authorities and providers to manage these categories. *See* TX Hist. Comm. Comments at 2 (stating that it "could support a shorter review period for new structures less than fifty (50) feet tall, or where structures are located within or adjacent to existing utility rights-of-way (but not transportation rights-of-way) with existing utility structures taller than the proposed telecommunications structure"); Georgia Dept. Tran. Comments at 2 (stating that time frames based on the zoning area are reasonable).

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

[295] BDAC Model Municipal Code at § 3.2a(i)(B),.

[296] CTIA Comments, Attach. 1 at 38.

[297] T-Mobile Comments at 19-20 (stating that some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks); Incompas Reply at 9 (stating that there is no basis for differing time-periods for similarly-situated small cell installation requests, and the lack of harmonization could discourage the use of a more efficient infrastructure); CCA Comments at 14, n.52 (citing CCA Streamlining Reply at 7-8 that in Houston, Texas, the (continued….)

collocation deployments.[298] Based on this record, we find it reasonable to conclude that construction of a new Small Wireless Facility warrants more review time than a mere collocation of the same, but less than the construction of a macro tower.

108. Finally, we note that our 60- and 90-day approach is similar to that in pending legislation that has bipartisan congressional support, and is consistent with the Model Code for Municipalities. Specifically, the draft STREAMLINE Small Cell Deployment Act, would apply a 60-day shot clock to collocation of small personal wireless service facilities and a 90-day shot clock to any other action relating to small personal wireless service facilities.[299] Further, the Model Code for Municipalities recommended by the FCC's Broadband Deployment Advisory Committee also utilizes this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures.[300]

### 2. Batched Applications for Small Wireless Facilities

109. Given the way in which Small Wireless Facilities are likely to be deployed, in large numbers as part of a system meant to cover a particular area, we anticipate that some applicants will submit "batched" applications: multiple separate applications filed at the same time, each for one or more sites *or* a single application covering multiple sites.[301] In the *Wireless Infrastructure NPRM/NOI*, the Commission asked whether batched applications should be subject to either longer or shorter shot clocks than would apply if each component of the batch were submitted separately.[302] Industry commenters contend that the shot clock applicable to a batch or a class of applications should be no longer than that applicable to an individual application of the same class.[303] On the other hand, several commenters, contend that batched applications have often been proposed in historic districts and historic buildings (areas that require a more complex review process), and given the complexities associated with reviews of that type, they urge the Commission not to apply shorter shot clocks to batched applications.[304] Some

(Continued from previous page)
review process for small cell deployments "usually takes 2 weeks, but no more than 30 days to process and complete the site review. In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days").

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

[299] STREAMLINE Small Cell Deployment Act, S.3157, 115 Congress, 2D Session (June 28,2018).

[300] BDAC Model Municipal Code at § 3.2a(i)(B),

[301] We define either scenario as "batching" for the purpose of our discussion here.

[302] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 18.

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

[304] San Antonio Comments, Exh. A at 17, 19-20; *see also* Smart Cities Coal. Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

localities also argue that a single, national shot clock for batched applications would fail to account for unique local circumstances.[305]

110. We see no reason why the shot clocks for batched applications to deploy Small Wireless Facilities should be longer than those that apply to individual applications because, in many cases, the batching of such applications has advantages in terms of administrative efficiency that could actually make review easier.[306] Our decision flows from our current Section 332 shot clock policy. Under our two existing Section 332 shot clocks, if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting agency.[307] These multiple siting applications are equivalent to a batched application and therefore the shot clocks for batching should follow the same rules as if the applications were filed separately. Accordingly, when applications to deploy Small Wireless Facilities are filed in batches, the shot clock that applies to the batch is the same one that would apply had the applicant submitted individual applications. Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

111. We recognize the concerns raised by parties arguing for a longer time period for at least some batched applications, but conclude that a separate rule is not necessary to address these concerns. Under our approach, in extraordinary cases, a siting authority, as discussed below, can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources.[308] Thus, contrary to some localities' arguments,[309] our approach provides for a certain degree of flexibility to account for exceptional circumstances. In addition, consistent with, and for the same reasons as our conclusion below that Section 332 does not permit states and localities to prohibit applicants from requesting multiple types of approvals simultaneously,[310] we find that Section 332(c)(7)(B)(ii) similarly does not allow states and localities to refuse to accept batches of applications to deploy Small Wireless Facilities.

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

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

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

---

[305] Cities of San Antonio *et al*. Comments, Exh. A at 17, 19-20; *see also* Smart Cities Coal. Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

[306] *See, e.g.,* Sprint Comments, Docket 16-421, at 43-44 (filed Mar. 8, 2017); Verizon Comments at 42; CTIA Comments at 17.

[307] WIA Comments at 27 ("Merely bundling similar sites into a single batched application should not provide a locality with more time to review a single batched application than to process the same applications if submitted individually.").

[308] *See infra* para. 116.

[309] Cities of San Antonio *et al*. Comments, Exh. A at 17, 19-20; *see also* Smart Cities Coal. Comments, Docket 16-421, at 47 (filed Mar. 8, 2017) (referenced by Austin's Comments).

[310] *See infra* para. 139.

additional remedy for our new Small Wireless Facility shot clocks.

114. State or local inaction by the end of the Small Wireless Facility shot clock will function not only as a Section 332(c)(7)(B)(v) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II). Accordingly, we would expect the state or local government to issue all necessary permits without further delay. In cases where such action is not taken, we assume, for the reasons discussed below, that the applicant would have a straightforward case for obtaining expedited relief in court.[311]

115. As discussed in the Declaratory Ruling, a regulation under Section 332(c)(7)(B)(i)(II) constitutes an effective prohibition if it materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.[312] Missing shot clock deadlines would thus presumptively have the effect of unlawfully prohibiting service in that such failure to act can be expected to materially limit or inhibit the introduction of new services or the improvement of existing services.[313] Thus, when a siting authority misses the applicable shot clock deadline, the applicant may commence suit in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II), in addition to a violation of Section 332(c)(7)(B)(ii), as discussed above. The siting authority then will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services.

116. Given the seriousness of failure to act within a reasonable period of time, we expect, as noted above, siting authorities to issue without any further delay all necessary authorizations when notified by the applicant that they have missed the shot clock deadline, absent extraordinary circumstances. Where the siting authority nevertheless fails to issue all necessary authorizations and litigation is commenced based on violations of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii), we expect that applicants and other aggrieved parties will likely pursue equitable judicial remedies.[314] Given the relatively low burden on state and local authorities of simply acting—one way or the other—within the Small Wireless Facility shot clocks, we think that applicants would have a relatively low hurdle to clear in establishing a right to expedited judicial relief. Indeed, for violations of Section 332(c)(7)(B), courts commonly have based the decision whether to award permanent injunctive relief on several factors. As courts have concluded, permanent injunctions fulfill Congressional intent that action on applications be timely and that courts consider violations of Section 332(c)(7)(B) on an expedited basis.[315] In addition, courts have observed that "[a]lthough Congress in the Telecommunications Act left intact some of local zoning boards' authority under state law," they should not be owed deference on issues relating to Section 332(c)(7)(B)(ii), meaning that "in the majority of cases the proper remedy for a zoning board decision

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

[312] *See supra* paras. 34-40.

[313] *See supra* paras. 34-40.

[314] *See, e.g.*, *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.

[315] *See, e.g.*, *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 41 (1st Cir. 2014) (addressing claimed violation of Section 332(c)(7)(B)(i)(II) of the Act); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2002) (same); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999) (addressing violation of Section 332(c)(7)(B)(v) of the Act); *AT&T Mobility Svcs., LLC v. Village of Corrales*, 127 F. Supp. 3d 1169, 1175-76 (D.N.M. 2015) (addressing violation of Section 332(c)(7)(B)(i)(II)); *Bell Atlantic Mobile of Rochester v. Town of Irondequoit*, 848 F. Supp. 2d 391, 403 (W.D.N.Y. 2012) (addressing violation of Section 332(c)(7)(B)(ii)); *New Cingular Wireless PCS, LLC v. City of Manchester*, 2014 WL 79932, *8 (D.N.H. Feb. 28, 2014) (addressing violation of Section 332(c)(7)(B)(i)(II)).

that violates the Act will be an order. . . instructing the board to authorize construction."[316] Such relief also is supported where few or no issues remain to be decided, and those that remain can be addressed by a court.[317]

117. Consistent with those sensible considerations reflected in prior precedent, we expect that courts will typically find expedited and permanent injunctive relief warranted for violations of Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii) of the Act when addressing the circumstances discussed in this Order. Prior findings that permanent injunctive relief best advances Congress's intent in assuring speedy resolution of issues encompassed by Section 332(c)(7)(B) appear equally true in the case of deployments of Small Wireless Facilities covered by our interpretation of Section 332(c)(7)(B)(ii) in this Third Report and Order.[318] Although some courts, in deciding whether a permanent injunction is the appropriate form of relief, have considered whether a siting authority's delay resulted from bad faith or involved other abusive conduct,[319] we do not read the trend in court precedent overall to treat such considerations as more than relevant (as opposed to indispensable) to an injunction. We believe that this approach is sensible because guarding against barriers to the deployment of personal wireless facilities not only advances the goal of Section 332(c)(7)(B) but also policies set out elsewhere in the Communications Act and 1996 Act, as the Commission recently has recognized in the case of Small Wireless Facilities.[320] This is so whether or not these barriers stem from bad faith. Nor do we anticipate that there would be unresolved issues implicating the siting authority's expertise and therefore requiring remand in most instances.

118. In light of the more detailed interpretations that we adopt here regarding reasonable time frames for siting authority action on specific categories of requests—including guidance regarding circumstances in which longer time frames nonetheless can be reasonable—we expect that litigation generally will involve issues that can be resolved entirely by the relevant court. Thus, as the Commission has stated in the past, "in the case of a failure to act within the reasonable time frames set forth in our rules, and absent some compelling need for additional time to review the application, we believe that it would also be appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief."[321] We therefore caution those involved in potential future disputes in this area against placing too much weight on the Commission's recognition that a siting authority's failure to act within the associated timeline might not always result in a permanent injunction under the Section 332(c)(7)(B) framework while placing too little weight on the Commission's recognition that policies established by federal communications laws are advanced by streamlining the process for deploying wireless facilities.

119. We anticipate that the traditional requirements for awarding permanent injunctive relief would likely be satisfied in most cases and in most jurisdictions where a violation of 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is found. Typically, courts require movants to establish the following elements of

---

[316] *See, e.g.*, *Nat'l Tower*, 297 F.3d at 21-22; *AT&T Mobility*, 127 F. Supp. 3d at 1176.

[317] *See, e.g.*, *Green Mountain Realty*, 750 F.3d at 41-42; *Nat'l Tower*, 297 F.3d at 24-25; *Cellular Telephone Co.*, 166 F.3d at 497; *Bell Atlantic Mobile*, 848 F. Supp. 2d at 403; *New Cingular Wireless PCS*, 2014 WL 79932, *8.

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

[319] *See, e.g.*, *Nat'l Tower*, 297 F.3d at 23; *Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29, 32 (2d Cir. 2017) (Summary Order).

[320] *See, e.g.*, *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 62; *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332, para. 5.

[321] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para, 284.

permanent injunctive relief: (1) actual success on the merits, (2) continuing irreparable injury, (3) the absence of an adequate remedy at law, (4) the injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (5) award of injunctive relief would not be adverse to the public interest. [322] Actual success on the merits would be demonstrated when an applicant prevails in its failure-to-act or effective prohibition case.[323] Continuing irreparable injury likely would be found because remand to the siting authority "would serve no useful purpose" and would further delay the applicant's ability to provide personal wireless service to the public in the area where deployment is proposed, as some courts have previously determined.[324] There also would be no adequate remedy at law because applicants "have a federal statutory right to participate in a local [personal wireless services] market free from municipally-imposed barriers to entry," and money damages cannot directly substitute for this right.[325] The public interest and the balance of harms also would likely favor the award of permanent injunction because the purpose of Section 332(c)(7) is to encourage the rapid deployment of personal wireless facilities while preserving, within bounds, the authority of states and localities to regulate the deployment of such facilities, and the public would benefit if further delays in the deployment of such facilities—which a remand would certainly cause—are prevented.[326] We also expect that the harm to the siting authority would be minimal because the only right of which it would be deprived by a permanent injunction is the right to act on the siting application beyond a reasonable time period,[327] a right that "is not legally cognizable, because under [Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii)], the [siting authority] has no right to exercise this power."[328] Thus, in the context of Small Wireless Facilities, we expect that the most appropriate remedy in typical cases involving a violation of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is the award of permanent injunctive relief in the form of an order to issue all necessary authorizations.[329]

120. Our approach advances Section 332(c)(7)(B)(v)'s provision that certain siting disputes, including those involving a siting authority's failure to act, shall be heard and decided by a court of

---

[322] *Pub. Serv. Tel. Co. v. Georgia Pub. Serv. Comm'n*, 755 F. Supp. 2d 1263, 1273 (N.D. Ga.), *aff'd*, 404 F. App'x 439 (11th Cir. 2010); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004); *Nat. Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914–15 (1st Cir. 1989). Note that the standards for permanent injunctive relief differ in some respects among the circuits and the states. For example, "most courts do not consider the public interest element in deciding whether to issue a permanent injunction, though the Third Circuit has held otherwise." *Klay*, 376 F.3d at 1097. Courts in the Second Circuit consider only irreparable harm and success on the merits. *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004). The Third and Fifth Circuits have precedents holding that irreparable harm is not an essential element of a permanent injunction. *See Roe v. Operation Rescue*, 919 F.2d 857, 873 n. 8 (3d Cir. 1990); *Lewis v. S. S. Baune*, 534 F.2d 1115, 1123–24 (5th Cir. 1976). For the sake of completeness, our analysis discusses all of the elements that have been used in decided cases.

[323] *See New Jersey Payphone Ass'n, Inc. v. Town of W. New York*, 130 F. Supp. 2d 631, 640 (D.N.J. 2001), *aff'd*, 299 F.3d 235 (3d Cir. 2002).

[324] *See Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 225–26 (S.D.N.Y. 2004) (quoting *Nextel Partners, Inc. v. Town of Amherst, N.Y.,* 251 F.Supp.2d 1187, 1201 (W.D.N.Y. 2003)); *see Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 318 (N.D.N.Y. 2017).

[325] *New Jersey Payphone Ass'n, Inc. v. Town of W. New York*, 130 F. Supp. 2d 631, 641 (D.N.J. 2001), *aff'd*, 299 F.3d 235 (3d Cir. 2002).

[326] *City of Arlington v. FCC*, 668 F.3d at 234.

[327] *Contra* 47 U.S.C. 332(c)(7)(B)(ii).

[328] *New Jersey Payphone Ass'n, Inc.*, 130 F. Supp. 2d at 641.

[329] *See Cellular Telephone Co. v. The Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir.1999).

competent jurisdiction on an expedited basis. The framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain.[330] This accords with the Fifth Circuit's recognition in *City of Arlington* that the Act could be read "as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision."[331]

121. The guidance provided here should reduce the need for, and complexity of, case-by-case litigation and reduce the likelihood of vastly different timing across various jurisdictions for the same type of deployment.[332] This clarification, along with the other actions we take in this Third Report and Order, should streamline the courts' decision-making process and reduce the possibility of inconsistent rulings. Consequently, we believe that our approach helps facilitate courts' ability to "hear and decide such [lawsuits] on an expedited basis," as the statute requires.[333]

122. Reducing the likelihood of litigation and expediting litigation where it cannot be avoided should significantly reduce the costs associated with wireless infrastructure deployment. For instance, WIA states that if one of its members were to challenge every shot clock violation it has encountered, it would be mired in lawsuits with forty-six localities.[334] And this issue is likely to be compounded given the expected densification of wireless networks. Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026.[335] If, for example, 30 percent (based on T-

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

[331] *City of Arlington*, 668 F.3d at 250.

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

[333] 47 U.S.C. § 332(c)(7)(B)(v).

[334] WIA Comments at 16.

[335] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13363-64 (2016) (continued….)

Mobile's experience[336]) of these expected deployments are not acted upon within the applicable shot clock period, that would translate to 45,000 violations in 2018 and 240,000 violations in 2026.[337] These sheer numbers would render it practically impossible to commence Section 332(c)(7)(B)(v) cases for all violations, and litigation costs for such cases likely would be prohibitive and could virtually bar providers from deploying wireless facilities.[338]

123. Our updated interpretation of Section 332(c)(7) for Small Wireless Facilities effectively balances the interest of wireless service providers to have siting applications granted in a timely and streamlined manner[339] and the interest of localities to protect public safety and welfare and preserve their authority over the permitting process.[340] Our specialized deployment categories, in conjunction with the acknowledgement that in rare instances, it may legitimately take longer to act, recognize that the siting process is complex and handled in many different ways under various states' and localities' long-established codes. Further, our approach tempers localities' concerns about the inflexibility of the *Wireless Infrastructure NPRM/NOI*'s deemed granted proposal because the new remedy we adopt here accounts for the breadth of potentially unforeseen circumstances that individual localities may face and the possibility that additional review time may be needed in truly exceptional circumstances.[341] We further find that our interpretive framework will not be unduly burdensome on localities because a number of states have already adopted even more stringent deemed granted remedies.[342]

124. At the same time, we see merit in the argument made by some commenters that the FCC has the authority to adopt a deemed granted remedy.[343] Nonetheless, we do not find it necessary to decide

(Continued from previous page)
(citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).

[336] T-Mobile Comments at 8.

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

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

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

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

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

[342] *See* Fla. Stat. Ann. § 365.172(13)(d)(3.b); Ariz. Rev. Stat. Ann. § 9-594(C) (3); 53 Pa. Stat. Ann. § 11702.4; Cal. Gov't Code § 65964.1; Va. Code Ann. § 15.2-2232; Va. Code Ann. § 15.2-2316.4; Va. Code Ann. § 56-484.29; Va. Code Ann. § 56-484.28; Ky. Rev. Stat. Ann. § 100.987; N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. Ann. § 66.0404; Kan. Stat. Ann. § 66-2019(h)(3); Del. Code Ann. tit. 17, § 1609; Iowa Code Ann. § 8C.7A(3)(c)(2); Iowa Code Ann. § 8C.4(4)(5); Iowa Code Ann. § 8C.5; Mich. Comp. Laws Ann. § 125.3514. *See also* CCA Reply at 9.

[343] *See, e.g.*, CTIA Comments at 10-11; T-Mobile Comments at 15-18, Verizon Comments at 37, 39-41, WIA Comments at 17-20.

that issue today, as we are confident that the rules and interpretations adopted here will provide substantial relief, effectively avert unnecessary litigation, allow for expeditious resolution of siting applications, and strike the appropriate balance between relevant policy considerations and statutory objectives[344] guiding our analysis.[345]

125. We expect that our decision here will result in localities addressing applications within the applicable shot clocks in a far greater number of cases. Moreover, we expect that the limited instances in which a locality does not issue a decision within that time period will result in an increase in cases where the locality then issues all needed permits. In what we expect would then be only a few cases where litigation commences, our decision makes clear the burden that localities would need to clear in those circumstances.[346] Our updated interpretation of Section 332 for Small Wireless Facilities will help courts to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions.[347]

---

[344] *City of Arlington v. FCC*, 668 F.3d at 234 (noting that the purpose of Section 332(c)(7) is to balance the competing interests to preserve the traditional role of state and local governments in land use and zoning regulation and the rapid development of new telecommunications technologies).

[345] *See supra* paras. 116-7 (explaining how the remedy strikes the proper balance between competing interests). Because our approach to shot clocks involves our interpretation of Section 332(c)(7)(B)(ii) and the consequences that flow from that—and does not rely on Section 253 of the Act—we need not, and thus do not, resolve disputes about the potential use of Section 253 in this specific context, such as whether it could serve as authority for a deemed granted or similar remedy. *See, e.g.*, San Francisco Comments at 9-10; CPUC Comments at 10; Smart Cities Coal. Comments at 6-11, 21; Smart Cities Coal. Reply at 78-79; League of Az Cities and Towns *et al*. Reply at 4; Alexandria Comments at 5; Irvine Comments at 5; Minnesota Cities Comments at 11-13; Smart Cities Coal. Comments at 4; Smart Cities Coal. Reply at 78-79; Philadelphia Reply at 2, 7; Fairfax County Comments at 17; Greenlining Reply at 4; NRUC Reply at 3-5; Smart Cities Coal. Reply at 78-79; NATOA June 21, 2018 *Ex Parte* Letter. To the extent that commenters raise arguments regarding the proper interpretation of "prohibit or have the effect of prohibiting" under Section 253 or the scope of Section 253, these issues are discussed in the Declaratory Ruling, *see supra* paras. 34-40.

[346] *See* App Association Comments at 9; CCI Comments at 6-8; Conterra Comments at 14-17; ExteNet Comments at 13; T-Mobile Comments at 17; Quintillion Reply at 6; Verizon Comments at 8-18; WIA Comments at 9-10. WIA contends that adoption of a deemed granted remedy is needed because various courts faced with shot clock claims have failed to provide meaningful remedies, citing as an example a case in which the court held that the town failed to act within the shot clock period but then declined to issue an injunction directing the siting agency to grant the application. WIA Comments at 16-17. However, a number of cases involving violations of the "reasonable period of time" requirement of Section 332(c)(7)(B)(ii)—decided either before or after the promulgation of the Commission's Section 332(c)(7)(B)(ii) shot clocks—have concluded with an award of injunctive relief. *See, e.g.*, *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 318 (N.D.N.Y. 2017) (concluding that the siting authority's failure to act within the 150-day shot clock was unreasonable and awarding a permanent injunction in favor of the applicant); *Am. Towers, Inc. v. Wilson County*, No. 3:10-CV-1196, 2014 WL 28953, at *13–14 (M.D. Tenn. Jan. 2, 2014) (finding that the county failed to act within a reasonable period of time, as required under Section 332(c)(7)(B)(ii), and granting an injunction directing the county to approve the applications and issue all necessary authorizations for the applicant to build and operate the proposed tower); *Cincinnati Bell Wireless, LLC v. Brown County*, Ohio, No. 1:04-CV-733, 2005 WL 1629824, at *4–5 (S.D. Ohio July 6, 2005) (finding that the county failed to act within a reasonable period of time under Section 332(c)(7)(B)(ii) and awarding injunctive relief). *But see Up State Tower Co. v. Town of Kiantone*, 2017 WL 6003349 (2d Cir. 2017) (declining to reverse district court's refusal to issue injunction compelling immediate grant of application). Courts have also held "that injunctive relief best serves the TCA's stated goal of expediting resolution of" cases brought under Section 332(c)(7)(B)(v). *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999); *Brehmer v. Planning Bd. of Town of Wellfleet*, 238 F.3d 117, 121 (1st Cir. 2001). Under these circumstances, we do not agree with WIA that courts have failed to provide meaningful remedies to such an extent as would require the adoption of a deemed granted remedy.

[347] *Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d 381, 383, 387 (D.N.J. 2014) (more than four-and-a-half years for Sprint to prevail in court), *aff'd*, 606 F. App'x 669 (3d Cir. 2015); *AT&T Mobility Servs. v. Village of Corrales*, 127 F. Supp. 3d 1169 (D.N.M.), *aff'd*, 642 Fed. App'x 886 (10th Cir.
(continued….)

Placing this burden on the siting authority should address the concerns raised by supporters of a deemed granted remedy—that filing suit in court to resolve a siting dispute is burdensome and expensive on applicants, the judicial system, and citizens—because our interpretations should expedite the courts' decision-making process.

126. We find that the more specific deployment categories and shot clocks, which presumptively represent the reasonable period within which to act, will prevent the outcome proponents of a deemed granted remedy seek to avoid: that siting agencies would be forced to reject applications because they would be unable to review the applications within the prescribed shot clock period.[348] Because the more specific deployment categories and shot clocks inherently account for the nature and scope of a variety of deployment applications, our new approach should ensure that siting agencies have adequate time to process and decide applications and will minimize the risk that localities will fail to act within the established shot clock periods. Further, in cases where a siting authority misses the deadline, the opportunity to demonstrate exceptional circumstances provides an effective and flexible way for siting agencies to justify their inaction if genuinely warranted. Our overall framework, therefore, should prevent situations in which a siting authority would feel compelled to summarily deny an application instead of evaluating its merits within the applicable shot clock period.[349] We also note that if the approach we take in this Order proves insufficient in addressing the issues it is intended to resolve, we may again consider adopting a deemed granted remedy in the future.

127. Some commenters also recommend that the Commission issue a list of "Best Practices" or "Recommended Practices."[350] The joint comments filed by NATOA and other government associations suggest the "development of an informal dispute resolution process to remove parties from an adversarial relationship to a partnership process designed to bring about the best result for all involved" and the development of "a mediation program which could help facilitate negotiations for deployments for parties who seem to have reached a point of intractability."[351] Although we do not at this time adopt these proposals, we note that the steps taken in this order are intended to facilitate cooperation between parties to reach mutually agreed upon solutions. For example, as explained below, mutual agreement between the parties will toll the running of the shot clock period, thereby allowing parties to resolve disagreements in a collaborative, instead of an adversarial, setting.[352]

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

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

128. As indicated above, Section 332(c)(7)(B)(ii) requires state and local governments to act "within a reasonable period of time" on "any request for authorization to place, construct, or modify personal wireless service facilities."[353] Neither the *2009 Declaratory Ruling* nor the *2014 Wireless*

(Continued from previous page)
2016) (nineteen months from complaint to grant of summary judgment); *Orange County–Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), *aff'd sub nom.*, *Orange County–County Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 632 F. App'x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).

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

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

[350] KS Rep. Sloan Comments at 2; Nokia Comments at 10.

[351] NATOA *et al*. Comments at 16-17.

[352] *See infra* paras. 140-1.

[353] *See* 47 U.S.C. § 332(c)(7)(B)(ii).

*Infrastructure Order* addressed the specific types of authorizations subject to this requirement. Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment.[354] Local siting authorities, on the other hand, argue that a broad application of Section 332 will harm public safety and welfare by not giving them enough time to evaluate whether a proposed deployment endangers the public.[355] They assert that building and encroachment permits should not be subsumed within the shot clocks because these permits incorporate essential health and safety reviews.[356] After carefully considering these arguments, we find that "any request for authorization to place, construct, or modify personal wireless service facilities" under Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. This interpretation finds support in the record and is consistent with the courts' interpretation of this provision and the text and purpose of the Act.

129. The starting point for statutory interpretation is the text of the statute,[357] and here, the statute is written broadly, applying to "any" request for authorization to place, construct, or modify personal wireless service facilities. The expansive modifier "any" typically has been interpreted to mean "one or some indiscriminately of whatever kind," unless Congress "add[ed] any language limiting the breadth of that word."[358] The title of Section 332(c)(7) ("Preservation of local zoning authority") does not restrict the applicability of this section to zoning permits in light of the clear text of Section 332(c)(7)(B)(ii).[359] The text encompasses not only requests for authorization to *place* personal wireless service facilities, e.g., zoning requests, but also requests for authorization to *construct* or *modify* personal wireless service facilities. These activities typically require more than just zoning permits. For example, in many instances, localities require building permits, road closure permits, and the like to make construction or modification possible.[360] Accordingly, the fact that the title standing alone could be read

[354] *See, e.g.,* CTIA Comments at 15; CTIA Reply at 10; Mobilitie Comments at 6-7; WIA Comments at 24; WIA Reply at 13; T-Mobile Comments at 21-22; CCA Reply at 9; Sprint June 18 *Ex Parte* at 3.

[355] League of Az Cities and Towns *et al*. Reply at 21-22.

[356] League of Az Cities and Towns *et al*. Reply at 21-22.

[357] *Implementation of Section 402(b)(1)(a) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 11233 (1996); *2002 Biennial Regulatory Review*, Report, 18 FCC Rcd 4726, 4731–32 (2003); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Communications Assistance for Law Enf't Act & Broadband Access & Servs.*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989, 14992–93, para. 9 (2005) (interpreting an ambiguous statute by considering the "structure and history of the relevant provisions, including Congress's stated purposes" in order to "faithfully implement[] Congress's intent"); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007) (using legislative history "to identify Congress's clear intent"); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (same).

[358] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *HUD v. Rucker*, 535 U.S. 125, 131 (2002).

[359] *See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528–29 (1947) ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text." ). Our conclusion is also consistent with our interpretation that Sections 253 and 332(c)(7) apply to fees for all applications related to a Small Wireless Facility. *See supra* para. 48.

[360] *See, e.g.,* Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Cities Coal Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

to limit Section 332(c)(7) to zoning decisions does not overcome the specific language of Section 332(c)(7)(B)(ii), which explicitly applies to a variety of authorizations.[361]

130. The purpose of the statute also supports a broad interpretation. As noted above, the Supreme Court has stated that the 1996 Act was enacted "to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies" by, *inter alia*, reducing "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers."[362] A narrow reading of the scope of Section 332 would frustrate that purpose by allowing local governments to erect impediments to the deployment of personal wireless services facilities by using or creating other forms of authorizations outside of the scope of Section 332(c)(7)(B)(ii).[363] This is especially true in jurisdictions requiring multi-departmental siting review or multiple authorizations. [364]

131. In addition, our interpretation remains faithful to the purpose of Section 332(c)(7) to balance Congress's competing desires to preserve the traditional role of state and local governments in regulating land use and zoning, while encouraging the rapid development of new telecommunications technologies.[365] Under our interpretation, states and localities retain their authority over personal wireless facilities deployment. At the same time, deployment will be kept on track by ensuring that the entire approval process necessary for deployment is completed within a reasonable period of time, as defined by the shot clocks addressed in this Third Report and Order.

132. A number of courts have either explicitly or implicitly adopted the same view, that all necessary permits are subject to Section 332. For example, in *Cox Communications PCS, L.P. v. San Marcos*, the court considered an excavation permit application as falling within the parameters of Section 332.[366] In *USCOC of Greater Missouri, LLC v. County of Franklin*, the Eighth Circuit reasoned that "[t]he issuance of the requisite building permits" for the construction of a personal wireless services facility arises under Section 332(c)(7).[367] In *Ogden Fire Co. No. 1 v. Upper Chichester Township*, the Third Circuit affirmed the district court's order compelling the township to issue a building permit for the

---

[361] *See Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947). If the title of Section 332(c)(7) were to control the interpretation of the text, it would render superfluous the provision of Section 332(c)(7)(B)(ii) that applies to "authorization to . . . construct, or modify personal wireless service facilities" and give effect only to the provision that applies to "authorization to place . . . personal wireless service facilities." This result would "flout[] the rule that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (quoting *Corley v. United* States, 556 U.S. 303, 314 (2009)).

[362] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. at 115 (internal quotation marks and citations omitted).

[363] For example, if we were to interpret Section 332(c)(7)(B)(ii) to cover only zoning permits, states and localities could delay their consideration of other permits (e.g., building, electrical, road closure or other permits) to thwart the proposed deployment.

[364] *See, e.g.*, Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; Smart Cities Coal. at 33-34; CTIA Comments at 15 (stating that some jurisdictions "impose multiple, sequential stages of review"); WIA Comments at 24 (noting that "[m]any jurisdictions grant the application within the shot clock period only to stall on issuing the building permit"); Verizon Comments at 6 (stating that "[a] large Southwestern city requires applicants to obtain separate and sequential approvals from three different governmental bodies before it will consider issuing a temporary license agreement to access city rights-of-way"); Sprint June 18 *Ex Parte* at 3 (noting that "after a land-use permit or attachment permit is received, many localities still require electric permits, road closure permits, aesthetic approval, and other types of reviews that can extend the time required for final permission well beyond just the initial approval.").

[365] *City of Arlington v. FCC*, 668 F.3d at 234.

[366] *Cox Communications PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

[367] *USCOC of Greater Mo., LLC v. County of Franklin*, 636 F.3d 927, 931-32 (8th Cir. 2011).

construction of a wireless facility after finding that the township had violated Section 332(c)(7).[368] In *Upstate Cellular Network v. Auburn*, the court directed the city to approve the application, including site plan approval by the planning board, granting a variance by the zoning authority, and "any other municipal approval or permission required by the City of Auburn and its boards or officers, including but not limited to, a building permit."[369] And in *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, the court ordered that the locality grant "any and all permits necessary for the construction of the proposed wireless facility."[370] Our interpretation is also consistent with judicial precedents involving challenges under Section 332(c)(7)(B) to denials by a wide variety of governmental entities, many of which involved variances,[371] special use/conditional use permits,[372] land disturbing activity and excavation permits,[373] building permits,[374] and a state department of education permit to install an antenna at a high school.[375] Notably, a lot of cases have involved local agencies that are separate and distinct from the local zoning authority,[376] confirming that Section 332(c)(7)(B) is not limited in application to decisions of zoning authorities. Our interpretation also reflects the examples in the record where providers are required to obtain other types of authorizations besides zoning permits before they can "place, construct, or modify personal wireless service facilities."[377]

---

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

[369] *Upstate Cellular Network v. Auburn*,257 F. Supp. 3d 309, 319 (N.D.N.Y. 2017).

[370] *PI Telecom Infrastructure V, LLC v. Georgetown–Scott County Planning Commission*, 234 F. Supp. 3d 856, 872 (E.D. Ky. 2017). *Accord T-Mobile Ne. LLC v. Lowell*, Civil Action No. 11–11551–NMG, 2012 WL 6681890, *6-7, *11 (D. Mass. Nov. 27, 2012) (directing the zoning board "to issue all permits and approvals necessary for the construction of the plaintiffs' proposed telecommunications facility"); *New Par v. Franklin County Bd. of Zoning Appeals*, No. 2:09–cv–1048, 2010 WL 3603645, *4 (S.D. Ohio Sept. 10, 2010) (enjoining the zoning board to "grant the application and issue all permits required for the construction of the" proposed wireless facility).

[371] *See, e.g., New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 760 (E.D. Mich. 2001), *aff'd*, 301 F.3d 390 (6th Cir. 2002)

[372] *See, e.g., Virginia Metronet, Inc. v. Bd. of Sup'rs of James City County*, 984 F. Supp. 966, 968 (E.D. Va. 1998); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 491 (2nd Cir. 1999); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1303 (10th Cir. 2008); T-*Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 989 (9th Cir. 2009); *Helcher v. Dearborn County*, 595 F.3d 710, 713–14 (7th Cir. 2010); *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1152 (S.D. Cal. 2003); *Primeco Pers. Commc'ns v. City of Mequon*, 242 F. Supp. 2d 567, 570 (E.D. Wis.), *aff'd sub nom.*, *PrimeCo Pers. Commc'ns, L.P. v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1212 (11th Cir. 2002).

[373] *See, e.g., Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005); *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

[374] *See, e.g., Upstate Cellular Network v. Auburn,* 257 F. Supp. 3d 309 (N.D.N.Y. 2017); *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395-96 (3rd Cir. 2007).

[375] *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d 148, 150 (S.D.N.Y. 1999), *aff'd*, 283 F.3d 404 (2d Cir. 2002).

[376] *See, e.g., Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005) (city public works department); *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 720 (9th Cir. 2009) (city public works director, city planning commission, and city council); *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d at 150 (New York State Department of Education).

[377] *See, e.g.,* Virginia Joint Commenters Comments at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); San Francisco Comments at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); Smart Cities Coal. Comments at 33-34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).

133. We reject the argument that this interpretation of Section 332 will harm the public because it would "mean that building and safety officials would have potentially only a few days to evaluate whether a proposed deployment endangers the public."[378] Building and safety officials will be subject to the same applicable shot clock as all other siting authorities involved in processing the siting application, with the amount of time allowed varying in the rare case where officials are unable to meet the shot clock because of exceptional circumstances.

### 2. Codification of Section 332 Shot Clocks

134. In addition to establishing two new Section 332 shot clocks for Small Wireless Facilities, we take this opportunity to codify our two existing Section 332 shot clocks for siting applications that do not involve Small Wireless Facilities. In the *2009 Declaratory Ruling*, the Commission found that 90 days is a reasonable time frame for processing collocation applications and 150 days is a reasonable time frame to process applications other than collocations.[379] Since these Section 332 shot clocks were adopted as part of a declaratory ruling, they were not codified in our rules. In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether to modify these shot clocks.[380] We find no need to modify them here and will continue to use these shot clocks for processing Section 332 siting applications that do not involve Small Wireless Facilities.[381] We do, though, codify these two existing shot clocks in our rules alongside the two newly-adopted shot clocks so that all interested parties can readily find the shot clock requirements in one place.

135. While some commenters argue for a 60-day shot clock for all collocation categories,[382] we conclude that we should retain the existing 90-day shot clock for collocations not involving Small Wireless Facilities. Collocations that do not involve Small Wireless Facilities include deployments of larger antennas and other equipment that may require additional time for localities to review and process.[383] For similar reasons, we maintain the existing 150-day shot clock for new construction applications that are not for Small Wireless Facilities. While some industry commenters such as WIA, Samsung, and Crown Castle argue for a 90-day shot clock for macro cells and small cells alike, we agree with commenters such as the City of New Orleans that there is a significant difference between the review of applications for a single 175-foot tower versus the review of a Small Wireless Facility with much smaller dimensions.[384]

---

[378] League of Az Cities and Towns *et al*. Reply at 21-22.

[379] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012-013, paras. 45, 48.

[380] *Wireless Infrastructure NPRM/NOI*, 24 FCC Rcd at 3332-33, 3334, 3337-38, paras. 6, 9, 17-19.

[381] Chicago Comments at 2 (supporting maintaining existing shot clocks); Bellevue *et al*. Comments at 13-14 (supporting maintaining existing shot clocks).

[382] CCIA Comments at 10; CCA Comments at 13-14; CCA Reply at 6 (arguing for 30-day shot clock for collocations and a 60-to-75-day shot clock for all other siting applications); WIA Reply at 21. *See also* Letter from Jill Canfield, NTCA Vice President Legal & Industry and Assistant General Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 19, 2018) (stating that NTCA supports a revised interpretation of the phrase "reasonable period of time" as found in Section 332(c) (7)(B)(ii) of the Communications Act as applicable to small cell facilities. Sixty days for collocations and 90 days for all other small cell siting applications should provide local officials sufficient time for review of requests to install small cell facilities in public rights-of-way).

[383] *Wireless Infrastructure Second R&O*, FCC 18-30 at paras. 74-76.

[384] New Orleans Comments at 2-3; Samsung Comments at 4-5 (arguing that the Commission should reduce the shot clock applicable to new construction from 150 days to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); TX Hist. Comm. Comments at 2 (arguing that the reasonable periods of time that the FCC proposed in 2009, 90 days for collocation applications and 150 days for other applications appear to be appropriate); WIA Comments at 20-23; WIA Reply at 11 (arguing for a 90-day shot clock for applications

(continued….)

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

136. Wireless industry commenters assert that they should be able to take advantage of the Section 332 collocation shot clock even when collocating on structures that have not previously been approved for wireless use.[385] Siting agencies respond that the wireless industry is effectively seeking to have both the collocation definition and a reduced shot clock apply to sites that have never been approved by the local government as suitable for wireless facility deployment.[386] We take this opportunity to clarify that for purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities. As the Commission stated in the *2009 Declaratory Ruling*, "an application is a request for collocation if it does not involve a 'substantial increase in the size of a tower' as defined in the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas."[387] The definition of "[c]ollocation" in the NPA provides for the "mounting or installation of an antenna on an existing tower, *building or structure* for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, *whether or not there is an existing antenna on the structure.*" [388] The NPA's definition of collocation explicitly encompasses collocations on structures and buildings that have not yet been zoned for wireless use. To interpret the NPA any other way would be unduly narrow and there is no persuasive reason to accept a narrower interpretation. This is particularly true given that the NPA definition of collocation stands in direct contrast with the definition of collocation in the Spectrum Act, pursuant to which facilities only fall within the scope of an "eligible facilities request" if they are attached to towers or base stations that have already been zoned for wireless use.[389]

### 4. When Shot Clocks Start and Incomplete Applications

137. In the *2014 Wireless Infrastructure Order*, the Commission clarified, among other things, that a shot clock begins to run when an application is first submitted, not when the application is deemed complete.[390] The clock can be paused, however, if the locality notifies the applicant within 30 days that the application is incomplete. [391] The locality may pause the clock again if it provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information. [392] In the *Wireless Infrastructure NPRM/NOI*, the Commission

(Continued from previous page)
involving substantial modifications, including tower extensions; and a 120-day shot clock for applications for all other facilities, including new macro sites); CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities).

[385] AT&T Comments at 10; AT&T Reply at 9; Verizon Reply at 32; WIA Comments at 22; ExteNet Comments at 9.

[386] Bellevue *et al.* Reply at 6-7 (arguing that the Commission has rejected this argument twice and instead determined that a collocation occurs when a wireless facility is attached to an existing infrastructure that houses wireless communications facilities; San Francisco Reply at 7-8 (arguing that under Commission definitions, a utility pole is neither an existing base station nor a tower; thus, the Commission simply cannot find that adding wireless facilities to utility pole that has not previously been used for wireless facilities is an eligible facilities request).

[387] *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para 46.

[388] 47 CFR Part 1, App. B, NPA, Subsection C, Definitions.

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

[390] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, at para. 258.

[391] *2009 Declaratory Ruling*, 24 FCC Rcd at 14014, paras. 52-53 (providing that the "timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information").

[392] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 259.

sought comment on these determinations.[393] Localities contend that the shot clock period should not begin until the application is deemed complete.[394] Industry commenters argue that the review period for incompleteness should be decreased from 30 days to 15 days.[395]

138. Based on the record, we find no cause to alter the Commission's prior determinations and now codify them in our rules. Codified rules, easily accessible to applicants and localities alike, should provide helpful clarity. The complaints by states and localities about the sufficiency of some of the applications they receive are adequately addressed by our current policy, which preserves the states' and localities' ability to pause review when they find an application to be incomplete. We do not find it necessary at this point to shorten our 30-day initial review period for completeness because, as was the case when this review period was adopted in the *2009 Declaratory Ruling*, it remains consistent with review periods for completeness under existing state wireless infrastructure deployment statutes[396] and still "gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that an application should be denied as incomplete."[397]

139. As noted above, multiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities.[398] All of these permits are subject to Section 332's requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here.

140. We also find that mandatory pre-application procedures and requirements do not toll the shot clocks.[399] Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock.[400] Localities counter that in many instances, applicants submit applications that are incomplete in material respects, that pre-application interactions smooth the application process, and that many of their pre-application requirements go to important health and safety

---

[393] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

[394] *See, e.g.*, Maine DOT Comments at 2-3; Philadelphia Comments at 6; League of Az Cities and Towns *et al.* at 4, 8-9.

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

[396] Most states have a 30-day review period for incompleteness. *See, e.g.*, Colo. Rev. Stat. Ann. § 29-27-403; Ga. Code Ann. § 36-66B-5; Iowa Code Ann. § 8C.4; Kan. Stat. Ann. § 66-2019; Minn. Stat. Ann. § 237.163(3c)(b); 53 Pa. Stat. Ann. § 11702.4(b)(1); Cal. Gov't Code § 65943. A minority of states have adopted either a longer or shorter review period for incompleteness, ranging from 5 days to 45 days. *See* N.C. Gen. Stat. Ann. § 153A-349.53 (45 days); Wash. Rev. Code Ann. § 36.70B.070 (28 days); N.H. Rev. Stat. Ann. § 12-K:10 (15 days); Del. Code Ann. tit. 17, § 1609 (14 days); Va. Code Ann. §§ 15.2-2316.4; 56-484.28; 56-484.29 (10 days); Wis. Stat. Ann. § 66.0404(3) (5 days).

[397] *2009 Declaratory Ruling*, 24 FCC Rcd at 14014-15, para. 53.

[398] *See* Sprint June 18 *Ex Parte* at 3; *cf.* Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; CTIA Comments at 15 ("The Commission should declare that the shot clocks apply to the entire local review process.").

[399] *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.

[400] *See, e.g.*, CCA Reply at 7 (noting also that some localities unreasonably request additional information after submission that is either already provided or of unreasonable scope); GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

matters.[401] We conclude that the ability to toll a shot clock when an application is found incomplete or by mutual agreement by the applicant and the siting authority should be adequate to address these concerns. Much like a requirement to file applications one after another, requiring pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their start date. An application is not ruled on within "a reasonable period of time after the request is duly filed" if the state or locality takes the full ordinary review period after having delayed the filing in the first instance due to required pre-application review. Indeed, requiring a pre-application review before an application may be filed is similar to imposing a moratorium, which the Commission has made clear does not stop the shot clocks from running.[402] Therefore, we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed,[403] the shot clock begins to run when the application is proffered. In other words, the request is "duly filed" at that time,[404] notwithstanding the locality's refusal to accept it.

141. That said, we encourage *voluntary* pre-application discussions, which may well be useful to both parties. The record indicates that such meetings can clarify key aspects of the application review process, especially with respect to large submissions or applicants new to a particular locality's processes, and may speed the pace of review.[405] To the extent that an applicant voluntarily engages in a pre-application review to smooth the way for its filing, the shot clock will begin when an application is filed, presumably after the pre-application review has concluded.

142. We also reiterate, consistent with the *2009 Declaratory Ruling*, that the remedies granted under Section 332(c)(7)(B)(v) are independent of, and in addition to, any remedies that may be available under state or local law.[406] Thus, where a state or locality has established its own shot clocks, an

[401] *See, e.g.*, Philadelphia Reply at 9 (arguing that shot clocks should not run until a complete application with a full set of engineering drawings showing the placement, size and weight of the equipment, and a fully detailed structural analysis is submitted, to assess the safety of proposed installations); Philadelphia Comments at 6; League of Az Cities and Towns *et al*. Comments at 4 (arguing that the shot clock should not begin until after an application has been "duly filed," because "some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate their submittal may be"); Colorado Comm. and Utility All. *et al*. Comments at 14 (explaining that the pre-application meetings are intended "to give prospective applicants an opportunity to discuss code and regulatory provisions with local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision"); Smart Cities Coal. Comments at 15, 35 (pre-application procedures "may translate into faster consideration of individual applications over the longer term, as providers and communities alike, gain a better understanding of what is required of them, and providers submit applications that are tailored to community requirements"); UT Dept. of Trans. Comments at 5 ("The purpose of the pre-application access meeting is to help the entity or person with the application and provide information concerning the requirements contained in the rule."); CCUA *at al*. Reply at 6 ("[Pre-application meetings] provide an opportunity for informal discussion between prospective applicants and the local jurisdiction. Pre-application meetings serve to educate, answer questions, clarify process issues, and ultimately result in a more efficient process from application filing to final action."); AASHTO Comments, Attach. at 3 (GA Dept. of Trans. contending that pre-application procedures "should be encouraged and separated from an 'official' "application submittal"); League of Az Cities and Towns *et al*. Comments at 5-7 (providing examples of incomplete applications).

[402] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971, at para. 265.

[403] *See, e.g.*, CCA Reply at 7; GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.

[404] 47 U.S.C. § 332(c)(7)(B)(ii).

[405] *See* Colorado Comm. and Utility All. *et al*. Comments at 14; Smart Cities Coal. Comments at 15, 35; Utah Dept. of Trans. Comments at 5; CCUA *et al*. Reply at 6; Mukilteo Reply, Docket No. WC 17-84, at 1 (filed July 10, 2017).

[406] *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

applicant may pursue any remedies granted under state or local law in cases where the siting authority fails to act within those shot clocks.[407] However, the applicant must wait until the Commission shot clock period has expired to bring suit for a "failure to act" under Section 332(c)(7)(B)(v).[408]

## V. PROCEDURAL MATTERS

143. *Final Regulatory Flexibility Analysis*. With respect to this Third Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Third Report and Order. The Commission will send a copy of the Third Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

144. *Paperwork Reduction Act*. This Third Report and Order does not contain new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

145. *Congressional Review Act*. The Commission will send a copy of this Declaratory Ruling and Third Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), *see* 5 U.S.C. § 801(a)(1)(A).

## VI. ORDERING CLAUSES

146. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), 7, 201, 253, 301, 303, 309, 319, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 157, 201, 253, 301, 303, 309, 319, 332, that this Declaratory Ruling and Third Report and Order in WT Docket No. 17-79 IS hereby ADOPTED.

147. IT IS FURTHER ORDERED that Part 1 of the Commission's Rules is AMENDED as set forth in Appendix A, and that these changes SHALL BE EFFECTIVE 30 days after publication in the Federal Register.

148. IT IS FURTHER ORDERED that this Third Report and Order SHALL BE effective 30 days after its publication in the Federal Register. The Declaratory Ruling and the obligations set forth therein ARE EFFECTIVE on the same day that this Third Report and Order becomes effective. It is our intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

149. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Declaratory Ruling and Third Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

150. IT IS FURTHER ORDERED that this Declaratory Ruling and Third Report and Order SHALL BE sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

[407] *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

[408] 47 U.S.C. § 332(c)(7)(B)(v).

Marlene H. Dortch
Secretary

**APPENDIX A**

**Final Rules**

**Streamlining State and Local Review of Wireless Facility Siting Applications**

Part 1 – Practice and Procedure

1. authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

2. Add subpart U to Part 1 of Title 47 to read as follows:

## Subpart U—State and Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Service Facilities

**§ 1.6001 Purpose.**

This subpart implements 47 U.S.C. 332(c)(7) and 1455.

**§ 1.6002 Definitions.**

Terms used in this subpart have the following meanings:

(a) *Action* or *to act* on a siting application means a siting authority's grant of a siting application or issuance of a written decision denying a siting application.

(b) *Antenna*, consistent with Rule 1.1320(d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this title.

(c) *Antenna equipment*, consistent with Rule 1.1320(d), means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

(d) *Antenna facility* means an antenna and associated antenna equipment.

(e) *Applicant* means a person or entity that submits a siting application and the agents, employees, and contractors of such person or entity.

(f) *Authorization* means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.

(g) *Collocation*, consistent with the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas, means—

(1) Mounting or installing an antenna facility on a pre-existing structure, and/or

(2) Modifying a structure for the purpose of mounting or installing an antenna facility on that structure.

(h) *Deployment* means placement, construction, or modification of a personal wireless service facility.

(i) *Facility* or *personal wireless service facility* means an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services.

(j) *Siting application* or *application* means a written submission to a siting authority requesting authorization for the deployment of a personal wireless service facility at a specified location.

(k) *Siting authority* means a State government, local government, or instrumentality of a State government or local government, including any official or organizational unit thereof, whose authorization is necessary prior to the deployment of personal wireless service facilities.

(l) *Small wireless facility*, consistent with Section 1.1312(e)(2), is a facility that meets each of the following conditions:

(1) The structure on which antenna facilities are mounted—

(i) Is 50 feet or less in height, or

(ii) Is no more than 10 percent taller than other adjacent structures, or

(iii) Is not extended to a height of more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities; and

(2) Each antenna (excluding associated antenna equipment) is no more than three cubic feet in volume; and

(3) All antenna equipment associated with the facility (excluding antennas) are cumulatively no more than 28 cubic feet in volume; and

(4) The facility does not require antenna structure registration under part 17 of this chapter;

(5) The facility is not located on Tribal lands, as defined under 36 C.F.R. § 800.16(x); and

(6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in Rule 1.1307(b)

(m) *Structure* means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of services).

Terms not specifically defined in this section or elsewhere in this subpart have the meanings defined in Part 1 of Title 47 and the Communications Act of 1934, 47 U.S.C. § 151 *et seq*.

**§ 1.6003 Reasonable periods of time to act on siting applications**

(a) *Timely action required.* A siting authority that fails to act on a siting application on or before the shot clock date for the application, as defined in paragraph (e) of this section, is presumed not to have acted within a reasonable period of time.

(b) *Shot clock period*. The shot clock period for a siting application is the sum of—

(1) the number of days of the presumptively reasonable period of time for the pertinent type of application, pursuant to paragraph (c) of this section, plus

(2) the number of days of the tolling period, if any, pursuant to paragraph (d) of this section.

(c) *Presumptively reasonable periods of time*.

(1) The following are the presumptively reasonable periods of time for action on applications seeking authorization for deployments in the categories set forth below:

(i) Collocation of small wireless facilities: 60 days.

(ii) Collocation of facilities other than small wireless facilities: 90 days.

(iii) Construction of new small wireless facilities: 90 days.

(iv) Construction of new facilities other than small wireless facilities: 150 days.

(2) *Batching*.

(i) If a single application seeks authorization for multiple deployments, all of which fall within a category set forth in either paragraph (c)(1)(i) or paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is equal to that for a single deployment within that category.

(ii) If a single application seeks authorization for multiple deployments, the components of which are a mix of deployments that fall within paragraph (c)(1)(i) and deployments that fall within paragraph (c)(1)(iii) of this section, then the presumptively reasonable period of time for the application as a whole is 90 days.

(iii) Siting authorities may not refuse to accept applications under paragraphs (c)(2)(i) and (c)(2)(ii).

(d) *Tolling period*. The tolling period for an application (if any) is—

(1) The period of time established by written agreement of the applicant and the siting authority; or

(2) The number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the application is materially incomplete and clearly and specifically identifies the missing documents or information that the applicant must submit to render the application complete, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(2)(i) is effectuated on or before the 30th day after the date when the application was submitted; or

(3) The number of days from—

(i) The day after the date when the siting authority notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority's original request under paragraph (d)(2) of this section, until

(ii) The date when the applicant submits all the documents and information identified by the siting authority to render the application complete,

(iii) But only if the notice pursuant to paragraph (d)(3)(i) is effectuated on or before the 10th day after the date when the applicant makes a supplemental submission in response to the siting authority's request under paragraph (d)(2) of this section

(e) *Shot clock date*. The shot clock date for a siting application is determined by counting forward, beginning on the day after the date when the application was submitted, by the number of calendar days of the shot clock period identified pursuant to paragraph (b) of this section and including any pre-application period asserted by the siting authority; *provided*, that if the date calculated in this manner is a "holiday" as defined in Rule 1.4(e)(1) or a legal holiday within the relevant State or local jurisdiction, the shot clock date is the next business day after such date. The term "business day" means any day as defined in Rule 1.4(e)(2) and any day that is not a legal holiday as defined by the State or local jurisdiction.

1. Redesignate section 1.40001 as section 1.6100, and remove and reserve paragraph (a).

2. Remove subpart CC.

**APPENDIX B**
**Comments and Reply Comments**

**Comments**

5G Americas
Aaron Rosenzweig
ACT | The App Association
Advisory Council on Historic Preservation
Advisors to the International EMF Scientist Appeal
African American Mayors Association
Agua Caliente Band of Cahuilla Indians Tribal Historic Preservation Office
Alaska Department of Transportation & Public Facilities
Alaska Native Health Board
Alaska Office of History and Archaeology
Alexandra Ansell
American Association of State Highway and Transportation Officials
American Bird Conservancy
American Cable Association
American Petroleum Institute
American Public Power Association
Angela Fox
Arctic Slope Regional Corporation
Arizona State Parks & Trails, State Historic Preservation Office
Arkansas SHPO
Arnold A. McMahon
Association of American Railroads
AT&T
B. Golomb
Bad River Band of Lake Superior Tribe of Chippewa Indians
Benjamin L. Yousef
BioInitiative Working Group
Blue Lake Rancheria
Board of County Road Commissioners of the County of Oakland
Bristol Bay Area Health Corporation
Cahuilla Band of Indians
California Office of Historic Preservation, Department of Parks and Recreation
California Public Utilities Commission
Cape Cod Bird Club, Inc.
Catawba Indian Nation Tribal Historic Preservation Office
Charter Communications, Inc.
Cheyenne River Sioux Tribe Cultural Preservation Office
Chickasaw Nation
Chippewa Cree Tribe
Choctaw Nation of Oklahoma
Chuck Matzker
Cindy Li
Cindy Russell
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
Citizen Potawatomi Nation
Citizens Against Government Waste
City and County of San Francisco
City of Alexandria, Virginia; Arlington County, Virginia; and Henrico County, Virginia

City of Arlington, Texas
City of Austin, Texas
City of Bellevue, City of Bothell, City of Burien, City of Ellensburg, City of Gig Harbor, City of Kirkland, City of Mountlake Terrace, City of Mukilteo, City of Normandy Park, City of Puyallup, City of Redmond, and City of Walla Walla
City of Chicago
City of Claremont (Tony Ramos, City Manager)
City of Eden Prairie, MN
City of Houston
City of Irvine, California
City of Kenmore, Washington, and David Baker, Vice-Chair, National League of Cities Information Technology and Communications Committee
City of Lansing, Michigan
City of Mukilteo
City of New Orleans, Louisiana
City of New York
City of Philadelphia
City of Springfield, Oregon
Cityscape Consultants, Inc.
Coalition for American Heritage, Society for American Archaeology, American Cultural Resources Association, Society for Historical Archaeology, and American Anthropological Association
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Colorado River Indian Tribes
Colorado State Historic Preservation Office
Comcast Corporation
Commissioner Sal Pace, Pueblo Board of County Commissioners
Community Associations Institute
Competitive Carriers Association
CompTIA (The Computing Technology Industry Association)
Computer & Communications Industry Association (CCIA)
Confederated Tribes of the Colville Reservation
Confederated Tribes of the Umatilla Indian Reservation Cultural Resources Protection Program
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group, Inc.
Critical Infrastructure Coalition
Crow Creek Sioux Tribe
Crown Castle
CTIA
CTIA and Wireless Infrastructure Association
David Roetman, Minnehaha County GOP Chairman
Defenders of Wildlife
Department of Arkansas Heritage (Arkansas Historic Preservation Program)
DuPage Mayors and Managers Conference
East Bay Municipal Utility District
Eastern Shawnee Tribe of Oklahoma
Edward Czelada
Elijah Mondy
Elizabeth Doonan
Ellen Marks
EMF Safety Network, Ecological Options Network

Environmental Health Trust
ExteNet Systems, Inc.
Fairfax County, Virginia
FibAire Communications, LLC d/b/a AireBeam
Florida Coalition of Local Governments
Fond du Lac Band of Lake Superior Chippewa
Forest County Potawatomi Community of Wisconsin
Fort Belknap Indian Community
Free State Foundation
General Communication, Inc.
Georgia Department of Transportation
Georgia Historic Preservation Division
Georgia Municipal Association, Inc.
Gila River Indian Community
Greywale Advisors
History Colorado (Colorado State Historic Preservation Office)
Hongwei Dong
Hualapai Department of Cultural Resources
Illinois Department of Transportation
Illinois Municipal League
INCOMPAS
Information Technology and Innovation Foundation
International Telecommunications Users Group
Jack Li
Jackie Cale
Jerry Day
Joel M. Moskowitz, Ph.D.
Jonathan Mirin
Joyce Barrett
Karen Li
Karen Spencer
Karon Gubbrud
Kate Kheel
Kaw Nation
Kevin Mottus
Keweenaw Bay Indian Community
Kialegee Tribal Town
League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities
League of Minnesota Cities
Leo Cashman
Lower Brule Sioux Tribe
Li Sun
Lightower Fiber Networks
Lisbeth Britt
Lower Brule Sioux Tribe
Maine Department of Transportation
Marty Feffer
Mary Whisenand, Iowa Governor's Commission on Community Action Agencies
Mashantucket (Western) Pequot Tribe
Mashpee Wampanoag Tribe
Matthew Goulet
Mayor Patrick Furey, City of Torrance, California

McLean Citizens Association
Miami Tribe of Oklahoma
Missouri State Historic Preservation Office
Mobile Future
Mobilitie, LLC
Mohegan Tribe of Indians of Connecticut
Montana State Historic Preservation Office
Monte R. Lee and Company
Muckleshoot Indian Tribe
Muscogee (Creek) Nation
National Association of Tower Erectors (NATE)
National Association of Tribal Historic Preservation Officers
National Black Caucus of State Legislators
National Conference of State Historic Preservation Officers
National Congress of American Indians
National Congress of American Indians, National Association of Tribal Historic Preservation Officers, and United South and Eastern Tribes Sovereignty Protection Fund
National Congress of American Indians and United South and Eastern Tribes Sovereignty Protection Fund
National League of Cities
National League of Cities, United States Conference of Mayors, International Municipal Lawyers Association, Government Finance Officers Association, National Association of Counties, National Association of Regional Councils, National Association of Towns and Townships, and National Association of Telecommunications Officers and Advisors
National Tribal Telecommunications Association
National Trust for Historic Preservation
Native Public Media
NATOA
Natural Resources Defense Council
Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
Naveen Albert
NCTA – The Internet & Television Association
nepsa solutions LLC
New Mexico Department of Cultural Affairs, Historic Preservation Division
Nez Perce Tribe
Nina Beety
Nokia
North Carolina State Historic Preservation Office
Northern Cheyenne Tribal Historic Preservation Office
NTCA – The Rural Broadband Association
Office of Historic Preservation for the Mashantucket Pequot Tribal Nation of Connecticut
Ohio State Historic Preservation Office
Oklahoma History Center State Historic Preservation Office
Olemara Peters
Omaha Tribe of Nebraska
ONE Media, LLC
Oregon State Historic Preservation Office
Osage Nation
Otoe-Missouria Tribe
Pala Band of Mission Indians
Patrick Wronkiewicz
Pechanga Band of Luiseno Indians

Pennsylvania State Historic Preservation Office
Prairie Island Indian Community
PTA-FLA, Inc .
Pueblo of Laguna
Pueblo of Pojoaque
Pueblo of Tesuque
Puerto Rico State Historic Preservation Office
Quad Cities Cable Communications Commission
Quapaw Tribe of Oklahoma
R Street Institute
Rebecca Carol Smith
Red Cliff Band of Lake Superior Chippewa
Representative Tom Sloan, State of Kansas House of Representatives
Representatives Anna G. Eshoo, Frank Pallone, Jr., and Raul Ruiz, U.S. House of Representatives
Rhode Island Historical Preservation and Heritage Commission
Rosebud Sioux Tribe Tribal Historic Preservation Cultural Resource Management Office
Ronald M. Powell, Ph.D.
S. Quick
Sacred Wind Communications, Inc.
Samsung Electronics America, Inc.
Santa Clara Pueblo
Sault Ste. Marie Tribe of Chippewa Indians
SCAN NATOA, Inc.
Seminole Nation of Oklahoma
Seminole Tribe of Florida
Senator Duane Ankney, Montana State Senate
Shawnee Tribe
Sisseton Wahpeton Oyate
Skokomish Indian Tribe Tribal Historic Preservation Office
Skull Valley Band of Goshute
Smart Communities and Special Districts Coalition
Soula Culver
Sprint
Standing Rock Sioux Tribe
Starry, Inc.
State of Washington Department of Archaeology & Historic Preservation
Sue Present
Swinomish Indian Tribal Community
Table Mountain Rancheria Tribal Government Office
Tanana Chiefs Conference
Telecommunications Industry Association
Texas Department of Transportation
Texas Historical Commission
Thlopthlocco Tribal Town
T-Mobile USA, Inc.
Tonkawa Tribe of Oklahoma
Triangle Communication System, Inc.
Twenty-Nine Palms Band of Mission Indians
United Keetoowah Band of Cherokee Indians In Oklahoma
Utah Department of Transportation
Ute Mountain Ute Tribe
Utilities Technology Council

Verizon
Wampanoag Tribe of Gay Head (Aquinnah)
WEC Energy Group, Inc.
Wei Shen
Wei-Ching Lee, MD, California Medical Association Delegate of Los Angeles County
Winnebago Tribe of Nebraska
Wireless Infrastructure Association
Wireless Internet Service Providers Association
Xcel Energy Services Inc.

**Reply Comments**
Alaska State Historic Preservation Office
American Cable Association
American Public Power Association
Association of American Railroads
California Public Utilities Commission
Catherine Kleiber
Chippewa Cree Tribe
Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee
City of Baltimore, Maryland
City of New York
City of Philadelphia
Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)
Comcast Corporation
Communications Workers of America
Competitive Carriers Association
Consumer Technology Association
Conterra Broadband Services, Southern Light, LLC, and Uniti Group Inc.
Critical Infrastructure Coalition
CTIA
Dan Kleiber
Enterprise Wireless Alliance
Environmental Health Trust
ExteNet Systems, Inc.
Florida Coalition of Local Governments
Confederated Tribes of Grand Ronde Community of Oregon Historic Preservation Department
INCOMPAS
Irregulators
League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities
National Association of Regulatory Utility Commissioners
National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Towns and Townships, National Association of Regional Councils, United States Conference of Mayors, and Government Finance Officers Association
National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers
National Organization of Black Elected Legislative (NOBEL) Women
National Rural Electric Cooperative Association
Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission
NCTA – The Internet & Television Association

Pueblo of Acoma
Puerto Rico Telephone Company, Inc., d/b/a Claro
Quintillion Networks, LLC, and Quintillion Subsea Operations, LLC
Rebecca Carol Smith
SDN Communications
Skyway Towers, LLC
SmallCellSite.Com
Smart Communities and Special Districts Coalition
Sue Present
The Greenlining Institute
T-Mobile USA, Inc.
Triangle Communication System, Inc.
United States Conference of Mayors
Verizon
Washington, D.C. Office of the Chief Technology Officer
Wireless Internet Service Providers Association
Xcel Energy Services Inc.

## APPENDIX C

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[409] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (*NPRM*), released in April 2017.[410] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are addressed below in Section B. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[411]

### A. Need for and Objectives of the Rules

2. In the *Third Report and Order*, the Commission continues its efforts to promote the timely buildout of wireless infrastructure across the country by eliminating regulatory impediments that unnecessarily delay bringing personal wireless services to consumers. The record shows that lengthy delays in approving siting applications by siting agencies has been a persistent problem.[412] With this in mind, the *Third Report and Order* establishes and codifies specific rules concerning the amount of time siting agencies may take to review and approve certain categories of wireless infrastructure siting applications. More specifically, the Commission addresses its Section 332 shot clock rules for infrastructure applications which will be presumed reasonable under the Communications Act. As an initial matter, the Commission establishes two new shot clocks for Small Wireless Facilities applications. For collocation of Small Wireless Facilities on preexisting structures, the Commission adopts a 60-day shot clock which applies to both individual and batched applications. For applications associated with Small Wireless Facilities new construction we adopt a 90-day shot clock for both individual and batched applications.[413] Next, the Commission codifies two existing Section 332 shot clocks for all other Non-Small Wireless Facilities that were established in the *2009 Declaratory Ruling* without codification.[414] These existing shot clocks require 90-days for processing of all other Non-Small Wireless Facilities collocation applications, and 150-days for processing of all other Non-Small Wireless Facilities applications other than collocations.

3. The Commission then addresses other issues related to both the existing and new shot clocks. In particular we address the specific types of authorizations subject to the "Reasonable Period of Time" provisions of Section 332(c)(7)(B)(ii), finding that "any request for authorization to place, construct, or modify personal wireless service facilities" under Section 332(c)(7)(B)(ii) means all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment of personal wireless services infrastructure.[415] The Commission also addresses collocation on structures not previously zoned for wireless use,[416] when the four Section 332 shot clocks

[409] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[410] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017).

[411] *See* 5 U.S.C. § 604.

[412] *See supra* paras. 23-9.

[413] *See supra* paras. 107, 109-12.

[414] *See supra* paras. 134-5; *2009 Declaratory Ruling*.

[415] *See supra* paras. 128-33.

[416] *See supra* para. 138.

begin to run,[417] the impact of incomplete applications on our Section 332 shot clocks,[418] and how state imposed shot clocks effect our Section 332 shot clocks.[419]

4. Finally, the Commission discuss the appropriate judicial remedy that applicants may pursue in cases where a siting authority fails to act within the applicable shot clock period.[420] In those situations, applicants may commence an action in a court of competent jurisdiction alleging a violation of Section 332(c)(7)(B)(i)(II) and seek injunctive relief granting the application. Notwithstanding the availability of a judicial remedy if a shot clock deadline is missed, the Commission recognizes that the Section 332 time frames might not be met in exceptional circumstances and has refined its interpretation of the circumstances when a period of time longer than the relevant shot clock would nonetheless be a reasonable period of time for action by a siting agency.[421] In addition, a siting authority that is subject to a court action for missing an applicable shot clock deadline has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services thereby rebutting the effective prohibition presumption.

5. The rules adopted in the *Third Report and Order* will accelerate the deployment of wireless infrastructure needed for the mobile wireless services of the future, while preserving the fundamental role of localities in this process. Under the Commission's new rules, localities will maintain control over the placement, construction and modification of personal wireless facilities, while at the same time the Commission's new process will streamline the review of wireless siting applications.

### B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. Only one party—the Smart Cities and Special Districts Coalition—filed comments specifically addressing the rules and policies proposed in the IRFA. They argue that any shortening or alternation of the Commission's existing shot clocks or the adoption of a deemed granted remedy will adversely affect small local governments, special districts, property owners, small developers, and others by placing their siting applications behind wireless provider siting applications.[422] This argument, however, fails to acknowledge that Section 332 shot clocks have been in place for years and reflect Congressional intent as seen in the statutory language of Section 332. The Commission has carefully considered this issue and has established shot clocks that take into consideration the nature and scope of siting requests by establishing shot clocks of different lengths of time that depend on the nature of the siting request at issue.[423] The length of these shot clocks is based in part on the need to ensure that local governments have ample time to take any steps needed to protect public safety and welfare and to process other pending utility applications.[424] The Commission, therefore, has taken into consideration the concerns of the Smart Cities and Special Districts Coalition and established shot clocks that will not favor wireless providers over other applicants with pending siting applications. Further, instead of adopting a deemed granted remedy that would grant a siting application when a shot clock lapses without a decision on the merits, the Commission provides guidance as to the appropriate judicial remedy that applicants may pursue and examples of exceptional circumstance where a siting authority may be justified in

---

[417] *See supra* paras. 137-42.

[418] *Id*.

[419] *See supra* para. 142.

[420] *See supra* paras. 112-27

[421] *See supra* para. 126.

[422] Smart Cities Coal. Comments at 81.

[423] *See supra* paras. 101-8, 134-5.

[424] *See supra id*.

needing additional time to review a siting application then the applicable shot clock allows.[425] Under this approach, the applicant may seek injunctive relief as long as several minimum requirements are met. The siting authority, however, can rebut the presumptive reasonableness of the applicable shot clock under certain circumstances. Under this carefully crafted approach, the interests of siting applicants, siting authorities, and citizens are protected.

### C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

7. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.[426]

8. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

### D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

9. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[427] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[428] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[429] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[430]

10. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.[431] First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[432] These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.[433]

---

[425] *See supra* paras. 112-127.

[426] 5 U.S.C. § 604(a)(3).

[427] *See* 5 U.S.C. § 604(a)(3).

[428] 5 U.S.C. § 601(6).

[429] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[430] 15 U.S.C. § 632.

[431] *See* 5 U.S.C. § 601(3)-(6).

[432] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1 – What is a small business?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

[433] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 2- How many small businesses are there in the U.S.?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).

11. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[434] Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[435]

12. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[436] U.S. Census Bureau data from the 2012 Census of Governments[437] indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[438] Of this number there were 37, 132 General purpose governments (county[439], municipal and town or township[440]) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts[441] and special districts[442]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have

[434] 5 U.S.C. § 601(4).

[435] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this number 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of $100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. *See* http://nccs.urban.org/sites/all/nccs-archive/html//tablewiz/tw.php where the report showing this data can be generated by selecting the following data fields: Report: "The Number and Finances of All Registered 501(c) Nonprofits"; Show: "Registered Nonprofits"; By: "Total Revenue Level (years 1995, Aug to 2016, Aug)"; and For: "2016, Aug" then selecting "Show Results".

[436] 5 U.S.C. § 601(5).

[437] *See* 13 U.S.C. § 161. The Census of Government is conducted every five (5) years compiling data for years ending with "2" and "7". *See also* Program Description Census of Government *https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#.*

[438] *See* U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

[439] *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01. There were 2,114 county governments with populations less than 50,000.

[440] *See* U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States – States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

[441] *See* U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. There were 12,184 independent school districts with enrollment populations less than 50,000.

[442] *See* U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01. The U.S. Census Bureau data did not provide a population breakout for special district governments.

populations of less than 50,000.[443] Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."[444].

13. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless Internet access, and wireless video services.[445] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[446] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[447] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[448] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

14. The Commission's own data—available in its Universal Licensing System—indicate that, as of May 17, 2018, there are 264 Cellular licensees that will be affected by our actions.[449] The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.[450] Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[451] Thus, using available data, we estimate that the majority of wireless firms can be considered small.

---

[443] *See* U.S. Census Bureau, 2012 Census of Governments, **C**ounty Governments by Population-Size Group and State: 2012 - United States-States - https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States–States - https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States. https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

[444] *Id.*

[445] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Carriers (Except Satellite)," *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&typib&id=ib.en./ECN.NAICS2012.517210.

[446] 13 CFR § 121.201, NAICS Code 517210.

[447] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[448] *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[449] *See* http://wireless.fcc.gov/uls. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

[450] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.

[451] *See id.*

15. *Personal Radio Services.* Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our rules.[452] These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.[453] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.[454] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[455] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[456] Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. We note however that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

16. *Public Safety Radio Licensees.* Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[457] Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this

---

[452] 47 CFR Part 90.

[453] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 CFR Part 95.

[454] 13 CFR § 121.201, NAICS Code 517312.

[455] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5*, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[456] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[457] *See* subparts A and B of Part 90 of the Commission's Rules, 47 CFR §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

category under SBA rules is that such a business is small if it has 1,500 or fewer employees. [458] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[459] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[460] Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.[461] There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.[462] We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

17. *Private Land Mobile Radio Licensees*. Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engag*ed in radiotelephone communications.*[463] The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.[464] For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[465] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[466] Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

---

[458] *See* 13 CFR § 121.201, NAICS Code 517210.

[459] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[460] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[461] This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

[462] Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA – Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.

[463] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Carriers (Except Satellite)," *See* https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210 (last visited Mar. 6, 2018).

[464] *See* 13 CFR § 121.201, NAICS Code 517210.

[465] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[466] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

18. According to the Commission's records, a total of approximately 400,622 licenses comprise PLMR users.[467] Of this number there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by the *Third Report and Order*.[468] The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

19. *Multiple Address Systems***.** Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define "small entity" for MAS licensees as an entity that has average annual gross revenues of less than $15 million over the three previous calendar years.[469] A "Very small business" is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than $3 million over the preceding three calendar years.[470] The SBA has approved these definitions.[471] The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications.

20. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS licenses in 176 EAs was conducted.[472] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

21. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The closest applicable definition of a

---

[467] This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.

[468] This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.

[469] *See Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008 para. 123 (2000).

[470] *Id*.

[471] *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

[472] *See Multiple Address Systems Spectrum Auction Closes*, Public Notice, 16 FCC Rcd 21011 (2001).

small entity is the "Wireless Telecommunications Carriers (except Satellite)" definition under the SBA rules.[473] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[474] For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[475] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[476] Thus under this category and the associated small business size standard, the Commission estimates that the majority of firms that may be affected by our action can be considered small.

22. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high-speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[477]

23. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[478] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard).[479] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

24. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[480] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding

---

[473] 13 CFR § 121.201, NAICS Code 517210.

[474] *Id*.

[475] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[476] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[477] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[478] 47 CFR § 21.961(b)(1).

[479] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[480] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[481] Auction 86 concluded in 2009 with the sale of 61 licenses.[482] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

25. *EBS* - The Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.[483] The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees.[484] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[485] Of this total, 3,083 operated with fewer than 1,000 employees.[486] Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census Bureau data, the Commission's Universal Licensing System indicates that as of October 2014, there are 2,206 active EBS licenses. The Commission estimates that of these 2,206 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[487]

26. *Location and Monitoring Service (LMS)*. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $15 million.[488] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $3 million.[489] These definitions

[481] *Id.* at 8296 para. 73.

[482] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[483] U.S. Census Bureau, 2017 NAICS Definitions, "517311 Wired Telecommunications Carriers,", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2017.

[484] *See* 13 CFR § 121.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICs code as 517311 for Wired Telecommunications Carriers. *See*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[485] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[486] *Id.*

[487] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[488] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 CFR § 90.1103.

[489] *Id*.

have been approved by the SBA.[490] An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

27. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."[491] These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.[492] These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.[493] The 2012 Economic Census reports that 751 firms in this category operated in that year.[494] Of that number, 656 had annual receipts of $25,000,000 or less, 25 had annual receipts between $25,000,000 and $49,999,999 and 70 had annual receipts of $50,000,000 or more.[495] Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

28. The Commission has estimated the number of licensed commercial television stations to be 1,377.[496] Of this total, 1,258 stations (or about 91 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384.[497] Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations.[498] Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

29. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations must be included.[499] Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of "small business" requires that an entity not be dominant in its field of

---

[490] *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

[491] U.S. Census Bureau, 2017 NAICS Definitions, "515120 Television Broadcasting," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017.

[492] *Id*.

[493] 13 CFR § 121.201; 2012 NAICS Code 515120.

[494] U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515120.

[495] *Id*.

[496] *Broadcast Station Totals as of* June 30, 2018, Press Release (MB, rel. Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals Press Release), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[497] *Id*.

[498] *Id.*

[499] *See* 13 CFR § 21.103(a)(1) "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both."

operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

30. *Radio Stations.* This Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources."[500] The SBA has established a small business size standard for this category as firms having $38.5 million or less in annual receipts.[501] Economic Census data for 2012 show that 2,849 radio station firms operated during that year.[502] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[503] Therefore, based on the SBA's size standard the majority of such entities are small entities.

31. According to Commission staff review of the BIA/Kelsey, LLC's Publications, Inc. Media Access Pro Radio Database (BIA) as of January 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of $38.5 million or less and thus qualify as small entities under the SBA definition.[504] The Commission has estimated the number of licensed commercial AM radio stations to be 4,633 stations and the number of commercial FM radio stations to be 6,738, for a total number of 11,371.[505] We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128.[506] Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

32. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.[507] The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation.[508] We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-

[500] U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[501] 13 CFR § 121.201, NAICS Code 515112.

[502] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[503] *Id.*

[504] BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).

[505] Broadcast Station Totals as of June 30, 2018, Press Release (MB Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[506] *Id.*

[507] 13 CFR § 121.103(a)(1). "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both."

[508] 13 CFR § 121.102(b).

inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

33. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.[509] This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.[510] Programming may originate in their own studio, from an affiliated network, or from external sources.[511] The SBA has established a small business size standard which consists of all radio stations whose annual receipts are $38.5 million dollars or less.[512] U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.[513] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[514] Therefore, based on the SBA's size standard, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

34. *Multichannel Video Distribution and Data Service (MVDDS)*. MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[515] These definitions were approved by the SBA.[516] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[517] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7,

[509] *See*, U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[510] *Id.*

[511] *Id*.

[512] 13 CFR § 121.201, NAICS code 515112.

[513] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[514] *Id.*

[515] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[516] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

[517] *See* "*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*," Public Notice, 19 FCC Rcd 1834 (2004).

2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[518]

35. *Satellite Telecommunications.* This category comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[519] Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.[520] For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.[521] Of this total, 299 firms had annual receipts of less than $25 million.[522] Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

36. *All Other Telecommunications.* The **"**All Other Telecommunications" category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[523] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.[524] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[525] The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of $32.5 million or less.[526] For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.[527] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 42 firms had annual receipts of $25 million to $49, 999,999.[528] Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

37. *Fixed Microwave Services*. Microwave services include common carrier,[529] private-operational fixed,[530] and broadcast auxiliary radio services.[531] They also include the Local Multipoint

---

[518] *See* "*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63*," Public Notice, 20 FCC Rcd 19807 (2005).

[519] U.S. Census Bureau, 2017 NAICS Definitions, "517410 Satellite Telecommunications," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017.

[520] 13 CFR § 121.201, NAICS Code 517410.

[521] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517410, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517410.

[522] *Id.*

[523] *See* U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code "517919 All Other Telecommunications", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

[524] *Id.*

[525] *Id*.

[526] 13 CFR § 121.201, NAICS Code 517919.

[527] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[528] *Id*.

[529] *See* 47 CFR Part 101, Subpart I.

Distribution Service (LMDS),[532] the Digital Electronic Message Service (DEMS),[533] the 39 GHz Service (39 GHz),[534] the 24 GHz Service,[535] and the Millimeter Wave Service[536] where licensees can choose between common carrier and non-common carrier status.[537] At present, there are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.[538] The Commission has not yet defined a small business size standard for microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.[539] U.S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year.[540] Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

38. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission also notes that it does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. The Commission estimates however, that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

39. *Non-Licensee Owners of Towers and Other Infrastructure*. Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over

(Continued from previous page)

[530] Persons eligible under parts 80 and 90 of the Commission's rules can use Private-Operational Fixed Microwave services. *See* 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[531] *See* 47 CFR Parts 74, 78 (governing Auxiliary Microwave Service) Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

[532] *See* 47 CFR §§ 101, 1001-101, 1017.

[533] *See* 47 CFR §§ 101, 101.501-101.538.

[534] *See* 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).

[535] *See id.*

[536] *See* 47 CFR §§ 101, 101.1501-101.1527.

[537] *See* 47 CFR §§ 101.533, 101.1017.

[538] These statistics are based on a review of the Universal Licensing System on September 22, 2015.

[539] 13 CFR § 121.201.

[540] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series, "Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration ("ASR") system and comply with applicable rules regarding review for impact on the environment and historic properties.

40. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.[541] Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

41. The closest applicable SBA category is All Other Telecommunications, and the appropriate size standard consists of all such firms with gross annual receipts of $32.5 million or less.[542] For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.[543] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[544] Thus, under this SBA size standard a majority of the firms potentially affected by our action can be considered small.

### E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

42. The *Third Report and Order* does not establish any reporting, recordkeeping, or other compliance requirements for companies involved in wireless infrastructure deployment.[545] In addition to not adopting any reporting, recordkeeping or other compliance requirements, the Commission takes significant steps to reduce regulatory impediments to infrastructure deployment and, therefore, to spur the growth of personal wireless services. Under the Commission's approach, small entities as well as large companies will be assured that their deployment requests will be acted upon within a reasonable period of time and, if their applications are not addressed within the established time frames, applicants may seek injunctive relief granting their siting applications. The Commission, therefore, has taken concrete steps to relieve companies of all sizes of uncertainly and has eliminated unnecessary delays.

43. The *Third Report and Order* also does not impose any reporting or recordkeeping requirements on state and local governments. While some commenters argue that additional shot clock classifications would make the siting process needlessly complex without any proven benefits, the

[541] We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

[542] 13 CFR § 121.201, NAICS Code 517919.

[543] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012,* NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[544] *Id*.

[545] *See supra* para. 144.

Commission concludes that any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.[546] The Commission's actions are consistent with the statutory language of Section 332 and therefore reflect Congressional intent. As a result, the additional shot clocks that the Commission adopts will foster the deployment of the latest wireless technology and serve consumer interests.

### F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

44. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[547]

45. The steps taken by the Commission in the *Third Report and Order* eliminate regulatory burdens for small entities as well as large companies that are involved with the deployment of person wireless services infrastructure. By establishing shot clocks and guidance on injunctive relief for personal wireless services infrastructure deployments, the Commission has standardized and streamlined the permitting process. These changes will significantly minimize the economic impact of the siting process on all entities, including small entities, involved in deploying personal wireless services infrastructure. The record shows that permitting delays imposes significant economic and financial burdens on companies with pending wireless infrastructure permits. Eliminating permitting delays will remove the associated cost burdens, and enabling significant public interest benefits by speeding up the deployment of personal wireless services and infrastructure.

46. The Commission considered but did not adopt proposals by commenters to issue "Best Practices" or "Recommended Practices,"[548] and to develop an informal dispute resolution process and mediation program, [549] noting that the steps taken in the *Third Report and Order* address the concerns underlying these proposals to facilitate cooperation between parties to reach mutually agreed upon solutions.[550] The Commission anticipates that the changes it has made to the permitting process will provide significant efficiencies in the deployment of personal wireless services facilities and this in turn will benefit all companies, but particularly small entities, that may not have the resources and economies of scale of larger entities to navigate the permitting process. By adopting these changes, the Commission will continue to fulfill its statutory responsibilities, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of personal wireless services facilities and infrastructure across the country.

### Report to Congress

47. The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.[551] In addition, the Commission will

[546] *See supra* para. 106.

[547] 5 U.S.C. § 603(c)(1)-(4).

[548] KS Rep. Sloan Comments at 2; Nokia Comments at 10.

[549] NATOA *et al*. Comments at 16-17.

[550] *See supra* para. 127.

[551] 5 U.S.C. § 801(a)(1)(A).

send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order* and FRFA (or summaries thereof) also will be published in the *Federal Register*. [552]

[552] 5 U.S.C. § 604(b).

**AFFIDAVIT OF JOE SMITH**

**STATE OF ARKANSAS )**
**) ss**
**COUNTY OF PULASKI )**

I, Joe Smith, being duly sworn on his oath, states:

1. My name is Joe A. Smith. I am the duly elected Mayor of the City of North Little Rock, Arkansas. North Little Rock is a city of the first class with a population of approximately 66,000. I have served as Mayor for almost six (6) years. I have worked in the administration of North Little Rock for over twenty (20) years. I also serve as the current President of the Arkansas Municipal League which represents five hundred (500) cities and towns.

2. As Mayor, I am responsible for the general supervision and safety of more than eight hundred (800) employees, including one hundred (100) employees of the North Little Rock Electric Department. I prepare and manage an annual budget in excess of $150 million. I am the custodian of property that is held by the city for the benefit of its citizens.

3. I was the sponsor for Ordinance No. 9031, the Small Wireless Communication Facility Regulation, that was adopted by the North Little Rock City Council on July 23, 2018. This ordinance created a process to allow licensed telecommunication service providers to attach small cell devices to city-owned poles. The ordinance was developed in cooperation with a neighboring city. It was based upon substantial comments from telecommunication service providers. Currently, small cell devices are being installed pursuant to Ordinance No. 9031. A copy of the ordinance is attached hereto as Exhibit A.

4. I sponsored Ordinance No. 9031 because I believed that it would improve the wireless communication services offered to North Little Rock citizens without compromising: (a) the safety of city employees; (b) the integrity of city infrastructure; or (c) the appearance of

the community. It was also important to me that Ordinance No. 9031 would assess sufficient fees to avoid subsidizing private business.

5. Ordinance No. 9031 contains protections to ensure that city employees can manage the permitting, inspection and administration of small cell devices. Applicants are only allowed to submit one permit at a time with up to twenty-five (25) similar attachments or poles on each application. Without such limits, city employees cannot review permit applications in a timely manner. A copy of the permit form used by the city is attached hereto as Exhibit B.

6. Ordinance No. 9031 encourages collocation of facilities whenever possible. Poles, and other structures in the right-of-way, can be dangerous to vehicular traffic and visually obtrusive. Collocation reduces the number of poles needed to provide services to the community.

7. Ordinance No. 9031 limits the height of small cell devices to thirty-five feet (35'). The city owns more than 25,000 poles, the vast majority of which are shorter than fifty feet (50') in height. Thus, the city typically purchases bucket trucks with a working height of fifty feet (50'). It is important to limit the location of small cell devices to areas that are accessible to bucket trucks because it is dangerous for lineworkers to attempt to climb around small cell devices. The electric distribution space is generally identified as the top fourteen feet (14') of a pole. By limiting the height of small cell devices to thirty-five feet (35'), the city ensures that collocation is possible, and that the electric distribution space can safely be reached with a bucket truck. Some have objected to this restriction. See letter attached hereto as Exhibit C.

8. Ordinance No. 9031 limits the issuance of permits to entities who provide wireless service to the general public pursuant under an FCC license. This is an important restriction because the administrative burden on local government to manage a few licensed

entities is significantly different than the administrative burden of managing any person who can complete a permit application. Further, my interest in sponsoring Ordinance No. 9031 was to advance telecommunications in North Little Rock. I did not intend to allow private persons to speculate on public property.

Joe A. Smith

Joe A. Smith

Subscribed and sworn to before me this 14th day of December, 2018.

Notary Public

My commission expires: 10/31/22

JULIE FISHER
MY COMMISSION EXPIRES
10-31-2022
NOTARY PUBLIC
COMM. # 12390881
PULASKI COUNTY - ARKANSAS

O-18-63

ORDINANCE NO. 9031

**AN ORDINANCE ADOPTING REGULATIONS TO GOVERN THE CONSTRUCTION, INSTALLATION, MAINTENANCE AND REMOVAL OF SMALL WIRELESS COMMUNICATION FACILITES IN THE RIGHT-OF-WAY; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES.**

WHEREAS, pursuant to Arkansas law, the City Council of North Little Rock, Arkansas ("City") is authorized to adopt regulations by reference (Ark. Code Ann. §14-55-207); and

WHEREAS, certain Wireless Service Providers propose to occupy public rights-of-way owned, held in trust and maintained by the City, in order to install and maintain small wireless communication facilities that will enhance data connectivity through wireless communication services; and

WHEREAS, the City recognizes the economic and social value of data connectivity and desires to encourage wireless infrastructure investment by providing a fair and predictable process for the deployment of small wireless communication facilities within the public rights-of-way in a manner that is: (1) safe; (2) compatible with and complementary to the provision of services by the City and others lawfully using the rights-of-way; and (3) consistent with the aesthetic standards of the City; and

WHEREAS, the City owns and operates a municipal utility ("North Little Rock Electric Department" or "NLRED") that performs the essential public service of distributing electric power and providing light and other important services; and

WHEREAS, NLRED is responsible for safeguarding its employees and the integrity of its electric system, obtaining fair compensation for the use of its infrastructure through collection of fees and other charges, ensuring compliance with all applicable federal, state and local laws, rules and regulations, ordinances and standards and policies, and permitting fair and reasonable access to available capacity on NLRED's infrastructure; and

WHEREAS, NLRED is willing, when it may lawfully do so, to issue one or more Permits authorizing the placement or installation of Wireless Communication Facilities on NLRED's Poles and/or Streetlights; and

WHEREAS, City is willing to permit Wireless Service Providers to occupy City's public rights-of-way for the placement or installation of Wireless Support Structures and Wireless Attachments, to include installation on Traffic Poles; and

WHEREAS, the City and NLRED preserve the rights to own, operate, and manage property in a proprietary manner while fairly governing the conduct of business and access to public rights-of-way.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS:

SECTION 1: That the **Small Wireless Communication Facility Regulation of the City of North Little Rock**, attached hereto as Exhibit "A" and incorporated herein by reference, is hereby adopted in its entirety.

SECTION 2: That three (3) copies of this ordinance shall be filed with the Office of the City Clerk and on the City web site for inspection and view by the public prior to adoption.

SECTION 3: That all ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of the conflict.

SECTION 4: That the provisions of this Ordinance are hereby declared to be severable, and if any section, phrase or provision shall be declared or held invalid, such invalidity shall not affect the remainder of the sections, phrases or provisions.

SECTION 5: That any person who violates this ordinance shall be subject to a fine of no less than $100 nor more than $1,000 per offense, except that when an offense is, in its nature, continuous in respect to time, the person in violation shall be subject to a fine of no less than $50 nor more than $500 per day.

SECTION 6: It is hereby found and determined that improved data connectivity would improve the North Little Rock economy and enhance the ability of North Little Rock citizens to share information and that adoption of a new regulation governing the installation, maintenance, and removal of small wireless communication facilities in the City's rights-of-way is necessary to achieve these benefits in a manner that is consistent with broad City interests including the proper and orderly growth of the City of North Little Rock, Arkansas, and being necessary for the immediate preservation of the public health, safety and welfare; THEREFORE, an emergency is hereby declared to exist, and this Ordinance shall be in full force and effect from and after its passage and approval.

PASSED:

12/3/18

APPROVED:

Joe A. Smith

Mayor Joe A. Smith

SPONSORS:

Joe A. Smith

Mayor Joe A. Smith

ATTEST:

Diane Whitbey, City Clerk

APPROVED AS TO FORM:

Amy Beckman Fields, City Attorney

PREPARED BY ATTORNEY C. JASON CARTER

FILED 11:30 A.M. _____ P.M.
By Amy Fields CA office
DATE 1-17-18
**Diane Whitbey, City Clerk and Collector**
**North Little Rock, Arkansas**
RECEIVED BY

**Small Wireless Communication Facility Regulation**

**of the**

**City of North Little Rock, Arkansas**
**("City")**

This Small Wireless Regulation (the "Regulation") dated 23 July, 2018 ("Effective Date") is made by the City of North Little Rock, Arkansas ("City"), a municipal corporation duly created, organized, and existing as a political subdivision of the State of Arkansas, owner and regulator of the North Little Rock Electric Department ("Utility"), supervisor and holder of public rights-of-way, and regulator of development within the City.

EX. "A" 7/23/18

# Table of Contents

## RECITALS

**WHEREAS**, City encourages wireless infrastructure investment and wishes to provide a fair and predictable process for the deployment of Wireless Communication Facilities while promoting proper management of the public rights-of-way in the overall interests of the public health, safety and welfare; and

**WHEREAS**, City recognizes that Wireless Communication Facilities – including facilities commonly referred to as small cells and distributed antenna systems -- are capable of delivering wireless access to advanced technology, broadband, and 911 services to residences, businesses, and schools within the City; and

**WHEREAS**, City recognizes that Wireless Communication Facilities can often be effectively deployed in public rights-of-way; and,

**WHEREAS**, City intends to fully comply with State and Federal Law to the extent it may preempt local municipal control; and

**WHEREAS**, Utility operates a municipal utility within and about City performing the essential public service of distributing electric power and providing light and other important services; and

**WHEREAS**, Utility is responsible for safeguarding the integrity of its electric system and its employees, obtaining fair compensation for the use of its infrastructure through collection of fees and other charges, ensuring compliance with all applicable federal, state and local laws, rules and regulations, ordinances and standards and policies, and permitting fair and reasonable access to available Capacity on Utility's infrastructure; and

**WHEREAS**, certain Wireless Service Providers propose to occupy City's public rights-of-way in order to install and maintain Wireless Communication Facilities and associated equipment, Wireless Service Provider's Attachments, on Utility's Poles and/or Streetlights to provide Wireless Communication Services;

**WHEREAS**, Utility is willing, when it may lawfully do so, to issue one or more Permits authorizing the placement or installation of Wireless Communication Facilities on Utility's Poles and/or Streetlights; and

**WHEREAS**, City is willing to permit Wireless Service Providers to occupy City's public rights-of-way for the placement or installation of Wireless Support Structures and Wireless Attachments; and

**WHEREAS**, City is willing to negotiate the placement of Wireless Support Structures and Wireless Attachments on City structures; such as buildings, recreational field lighting, and the like; and

**WHEREAS,** City and Utility preserve their respective rights to own, operate, and manage property in a proprietary manner while fairly governing the conduct of business and access to public rights-of-way.

**NOW THEREFORE,** in consideration of the mutual covenants, terms and conditions set out below the parties agree as follows:

**Article 1. Definitions**

For the purposes of this Regulation, the following terms, phrases, words, and their derivations, shall have the meaning given below, unless more specifically defined within a specific Article or Section of this Regulation. When not inconsistent with the context, words used in the present tense include the future and past tense, and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

1.1 **Affiliate:** when used in relation to a Wireless Service Provider, means another entity that owns or controls, is owned or controlled by, or is under common ownership or control with the Wireless Service Provider.

1.2 **Applicable Standards:** means all applicable engineering and safety standards governing the installation, maintenance, and operation of facilities and the performance of all work in or around electric Utility Facilities and includes the most current versions of National Electric Safety Code ("NESC"), the National Electrical Code ("NEC"), the American Public Power Association ("APPA") Safety Manual, and the regulations of the Occupational Safety and Health Administration ("OSHA"), each of which is incorporated by reference in this Regulation, and/or other reasonable safety and engineering requirements of Utility or other federal, state, or local authority with jurisdiction over Utility Facilities.

1.3 **Application:** means a request submitted by a Wireless Service Provider, or a Person acting on behalf of a Wireless Service Provider, to the Designated Office for a Permit to install Wireless Communication Facilities including approval for installation or modification of a Utility pole or Wireless Support Structure.

**Standard Application**: means an application that fully conforms to all design standards shown in Appendix B.

**Non-Standard Application**: means an Application that does not fully conform to all design standards shown in Appendix B.

1.4 **Attaching Entity:** means any public or private entity, including a Wireless Service Provider, that pursuant to an agreement with Utility or other authority, places one more Attachments on Utility's Poles.

1.5 **Attachment(s):** means both Wireless Communication Facilities and wireline communications wires of Wireless Service Providers and other Attaching Entities that are lawfully affixed to or installed within a Pole.

1.6 **Capacity:** means the ability of a Pole to accommodate the installation of an Attachment based on Applicable Standards, including space and loading considerations.

1.7 **City:** means the City of North Little Rock, Arkansas, a municipal corporation duly created, organized, and existing as a political subdivision of the State of Arkansas.

1.8 **City Facilities**: means all personal property and real property owned or controlled by City, including those used for the provision of public services and those used for other purposes.

1.9 **Communications Service**: means the transmission or receipt of voice, video, data, broadband Internet, or other forms of digital or analog service.

1.10 **Communications Space**: means the space on a Pole designated for horizontal wireline communications attachments under the NESC and other Applicable Standards.

1.11 **Correct**: means to perform work to bring an Attachment into compliance with Applicable Standards in a workman like condition.

1.12 **Days:** means calendar days unless otherwise specifically stated.

1.13 **Designated Office:** means the Utility's Office of Engineering and Design, or such City office as may be designated by the Mayor, where Wireless Service Providers may submit an Application.

1.14 **Electric Supply Space:** means the upper portion of a Pole above the communications workers safety space dedicated to electric distribution facilities under the NESC and other Applicable Standards.

1.15 **Emergency:** means a situation exists which, in the reasonable discretion of a Wireless Service Provider, City or Utility, if not remedied immediately, poses an imminent threat to public health, life, or safety, damage to property or a service outage.

1.16 **Equipment Attachment**: means each power supply, amplifier, appliance or other single device or piece of equipment associated with Wireless Communication Facilities affixed to any Utility Pole.

1.17 **Historic District:** means a geographically defined area within City that is empowered by City ordinance to approve or disapprove development through the issuance of a certificate of appropriateness (COA).

1.18 **Make-Ready or Make-Ready Work**: means all work that City or Utility reasonably determines to be required to accommodate a Wireless Communication Facility and/or to comply with all Applicable Standards. Such work includes, but is not limited to, field survey work, rearrangement and/or transfer of Utility Facilities or existing Attachments, inspections, engineering work, permitting work, tree trimming (other than tree trimming performed for normal maintenance purposes), pole replacement and construction, but does not include a Wireless Service Provider's routine maintenance.

1.19 **Occupancy**: means the use or reservation of space for Attachments on a Pole.

1.20 **Overhead:** means all organizational costs that are not directly related to the cost of performing a particular task, but incurred by the Utility as necessary operational expenses, including any specified payment in lieu of taxation or internal rate of return.

1.21 **Pedestals/Vaults/Enclosures**: means above- or below-ground housings that are not attached to Poles but are used to enclose a cable/wire splice, power supplies, amplifiers, passive devices, and/or to provide a service connection point.

1.22 **Permit**: means written or electronic authorization executed by City and/or Utility for a Wireless Service Provider to install Wireless Communication Facilities on or within specified Poles pursuant to the requirements of this Regulation, as described within the authorization. Wireless Communication Facilities installed by a Wireless Service Provider prior to the Effective Date and previously authorized by written agreement with City and Utility ("Existing Attachments") shall be deemed permitted hereunder.

1.23 **Person**: means an individual, corporation, limited liability company, partnership, association, trust, or other entity or organization that can sue or be sued, including the City.

1.24 **Pole**: means a Decorative Pole, Distribution Pole, Streetlight Pole, or Traffic Pole.

**Decorative Pole**: means a non-wooden pole owned or controlled by City or Utility that is specially designed to enhance the aesthetic appearance of the surrounding area. Decorative Poles are typically painted and constructed with ornamental design elements.

**Distribution Pole**: means a pole owned or controlled by Utility that is used to provide electricity and/or Communications Service

**Streetlight Pole**: means a non-Decorative Pole owned or controlled by City or Utility that is used to provide lighting or ancillary services.

**Traffic Pole**: means a pole that is owned or controlled by City and used to provide vertical support to traffic signals.

1.25 **Post-Installation Inspection**: means the inspection by Utility or, if permitted by Utility, inspection by Wireless Service Provider or some combination of the Utility and Wireless Service Provider to verify that Attachments have been made in accordance with Applicable Standards and the Permit.

1.26 **Pre-Construction Survey**: means all work or operations required by Applicable Standards and/or Utility to determine the Make-Ready Work necessary to accommodate Wireless Communication Facilities on a Pole. Such work includes, but is not limited to, field inspection and administrative processing.

1.27 **Reserved Capacity**: means capacity or space on a Pole that City or Utility has identified and reserved for its own future utility requirements at the time of the Permit grant pursuant to a

projected need for such use, including the installation of communications circuits for operation of Utility's electric system and/or lighting services.

1.28 **Riser**: means metallic or plastic encasement materials placed vertically on the Pole to guide and protect wires and cables.

1.29 **Tag**: means an identification label ("Tag") that is no smaller than 12 square inches and no larger than 64 square inches. Using font that is 12-point or larger, Tags will be permanently imprinted with the following minimum information:

1. Identity of Licensee
2. Licensee's phone number used to respond to emergencies or planned work on a 24-hour basis
3. Serial identifier that is unique to each Wireless Communication Facility.
4. Any required safety information

1.30 **Unauthorized Attachment**: means any Attachment placed on Utility's Poles without a permit as required by this Regulation, provided the Wireless Service Provider's previously authorized Attachments made pursuant to a prior written agreement between the parties shall not be considered Unauthorized Attachments.

1.31 **Utility**: means the North Little Rock Electric Department.

1.32 **Utility Facilities**: means all personal property and real property owned or controlled by Utility, including Poles, wires, equipment, and related facilities.

1.33 **Wireless Communication Facilities**: means equipment at a fixed location that enables wireless communications between a retail user's equipment and a communication network, including: (i) equipment associated with wireless communication; (ii) radio transceivers, Antennas, coaxial or fiber-optic cable, regular and back-up power supplies, and comparable equipment, regardless of technological configuration. The term does not include Wireless Support Structures, wireline backhaul facilities, coaxial or fiber optic cable that is between Wireless Support Structures, ground wires, service drops or Utility Poles or coaxial or fiber optic cable that is otherwise not immediately adjacent to, or directly associated with, an antenna.

1.34 **Wireless Services** means any services, whether at a fixed location or mobile, provided it is using Wireless Communication Facilities.

1.35 **Wireless Service Provider**: means a Person who sells and provides Wireless Services to the general public using Wireless Communication Facilities pursuant to one or more licenses properly issued by the FCC and other applicable authorities.

1.36 **Wireless Support Structure**: means a freestanding structure, such as: an equipment pedestal; a monopole; tower, either guyed, or self-supporting as determined by the City; billboard; or, other existing or proposed structure designed to support or capable of supporting Wireless Communication Facilities. Such term shall not include a City or Utility Pole.

**Article 2. Purpose and Scope of Regulation**

2.1. **Purpose**: The purpose of this Regulation is to provide policies and procedures for the placement of Wireless Communications Facilities in public rights-of-way within the jurisdiction of the City, and upon City and Utility Facilities, which will preserve the integrity, safe usage, and visual qualities of the City public rights-of-way and the City as a whole. This Regulation establishes uniform standards, to be used and included in individual permits, to address issues presented by Wireless Communication Facilities including, but not limited to:

2.1.1. Prevention of interference with the use of streets, sidewalks, alleys, parkways, Utility Poles, and other public ways and places;

2.1.2. Prevention of the creation of visual and physical obstructions and other conditions that are hazardous to vehicular and pedestrian traffic;

2.1.3. Prevention of interference with other facilities and operations of facilities lawfully located in City public rights-of-way or public property;

2.1.4. Protection against environmental damage, including damage to trees or shrubbery including, but not limited, those items planted pursuant to City landscaping, zoning, tree preservation, or other City policies;

2.1.5. Preservation of the character of neighborhoods in which facilities are installed;

2.1.6. Preservation of the historical character of historic structures, or historic neighborhoods, including but not limited to such structures or neighborhoods listed on the National Register of Historic Places; and,

2.1.7. Facilitation of the rapid deployment of small cell facilities to provide the citizens with the benefits of advanced wireless services.

2.2. **Grant of Permits**.

2.2.1. City shall grant Wireless Service Providers a revocable, nonexclusive permit authorizing the installation and maintenance of Wireless Support Structures and Wireless Communication Facilities within the City's public rights-of-way, as provided in this Regulation. Applications to install Wireless Support Structures or Wireless Communication Facilites outside of the right-of-way will be processed according to City ordinances governing the zoning and development of property.

2.2.2. Utility shall grant Wireless Service Providers a revocable, nonexclusive permit authorizing the installation of Attachments to Utility's Poles; provided that: (i) the Utility has sufficient Capacity to accommodate the requested Attachment(s), (ii) the Wireless Service Provider meets all requirements set forth in this Regulation, and (iii) such Permit(s) comply with all Applicable Standards.

2.2.3. City may grant a Wireless Service Provider a revocable, nonexclusive permit authorizing the installation and maintenance of a Wireless Support Structure and Wireless Communication Facilities on City property, other than a Pole, upon such terms and conditions as may be approved in accordance with Arkansas law.

2.2.4. Permits issued pursuant to this regulation may be reviewed and revised by the City and/or Utility after eight (8) years from the date approved in order to advance a public concern identified in Section 2.1. Within one year of any such revision, Wireless Service Providers shall: (1) cause their Wireless Support Structures and Wireless Communication Facilities to conform to revised permit requirements; or (2) cause or allow their Wireless Support Structures and Wireless Communication Facilities to be removed at the expense of the Wireless Service Provider.

2.3. **General Restrictions for Wireless Support Structures.**

2.3.1. No Person shall install or maintain a Wireless Support Structure within the public right-of-way without a permit issued by the City, or in violation thereof.

2.3.2. No Person shall be issued a Permit to install or maintain a Wireless Support Structure within the public right-of-way unless that Person is a Wireless Service Provider, or an Affiliate duly authorized to act on behalf of a Wireless Service Provider.

2.3.3. No Person shall install a Wireless Support Structure within the public right-of-way when suitable Utility Poles or Wireless Support Structures are available for Attachments in the public right-of-way within one hundred feet (100') of the proposed location. Provided that a Utility Pole or Wireless Support Structure can structurally support the proposed Wireless Communication Facility, the suitability of a Utility Pole or Wireless Support Structure shall be determined pursuant to the operational constraints of equipment used by the Wireless Service Provider.

2.3.4. No Person shall install a Wireless Support Structure in the right-of-way that is taller than thirty-five feet (35') in height above ground.

2.3.5. No Person shall install a Wireless Support Structure in any location that impedes or prevents the provision of lighting, electric distribution, communication, or other existing services that are provided using a City or Utility Pole.

2.3.6. No Person shall install a Wireless Support Structure in any Historic District unless and until issued a certificate of appropriateness by the historic district commission.

2.3.8. All Wireless Support Structures shall conform to design standards of Appendix B and be designed for colocation, lighting, or other services that the City deems to be useful to the public.

2.3.9 No Person shall install a Wireless Support Structure within twenty-five (25) feet of the outer curbing of an intersection. This section shall not apply to City or Utility approved Street Light Poles, Traffic Poles, and other City and/or Utility Facilities that are modified or replaced to hold a Wireless Communication Facility.

2.4. **General Restrictions for Wireless Communications Facilities.**

2.4.1. No Person shall install or maintain a Wireless Communication Facility on any City or Utility Facility without a permit issued by the Utility, or in violation thereof.

2.4.2. No Person shall be issued a Permit to install or maintain a Wireless Communications Facility on any City or Utility Facility unless that Person is a Wireless Service Provider, or an Affiliate duly authorized to act on behalf of a Wireless Service Provider.

2.4.3. No Person shall install a Wireless Communications Facility on any City or Utility Facility that impedes or prevents the provision of light, electricity, or operation of electrical equipment or other existing services that are provided using the City or Utility Facility.

2.4.4. No Person shall install a Wireless Communication Facility on any City or Utility Pole that is inaccessible from a street with a bucket truck.

2.4.5. No Person shall energize a Wireless Communication Facility unless and until the Wireless Communication Facility has passed Post-Installation Inspection in accordance with Article 8.

2.5. **Decorative Poles Restrictions**. In addition to the General Restrictions in Article 2.4, no Person shall install a Wireless Communication Facility on or within a Decorative Pole unless the specific design of the Wireless Communication Facility has been approved by the City and Utility. Applications for Permits to install a Wireless Communication Facility on or within a Decorative Pole shall be treated as a Non-Standard Application.

2.6. **Distribution Poles**. In addition to the General Restrictions in Article 2.4, no Person other than Utility shall install any Attachments within or above the Electric Supply Space on any Distribution Pole.

2.7. **Streetlight or Traffic Poles**. In addition to the General Restrictions in Article 2.4, no Person shall install a Wireless Communication Facility on or within a Streetlight or Traffic Pole that, when combined with the existing lighting equipment and other existing City and Utility Facilities, shall require more electricity than can be safely provided by the existing service line, without sufficiently upgrading the existing service line.

2.8. **Reserved Capacity.** City and/or Utility may limit access to Poles when the City and/or Utility plan to use such Poles for future purposes. At the time of Permit issuance, Wireless Service Provider shall be notified if Capacity on particular Poles is being reserved for reasonably foreseeable future use. For Attachments made with notice of such a Reservation of Capacity, on giving Wireless Service Provider at least ninety (90) calendar days prior notice, City or Utility may reclaim such Reserved Capacity at any time following the installation of a Wireless Service Provider's Attachment if required for City's or Utility's use. If reclaimed, City or Utility may at such time also install associated facilities, including the attachment of communications lines for internal operational or governmental communications requirements. City or Utility shall give Wireless Service Provider the option to remove its Attachment(s) from the affected Poles or to pay for the cost of any Make-Ready Work needed to expand Capacity for City or Utility service requirements, so that Wireless Service Provider can maintain its Attachment on the affected Poles. The allocation of the cost of any such Make-Ready Work (including the transfer, rearrangement, or relocation of third-party Attachments) shall be determined in accordance with Article 10. Wireless Service Provider shall not be required to bear any of the costs of rearranging

or replacing its Attachment(s), if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity. The above notwithstanding, City or Utility may deny access to a particular Pole at the time of Application if City or Utility has an identified need for that Pole within the reasonably foreseeable future for future electric, illumination, communications or other municipal purposes.

2.9. **No Interest in Property.** No use, however lengthy, of any City or Utility Facility, and no payment of any fees or charges required under this Regulation, shall create or vest in any Wireless Service Provider any easement or other ownership or property right of any nature in any portion of such Facility. Neither this Regulation, nor any Permit granted under this Regulation, shall constitute an assignment of any rights of any nature by City or Utility. Notwithstanding anything in this Regulation to the contrary, Wireless Service Providers shall, at all times, be and remain permit-holders only.

2.10. **Right to Attach.** Nothing in this Regulation, other than a Permit issued pursuant to this Article 2, shall be construed as granting any Person any right to install Attachments to any specific City or Utility Pole, or poles in general.

2.11. **Rights over Poles.** This Regulation does not in any way limit City's or Utility's right to locate, operate, maintain, or remove its Poles in the manner that will best enable it to fulfill its service requirements or to comply with any federal, state, or local legal requirement and policies, including undergrounding requirements.

2.12. **Expansion of Capacity.** Nothing in this Regulation shall be construed to require City or Utility to install, retain, extend, or maintain any Pole for use when such Pole is not needed for City's or Utility's own service requirements. The above, notwithstanding Utility will not unreasonably deny a request to extend or replace a Pole upon request.

2.13. **Poles and Wireless Support Structures Owned by Wireless Service Provider.** Wireless Support Structures, and their surrounding area, owned by Wireless Service Providers shall be maintained according to this Regulation and the uniform standards of the City, as may be amended from time to time.

2.14. **Service Restoration.** Utility's service restoration requirements shall take precedence over any and all work operations of a Wireless Service Provider on Utility's Poles.

2.15. **Other Agreements.** Except as expressly provided in this Regulation, nothing in this Regulation shall limit, restrict, or prohibit Utility from fulfilling any agreement or arrangement regarding Utility Facilities into which Utility has previously entered, or may enter in the future, with others parties.

2.16. **Permitted Uses.** Application of this Regulation is limited to the uses specifically stated in the recitals set forth above and no other use shall be allowed without the express written consent to such use by City and Utility.

2.17. **Electric Power.** To the extent a Wireless Service Provider requires electric service for its facilities it shall obtain and be responsible for payment of such power and extension of service

pursuant to the applicable standard process for such service. Utility shall bill Wireless Service Provider for electric service in accordance with Section 3.6.

**Article 3. Fees and Charges**

3.1. **Payment of Fees and Charges.** As a condition of any permit issued under Article 2, Wireless Service Providers shall pay to City and Utility the fees and charges specified in Appendix A and shall comply with the terms and conditions specified in this Regulation.

3.2. **Payment Period.** Unless otherwise expressly provided, Wireless Service Providers shall pay any invoice they receive from City and/or Utility pursuant to this Regulation within sixty (60) calendar days of receipt of invoice. If a Wireless Service Provider pays any amount under protest or dispute, then such Wireless Service Provider shall make full payment consistent with the timeframe prescribed above, and shall designate payment as "PAID UNDER PROTEST."

3.2.1. Any charges payable by Wireless Service Providers and/or City or Utility hereunder shall be billed by a party within two (2) years from the end of the calendar year in which the charges were incurred; any such charges beyond such period shall not be billed by a party and shall not be payable by the other party.

3.3. **Application Fee**. Wireless Service Providers shall pay a non-refundable Application Fee for each Wireless Communication Structure and Wireless Communication Facility to be installed in the public right-of-way in the amount stated in Appendix A. The purpose of this fee is to reimburse City and Utility for all administrative, engineering, professional and other costs related to review of the Application.

3.3.1 A single Application may include up to twenty-five (25) Wireless Communication Structures or Wireless Communication Facilities. Wireless Service Providers shall only include Wireless Communication Structures and Wireless Communication Facilities of the same type and design on a single Application.

3.3.2 City may adjust the Application Fee from time to time to cover actual and documented costs incurred in processing Applications or adjust a particular Application Fee based on documented excessive costs to the City. Any adjustment in the standard fees shown on Appendix A will be publicized for thirty (30) days before the effective date.

3.3.3 Failure to include appropriate Application Fees with Applications will cause the Application(s) to be deemed incomplete. Incomplete Application(s) will not be processed until cured.

3.4. **Attachment Fees**. Wireless Service Providers shall pay an annual Wireless Attachment Fee per Wireless Communication Facility installed on or within City or Utility Poles, as set out in Appendix A. The Wireless Attachment Fee shall be subject to periodic adjustment by a vote of the City Council.

3.5. **Right-of-Way Fees**. Wireless Service Providers shall pay the City a separate annual Right-of-Way Fee for each Wireless Communication Structure and Wireless Communication

Facility occupying the right-of-way, as set out in Appendix A. The Right-of-Way Fee shall be subject to periodic adjustment by a vote of the City Council.

3.6. **Power Consumption**. In addition to the all other fees, Wireless Service Providers shall pay for electric power consumed by their Attachments according to the electric rates approved by the City. Utility will normally base charges for all Attachments by metering one Attachment and multiplying the result by the total number of Attachments.

3.7. **Billing of Attachment and Right-of-Way Fees.** Wireless Service Providers shall be invoiced for the per-pole Wireless Attachment Fees and Right-of-Way Fees annually. These fees shall be payable in advance for each Wireless Communication Facility and Wireless Communication Structure for which a Permit was issued as of October 1 of the prior calendar year (the "Record Date"). The invoices shall set forth the total number of Wireless Communication Facilities and Wireless Communication Structures of the Wireless Service Provider during the annual period as of the Record Date.

3.7.1. **Contesting Fee.** Wireless Service Providers shall have sixty (60) days from receipt of invoice to contest the invoice or any quantity or calculation within the invoice.

3.8. **Refunds**. No fees and charges specified in Appendix A shall be refunded on account of any surrender of a Permit granted under this Regulation.

3.9. **Late Charges**. If City and/or Utility does not receive payment for any fee or other amount owed within sixty (60) calendar days after it becomes due, Wireless Service Providers shall pay a late processing charge equal to five percent (5%) of the amount owed. In addition to assessing a late processing charge, if any fees or charges remain unpaid for a period exceeding ninety (90) days: (1) Wireless Service Providers shall be charged interest at the rate of ten percent (10%) per year on the amount owed; (2) City and/or Utility may discontinue the processing of Applications for new Attachments until such fees or charges are paid: and (3) City and/or Utility may disconnect electric service from Wireless Service Provider's Attachment(s) at Wireless Service Provider's expense.

3.10. **Charges and Expenses**. After the issuance of a Permit, Wireless Service Providers shall reimburse City, Utility and any other Attaching Entity for those actual, and documented costs for facilitating the installation of Attachments or for which such Wireless Service Provider is otherwise responsible under this Regulation. Such costs and reimbursements shall include, but not necessarily be limited to, all design, engineering, administration, supervision, payments, labor, Overhead, materials, equipment and applicable transportation used for work on, or in relation to such Wireless Service Provider's Attachments as set out in this Regulation or as requested by such Wireless Service Provider in writing.

3.11. **Advance Payment**. City or Utility, in their sole reasonable discretion, will determine the extent to which Wireless Service Providers will be required to pay in advance estimated costs, including, but not limited to, administrative, construction, inspections, and Make-Ready Work costs, in connection with the initial installation or rearrangement of such Wireless Service Provider's Attachments pursuant to the procedures set forth in Articles 6 and 7 below.

3.12. **True-Up.** Whenever City or Utility requires advance payment of estimated expenses prior to undertaking an activity on behalf of a Wireless Service Provider and the actual cost of the activity exceeds the advance payment of estimated expenses, Wireless Service Providers must pay the difference in cost, provided that costs are documented with sufficient detail to enable a Wireless Service Provider to verify the charges. To the extent that City's or Utility's actual cost of the activity is less than the estimated cost, the difference in cost shall be refunded to the Wireless Service Provider.

3.13. **Determination of Charges.** Wherever this Regulation requires a Wireless Service Provider to pay for work done including applicable Overhead cost or contracted by City or Utility, the charge for such work shall include all reasonable material, labor, engineering, administrative, and applicable Overhead costs. City and Utility shall bill their services based upon actual costs, and such costs will be determined in accordance with the cost accounting systems used for recording capital and expense activities. Consistent with Article 19, if a Wireless Service Provider was required to perform work and fails to perform such work within the specified timeframe, and City or Utility performs such work, the Wireless Service Provider may be charged for actual and documented costs for completing such work.

3.14. **Work Performed by City or Utility.** Wherever this Regulation requires City or Utility to perform any make ready work, City or Utility, at their sole discretion, may utilize its employees or contractors, or any combination of the two, to perform such work.

3.15. **Charges for Incomplete Work**. In the event that a Permit is awarded to a Wireless Service Provider and then steps are taken by City and/or Utility to facilitate construction by performing necessary engineering and administrative work and the Permit is subsequently abandoned or canceled by Wireless Service Provider, such Wireless Service Provider shall reimburse Utility for all of the actual and documented costs incurred by Utility through the date of cancellation, including engineering, clerical and administrative and Make-Ready construction costs.

## Article 4. Specifications

4.1. **Installation**. Wireless Communication Facilities and Wireless Support Structures, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of Applicable Standards, including the latest revision of the National Electric Code (NEC) and National Electrical Safety Code (NESC), as may be amended from time to time, and in compliance with any construction standards now in effect or that may hereafter be issued by City or Utility (provided such construction standards are not inconsistent with this Regulation and are applied on a non-discriminatory basis) or any rules or orders of a governmental authority having jurisdiction. The location of any Attachment may be reasonably re-designated from time to time to accommodate other Attaching Entities for reasons of electrical service safety or reliability, with costs allocated in accordance with Article 10.2. Notwithstanding the foregoing, with respect to any Attachment that was in compliance with the Applicable Standards, including NESC or Utility construction standards, at the time such Attachment was made but has become noncompliant because of revisions to the NESC or Utility construction standards, Wireless Service Providers shall be required to bring their Attachments into compliance with then-current standards only in connection with relocation, pole

replacement, or rebuild affecting such Attachment or in the event such noncompliance creates an imminent threat to public safety. When maintenance or repair work is needed with respect to noncompliance with Applicable Standards as set forth in this Section, the actual costs of maintenance, repair, and inspection shall be borne by Wireless Service Providers.

4.2. **Limitations**. Absent Utility's prior written permission, the following limitations shall apply to Wireless Communication Facilities installed on Utility's Poles:

4.2.1. **Pole Top Installation**. Wireless Communication Facilities will only be installed below the Electric Supply Space on Poles used for electric distribution, in compliance with Applicable Standards.

4.2.2. **One Wireless Communication Facility Per Pole**. No more than one Wireless Communication Facility may be installed on a single Utility Pole (a single facility installation consisting of multiple antennas or nodes may be permissible).

4.2.3. **Poles with Distribution Equipment Installed**. In determining whether a particular Pole has sufficient capacity to accommodate a proposed Wireless Communication Attachment, the Utility shall deny access if existing electric equipment installed on the Pole (including without limitation: transformers, capacitors, reclosers, sectionalizers, voltage-regulators, voltage-regulator racks, primary metering, gang operated switches, and any other equipment being used by the Utility) would, in the Utility's reasonable judgment, preclude the attachment of additional facilities.

4.2.4. **Accessible by Bucket Truck**. In order to ensure a clear and safe climbing path for utility linemen, Wireless Communication Facilities may only he installed on Poles that are less than 50 feet above ground in height and that are accessible from the street by a Utility bucket truck.

4.2.5. **Pedestals.** Absent Utility's approval, no Pedestals, Vaults, and/or other Enclosures shall be placed within six (6) feet of any Utility Pole or other Utility Facilities. If permission is granted, all such installations shall be per the Applicable Standards. Further, Wireless Service Providers must move any such above-ground enclosures at such Wireless Service Provider's expense in order to provide sufficient space for Utility to set a replacement Pole.

4.2.6. **Installations within Certain Distance from Utility Substations**. No permit Applications will be approved for the installation of Wireless Communication Facilities on Utility Poles within three-hundred (300) feet of any Utility electric substation's outer fence.

4.3. **Request of a Waiver.**

4.3.1. Requests to waive any City requirements applicable to a new Wireless Support Structure must be made in writing by a Wireless Service Provider to the City's Planning Department for submission to the Board of Zoning Adjustments, with notice to Utility, either before or at the time of Permit Application submission. The request must specifically identify the provision requested to be waived, justification for requesting the

granting of the waiver, and the proposed solution as a result of the waiver. City shall notify the Wireless Service Provider in writing within sixty (60) days of receiving a request for waiver as to whether the request is granted in whole or in part. The request will be considered according to the normal rules and procedures of the Board of Zoning Adjustments.

4.3.2. Requests to waive any other requirements must be made in writing by the Wireless Service Provider to the Utility's senior employee, or his designee, either before or at the time of Permit Application submission. The request must specifically identify the Applicable Standard or provision requested to be waived, justification for requesting the granting of the waiver, and the proposed solution as a result of the waiver. Utility shall notify the Wireless Service Provider in writing within thirty (30) days of receiving a request for waiver as to whether the request is granted in whole or in part. Utility will not grant any waiver which in the sole opinion of Utility will result in a violation of the NESC or other applicable federal, state, or local law, regulation, or ordinance.

4.3.3. Notwithstanding the foregoing, in the event a request for waiver for a particular Wireless Communication Facility requires approval by both City and Utility, City and Utility shall work together to coordinate a joint-response in order not to unreasonably delay or interfere with Wireless Service Provider's proposed Permit.

4.4. **Maintenance of Facilities**. Wireless Service Providers shall, at their own expense, make and maintain their Attachment(s) and Wireless Communication Facilities in safe condition and good repair, in accordance with all Applicable Standards. All maintenance work on Wireless Communication Facilities located below the Electric Supply Space shall only be performed by qualified personnel. During the period described in Section 2.2.4, Wireless Service Providers shall not be required to update or upgrade its Attachments if they met Applicable Standards at the time they were made; provided, however, Wireless Service Provider shall update or upgrade the Attachment in connection with relocation, pole replacement or rebuild affecting such Attachment or in the event such update or upgrade is required or necessary in order to resolve an imminent threat to public safety.

4.5. **Tagging.** Upon installation, Wireless Service Providers shall affix a Tag to any pole or structure upon which Licensee's Wireless Communication Facilities have been installed and to the exterior of any ground-mounted Wireless Communication Facilities. The Tag will be constructed of aluminum, plastic or other material of extended durability. Tags will be installed on any pole or structure to which a Wireless Communication Facility has been installed.

4.6. **Interference.** Wireless Service Providers shall not allow their Wireless Communication Facilities to impair the ability of City, Utility or any third party to use Utility's Poles including telecommunications already on the poles, nor shall any Wireless Service Provider allow its Wireless Communication Facilities to interfere with the operation of any City facilities, Utility Facilities or third-party facilities. Neither City nor Utility will grant after the date of this Regulation a permit, license or any other right to any third party, if at the time such third party applies for access to a Pole Utility knows or has reason to know that such third party's use may in any way adversely affect or interfere with the Wireless Service Provider's existing Attachments or Wireless Communication Facilities, Wireless Service Provider's use and

operation of its facilities, or Wireless Service Provider's ability to comply with the terms and conditions of this Regulation.

4.6.1. **RF Responsibility**. Wireless Service Providers are solely responsible for the radio frequency ("RF") emissions emitted by its Wireless Communication Facilities and associated equipment, ensuring that the RF exposure from its emissions are within the limits permitted under all applicable rules of the FCC. City and Utility are solely responsible for the RF emissions emitted by its equipment or facilities and ensuring that the RF exposure from its emissions are within the limits permitted under all applicable rules of the FCC.

4.6.2. **Signage**. To the extent required by FCC rules and/or applicable local, state or federal law, Wireless Service Providers shall install appropriate signage to notify workers and third parties of the potential for exposure to RF emissions. The signage will be placed so that it is clearly visible to workers who climb the pole or ascend by mechanical means.

4.6.3. **Duty to Others**. Wireless Service Providers shall be under a duty and obligation in connection with the operation of its facilities to protect against RF interference to the RF signals of City, Utility, all Wireless Service Providers, and any other Attaching Entities. Utility shall be under no obligation to remedy or resolve RF interference among Wireless Service Providers or other Attaching Entities, and shall not be liable for any such RF interference among Wireless Service Providers or other Attaching Entities. Utility will, however, endeavor to have all Attaching Entities coordinate and cooperate with each other relating to the resolution of interference. Notwithstanding the foregoing, in the event City's or Utility's operations create RF interference to Wireless Service Providers or other Attaching Entities, City or Utility shall endeavor to correct such RF interference promptly and shall cooperate with the other parties relating to the correction.

4.7. **Protective Equipment**. Each Wireless Service Provider and its employees and contractors shall utilize and install adequate protective equipment to ensure the safety of people and facilities pursuant to FCC and Utility rules and requirements. Each Wireless Service Provider shall, at its own expense, install protective devices designed to handle the electric voltage and current carried by Utility's Facilities. Every Permit issued pursuant to this Regulation shall bear the warning and condition that NEITHER CITY NOR UTILITY SHALL BE LIABLE FOR ANY ACTUAL OR CONSEQUENTIAL DAMAGES TO WIRELESS COMMUNICATION FACILITIES, WIRELESS SERVICE PROVIDER'S CUSTOMERS' FACILITIES, OR TO ANY OF WIRELESS SERVICE PROVIDER'S EMPLOYEES, CONTRACTORS, CUSTOMERS, OR OTHER PERSONS, EXCEPT TO THE EXTENT CAUSED BY UTILITY'S GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT.

4.8. **Safety Briefing**. Wireless Service Providers shall prepare a written "Safety Briefing" suitable for City and Utility employees and contractors who may be required to work near and/or around such Wireless Communication Facilities.

4.9. **Signage and Cut-Off Switch**. Each Wireless Service Provider shall install a lockable power cut-off switch as directed by Utility and consistent with Applicable Standards and Utility

specifications for every Pole to which such Wireless Service Providers has attached facilities that can emit RF energy. Utility will specify instances where these power cut-off facilities and associated equipment need to be pad mounted. The cut-off switch will allow for the power source and any back-up power sources to be disconnected. If required by City and/or Utility, the power source must also be equipped with an external indicator light to provide certainty that the power has been disconnected. Wireless Service Providers shall provide Utility with access to disconnect switch by providing keys or combinations to the lock. Disconnect and meter sockets must be installed according the Utility's standards. RF caution signs shall be installed according to Applicable Standards.

4.10. **Cut-Off Procedure**. In ordinary circumstances, City and/or Utility's authorized field personnel will contact the applicable Wireless Service Provider's designated point of contact to inform a Wireless Service Provider of the need for a temporary power shut-down. Upon receipt of the call, the Wireless Service Provider will power down its antenna remotely, the power-down will occur during normal business hours and City and/or Utility will endeavor to provide 24 hours' advance notice. In the event of an unplanned power outage or other unplanned cut-off of power, or an Emergency, the power-down will be with such advance notice at City's and/or Utility's sole discretion and, if circumstances warrant, employees and contractors of City and/or Utility may accomplish the power-down by operation of the power disconnect switch without advance notice to the Wireless Service Provider and shall notify the Wireless Service Provider as soon as possible. In all such instances, once the work has been completed and the worker(s) have departed the exposure area, the party who accomplished the power-down shall restore power and inform the other party as soon as possible that power has been restored.

4.11. **Emergency Contact Information**. Each Wireless Service Provider shall provide emergency after hours contact information to City and Utility to ensure proper notification in case of an emergency. Information will include 24/7 telephone, cell phone and pager information, a list of duty managers by district and escalation procedures. Wireless Service Providers shall provide Utility with updated emergency contact information on an annual basis and whenever changes are made.

4.12. **Violation of Specifications.** If a Wireless Service Provider's Attachments, or any part of them, are installed, used, or maintained in violation of this Regulation, and Wireless Service Provider has not Corrected the violation(s) within thirty (30) days from receipt of written notice of the violation(s) from Utility, the provisions of Article 19 shall apply. When City or Utility believes that any violation(s) by a Wireless Service Provider poses an imminent threat to the safety of any person, interfere with the performance of City's or Utility's service obligations, or present an imminent threat to the physical integrity of Utility Poles or facilities, Utility may perform such work and/or take such action as it deems reasonably necessary without first giving written notice to any Wireless Service Provider. As soon as practicable afterward, the Wireless Service Provider will be advised of the work performed or the action taken. The Wireless Service Provider shall be responsible for all actual and documented costs incurred by City or Utility in taking action pursuant to this Article 4.12.

4.13. **Removal of Nonfunctional Attachments.** At its sole expense, each Wireless Service Provider shall remove any of its Attachments or any part thereof that becomes nonfunctional and no longer fit for service ("Nonfunctional Attachment") as provided in this Section 4.13. Except

as otherwise provided in this Regulation, each Wireless Service Provider shall remove Nonfunctional Attachments within one (1) year of the Attachment becoming nonfunctional, unless the Wireless Service Provider receives written notice from City or Utility that removal is necessary to accommodate City's, Utility's or another Attaching Entity's use of the affected Pole(s), in which case the Wireless Service Provider shall remove the Nonfunctional Attachment within ninety (90) days of receiving the notice. After the time designated for removal, Utility may, in its sole discretion, remove and dispose of the Nonfunctional Attachment and Wireless Service Provider shall he responsible for the costs therefor.

## Article 5. Private and Regulatory Compliance

5.1. **Necessary Authorizations.** Before a Wireless Service Provider occupies any of City's or Utility's Poles, the Wireless Service Provider shall obtain from the appropriate public or private authority, or from any property owner or other appropriate Person, any required authorization to construct, operate, or maintain its Wireless Communication Facilities on public or private property. City and Utility retain the right to require evidence that appropriate authorization has been obtained before any Permit is issued to a Wireless Service Provider. A Wireless Service Provider's obligations under this Article 5 include, but are not limited to, its obligation to obtain and pay for all necessary approvals to occupy public/private rights-of-way and easements from entities other than City, and all necessary licenses and authorizations to provide the services that it provides over its Wireless Communication Facilities from entities other than City. As a condition of every permit, WIRELESS SERVICE PROVIDERS SHALL DEFEND, INDEMNIFY, AND REIMBURSE CITY AND UTILITY FOR ALL LOSSES, COSTS, AND EXPENSES, INCLUDING REASONABLE ATTORNEY'S FEES, THAT CITY AND/OR UTILITY MAY INCUR AS A RESULT OF CLAIMS BY GOVERNMENTAL BODIES, OWNERS OF PRIVATE PROPERTY, OR OTHER PERSONS THAT A WIRELESS SERVICE PROVIDER DOES NOT HAVE SUFFICIENT RIGHTS OR AUTHORITY TO ATTACH WIRELESS SERVICE PROVIDER'S WIRELESS COMMUNICATION FACILITIES ON UTILITY'S POLES TO PROVIDE PARTICULAR SERVICES.

5.2. **Sufficiency of Public Rights-of-Way.** Neither City nor Utility makes any representation or warranty of any nature that its existing or future public rights-of-way, easements or other property rights, private or public, were, are or will be sufficient to permit the attachment, maintenance, replacement, relocation, repair, or modification of Attachments on any City or Utility Poles.

5.3. **Lawful Purpose and Use.** All Wireless Communication Facilities and Wireless Support Structures must at all times serve a lawful purpose, and the use of such Wireless Communication Facilities and Wireless Support Structures must comply with all applicable federal, state and local laws.

5.4. **Forfeiture of City's or Utility's Rights.** No Permit granted under this Regulation shall extend, or be deemed to extend, to any of City's or Utility's Poles or other City or Utility Facilities, to the extent that a Wireless Service Provider's Attachment would result in a forfeiture of City's or Utility's rights. Any Permit that would result in forfeiture of City's or Utility's rights shall be deemed invalid as of the date that City and/or Utility granted it. Further, if any Wireless Service Provider's existing Wireless Communication Facilities, whether installed

pursuant to a valid Permit or not, would cause such forfeiture, such Wireless Service Provider shall remove its Wireless Communication Facilities within sixty (60) days of receipt of written notice from City or Utility. If the Wireless Service Provider does not remove its Wireless Communication Facilities in question within sixty (60) days of receiving written notice from City or Utility, City or Utility may at its option perform such removal at the Wireless Service Provider's expense. Notwithstanding the forgoing, Wireless Service Providers shall have the right to contest any such forfeiture before any of its rights are terminated, provided that such Wireless Service Provider shall indemnify City and Utility for liability, costs, and expenses, including reasonable attorney's fees, which may accrue during Wireless Service Provider's challenge.

5.5. **Effect of Consent to Construction/Maintenance.** Consent by City or Utility to the construction or maintenance of any Attachments by a Wireless Service Provider shall not be deemed consent, authorization, or acknowledgment that the Wireless Service Provider has obtained all required Authorizations with respect to such Attachment.

## Article 6. Permit Application Procedures.

6.1. **Permit Required.**

6.1.1. Before installing any Wireless Communication Facility or Wireless Support Structure in a right-of-way, a Wireless Service Provider, or an Affiliate duly authorized to act on behalf of a Wireless Service Provider, shall submit an Application to the Designated Office and receive a Permit therefor, with respect to each such Wireless Communication Facility or Wireless Support Structure.

6.1.2. Subject to Section 7.7.3, before making any original Attachment to any City or Utility Facility, a Wireless Service Provider or an Affiliate duly authorized to act on behalf of a properly licensed and authorized Wireless Service Provider, shall submit an Application and receive a Permit therefor from the City or Utility, with respect to each such Utility Pole or Utility Facility.

6.2. **Professional Engineer**. Unless otherwise waived in writing by Utility, as part of the Utility's Pole Attachment Permit Application process, and at the Wireless Service Provider's sole expense, a qualified and experienced professional engineer, or an employee or contractor of the Wireless Service Provider who has been approved by Utility, must undertake and complete the engineering design and pole loading analyses calculations required in completing a Permit Application, participate in the Pre-Construction Survey, conduct the Post-Construction Inspection, and certify that the Wireless Service Provider's Wireless Communication Facilities can be and were installed on the identified Poles in compliance with the Applicable Standards and in accordance with the Permit. The professional engineer's qualifications must include experience performing such work, or substantially similar work, on electric transmission or distribution systems, and unless otherwise waived by Utility, such engineer must be licensed in the State of Arkansas. The Utility may require the Wireless Service Provider's professional engineer, employee or contractor to conduct a post-construction inspection that the Utility will verify by means that it deems to be reasonable.

6.2.1. **Pre-Existing Attachments.** Unless updates or upgrades are required by Applicable Standards, or unless Utility provides notice to the contrary, Wireless Service Providers shall not be required to obtain Permits for authorized Attachment(s) existing as of the effective date of this Regulation. Such grandfathered Attachments shall, however, be subject to the Attachment Fees specified in Appendix A. Wireless Service Providers shall provide City and Utility a list of all such pre-existing Attachments within six (6) months of the Effective Date of this Regulation but shall be subject to notification requirements.

6.3. **Submission of Application for Attachment Permit.** Wireless Service Providers shall submit a properly executed Application, which, unless otherwise agreed by Utility, shall include a survey and detailed plans for the proposed Attachments, including a description of any necessary Make-Ready Work to accommodate the Attachments, certified by a licensed professional engineer or City or Utility approved employee or contractor of Wireless Service Provider. Wireless Service Providers shall use the Application form provided. The City or Utility may amend the Application form from time to time, provided that any such changes are not inconsistent with the terms of this Regulation, and are applied to all Attaching Entities on a non-discriminatory basis and reasonable advance written notice is provided to Wireless Service Provider of such changes. City's or Utility's acceptance of the submitted design documents does not relieve any Wireless Service Provider of full responsibility for any errors and/or omissions in the engineering analysis.

6.3.1 Each Application for Wireless Communication Facilities may contain applications for up to a maximum of twenty-five (25) locations, provided that the proposed Wireless Communication Facilities to be installed at each such location are of the same size, type and configuration.

6.3.2 Each Application shall contain a detailed description of the Wireless Communication Facilities proposed to be installed, including type of equipment, certification as to approval of FCC equipment compliance, the installation design, pole loading calculations, RF interference studies and documentation (datasheets and technical specifications of the antenna system) that confirms all RF emissions comply with applicable laws governing RF exposure levels, including FCC OET Bulletin 65.

6.3.3 Each Application shall include a proposed attachment submittal of each device or design that has not been previously approved, which shall be considered a Non-Standard Application.

6.3.4 Wireless Service Providers shall utilize generally accepted industry standard software for the pole loading analysis, including SPIDA Calc.

6.3.5 Reserved.

6.3.6 Each Permit Application shall contain a Safety Briefing for the type of Wireless Installation proposed, if not previously approved.

6.3.7 No Wireless Service Provider, nor any Person acting on behalf of a Wireless Service Provider shall simultaneously submit more than one Permit Application. No Wireless Service Provider, nor any Person acting on behalf of a Wireless Service

Provider, shall submit a Permit Application while such Wireless Service Provider has a Permit Application under review.

6.4. **Review of Application for Attachment Permit**. Permit Applications shall be reviewed in the order received. Unless otherwise agreed, under normal circumstances, the Permit Application review process shall be as follows:

6.4.1. **Application for Attachment with Survey**. If a Wireless Service Provider's Application includes a survey and detailed plans for the proposed Attachments, including a description of any necessary Make-Ready to accommodate the Attachments, City or Utility shall review and respond to such properly executed and complete Permit Application for routine installations as promptly as is reasonable, providing a response during normal circumstances within ninety (90) days of receipt.

6.4.1.1. City's or Utility's response will either: (i) concur with the proposed Make-Ready as described in the Wireless Service Provider's Application and engineering survey and provide a cost estimate for the Utility's portion of that Make-Ready (ii) provide the Wireless Service Provider a revised Make-Ready analysis based on what Make-Ready Work Utility reasonably determines is required as well as providing the Wireless Service Provider a cost estimate for the Utility's portion of that Make-Ready work; or (iii) provide a written explanation as to why the Application is being denied, in whole or in part, for reasons of safety, reliability or insufficient Capacity that cannot be resolved consistent with Applicable Standards, including City and County zoning and construction ordinances.

6.4.2. **Application for Attachment Without a Survey**. Utility in its sole discretion may authorize a Wireless Service Provider to submit an Application without a Pre-Construction Survey (including a description of necessary Make-Ready). In such case, Utility or its contractor Engineer shall review the Application and perform a Pre-Construction Survey, and, if the Attachment can be accommodated consistent with Applicable Standards, prepare a description of any necessary Make-Ready to accommodate the proposed Attachment. Under normal circumstances, Utility will respond to such properly executed and complete Permit Application for routine installations as promptly as is reasonable, with a goal of providing a response within ninety (90) days of receipt.

6.4.2.1. A field survey will be required for each Attachment requested to determine the adequacy of the Pole to accommodate the proposed Wireless Communication Facilities. Utility shall assess the Wireless Service Provider the actual and documented costs of the survey(s).

6.4.2.2. Utility's response will either: (i) provide a description of Make-Ready identified by Utility and a cost estimate for the Utility's portion of that Make-Ready; or (ii) provide a written explanation as to why the Application is being denied, in whole or in part.

6.4.2.3. If Utility does not meet the timeframe described in this Section 6.4.2 to complete the Pre-Construction Survey, the Wireless Service Provider may, at its option, hire a Utility approved professional engineer or an approved Wireless Service Provider employee or contractor to conduct the Survey. Any such Pre-Construction Survey shall by subject to review and approval by Utility.

6.4.3 Response to Estimate. Upon receipt of Utility's response, a Wireless Service Provider shall have sixty (60) days to approve the estimate of any proposed Make-Ready Work and, if advance payment is required, provide payment in accordance with this Regulation and the specifications of the estimate.

6.5. **Permit for Installation in Public Right-of-Way.** Wireless Service Providers shall submit a properly executed Permit Application to the City which accurately describes the location, dimensions, and appearance of any Wireless Communication Facilities or Wireless Support Structures to be installed in the public right-of-way, along with other information required by this Regulation. Designated City and Utility employees may administratively approve Applications to install attachments of Wireless Communication Facilities to City Poles and Utility Poles, respectively, and installation of Wireless Support Structures upon payment of proper fees by the Applicant, provided that the Application fully complies with all requirements of this Regulation and meets the design standards of Appendix B. Noncompliant Applications may only be approved by designated City and Utility employees when fully compliant with City ordinances and aesthetic standards. The denial of a permit may be appealed in accordance with Section 4.3

6.6. **Permit as Authorization to Attach.** Upon completion and inspection of any necessary Make-Ready Work and receipt of payment for such work, City and/or Utility will sign and return the Permit Application, which shall serve as authorization for the Wireless Service Provider to make its Attachment(s).

6.7. **Notification to Utility.** Within thirty (30) days of completing the installation of an Attachment, each Wireless Service Provider shall provide written notice and as-builts, as required to Utility.

## Article 7. Make-Ready Work/Installation

7.1. **Estimate for Make-Ready Work.** As per Article 6, if Utility determines that it can accommodate a Wireless Service Provider's request for Attachment(s), it will advise the Wireless Service Provider of any estimated Make-Ready Work charges necessary to accommodate the Attachment.

7.2. **Who May Perform Make-Ready**. Make-Ready Work shall be performed only by Utility and/or a qualified contractor authorized by Utility to perform such work.

7.2.1. Unless otherwise agreed by Utility, only Utility or its contractor will set any new or replacement Poles or perform Make-Ready in the electric supply space.

7.3. **Time Frame for Completion of Make-Ready**. If Utility, or its contractor, is performing Make-Ready Work it will use good faith efforts to complete routine Make-Ready Work within ninety (90) days of receipt of the Wireless Service Provider's approval of the Make-Ready

estimate (and advance payment if required). If there are extenuating circumstances that make the necessary Make-Ready Work more complicated or time-consuming, including, but not limited to, the relative novelty of the type of Wireless Communication Facilities and associated equipment to be attached, the total number of Poles upon which Utility is currently obligated to perform Make-Ready Work, or seasonal weather conditions, Utility shall identify those factors in the Make-Ready description and cost estimate and the parties shall agree upon a reasonable timeframe for completion. If Utility does not complete agreed upon Make-Ready work within ninety (90) days, or the agreed-upon timeframe, it may allow the Wireless Service Provider to use a Utility approved qualified contractor to complete such Make-Ready Work and refund any amounts paid by the Wireless Service Provider to Utility for performing such Make-Ready Work that is not completed.

7.3.1. Utility may delay the time period for completion of Make-Ready work by written notice in order to respond to severe storms, natural disasters, or other emergency situations.

7.4. **Scheduling of Make-Ready Work**. In performing all Make-Ready Work to accommodate Wireless Service Provider's Attachments, Utility will endeavor to include such work in its normal work schedule. If a Wireless Service Provider requests, and Utility agrees, to perform Make-Ready Work on a priority basis or outside of Utility's normal work hours, the Wireless Service Provider will pay any resulting increased actual and documented costs. Nothing in this Regulation shall be construed to require Utility to perform a Wireless Service Provider's work before other scheduled work or Utility service restoration.

7.5. **Payment for Make-Ready Work**. Upon completion of the Make-Ready Work performed by Utility, Utility shall invoice the Wireless Service Provider for Utility's actual and documented cost of such Make-Ready Work. The costs of the work shall be itemized in accordance with Article 3, and if Utility received advance payment, the costs shall be trued up in accordance with Article 3. Each Wireless Service Provider shall be responsible for entering into an agreement with other existing Attaching Entities to reimburse them for any costs that they incur in rearranging or transferring their facilities to accommodate the Wireless Service Provider's Attachments.

7.6. **Notification of Make Ready Work.** Before starting Make-Ready Work, Utility shall notify all existing Attaching Entities of the date and location of the scheduled work and notify them of the need to rearrange and/or transfer their facilities at the Wireless Service Provider's cost within the specified time period. To the extent that Utility has the legal authority, it shall rearrange and/or transfer existing facilities of such other Attaching Entities that have not been moved in a timely manner. The Wireless Service Provider shall pay for any such rearrangement or transfer.

7.6.1. In instances where a Wireless Service Provider is performing Make-Ready, where an existing Attaching Entity has not relocated or otherwise undertaken work required to complete Make-Ready (such as repairing existing Attachments not in compliance with Applicable Standards) within ninety (90) days of notice by Utility or the Wireless Service Provider to such other Attaching Entity, the Wireless Service Provider is authorized, to the extent that Utility has such authority, and the legal ability to delegate such authority, to relocate or repair the other Attaching Entity's Attachments on behalf of Utility. The

Wireless Service Provider shall pay the costs to relocate the other Attaching Entity's Attachments as part of the Wireless Service Provider's Make Ready.

7.7. **Operator's Installation/Removal/Maintenance Work.**

7.7.1. All of the Wireless Service Provider's installation, removal, and maintenance work, by either the Wireless Service Provider's employees or authorized contractors, shall be performed at the Wireless Service Provider's sole cost and expense, in a good and workmanlike manner, and must not adversely affect the structural integrity of Utility's Poles or other Facilities or other Attaching Entity's facilities or equipment. All such work is subject to the insurance requirements of Article 25.

7.7.2. All of a Wireless Service Provider's installation, removal, and maintenance work, either by its employees or authorized contractors, shall comply with all applicable regulations specified in Section 4.1. Wireless Service Providers shall assure that any person installing, maintaining, or removing its Wireless Communication Facilities is fully qualified and familiar with all Applicable Standards, and the design specifications established by Utility.

7.7.3. Notwithstanding anything to the contrary in this Regulation, subsequent to the original installation of Wireless Service Provider's Wireless Communications Facilities, Wireless Service Provider may modify or replace the Wireless Communications Facilities without obtaining prior written consent of City or Utility so long as such modification or replacement does not, except in a minimal manner: (a) modify the external appearance of the Wireless Communication Facility; (b) increase the electric consumption of the Wireless Communication Facility; (c) increase the load on the applicable Pole beyond the loading, if any, that was established in the approved Application; or (d) involve placement of equipment outside the area designated in the approved Application. Licensee may request, and City and/or Utility shall timely provide, a determination as to whether a modification or replacement made subsequent to original installation deviates from the original permit sufficiently to require the issuance of a permit.

**Article 8. Post-Installation Inspections**

8.1. No Person shall energize any Wireless Communication Facility unless and until it has passed Post-Installation Inspection.

8.2. Within five (5) business days after the Wireless Service Provider notifies the City and/or Utility that the installation of a Wireless Support Structure or Wireless Communication Facility has been completed, the City, Utility or their contractors shall perform a Post-Installation Inspection to ensure all work was performed in accordance with the Permit and Applicable Standards. If City and/or Utility fail to perform the Post-Installation Inspection within the 5-day period, any affected Wireless Support Structure or Wireless Communication Facility may be used as if it had passed the inspection; provided, however, that if City and/or Utility identifies any violation when actually performing the Post-Installation Inspection, Wireless Service Provider shall have thirty (30) days from the date of receipt of such notice to correct such violation(s), or such other period as the

parties may agree upon in writing, unless such violation creates an Emergency in which case the Wireless Service Provider shall make all reasonable efforts to correct such violation immediately. A reinspection fee, as shown on Appendix A, will be charged to the Wireless Service Provider for each additional inspection of the facility.

8.3. If the Post-Installation inspection reveals that a Wireless Service Provider's facilities have been installed in violation of a Permit or Applicable Standards, City and/or Utility will notify the Wireless Service Provider in writing and the Wireless Service Provider shall have thirty (30) days from the date of receipt of such notice to correct such violation(s), or such other period as the parties may agree upon in writing, unless such violation creates an Emergency in which case the Wireless Service Provider shall make all reasonable efforts to correct such violation immediately. Upon receipt of notice from Wireless Service Provider that such violation has been corrected, City and/or Utility shll promptly perform a reinspection of the Wireless Support Structure or Wireless Communication Facility. A reinspection fee, as shown on Appendix A, will be charged to the Wireless Service Provider for each additional inspection of the facility.

8.4. If a Wireless Service Provider's Attachments remain out of compliance with Applicable Standards or approved design after any three (3) subsequent inspections or a period of ninety (90) days, consistent with Article 19 City and/or Utility will provide notice of the continuing violation and the Wireless Service Provider will have thirty (30) days from receipt of such notice to Correct the violation, otherwise the provisions of Article 19 shall apply.

## Article 9. Abandonment of Permit

City or Utility may deem a Permit to be abandoned if a Wireless Service Provider does not: (1) begin work authorized by a Permit issued under this Regulation within one hundred eighty (180) calendar days of the effective date of such right to begin work, unless such time period is extended; or (2) request a Post-Installation inspection of completed work within two hundred seventy days (270), unless such time period is extended. If a Permit is deemed to be abandoned in accordance with this Article, City or Utility may, but shall have no obligation to, use the space allocated for a Wireless Service Provider's Attachment(s) for its own needs or make the space available to other Attaching Entities. Application Fees associated with abandoned Permits shall not be refunded.

## Article 10. Rearrangements and Transfers

10.1 **Required Transfers of Wireless Communication Facilities.** If Utility reasonably determines that a rearrangement or transfer of a Wireless Communication Facility is necessary, including as part of Make-Ready to accommodate another Attaching Entity's Attachment, Utility will require the Wireless Service Provider who owns the Wireless Communication Facilities to perform such rearrangement or transfer within ninety (90) days after receiving notice from Utility, or other agreed upon notification. If the Wireless Service Provider fails to rearrange or transfer its Attachment within ninety (90) days after receiving such notice from Utility, the provisions of Article 19 shall apply, including Utility's right to rearrange or transfer the Wireless Communication Facilities ninety (90) days after the Wireless Service Provider's receipt of original notification of the need to rearrange or transfer its facilities. The actual and documented costs of such rearrangements or transfers shall he apportioned as specified under Article 10.2. Utility shall not be liable for damage to Wireless Communication Facilities except to the extent

provided in Article 23. In Emergency situations, Utility may rearrange or transfer Wireless Communication Facilities as it determines to be necessary in its reasonable judgment. In Emergency Situations Utility shall use reasonable efforts provide such notice as is practical, given the urgency of the particular situation., If a Wireless Service Provider fails to rearrange and/or transfer its Wireless Communication Facilities within the prescribed time period, Utility may delegate its authority to rearrange and/or transfer the Wireless Communication Facilities to an authorized Attaching Entity or its authorized contractors. In such case, another Attaching Entity may rearrange or transfer the Wireless Communication Facilities ninety (90) days after the Wireless Service Provider's receipt of original notification of the need to rearrange or transfer its facilities.

10.2 **Allocation of Costs.** The costs for any rearrangement or transfer of any Wireless Communication Facilities or the replacement of a Pole (including, without limitation, any related costs for tree cutting or trimming required to clear the new location of Utility's cables or wires) shall be allocated to Utility and/or the Wireless Service Provider that owns the Wireless Communication Facilities and/or other Attaching Entity on the following basis:

10.2.1. If Utility intends to modify or replace a Pole solely for its own requirements, it shall be responsible for the Utility's costs related to the modification/replacement of the Pole. The Wireless Service Provider shall be responsible for costs associated with the rearrangement or transfer of the Wireless Service Provider's Wireless Communication Facilities. Prior to making any such modification or replacement, Utility shall make reasonable efforts to provide the Wireless Service Provider at least ninety (90) days written notification of its intent in order to provide the Wireless Service Provider a reasonable opportunity to modify. Should the Wireless Service Provider decide to do so, it must seek Utility's written permission in accordance with this Regulation. If the Wireless Service Provider elects to add to or modify its Wireless Communication Facilities, the Wireless Service Provider shall pay its fair share of the costs incurred by Utility in making the space on the Poles accessible to the Wireless Service Provider.

10.2.2. If the modification or replacement of a Pole is necessitated by the requirements of a Wireless Service Provider, the Wireless Service Provider shall be responsible for all costs caused by the modification or replacement of the Pole as well as the costs associated with the transfer or rearrangement of any other Attaching Entity's facilities. At the time the Wireless Service Provider submits a Permit Application to Utility, the Wireless Service Provider shall submit evidence in writing that it has made arrangements to reimburse all affected Attaching Entities for their costs caused by the transfer or rearrangement of their Facilities. Utility shall not be obligated in any way to enforce or administer the Wireless Service Provider's responsibility for the costs associated with the transfer or rearrangement of another Attaching Entity's Facilities pursuant to this Article.

10.2.3. If the modification or the replacement of a Pole is the result of an additional Attachment or the modification of an existing Attachment sought by an Attaching Entity other than Utility or the Wireless Service Provider, the Attaching Entity requesting the additional or modified Attachment shall bear the entire cost of the modification or

replacement, as well as the costs for rearranging or transferring the Wireless Service Provider's Wireless Communication Facilities. The Wireless Service Provider shall cooperate with such third-party Attaching Entity to determine the costs of moving the Wireless Service Provider's facilities.

10.3. If the Pole must be modified or replaced for reasons unrelated to the use of the Pole by Attaching Entities or Utility (*e.g.*, storm, accident, deterioration), Utility shall pay the costs of such modification or replacement and the Wireless Service Provider shall pay the costs of rearranging or transferring its Wireless Communication Facilities.

**Article 11. Pole Replacements**

11.1. **Utility/City Not Required to Replace.** Nothing in this Regulation shall be construed to require City or Utility to replace its Poles for the benefit of a Wireless Service Provider.

11.2. **Ownership of Replacement Pole.** In all instances a replaced Pole will remain the property of City or Utility, as prior to this Regulation.

11.3. **Customized Poles.** Whenever a Wireless Service Provider uses a customized pole to install a Wireless Communication Facility on or within a Streetlight Pole, the Wireless Service Provider will provide an identical spare of the customized pole to the Utility at no cost; provided, if the same type of customized pole is used at multiple locations, the Wireless Service Provider need only provide one spare.

**Article 12. Treatment of Multiple Requests for Same Pole**

If Utility receives a Permit Application for attachment of a Wireless Communication Facility from a Wireless Service Provider and a wireline attachment application from a third-party attaching entity for the same Pole and has not yet completed the Permitting of the initial applicant, and accommodating the respective requests would require modification of the Pole or replacement of the Pole, Utility will make reasonable and good faith efforts to allocate among the Wireless Service Provider and such third-party attaching entity the applicable costs associated with such modification or replacement.

**Article 13. Equipment Attachments**

13.1. Each Wireless Service Provider shall compensate City and Utility for the actual and documented cost, including engineering and administrative cost, for rearranging, transferring, and/or relocating Utility's Poles to accommodate the Wireless Service Provider's Equipment Attachments.

13.2. Each Wireless Service Provider shall reimburse the owner or owners of other facilities attached to City or Utility Poles for any actual and documented cost incurred by them for rearranging or transferring such facilities to accommodate the Wireless Service Provider's Equipment Attachments.

**Article 14. Authorized Contractors**

Wireless Service Providers shall only use authorized, qualified contractors approved by Utility to conduct Make-Ready Work (or any other work), such approval not to be unreasonably withheld, conditioned or delayed.

**Article 15. Guys and Anchor Attachments**

Utility shall install all guy wires and anchors at the Wireless Service Provider's sole cost to sustain any unbalanced loads caused by the Wireless Service Provider's Attachments. The Wireless Service Provider shall bear all costs associated with the Utility's maintenance, replacement, or reinstallation of required guy wires and anchors.

**Article 16. Installation of Grounds**

When Utility is requested by a Wireless Service Provider to install grounds or make connections to Utility's system neutral, the Wireless Service Provider shall within sixty (60) days of demand reimburse Utility for the total actual and documented costs including engineering, clerical and administrative cost thereby incurred on initial installation only. All grounds installed by the Wireless Service Provider shall be in accordance with Utility's standard grounding practices.

**Article 17. Change in Utility Facilities that Forfeits Attachment Accommodations.**

17.1. **Notice of Change in City or Utility Facilities that Forfeits Attachment Accommodations**. Prior to changing any City or Utility Facility to which Wireless Communication Facilities are attached in such a manner that attachment will no longer be reasonably possible (including without limitation: abandonment, removal, relocation underground, replacement, or reconfiguration), the owner of such Wireless Communication Facilities shall be provided at least ninety (90) calendar days prior written notice by City or Utility, as apropriate. Provided that, notice may be less than ninety (90) calendar days as a result of the action of a third party and the ninety day notice period is not practical. If, following the expiration of the notice period, the owner of the Wireless Communication Facilities has not yet removed and/or transferred all of its Wireless Communication Facilities, City and/or Utility shall have the right, but not the obligation, to remove or transfer the Wireless Communication Facilities at the owner's expense and the owner shall be subject to the provisions of Article 19.

17.1.1. **Underground Relocation**. If Utility moves any portion of its aerial system underground pursuant to City requirements, Wireless Service Providers shall remove their Wireless Communication Facilities from any affected Poles within the notice period as established in 17.1 *supra* and must either relocate its affected Wireless Communication Facilities underground with Utility or find other means to accommodate its Wireless Communication Facilities. If a Wireless Service Provider does not remove its Wireless Communication Facilities, the Utility shall have the right to remove or transfer the Wireless Communication Facilities at the owner's expense. A Wireless Service Provider's failure to remove its Facilities as required under this Article 17.1 shall subject such Wireless Service Provider to the provisions of Article 19.

17.1.2. **Replace/Reconfigure Utility Facilities without Attachment Accommodations**. If Utility replaces or reconfigures any portion of its aerial facilities, Utility will make reasonable efforts to accommodate the existing attachments on the replaced/reconfigured Utility facilities by utilizing all available make-ready procedures subject to allocation of costs described in Section 10.2. If the Utility, at its sole discretion, reasonably determines the Attachments cannot be accommodated on the replaced/reconfigured Utility facilities, Wireless Service Providers shall remove facilities from the affected poles, within the notice period as described in 17.1 and must, at their own expense, find other means to accommodate their facilities. When Utility can accommodate some, but not all, of the existing Attachments, the Utility will allow reattachment in the order the Attachments were originally installed, unless otherwise stipulated in this Regulation. If a Wireless Service Provider does not remove its Attachments within the notice period, Utility shall have the right to remove them at the Wireless Service Provider's expense. Failure to remove facilities as required under this Article 17.1.2 shall subject Wireless Service Providers to the provisions of Article 19.

## Article 18. Inspection

18.1. **General Inspections.** City and Utility reserve the right to make periodic inspections, as conditions may warrant, of all Wireless Communication Facilities. Such inspections, or the failure to make such inspections, shall not operate to relieve any Wireless Service Provider of any responsibility or obligation or liability assumed under this Regulation.

18.2. **Periodic Safety Inspections**. Utility may at its option and expense perform a safety inspection in all or in part of the territory covered by this Regulation to identify any safety violations of all Attachments and Wireless Communication Facilities on Utility Poles ("Safety Inspection"). Wireless Service Providers shall correct any and all safety violations at their own expense per Section 18.3.

18.3. **Corrections**. In the event any Wireless Communication Facilities are found to be in violation of the Applicable Standards and such violation poses a potential Emergency, the owner of such Facilities shall use all reasonable efforts to correct such violation immediately. Should the owner fail or be unable to correct such potential Emergency immediately, City or Utility may correct the potential Emergency and bill the owner for the actual and documented costs incurred, including Overhead. If any Wireless Communication Facilities are found to be in violation of the Applicable Standards and such violations do not pose a potential Emergency, City or Utility shall, consistent with Article 19, give notice to the owner of the Wireless Communication Facilities, whereupon the owner shall have thirty (30) days from receipt of notice to correct any such violation, or up to ninety (90) days by agreement with City or Utility. In the event City, Utility or another Attaching Entity prevents an owner of Wireless Communication Facilities from correcting a non-Emergency violation, the timeframe for correcting such violation shall be extended one day for each day the owner was so delayed. No Wireless Service Provider will be responsible for the costs associated with violations caused by other Attaching Entities that are not affiliated with them or acting under their direction. In all circumstances, all of the Attaching Entities on each Pole and City or Utility will work together to maximize safety while minimizing the cost of correcting deficiencies, but the entity responsible for the violation will be responsible for the actual and documented cost of any necessary or appropriate corrective measures, including removal and

replacement of the Pole and all transfers or other work incident thereto. If a Wireless Service Provider fails to Correct a non-Emergency violation within the specified time period, including any extensions, the provisions of Article 19 shall apply.

18.3.1. If any facilities of City and/or Utility are found to be in violation of the Applicable Standards and specifications and City and/or Utility has caused the violation, then the parties will work together to minimize the cost of correcting any such deficiencies, but City and/or Utility shall be responsible for the full cost of any necessary or appropriate corrective measures, including removal and replacement of the Poleprovided, however, that Utility shall not be responsible for a Wireless Service Provider's transfer or rearrangement costs.

18.3.2. If one or more Attaching Entity caused the violation, then such Attaching Entities shall pay the Corrective costs incurred by all who have Attachments on the Pole, including any Wireless Service Provider, and Utility will make reasonable effort to cause the Attaching Entity to make such payment.

18.3.3. If there exists a violation of Applicable Standards and it cannot be determined which Attaching Entity on the Pole caused such violation or there is a mixture of the Attaching Entities causing the violation, then the parties will work together to minimize the cost of correcting any such deficiencies, and all Attaching Entities who may have caused such violation will share equally in such costs.

**Article 19. Failure to Rearrange, Transfer or Correct**

19.1. Unless otherwise agreed, as part of City's or Utility's written notice of a need for a Wireless Service Provider to rearrange, transfer, remove or Correct violations, City or Utility will indicate whether or not City or Utility is willing to perform the required work.

19.2. If City or Utility indicates in the notice that it is willing to perform the work, the Wireless Service Provider shall have thirty (30) days to notify City or Utility in writing of its election to have City or Utility perform the work or that the work will be performed by an entity other than City or Utility.

19.2.1. If the Wireless Service Provider requests that City or Utility perform the work, the Wireless Service Provider shall reimburse City or Utility for the actual and documented cost of such work, including Overhead.

19.2.2. If the Wireless Service Provider either fails to respond or indicates that the work will be performed by an entity other than the City or Utility, then until such work is complete and City or Utility receives written notice of the completion of such work, the Wireless Service Provider shall be subject to a daily continuing violation fee as specified in Appendix A, per Attachment, per day commencing on the day after expiration of the time period for completion of the work as specified in this Regulation.

19.2.3. Notwithstanding a Wireless Service Provider's election under Article 19.2.2 to perform the required work by an entity other than City or Utility, commencing on the thirtieth (30th) day after expiration of the time period for completion of the work as

specified in this Regulation, City or Utility may perform the required work at the Wireless Service Provider's expense, or may delegate such authority to another Attaching Entity or a qualified contractor and impose all applicable penalties under Exhibit A.

19.2.4. If a Wireless Service Provider was required to perform work under this Article 19 and fails to perform such work within the specified timeframe, and City or Utility performs such work, City or Utility may charge the Wireless Service Provider its actual and documented costs, including Overhead, for completing such work.

19.3. If Utility indicates in the notice that it is unwilling or unable to perform the work, then until such work is completed and Utility receives written notice of the completion of such work, the Wireless Service Provider shall be subject to a daily penalty as specified in Exhibit A, per Attachment, per day commencing on the day after expiration of the time period for completion of the work as specified in this Regulation.

19.4. Wireless Service Providers shall provide timely written notification to City or Utility upon completion of work necessary to Correct a violation or deficiency. All applicable daily penalties and fees will continue to accrue until City's or Utility's receipt of such notice of completion. Notice of completion shall be delivered by the same means as it was received from City or Utility.

**Article 20. Actual Inventory**

20.1. At intervals of three (3) years or more, City or Utility may inventory all Attachments on City or Utility's Facilities made by a particular Wireless Service Provider. Such inventory shall be made jointly by all parties and shall be at the cost of the Wireless Service Provider, such costs to be actual and documented, unless Utility is also performing an inventory of any other Attaching Entity with Attachments on such Poles, and then the actual and documented cost shall be shared proportionately among all such Attaching Entities based upon the number of Attachments.

20.1.1 Utility may at any time perform an inventory at its own expense to verify the number of reported Attachments. Wireless Service Providers shall pay the costs of such inventory if its unauthorized or unreported Attachments exceeds five percent (5%) of the Wireless Service Provider's Attachments that are authorized and reported.

**Article 21. Unauthorized Attachments**

If the City discovers unauthorized Wireless Communication Facilities or Wireless Support Structures in the public right-of-way, or Utility discovers Unauthorized Attachments placed on its Poles or other Facilities, the following fees may be assessed, and procedures will be followed:

21.1. City or Utility, as appropriate, shall provide specific written notice of each violation and the owner of the unauthorized Wireless Communication Facilities, Wireless Support Structures or Attachment shall be given thirty (30) days from receipt of notice to contest an allegation that the Wireless Communication Facilities, Wireless Support Structures, or Attachment is unauthorized. If the owner cannot be ascertained, the City or Utility will post a notice of violation on the Wireless Communication Facilities, Wireless Support Structures or Attachment believed to be unauthorized.

21.2. In addition to all other fines or penalties that may be assessed by a court of law, the owner of an unauthorized Wireless Communication Facilities, Wireless Support Structures or Attachment shall pay double rent and fees for a period of three (3) years, or since the date of the last inventory of Attachments (whichever period is shortest), at the rates in effect during such periods.

21.3. The owner of an unauthorized Wireless Communication Facilities, Wireless Support Structures or Attachment shall submit a Permit Application in accordance with this Regulation within thirty (30) days of receipt of the notice described in this Article 21, or such longer time as may be agreed by the City or Utility.

21.4. In the event a Wireless Service Provider fails to submit a Permit Application within thirty (30) days, or such longer time as mutually agreed to by the parties after an inventory, the provisions of Article 19 shall apply.

21.5. **No Ratification of Unauthorized Use**. No act or failure to act by City or Utility with regard to any unpermitted Wireless Communication Facilities, unpermitted Wireless Support Structures, or Unauthorized Attachments shall be deemed as ratification or waiver of any requirement under this Regulation. Unless the parties agree otherwise, a Permit for a previously Unauthorized Attachment shall not operate retroactively or constitute a waiver by Utility of any of its rights or privileges under this Regulation or otherwise, and the Wireless Service Provider shall remain subject to all obligations and liabilities arising out of or relating to its unauthorized use.

**Article 22. Reporting Requirements.**

In addition to the inventory provisions described in Article 20 above, when a Wireless Service Provider pays its annual fees, the Wireless Service Provider shall also provide the following information to City and Utility:

22.1. All Attachments that have become nonfunctional during the relevant reporting period. The report shall identify the Pole on which the nonfunctional Attachment is located, indicate the approximate date the Attachment became nonfunctional, and shall provide a schedule for removal.

22.2. Any equipment the Wireless Service Provider has removed from Poles during the relevant reporting period. The report shall identify the Pole from which the equipment was removed and indicate the approximate date of removal. This requirement does not apply where a Wireless Service Provider is surrendering a Permit.

**Article 23. Liability and Indemnification**

23.1. **Liability.** City and Utility reserve to themselves the right to maintain and operate their Poles in the manner that will best enable them to fulfill their service requirements. As a condition of every permit, Wireless Service Providers must agree that its use of City's and Utility's Facilities is at the sole risk of the Wireless Service Provider. Notwithstanding the foregoing, City and Utility shall exercise reasonable precaution to avoid damaging Wireless Communication Facilities and shall report to Wireless Service Providers the occurrence of any

such damage caused by its employees, agents or contractors. Subject to Section 23.5, City and Utility will reimburse Wireless Service Providers for all reasonable costs incurred during the physical repair of facilities damaged by the gross negligence or willful misconduct of City and/or Utility.

23.2. **Indemnification.** As a condition of every permit, Wireless Service Providers, as well as their agents, contractors, and subcontractors, ("Wireless Service Provider Indemnitors") shall be required to defend, indemnify, and hold harmless City and Utility and their respective officials, officers, board members, council members, representatives, employees, agents, and contractors against any and all liability, costs, damages, fines, taxes, special charges by others, penalties, payments (including payments made by Utility under any Workers' Compensation Laws or under any plan for employees' disability and death benefits), and expenses (including reasonable attorney's fees of Utility and all other costs and expenses of litigation) ("Covered Claims") arising in any way or in connection with the negligent construction, maintenance, repair, presence, use, relocation, transfer, removal or operation of Wireless Communication Facilities and/or Wireless Support Structures by a Wireless Service Provider or their officers, directors, employees, agents, contractors, or subcontractors, except to the extent that City's or Utility's negligence or willful misconduct gives rise to such Covered Claims. Covered Claims shall include, but are not limited to, the following:

23.2.1. Intellectual property infringement, libel and slander, trespass, unauthorized use of television or radio broadcast programs and other program material, and infringement of patents;

23.2.2. Cost of work performed by Utility that was necessitated by a Wireless Service Provider's failure, or the failure of a Wireless Service Provider's officers, directors, employees, agents, contractors, or subcontractors to install, maintain, use, transfer, or remove their Wireless Communication Facilities in accordance with the requirements and specifications of this Regulation, or from any other work this Regulation authorizes Utility to perform on behalf of a Wireless Service Provider;

23.2.3. Damage to property, injury to or death of any person arising out of the performance or nonperformance of any work or obligation undertaken by a Wireless Service Provider, or a Wireless Service Provider's officers, directors, employees, agents, contractors, or subcontractors pursuant to this Regulation;

23.2.4. Liabilities incurred as a result of a Wireless Service Provider's violation, or a violation by a Wireless Service Provider's officers, directors, employees, agents, contractors, or subcontractors of any law, rule, or regulation of the United States, any state, or any other governmental entity or administrative agency.

23.2.5. Environmental harm arising from or due to the release, threatened release or storage of hazardous substances on, under, or around Utility's Poles and Facilities or City public rights-of-way attributable to an Indemnitor.

**23.3. Procedure for Indemnification.**

23.3.1. City or Utility shall give prompt written notice of any claim or threatened claim to the appropriate Indemnitors, specifying the factual basis for such claim and the amount of the claim. If the claim relates to an action, suit, or proceeding filed by a third party against City or Utility, City or Utility shall give the notice to Indemnitors no later than fifteen (15) calendar days after City or Utility receives written notice of the action, suit, or proceeding.

23.3.2. City, Utility or Wireless Service Provider's failure to give the required notice will not relieve any Indemnitor from its obligation to indemnify City, Utility or Wireless Service Provider unless, and only to the extent, that an Indemnitor is materially prejudiced by such failure.

23.3.3. Indemnitor will have the right at any time, by notice to City, Utility or Wireless Service Provider (as appropriate), to participate in or assume control of, the defense of the claim with counsel of its choice, which counsel must be reasonably acceptable to the indemnified party. City, Utility or Wireless Service Provider agree to cooperate fully with Indemnitor. If Indemnitor assumes control of the defense of any third-party claim, City, Utility or Wireless Service Provider shall have the right to participate in the defense at its own expense. If Indemnitor does not assume control or otherwise participate in the defense of any third-party claim, Indemnitor shall be bound by the results obtained by City, Utility or Wireless Service Provider with respect to the claim.

23.3.4. If Indemnitor assumes the defense of a third-party claim as described above, then in no event will City, Utility or Wireless Service Provider admit any liability with respect to, or settle, compromise or discharge, any third-party claim without Indemnitor's prior written consent.

23.4. **Environmental Hazards.** As a condition of every permit, Wireless Service Providers shall represent and warrant that their use of Utility's Poles and/or Facilities and/or City public rights-of-way will not generate any Hazardous Substances, that it will not store or dispose on or about City's or Utility's Poles and/or Facilities or transport to City's or Utility's Facilities any hazardous substances and that no Wireless Communication Facilities or Wireless Support Structures will constitute or contain or generate any hazardous substance in violation of federal, state, or local law now or hereafter in effect, including any amendments. "Hazardous Substance" shall be interpreted broadly to mean any substance or material designated or defined as hazardous or toxic waste, hazardous or toxic material, hazardous or toxic or radioactive substance, dangerous radio frequency radiation, or other similar terms by any federal, state, or local laws, regulations or rules now or hereafter in effect, including any amendments. As a condition of every permit, Wireless Service Providers must further represents and warrants that in the event of breakage, leakage, incineration, or other disaster, its Wireless Communication Facilities would not release any Hazardous Substanees.

23.5. **No Consequential Damages.** As a condition of every permit, Wireless Service Providers shall he required to agree that, notwithstanding any other provision of this Regulation, neither any entity receiving a permit or any entity issuing a permit shall be liable to one another for any consequential, incidental, indirect, liquidated, or special damages or lost revenue or lost profits to any person arising out of this Regulation, or any Permit issued under this Regulation, or any

performance or nonperformance of any provision of this Regulation, even if such entity has been informed of the possibility of such damages.

23.6. **Municipal Liability Limits.** No provision of this Regulation is intended, or shall be construed, to be a waiver for any purpose by City or Utility of any applicable state limits on municipal liability or governmental immunity. No indemnification provision contained in this Regulation under which an Indemnitor indemnifies City or Utility shall be construed in any way to limit any other indemnification provision contained in this Regulation, or constitute insurance under state law.

## Article 24. Duties, Responsibilities, and Exculpation

24.1. **Duty to Inspect.** As a condition of every permit, Wireless Service Providers shall acknowledge and agree that City and Utility do not warrant the condition or safety of Utility's Facilities and City's public rights-of-way, or the premises surrounding the Facilities, and that all Wireless Service Providers have an obligation to inspect Utility's Poles or premises surrounding such Facilities, prior to commencing any work on Utility's Poles or entering the premises surrounding such Facilities.

24.2. **Knowledge of Work Conditions.** As a condition of every permit, Wireless Service Provider shall warrant that it has acquainted, or will fully acquaint, itself and its employees and/or contractors and agents with the conditions relating to the work that the Wireless Service Provider will undertake and that it fully understands or will acquaint itself with the facilities, difficulties, and restrictions attending the execution of such work.

24.3. **Duty of Competent Supervision and Performance.** As a condition of every Permit authorizing attachment to a Distribution Pole, Wireless Service Providers shall acknowledge that its agents, employees, contractors, and subcontractors will work near electrically energized lines, transformers, or other City or Utility Facilities, that energy generated, stored, or transported by Utility Facilities will not be interrupted except in Emergencies, and that Wireless Service Providers have the duty to ensure that their employees, agents, contractors, and subcontractors have the necessary qualifications, skill, knowledge, training, and experience to protect themselves, their fellow employees, agents, contractors, and subcontractors; employees, agents, contractors, and subcontractors of Utility; and the general public, from harm or injury while performing work permitted pursuant to this Regulation. Wireless Service Providers must furnish its employees, agents, contractors, and subcontractors competent supervision and sufficient and adequate tools and equipment for their work to be performed in a safe manner. When circumstances necessitate de-energization any part of Utility's equipment, Wireless Service Providers shall ensure that work is suspended until the equipment has been de-energized and that no such work is conducted unless and until the equipment is made safe.

24.4. **Requests to De-energize.** Typically, Utility shall only de-energize its electric facilities in response to Emergency situations, and any such de-energizations shall be at Utility's sole discretion. Wireless Service Providers shall be responsible for all costs related to any request to de-energize any equipment or lines in accordance with Article 3.8.

24.4.1. Wireless Service Providers may request nonemergency de-energization with 24 hours' notice. Wireless Service Providers shall be responsible for all costs related to any request to de-energize any equipment or lines in accordance with Article 3.8. Before Utility de-energizes any equipment or line, it shall provide, upon request, an estimate of all costs and expenses to be incurred in accommodating a Wireless Service Provider's request.

24.5. **Interruption of Service.** If a Wireless Service Provider causes an interruption of service by damaging or interfering with any equipment of Utility, such Wireless Service Provider shall, at its own expense, immediately do all things reasonable to avoid injury or damages, direct and incidental, resulting therefrom and shall notify Utility immediately.

24.6. **Duty to Inform.** As a condition of every permit to attach to a Utility Pole, Wireless Service Providers shall warrant that they understand the imminent dangers (INCLUDING SERIOUS BODILY INJURY OR DEATH FROM ELECTROCUTION) inherent in the work necessary to make installations on Utility's Poles and other Facilities by such Wireless Service Provider's employees, agents, contractors, or subcontractors, including the inherent danger in working in close proximity to electric facilities.

**Article 25. Insurance**

25.1. **Policies Required.** As a condition of every permit, Wireless Service Providers shall keep in force and effect all insurance policies as described below:

25.1.1. **Workers' Compensation and Employers' Liability Insurance.** Statutory workers' compensation benefits and employers' liability insurance with a limit of liability no less than that required by Arkansas law at the time of the application of this provision for each accident. This policy shall include a waiver of subrogation in favor of City and Utility. Wireless Service Providers shall require subcontractors and others not protected under its insurance to obtain and maintain such insurance.

25.1.2. **Commercial General Liability Insurance.** Policy on form ISO CGL 00 01 or equivalent will be written to provide coverage for, but not limited to, the following: premises and operations, products and completed operations (not excluding injury or harms caused by RF emissions), personal injury, blanket contractual liability coverage, broad form property damage, independent contractor's coverage with limits of liability of $2,000,000 general aggregate, $2,000,000 products/completed operations aggregate, $2,000,000 personal injury, $2,000,000 each occurrence. City and/or Utility shall be added as an additional insured on ISO CG 20 10 or equivalent.

25.1.3. **Automobile Liability Insurance.** Business automobile policy covering all owned, hired and non-owned private passenger autos and commercial vehicles. Limits of liability of $1,000,000 each occurrence, $1,000,000 aggregate.

25.1.4. **Umbrella Excess Liability Insurance.** Coverage is to be in excess of employers' liability, commercial general liability, and automobile liability insurance required above. Limits of liability of $5,000,000 each occurrence, $5,000,000 aggregate. Wireless

Service Provider may use any combination of primary and excess to meet required total limits.

25.1.5. **Property Insurance.** Wireless Service Providers shall be responsible for maintaining property insurance on its own facilities, buildings, and other improvements, including all equipment, fixtures, and utility structures, fencing, or support systems that may be placed on, within, or around Utility Facilities to protect fully against hazards of fire, vandalism and malicious mischief, and such other perils as are covered by policies of insurance commonly referred to and known as "extended coverage" insurance or self-insure such exposures.

Notwithstanding the forgoing, Wireless Service Provider may, in its sole discretion, self insure any of the required insurance under the same terms as required by this Regulation. In the event Wireless Service Provider elects to self-insure its obligation under this Regulation to include City and Utility as an additional insured, the following conditions apply: (i) City and Utility shall promptly and no later than thirty (30) days after notice thereof provide Wireless Service Provider with written notice of any claim, demand, lawsuit, or the like for which it seeks coverage pursuant to this Section and provide Wireless Service Provider with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand, lawsuit, or the like; (ii) City or Utility shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Wireless Service Provider; and (iii) City and Utility shall fully cooperate with Wireless Service Provider in the defense of the claim, demand, lawsuit, or the like.

25.2. **Qualification; Priority; Contractors' Coverage.** The insurer must be eligible to do business under the laws of the state of Arkansas and have an "A minus" or better rating in Best's Guide. Such required insurance will be primary. All contractors and all of their subcontractors who perform work on behalf of a Wireless Service Provider shall carry, in full force and effect, workers' compensation and employers' liability, commercial general liability, and automobile liability insurance coverages of the type that Wireless Service Providers are required to obtain under this Article 25 with reasonable and prudent limits.

25.3. **Certificate of Insurance; Other Requirements.** As a condition of every permit, Wireless Service Providers will furnish Utility with a certificate of insurance ("Certificate"). The Certificate shall reference this Regulation and workers' compensation and property insurance waivers of subrogation required by this Regulation. Utility and City shall be given thirty (30) calendar days advance notice of cancellation or nonrenewal of required insurance if not replaced during the term of this Regulation. Utility and City, its council members, board members, commissioners, agencies, officers, officials, employees and representatives (collectively, "Additional Insureds") shall be included as Additional Insureds under all of the required auto and general liability policies, except workers' compensation, which shall be so stated on the Certificate of Insurance. All policies, other than workers' compensation, shall be written on an occurrence and not on a claims-made basis. All policies may be written with deductibles or self-insured retentions. Upon request, Wireless Service Providers shall obtain Certificates from its agents, contractors, and their subcontractors working hereunder and provide a copy of such Certificates to Utility.

25.4. **Limits.** The limits of liability set out in this Article 25 may be increased or decreased by consent, which consent will not be unreasonably withheld by either Utility or any Wireless Service Provider, in the event of any factors or occurrences, including substantial increases in the level of jury verdicts or judgments or the passage of state, federal, or other governmental compensation plans, or laws that would materially increase or decrease a Wireless Service Provider's exposure to risk.

25.5. **Prohibited Exclusions.** No policies of insurance required to be obtained by a Wireless Service Provider or its contractors or subcontractors shall contain provisions that: (1) exclude coverage of liability assumed by this Regulation with City or Utility except as to infringement of patents or copyrights or for libel and slander in program material, (2) exclude coverage of liability arising from excavating, collapse, or underground work, (3) exclude coverage for injuries to City's or Utility's employees or agents, or (4) exclude coverage of liability for injuries or damages caused by the Wireless Service Provider's contractors or the contractors' employees, or agents. This list of prohibited provisions shall not be interpreted as exclusive.

25.6. **Deductible/Self-insurance Retention Amounts.** Wireless Service Providers shall be fully responsible for any deductible or self-insured retention amounts contained in their insurance or for any deficiencies in the amounts of insurance maintained.

## Article 26. Assignment

26.1. **Limitations on Assignment.** Wireless Service Providers shall not assign any permits granted under this Regulation, nor any part of such permits, without the prior written consent of Utility and City, which consent shall not be unreasonably withheld; provided, however, Wireless Service Provider may assign its rights and obligations to an Affiliate without consent upon prior written notice. Permits may only be assigned to a properly licensed and authorized Wireless Service Provider, or an Affiliate duly authorized to act on behalf of a properly licensed and authorized Wireless Service Provider.

26.2. **Obligations of Assignee/Transferee and Permittee.** No assignment or transfer under this Article 26 shall be allowed until the assignee or transferee becomes a signatory to the permit issued under this Regulation and assumes all associated obligations arising under this Regulation. Wireless Service Providers who seek to assign or transfer a permit shall furnish Utility or City with prior written notice of the transfer or assignment, together with the name and address of the transferee or assignee.

26.3. **Sub-permitting.** Wireless Service Providers shall not sub-permit, sub-license, lease, or otherwise allow any third parties to place Attachments on Utility's Facilities. Any such action shall constitute a violation of this Regulation and any permit held by such Wireless Service Provider. The authorized use of Wireless Communication Facilities by third parties that involves no additional Attachment is not subject to this Article 26.3.

## Article 27. Failure to Enforce

Failure of City, Utility or a Wireless Service Provider to take action to enforce compliance with any of the terms or conditions of this Regulation or to give notice or declare this Regulation

or any permit granted hereunder terminated shall not constitute a waiver or relinquishment of any term or condition of this Regulation, but the same shall be and remain at all times in full force and effect until terminated, in accordance with this Regulation.

**Article 28. Receivership, Foreclosure or Act of Bankruptcy.**

As a condition to every permit, Wireless Service Providers shall consent to termination by Utility and/or City of any and every permit one hundred twenty (120) days after the filing of bankruptcy or the appointment of a receiver or receivers or trustee or trustees to take over and conduct the business of the Wireless Service Provider whether in a receivership, reorganization, bankruptcy or other action or proceeding unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless such receivers or trustees shall have, within one hundred twenty (120) days after their election or appointment, fully complied with all the terms and provisions of this Regulation granted pursuant hereto, and the receivers or trustees within said one hundred twenty (120) days shall have remedied all violations and deficiencies under this Regulation.

**Article 29. Removal of Attachments.**

Wireless Service Providers may at any time remove their Attachments from any Facility of City or Utility, but any such removal must be done with prior written notice and in coordination with Utility to disconnect a power supply. No refund of any fee will be due on account of such removal.

**Article 30. Performance Bond.**

As a condition to permitting, Wireless Service Providers shall furnish a performance bond executed by a surety company reasonably acceptable to City and Utility which is duly authorized to do business in the state of Arkansas in the amount of fifty thousand dollars ($50,000.00) for the duration of this Regulation as security for the faithful performance of this Regulation and for the payment of all persons performing labor and furnishing materials in connection with this Regulation.

**Article 31. Severability.**

If any provision or portion thereof of this Regulation is or becomes invalid under any applicable statute or rule of law, and such invalidity does not materially alter the essence of this Regulation to either party, such provision shall not render unenforceable this entire Regulation. Rather, the parties intend that the remaining provisions shall be administered as if the Regulation did not include the invalid provision.

**Article 32 Governing Law**

As a condition of each permit, Wireless Service Providers shall consent that all actions or proceedings arising directly or indirectly from this Regulation shall be commenced and litigated only in the Circuit Court of Pulaski County, Arkansas or the Eastern District of Arkansas federal court with jurisdiction over North Little Rock, Arkansas, and consent to the jurisdiction over the

above-listed courts, in all actions or proceeding arising directly or indirectly from this Regulation with all disputes based on Arkansas law.

In the event that any legislative, regulatory, judicial, or other action ("New Law") affects the rights or obligations of the Parties, or establishes rates, terms or conditions for the construction, operation, maintenance, repair or replacement of Attachments on Utility Poles or in the public right-of-way, that differ, in any material respect from the terms of this Regulation, then either Party may, upon thirty (30) days' written notice, require that the terms of this Regulation be amended to conform to the New Law on a going forward basis for all existing and new Attachments, unless the New Law requires retroactive application. In the event that the Parties are unable to agree upon such new terms within 90 days after such notice, then any rates contained in the New Law shall apply from the 90th day forward until the negotiations are completed or a Party obtains a ruling regarding the appropriate conforming terms from a commission or court of competent jurisdiction. Except as provided in the proceeding, all terms in the existing Regulation shall remain in effect while the Parties are negotiating.

**Article 33. Incorporation of Recitals and Appendices.**

The recitals stated above and all appendices to this Regulation are incorporated into and constitute part of this Regulation.

**Article 34. Force Majeure.**

If City, Utility, or any Wireless Service Provider is prevented or delayed from fulfilling any term or provision of this Regulation by reason of fire, flood, earthquake, or like acts of nature, wars, revolution, civil commotion, explosion, acts of terrorism, embargo, acts of the government in its sovereign capacity, material changes of laws or regulations, labor difficulties, including without limitation, strikes, slowdowns, picketing or boycotts, unavailability of equipment of vendor, or any other such cause not attributable to the negligence or fault of the party delayed in performing the acts required by the Regulation, then performance of such acts shall be excused for the period of the unavoidable delay, and the affected party shall endeavor to remove or overcome such inability as soon as reasonably possible.

**Article 35. Casualty.**

Wireless Service Provider may at any time remove Attachments or Wireless Communications Facilities from Utility Poles in the event of a casualty, fire or other harm affecting any Utility Poles ("Casualty Event"). City or Utility will provide notice to Wireless Service Provider of any Casualty Event as soon as reasonably possible thereafter. In the event of damage by a Casualty Event to a Utility Pole that cannot reasonably be expected to be repaired within forty-five (45) days following such Casualty Event or which City or Utility elects not to repair, or if such Casualty Event is reasonably expected to disrupt Wireless Service Provider's operations on the Utility Pole for more than forty-five (45) days, then Wireless Service Provider may, at any time following such casualty or harm; (i) terminate the applicable Permit upon fifteen (15) days' written notice to City or Utility; (ii) place a temporary facility, if feasible, at a location equivalent to Wireless Service Provider's current use of the Utility Pole until such time as the Utility Pole is

fully restored to accommodate Wireless Service Provider's Attachment or Wireless Communications Facility; or (iii) permit Wireless Service Provider to submit a new Application for Permit for an alternate location equivalent to Wireless Service Provider's current use of the Utility Pole, and City or Utility shall waive the application fee and transfer all remaining rights to the new Utility Pole so long as such relocation was due to a Casualty Event not directly caused by Wireless Service Provider. Any such notice of termination shall cause the applicable Permit to expire with the same force and effect as though the date set forth in such notice were the date originally set as the expiration date of the applicable Permit. The Attachment Fees shall abate during the period of repair following such Casualty Event in proportion to the degree to which Wireless Service Provider's use of the Utility Pole is impaired. Wireless Service Provider will be entitled to collect all insurance proceeds payable to Wireless Service Provider on account thereof and to be reimbursed for any prepaid Attachment Fees on a pro rata basis.

# APPENDIX A – FEES

**Standard Application Fee..... $ 1,000.00**
*This fee applies to each Wireless Comunication Facility or Wireless Support Structure proposed in an Application that complies with design standards set forth in Appendix B. This fee ensures that the City and Utility recover costs associated with administrative processing, design review, make-ready estimates, and initial Post-Installation Inspection.*

**Non-Standard Application Fee ..... $ 2,000.00**
*This fee applies to each Wireless Comunication Facility or Wireless Support Structure proposed in an Application that does not comply with design standards set forth in Appendix B. This fee ensures that the City and Utility recover costs associated with administrative processing, design review, make-ready estimates, and initial Post-Installation Inspection.*

**ROW Fee ..... $ 25.00/year**
*This fee applies per year to each Wireless Comunication Facility or Wireless Support Structure installed in the right-of-way. This fee ensures that the City and Utility recover costs associated with administering and maintaining the public right-of-way.*

**Attachment Fee..... $ 200.00/year**
*This fee applies per year to each Wireless Comunication Facility attached to a City or Utility Facility. This fee ensures that the City and Utility recover costs associated with administering and maintaining their Facilities.*

**Reinspection Fee..... $ 150.00**
*This fee applies to each Wireless Comunication Facility or Wireless Support Structure that does not pass an initial inspection and requires re-inspection. This fee ensures that the City and Utility recover costs associated with administering and conducting reinspections.*

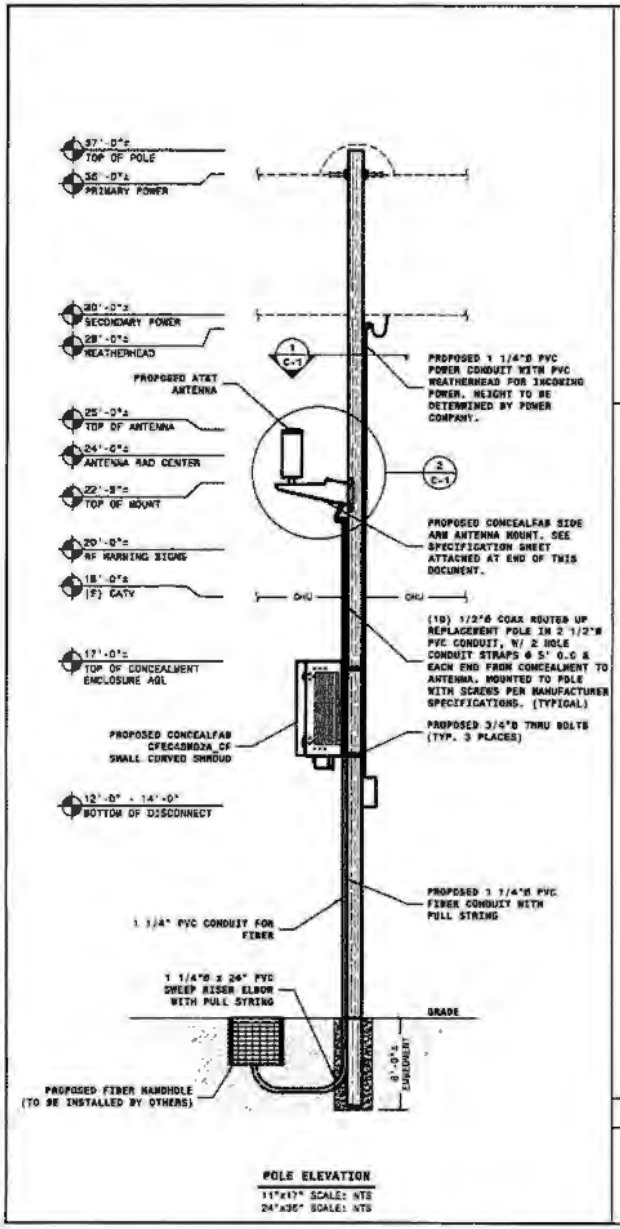
**Unauthorized Attachment Fee..... $ 400.00/year**
*This fee applies per year to each Wireless Comunication Facility attached to a City or Utility Facility without proper authority. It is in addition to any penalty that may be assigned or adjudicated for violation of a City ordinance. This fee ensures that the City and Utility recover costs associated with locating and remediating Unauthorized Attachments.*

**Continuing Violation Fee .....$ 10.00/day**
*This fee applies per day to each Wireless Comunication Facility attached to a City or Utility Facility in violation of the Permit or Applicable Standards for more than thirty (30) days after notice of the violation. It is in addition to any penalty that may be assigned or adjudicated for violation of a City ordinance. This fee ensures that the City and Utility recover costs associated with locating and remediating specific permit violations.*

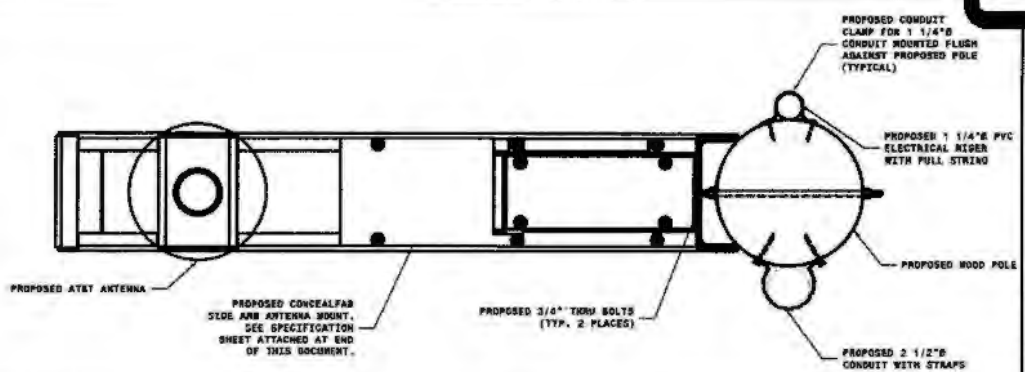
# APPENDIX B – DESIGN STANDARDS

## B-1: Distribution Pole Attachment Design

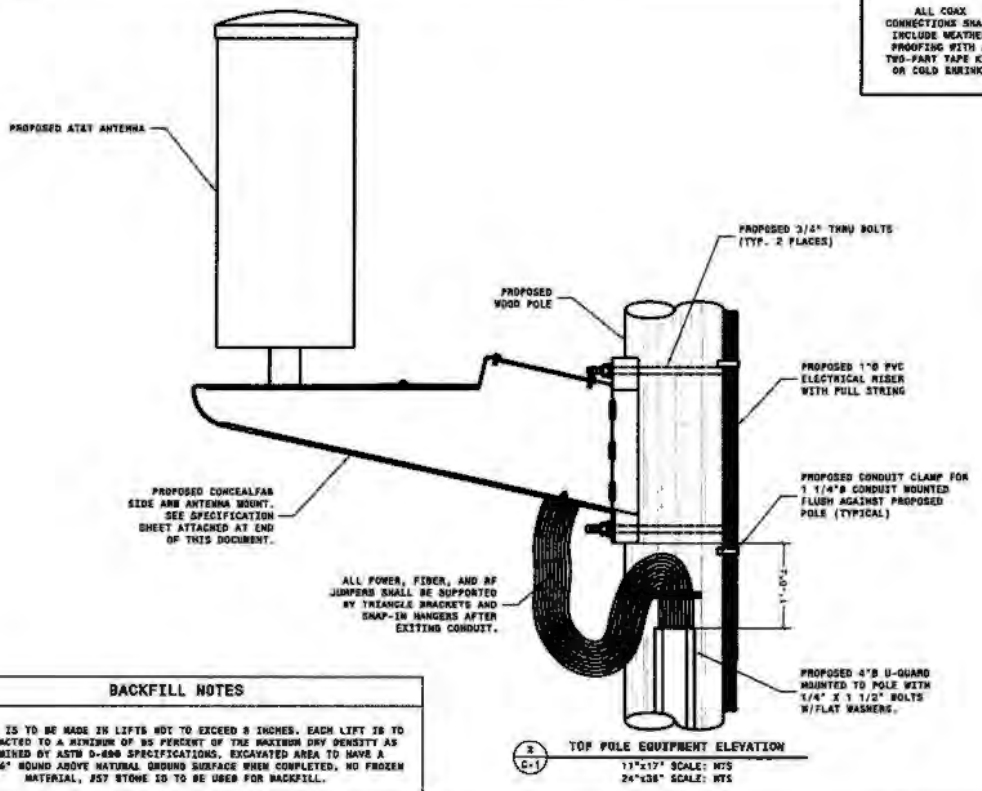
EXHIBIT
tabbies
B-1




POLE ELEVATION
11"x17" SCALE: NTS
24"x36" SCALE: NTS




ALL COAX CONNECTIONS SHALL INCLUDE WEATHER PROOFING WITH A TWO-PART TAPE KIT OR COLD SHRINK.




3 C-1 TOP POLE EQUIPMENT ELEVATION
11"x17" SCALE: NTS
24"x36" SCALE: NTS

**BACKFILL NOTES**

BACKFILL IS TO BE MADE IN LIFTS NOT TO EXCEED 8 INCHES. EACH LIFT IS TO BE COMPACTED TO A MINIMUM OF 95 PERCENT OF THE MAXIMUM DRY DENSITY AS DETERMINED BY ASTM D-698 SPECIFICATIONS. EXCAVATED AREA TO HAVE A MINIMUM 6" MOUND ABOVE NATURAL GROUND SURFACE WHEN COMPLETED. NO FROZEN MATERIAL, #57 STONE IS TO BE USED FOR BACKFILL.

STATE OF ARKANSAS
LICENSED PROFESSIONAL ENGINEER
No. 12402
RAPHAEL MOHAMED
07/16/18

RAPHAEL I. MOHAMED, PE, PEng
ARKANSAS LICENSE NO. 12402

SUBMITTALS

| DATE | DESCRIPTION | REV | ISSUED BY |
|---|---|---|---|
| 10/10/17 | CONSTRUCTION | 0 | RM |
| 10/17/17 | CONSTRUCTION | 1 | RM |
| 04/13/18 | CONSTRUCTION | 2 | RM |
| 07/16/18 | CONSTRUCTION | 3 | RM |

| | |
|---|---|
| DRAWN BY: | TSJ |
| CHECKED BY: | JPS |
| APPV'D BY: | RM |
| MNS PROJECT NO: | 0207010101-7 |



PREPARED FOR:
at&t

PREPARED BY:
MasTec Network Solutions
1000 CENTREGREEN WAY, SUITE 330
CARY, NC 27513

SITE ID:

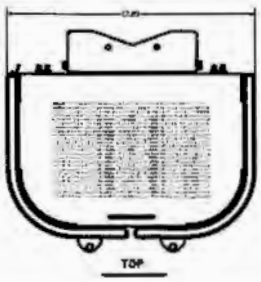
LATITUDE AND LONGITUDE:
35.091925, -92.446001

SITE ADDRESS:

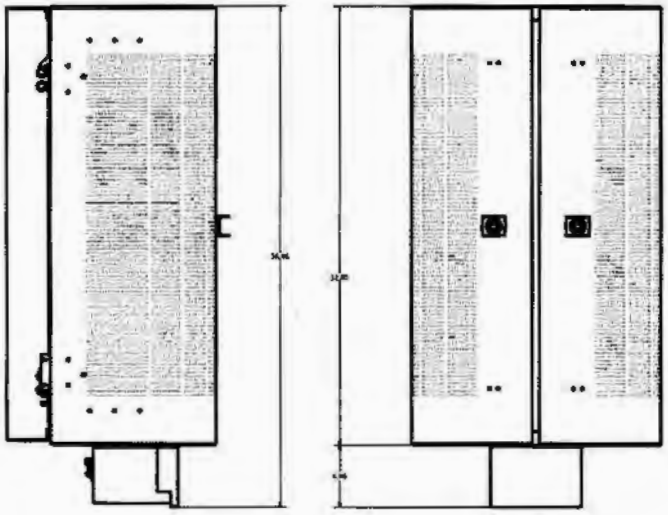
MODE #:
DOR

SHEET TITLE
TOWER ELEVATION & ANTENNA LAYOUT

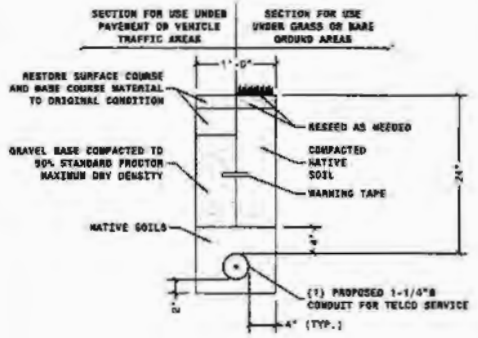
SHEET NUMBER
C-2



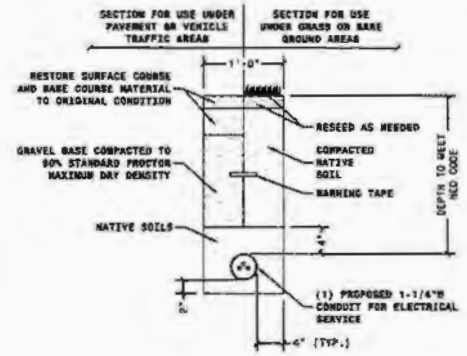

| | |
|---|---|
| WEIGHT: | 92 LBS W/O EQUIPMENT |
| EQUIPMENT: | (2) ERICSSON RRUS-32 B2<br>(1) ERICSSON RADIO 2203<br>(1) FIBER BOX<br>(2) PSU AC-02<br>(2) QUADPLEXERS |




CONCEALFAB CFEC45MU2A_CF CABINET DETAIL
11"x17" SCALE: N.T.S.
24"x36" SCALE: N.T.S.




FIBER TRENCH DETAIL
11"x17" SCALE: N.T.S.
24"x36" SCALE: N.T.S.




ELECTRICAL TRENCH DETAIL
11"x17" SCALE: N.T.S.
24"x36" SCALE: N.T.S.

STATE OF ARKANSAS
LICENSED PROFESSIONAL ENGINEER
No. 12402
RAPHAEL MOHAMED

07/19/18

RAPHAEL I. MOHAMED, PE, PENG
ARKANSAS LICENSE NO. 12402

SUBMITTALS

| DATE | DESCRIPTION | REV | ISSUED BY |
|---|---|---|---|
| 10/16/17 | CONSTRUCTION | 0 | RM |
| 10/17/17 | CONSTRUCTION | 1 | RM |
| 04/13/18 | CONSTRUCTION | 2 | RM |
| 07/18/18 | CONSTRUCTION | 3 | RM |

| | |
|---|---|
| DRAWN BY: | TSJ |
| CHECKED BY: | JFS |
| APPV'D BY: | RM |
| MNS PROJECT NO: | 0207010101-7 |



PREPARED FOR:
at&t

PREPARED BY:
MasTec Network Solutions
1005 CONFEDERATE WAY, SUITE 200
CARY, NC 27513

SITE ID:
- - -

LATITUDE AND LONGITUDE:
35.051923, -92.448001

SITE ADDRESS:

NODE #:
008

SHEET TITLE
ANTENNA & EQUIPMENT DETAILS

SHEET NUMBER
C-3

**UTILITY NOTES:**

**WORK INCLUDES:**
THESE NOTES AND ACCOMPANYING DRAWINGS COMPLEMENT THE PROVISIONS AND INSTALLATIONS BY THE ELECTRICAL CONTRACTOR, OF ALL LABOR, MATERIALS AND EQUIPMENT REQUIRED TO INSTALL THE ELECTRICAL WORK COMPLETE IN CONNECTION WITH THIS CELLULAR SITE AND SHALL INCLUDE, BUT NOT BE LIMITED TO THE FOLLOWING:

- THE PROVISIONS, INSTALLATION AND CONNECTION OF A GROUNDING ELECTRODE SYSTEM COMPLETE WITH SECONDARY GROUNDING, AND CONNECTIONS TO THE INCOMING ELECTRICAL DISTRIBUTION EQUIPMENT.
- THE PROVISION AND INSTALLATION OF AN OVERHEAD ELECTRICAL SERVICE OR UNDERGROUND ELECTRICAL SERVICE AND ALL ASSOCIATED WIRE AND CONDUIT AS REQUIRED AND/OR INDICATED ON PLANS.
- THE PROVISION AND INSTALLATION OF CONDUIT AND CONNECTIONS FOR LOCAL FIBER SERVICE.
- THE FURNISHING AND INSTALLATION OF THE ELECTRICAL SERVICE ENTRANCE CONDUCTORS, CONDUITS, METER SOCKET, AND CONNECTIONS TO THE SERVICE EQUIPMENT.
- ALL CONDUITS SHOULD BE LEFT WITH NYLON PULL CORD FOR FUTURE USE.
- EXCAVATION, TRENCHING, AND BACKFILLING FOR CONDUIT(S), CABLE(S) AND POLE WITH PIPE STRAPS. EXTERNAL GROUNDING SYSTEM.

**CODES, PERMITS AND FEES:**
ALL REQUIRED PERMITS, LICENSES, INSPECTIONS AND APPROVALS SHALL BE SECURED AND ALL FEES FOR SAME PAID BY CONTRACTOR. THE INSTALLATION SHALL COMPLY WITH ALL APPLICABLE CODES: STATE, LOCAL AND NATIONAL AND THE DESIGN, PERFORMANCE CHARACTERISTICS AND METHODS OF CONSTRUCTION OF ALL ITEMS AND EQUIPMENT SHALL BE IN ACCORDANCE WITH THE LATEST ISSUE OF THE VARIOUS APPLICABLE STANDARD SPECIFICATIONS OF THE FOLLOWING AUTHORITIES:

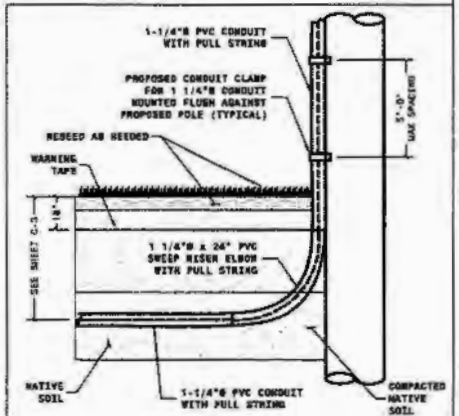
| | |
|---|---|
| N.E.C. | NATIONAL ELECTRICAL CODE |
| A.N.S.I. | AMERICAN NATIONAL STANDARDS INSTITUTE |
| I.E.E.E. | INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS |
| A.S.T.M. | AMERICAN SOCIETY FOR TESTING MATERIALS |
| N.E.M.A. | NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION |
| U.L. | UNDERWRITERS LABORATORIES, INC. |
| N.F.P.A. | NATIONAL FIRE PROTECTION ASSOCIATION |

**RACEWAYS AND WIRING:**
WIRING OF EVERY KIND MUST BY INSTALLED IN CONDUIT, UNLESS NOTED OTHERWISE, OR AS APPROVED BY THE ARCHITECT/ENGINEER. UNLESS OTHERWISE SPECIFIED, ALL WIRING SHALL BE COPPER (CU) TYPE THWN, SIZED IN ACCORDANCE WITH THE NATIONAL ELECTRICAL CODE AND LOCAL CODES.

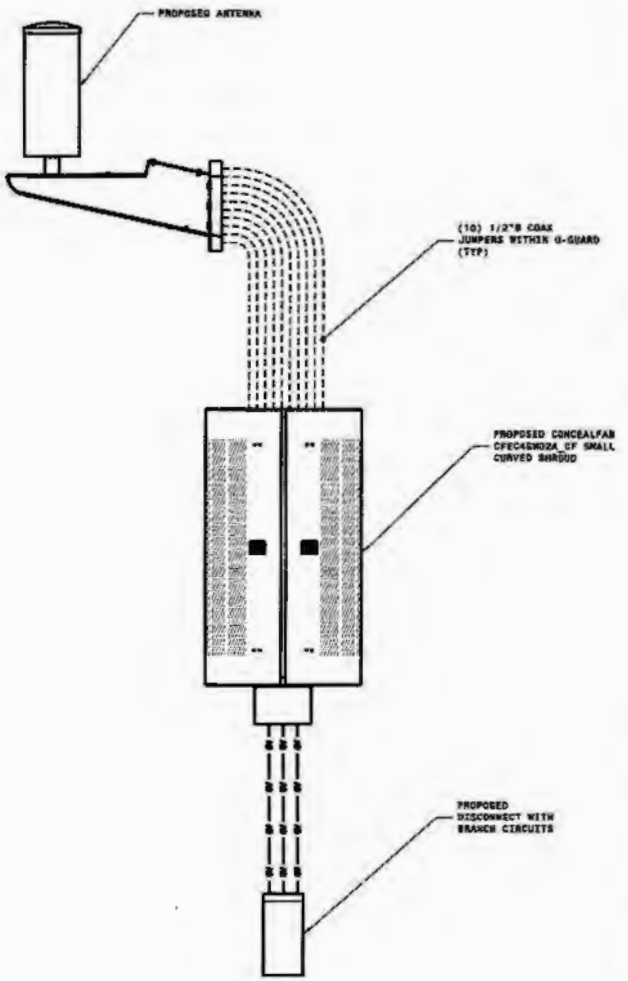
- RACEWAYS SHALL BE GALVANIZED STEEL, SIZED IN ACCORDANCE WITH THE NATIONAL ELECTRICAL CODE AND LOCAL CODES UNLESS OTHERWISE NOTED. ALL RACEWAYS SHALL BE APPROVED FOR THE INSTALLATION.
- PULL OR JUNCTION BOXES SHALL BE PROVIDED AS REQUIRED TO FACILITATE PROPOSED 4-CIRCUIT INSTALLATION OF RACEWAYS AND WIRING. PROVIDE JUNCTION AND PULLBOXES 60A LOAD CENTER FOR CONDUIT RUNS WITH MORE THAN (360) DEGREES OF BENDS.
- PROVIDE A COMPLETE RACEWAY AND WIRING INSTALLATION, PERMANENTLY AND EFFECTIVELY GROUNDED IN ACCORDANCE WITH ARTICLE 250 OF THE NATIONAL ELECTRICAL CODE AND LOCAL CODES.
- ALL STEEL CONDUIT SHALL BE BONDED AT BOTH ENDS WITH GROUNDING BUSHING.

**GENERAL NOTES:**
SEE DETAILS, SCHEDULES AND SPECIFICATIONS FOR ADDITIONAL REQUIREMENTS AND INFORMATION. CHECK ARCHITECTURAL, STRUCTURAL, AND OTHER MECHANICAL AND ELECTRICAL DRAWINGS FOR SCALE, SPACE LIMITATIONS, COORDINATION, AND ADDITIONAL INFORMATION, ETC. REPORT ANY DISCREPANCIES, CONFLICTS, ETC. TO ARCHITECT/ENGINEER BEFORE SUBMITTING BID. ALL EQUIPMENT FURNISHED BY OTHERS (FBO) SHALL BE PROVIDED WITH PROPER MOTOR STARTERS, DISCONNECTS, CONTROLS, ETC. BY THE ELECTRICAL CONTRACTOR UNLESS SPECIFICALLY NOTED OTHERWISE. THE ELECTRICAL CONTRACTOR SHALL INSTALL AND COMPLETELY WIRE ALL ASSOCIATED EQUIPMENT IN ACCORDANCE WITH MANUFACTURER'S WIRE DIAGRAMS AND AS REQUIRED FOR A COMPLETE OPERATING INSTALLATION. ELECTRICAL CONTRACTOR SHALL VERIFY AND COORDINATE ELECTRICAL CHARACTERISTICS AND REQUIREMENTS OF (FBO) EQUIPMENT PRIOR TO ROUGH-IN OF CONDUIT AND WIRING TO AVOID CONFLICTS.

**COORDINATION WITH UTILITY COMPANY:**
THE ELECTRICAL CONTRACTOR SHALL COORDINATE COMPLETE ELECTRICAL SERVICE WITH LOCAL UTILITY COMPANY FOR A COMPLETE OPERATIONS SYSTEM, INCLUDING TRANSFORMER CONNECTIONS, CONCRETE TRANSFORMER PADS, IF REQUIRED, METER SOCKETS, PRIMARY CABLE RACEWAY REQUIREMENTS, SECONDARY SERVICE, ETC. PRIOR TO SUBMITTING BID TO INCLUDE ALL LABOR AND MATERIALS. THE ELECTRICAL CONTRACTOR SHALL INCLUDE IN THE BID ANY OPTIONAL OR EXCESS FACILITY CHARGES ASSOCIATED WITH PROVIDING ELECTRICAL SERVICE FROM LOCAL UTILITY COMPANY. VERIFY BEFORE BIDDING TO INCLUDE ALL COSTS. THE ELECTRICAL CONTRACTOR SHALL VERIFY THE AVAILABLE FAULT CURRENT WITH THE LOCAL UTILITY COMPANY PRIOR TO SUBMITTING BID. ADJUST A.I.C. RATINGS OF ALL REQUIRED TO COORDINATE WITH AVAILABLE FAULT CURRENT FROM LOCAL UTILITY COMPANY.




**CONDUIT/ELBOW DETAIL**
11"x17" SCALE: NTS
24"x36" SCALE: NTS




**POWER RISER DIAGRAM**
11"x17" SCALE: NTS
24"x36" SCALE: NTS

STATE OF ARKANSAS
LICENSED PROFESSIONAL ENGINEER
No. 12402
RAPHAEL MOHAMED

07/16/18

RAPHAEL I. MOHAMED, PE, PEng
ARKANSAS LICENSE NO. 12402

SUBMITTALS

| DATE | DESCRIPTION | REV | ISSUED BY |
|---|---|---|---|
| 10/16/17 | CONSTRUCTION | 0 | RM |
| 10/17/17 | CONSTRUCTION | 1 | RM |
| 04/13/18 | CONSTRUCTION | 2 | RM |
| 07/16/18 | CONSTRUCTION | 3 | RM |

| | |
|---|---|
| DRAWN BY: | TSJ |
| CHECKED BY: | JFS |
| APPV'D BY: | RM |
| MNS PROJECT NO: | 0207010101-7 |



PREPARED FOR:
at&t

PREPARED BY:
MasTec Network Solutions
1303 CENTREGREEN WAY, SUITE 200
CARY, NC 27513

SITE ID:

LATITUDE AND LONGITUDE:
35.081923, -92.448001

SITE ADDRESS:

NODE #:
008

SHEET TITLE
ELECTRICAL DETAILS

SHEET NUMBER
E-1

**GROUNDING:**

- WIRE AND CABLE CONDUCTORS SHALL BE COPPER, 600V, TYPE THWN OR THHN, WITH A MIN. SIZE OF #12 AWG, COLOR CODED.
- METER SOCKET AMPERES, VOLTAGE, NUMBER OF PHASES SHALL BE NOTED ON THE DRAWINGS. MANUFACTURED BY MILBANK OR APPROVED EQUAL, AND SHALL BE UTILITY COMPANY APPROVED.
- CONDUIT:
  - RIGID CONDUIT SHALL BE U.L. LABEL GALVANIZED ZINC COATED WITH GALVANIZED ZINC INTERIOR AND SHALL BE USED WHEN INSTALLED IN OR UNDER CONCRETE SLABS, UNDER PUBLIC ROADWAYS, IN MASONRY WALLS OR EXPOSED ON BUILDING EXTERIOR.
  - FLEXIBLE METALLIC CONDUIT SHALL HAVE U.L. LISTED LABEL AND MAY BE USED WHERE PERMITTED BY CODE. FITTINGS SHALL BE "JAKE" OR "SQUEEZE" TYPE. ALL FLEXIBLE CONDUITS SHALL HAVE FULL LENGTH GROUND WIRE.
  - IT IS REQUIRED AND WILL BE THE RESPONSIBILITY OF THE ELECTRICAL CONTRACTOR TO NOTIFY 811 OR OTHER SUCH UTILITY LOCATING AGENCY 3 DAYS BEFORE DIGGING.
- CONTRACTOR TO COORDINATE WITH UTILITY COMPANY FOR CONNECTION OF TEMPORARY AND PERMANENT POWER TO THE SITE. THE TEMPORARY POWER AND ALL HOOKUP COSTS ARE TO BE PAID BY THE CONTRACTOR.
- UPON COMPLETION OF WORK, CONTINUITY, SHORT CIRCUIT, AND FALL POTENTIAL GROUNDING TESTS BY AN INDEPENDENT TESTING SERVICE ENGAGED BY THE CONTRACTOR SHALL BE SUBMITTED FOR APPROVAL. SUBMIT TEST REPORTS TO PROJECT MANAGER. CLEAN PREMISES OF ALL DEBRIS RESULTING FROM WORK AND LEAVE WORK IN A COMPLETE AND UNDAMAGED CONDITION.
- GROUNDING ELECTRODE SYSTEM
  - PREPARATION
    - SURFACE PREPARATION: ALL CONNECTIONS SHALL BE MADE TO BARE METAL. ALL PAINTED SURFACES SHALL BE FIELD INSPECTED AND MODIFIED TO ENSURE PROPER CONTACT. NO WASHERS ARE ALLOWED BETWEEN THE ITEMS BEING GROUNDED. ALL CONNECTIONS ARE TO HAVE A NON-OXIDIZING AGENT APPLIED PRIOR TO INSTALLATION.
    - IF CONDUCTORS MUST RUN THROUGH CONDUIT, BOTH ENDS OF CONDUIT SHALL BE GROUNDED. SEAL BOTH ENDS OF CONDUIT WITH SILICONE CAULK.
  - EXTERNAL CONNECTIONS
    - ALL BURIED GROUNDING CONNECTIONS SHALL BE MADE BY THE EXOTHERMIC WELD PROCESS. CONNECTIONS SHALL INCLUDE ALL CABLE TO CABLE, SPLICES, TEE'S, CROSSES, ETC. ALL CABLE TO GROUND RODS, GROUND ROD SPLICES AND LIGHTNING PROTECTION SYSTEMS ARE TO BE AS INDICATED. ALL MATERIALS USED (MOLDS, WELDING METAL, TOOLS, ETC.) SHALL BE BY "ULTRAWELD" AND INSTALLED PER MANUFACTURER'S RECOMMENDED PROCEDURES.
    - ALL ABOVE GRADE GROUNDING AND BONDING CONDUCTORS SHALL BE CONNECTED BY TWO HOLE CRIMP TYPE (COMPRESSION) CONNECTIONS (EXCEPT FOR THE ACCD AND GROUND ROD). MECHANICAL CONNECTIONS, FITTINGS OR CONNECTORS THAT DEPEND SOLELY ON SOLDER SHALL NOT BE USED. ALL CABLE TO CABLE CONNECTIONS SHALL BE HIGH PRESSURE DOUBLE CRIMP TYPE CONNECTIONS. CONNECTIONS TO STRUCTURAL STEEL SHALL BE EXOTHERMIC WELDS.
  - GROUND RODS: ALL GROUND RODS SHALL BE 5/8-INCH DIAMETER X 10'-0" LONG "COPPERWELD" OR APPROVED EQUAL, OF THE NUMBER AND LOCATIONS INDICATED. GROUND RODS SHALL BE DRIVEN FULL LENGTH VERTICAL IN UNDISTURBED EARTH.
  - GROUND CONDUCTORS: ALL GROUND CONDUCTORS SHALL BE STANDARD TINNED SOLID BARE COPPER ANNEALED, AND OF SIZE INDICATED ON DRAWINGS UNLESS OTHERWISE NOTED.
  - LUGS
    - LUGS SHALL BE 2-HOLE, LONG BARREL, STRAND COPPER UNLESS OTHERWISE SPECIFIED IN THE CONTRACT DOCUMENTS. LUGS SHALL BE THOMAS AND BETTS SERIES #54___BE OR EQUIVALENT

| | | |
|---|---|---|
| ** | 535 MCM OLD | 54680BE |
| ** | 252 MCM OLD | 54672BE |
| ** | #1/0 OLD | 54662BE |
| ** | #4/0 THWN AND BARE | 54646BE |
| ** | #2/0 THWN | 54626BE |
| ** | #2 THWN | 54207BE |
| ** | #6 OLD | 54205BE |

    - WHEN THE DIRECTION OF THE CONDUCTOR MUST CHANGE, IT SHALL BE DONE GRADUALLY. THE CURVATURE OF THE TURN SHALL BE DONE IN ACCORDANCE WITH THE FOLLOWING CHART:

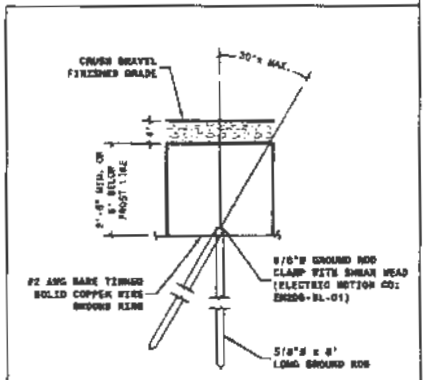
| GROUNDING CONDUCTOR SIZE | MIN. BENDING RADIUS TO INSIDE EDGE |
|---|---|
| NO.6 AWG TO NO.4 AWG | 6 INCHES |
| NO. 2 AWG TO NO 1/0 AWG | 8 INCHES |
| NO. 2/0 AWG TO 4/0 AWG | 12 INCHES |
| 250 MCM TO 750 MCM | 24 INCHES |

**GROUNDING GENERAL:**

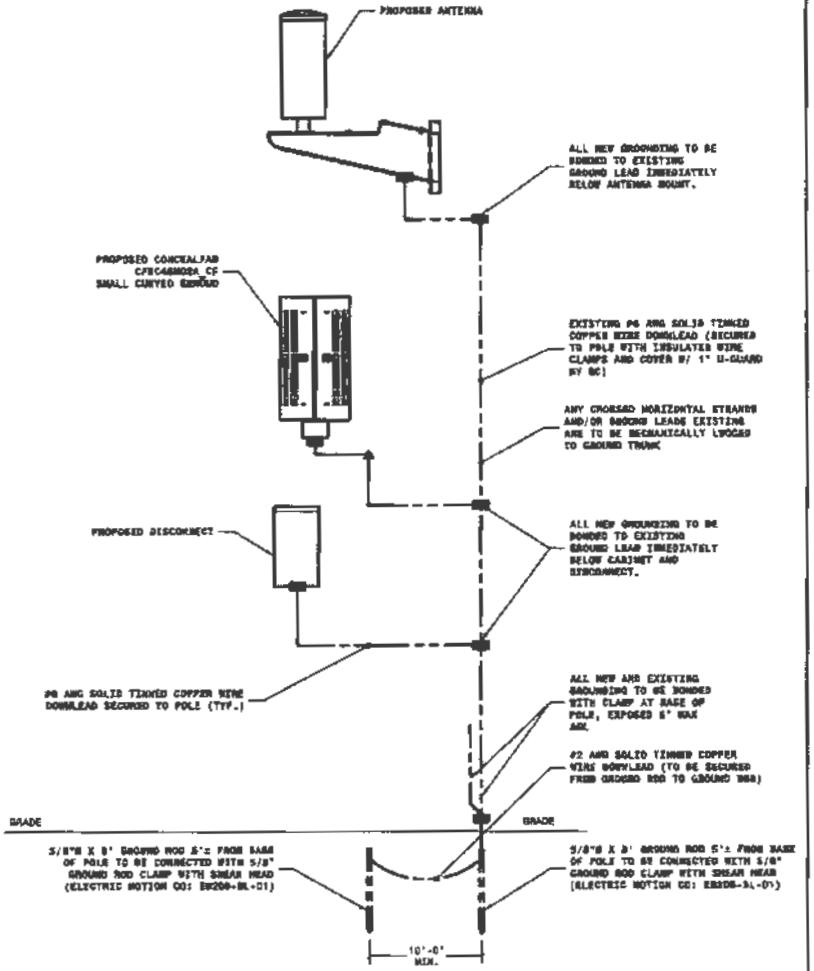
- CONTRACTOR SHALL REVIEW THE CONTRACT DOCUMENTS PRIOR TO ORDERING THE ELECTRICAL EQUIPMENT AND STARTING THE ACTUAL CONSTRUCTION. CONTRACTOR SHALL ISSUE A WRITTEN NOTICE OF ALL FINDINGS TO THE ARCHITECT/ENGINEER LISTING ANY DISCREPANCIES OR CONFLICTING INFORMATION.
- ELECTRICAL PLANS, DETAILS AND DIAGRAMS ARE DIAGRAMMATIC ONLY. VERIFY EXACT LOCATIONS AND MOUNTING HEIGHTS OF ELECTRICAL EQUIPMENT WITH OWNER PRIOR TO INSTALLATION.
- EACH CONDUCTOR OF EVERY SYSTEM SHALL BE PERMANENTLY TAGGED IN EACH PANELBOARD, PULLBOX, JUNCTION BOX, SWITCH BOX, ETC. THE TYPE OF TAGGING METHODS SHALL BE IN COMPLIANCE WITH OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (O.S.H.A.)
- ALL MATERIALS AND EQUIPMENT SHALL BE NEW AND IN GOOD WORKING CONDITION WHEN INSTALLED AND SHALL BE OF THE BEST GRADE AND OF THE SAME MANUFACTURER THROUGHOUT FOR EACH CLASS OR GROUP OF EQUIPMENT. MATERIALS SHALL BE LISTED "U.L." WHERE APPLICABLE. MATERIALS SHALL MEET WITH APPROVAL OF ALL GOVERNING BODIES HAVING JURISDICTION. MATERIALS SHALL BE MANUFACTURED IN ACCORDANCE WITH APPLICABLE STANDARDS ESTABLISHED BY ANSI, NEMA, NAFU AND "U.L." LISTED.
- ALL CONDUIT SHALL HAVE A PULL CORD.
- PROVIDE PROJECT MANAGER WITH ONE SET OF COMPLETE ELECTRICAL "AS INSTALLED" DRAWINGS AT THE COMPLETION OF THE JOB, SHOWING ACTUAL DIMENSIONS, ROUTINGS, AND CIRCUITS.
- ALL CIRCUIT BREAKERS, FUSES AND ELECTRICAL EQUIPMENT SHALL HAVE AN INTERRUPTING SHORT CIRCUIT CURRENT TO WHICH THEY MAY BE SUBJECTED, AND A MINIMUM OF 10,000 A.I.C.
- THE ENTIRE ELECTRICAL INSTALLATION SHALL BE GROUNDED AS REQUIRED BY IBC, NEC AND ALL APPLICABLE CODES.
- PATCH, REPAIR AND PAINT ANY AREA THAT HAS BEEN DAMAGED IN THE COURSE OF THE ELECTRICAL WORK.

**GROUNDING DIAGRAM NOTES:**

- SUB-CONTRACTOR SHALL CONNECT AT&T EQUIPMENT TO ONLY THE NEW GROUND DOWNLEAD INSTALLED BY EC. GROUND WIRE AND ROD FOR FIBER INSTALLATION BY FIBER PROVIDER.
- FOR OTHER POLES WITH EXISTING GROUND WIRE, THE AT&T EQUIPMENT MAY BE CONNECTED TO EXISTING GROUND WIRE.
- FOR POLES WITHOUT EXISTING GROUND, THE GC WILL INSTALL NEW GROUND DOWNLEAD.




**GROUND ROD DETAIL**
11"x17" SCALE: N.T.S.
24"x36" SCALE: N.T.S.




**GROUNDING DIAGRAM**
11"x17" SCALE: NTS
24"x36" SCALE: NTS

MECHANICAL CONNECTION
A COMPRESSION CONNECTION

STATE OF ARKANSAS
LICENSED PROFESSIONAL ENGINEER
No. 12402
RAPHAEL MOHAMED

07/16/18

RAPHAEL I. MOHAMED, PE, PEMG
ARKANSAS LICENSE NO. 12402

SUBMITTALS

| DATE | DESCRIPTION | REV | ISSUED BY |
|---|---|---|---|
| 10/16/17 | CONSTRUCTION | 2 | RM |
| 10/17/17 | CONSTRUCTION | 1 | RM |
| 04/13/18 | CONSTRUCTION | 3 | RM |
| 07/16/18 | CONSTRUCTION | 4 | RM |

DRAWN BY: TSJ
CHECKED BY: JFS
APPV'D BY: RM
MMS PROJECT NO: 020720101-7



PREPARED FOR:
at&t

PREPARED BY:
MasTec Network Solutions
1000 CENTREGREEN WAY, SUITE 300
CARY, NC 27513

SITE ID:

LATITUDE AND LONGITUDE:
35.091923, -92.442001

SITE ADDRESS:

MODE #:
DOS

SHEET TITLE
**GROUNDING DETAILS**

SHEET NUMBER
**G-1**

**WORK ORDER/APPLICATION NO: _____**

## WIRELESS COMMUNICATION FACILITY/WIRELESS SUPPORT STRUCTURE IN RIGHT OF WAY PERMIT APPLICATION

Any person submitting this form must hold an active Federal Communication Commission ("FCC") license to provide cellular or broadband personal communication service or have evidence that he or she is authorized to act on behalf of an entity holding such license. Submission of this form by unauthorized persons may constitute fraud under Arkansas law.

**NOTICE: DO NOT USE THIS FORM TO REQUEST A PERMIT TO BUILD A CELL TOWER OUTSIDE THE RIGHT-OF WAY ("ROW"). CONTACT NLR PLANNING AT (501) 975-8835.**

| | | | |
|---|---|---|---|
| Applicant: | | Email Address: | |
| Address: | | | |
| City/State/Zip: | | | |
| Point of Contact: | | Phone Number: | |
| FCC License Holder: | | FCC License No: | |
| Fee*: | | | |
| **I HEREBY AFFIRM THAT I AM AN AUTHORIZED REPRESENTATIVE OF THE APPLICANT IDENTIFIED ABOVE AND THAT THE REPRESENTATIONS CONTAINED IN THIS APPLICATION AND THE ATTACHMENTS HERETO ARE ACCURATE. I AGREE TO DEFEND, INDEMNIFY AND HOLD HARMLESS THE NORTH LITTLE ROCK ELECTRIC DEPARTMENT AGAINST ANY COST OR CLAIM OF ANY KIND THAT IS BASED UPON THE SUBMISSION OF THIS APPLICATION OR ANY FACT CONTAINED THEREIN. (REF: 2.3.2)** | | | |
| Signature: | | Date: | |
| Printed Name: | | | |

**This fee covers up to 25 poles/attachments.*

**All applicants must complete SECTION E. Please answer the following questions to determine which other sections of this application must be completed:**

1. Do you request permission to install a Wireless Support Structure in the ROW and/or attach a Wireless Communication Facility to a structure that is not owned by the City?
   *If so, complete **SECTION A** and submit this application to the City Engineer.*
2. Do you request permission to attach a Wireless Communications Facility to a City-owned street light or utility pole?
   *If so, complete **SECTION B** and submit this application to NLRED Engineering.*
3. Does your request include installation of a Wireless Support Structure or Wireless Communications Facility in an Historic District?
   *If so, complete **SECTION C**. and submit this permit to the Historic District Commission.*
4. Do you request a waiver from any specific requirement of the small cell ordinance?
   *If so, complete **SECTION D** and submit this application to the Board of Zoning Appeals.*

**SECTION A CHECKLIST (Wireless Support Structures in the Right-of-Way)**

| | YES | NO | RULE |
|---|---|---|---|
| **1** | | | Has the applicant attached a map or other description that indicates the locations of proposed Wireless Support Structures? (REF?) |
| **2** | | | Has the applicant attached a description, with drawings, that indicate the final appearance of the Wireless Support Structures? (REF?) |
| **3** | | | Are there less than twenty-six (26) sites on this permit application? (6.3.1) |
| **4** | | | Are all sites on this permit application similar? (6.3.1) |
| **5** | | | Was the appropriate fee submitted with the permit application? (3.3) |
| **6** | | | Are Wireless Support Structures farther than one hundred feet (100') from other suitable structures? (2.3.3) |
| **7** | | | Are Wireless Support Structures farther than three hundred feet (300') from the outer fence of any electric substation? (4.2.6) |
| **8** | | | Are Wireless Support Structures thirty-five feet (35') or less in height? (2.3.5) |
| **9** | | | Are Wireless Support Structures accessible by bucket truck? (4.2.4) |
| **10** | | | Do Wireless Support Structures have ground-mounted equipment that is located at least six feet (6') from the structure? (2.3.8 / 4.2.5) |
| **11** | | | Are Wireless Support Structures capable of accommodating other services (lighting, electric distribution, communication, etc.)? (2.3.8) |
| **12** | | | Will existing services able to freely operate after the Wireless Support Structures are installed? (2.4.3) |

***ANY "NO" ANSWER REQUIRES COMPLETION OF A WAIVER REQUEST IN SECTION E.***

ADDITIONAL QUESTIONS:

Does design conform to standards shown on Exhibit B? YES NO

If no, design must be approved by either: (1) City Engineer, City Planning Director, NLRED Manager, and Mayor's office or (2) City Council.

Refer to Ordinance No. 9031 for detailed information.

**SECTION B CHECKLIST (Attachment of WCF to Utility Pole or Street Light)**

| | YES | NO | RULE |
|---|---|---|---|
| **1** | | | Has the applicant attached a topographical survey or other description that indicates the locations of proposed Wireless Communication Facilities? ***NOTE: Identify pole number when available.*** (6.3) |
| **2** | | | Has the applicant included a detailed description of the Wireless Communication Facilities to be installed, including RF documentation? (6.3.2) |
| **3** | | | Has the applicant included the engineering design of Wireless Communication Facilities to be installed? (6.3) |
| **4** | | | Has the applicant included the pole loading calculations of all poles to which Wireless Communication Facilities will be attached? (6.3.2) |
| **5** | | | Are there less than twenty-six (26) sites on this permit application? (6.3.1) |
| **6** | | | Are all sites on this permit application similar? (6.3.1) |
| **7** | | | Was the appropriate fee submitted with the permit application? (3.3) |
| **8** | | | Are Wireless Communication Facilities farther than three hundred feet (300') from the outer fence of any electric substation? (4.2.6) |
| **9** | | | Are all Wireless Communication Facilities fully below thirty-five feet (35') or less in height? (2.3.5) |
| **10** | | | Are Wireless Communication Facilities accessible by bucket truck? (4.2.4) |
| **11** | | | Is there only one Wireless Communication Facility per pole? (4.2.2) |
| **12** | | | Are Wireless Communication Facilities completely below the electric utility space, if any? (4.2.3) |
| **13** | | | Is ground-mounted equipment located at least six feet (6') from the structure? (2.3.8 / 4.2.5) |
| **14** | | | Will existing services able to freely operate after the Wireless Communication Facilities are installed? (2.4.3) |
| **15** | | | Has the applicant included a copy of the safety briefing used in conjunction with the installation of Wireless Communication Facilities? (6.3.6) |

***ANY "NO" ANSWER REQUIRES COMPLETION OF A WAIVER REQUEST IN SECTION E.***

ADDITIONAL QUESTIONS:

Does design conform to standards shown on Exhibit B?

If no, design must be approved by either: (1) City Engineer, City Planning Director, NLRED Manager, and Mayor's office or (2) City Council.

**SECTION C CHECKLIST (Construction in Historic District)**

The City of North Little Rock has established the Argenta Historic District to preserve the character of early development in the downtown area. No building or structure, including but not limited to stone walls, fences, light fixtures, steps, paving or other appurtenant fixtures shall be erected, altered, restored, moved, or demolished within the Historic District until an application for a Certificate of Appropriateness has been submitted and approved by the History Commission. The North Little Rock Historic District Commission meets on the second Thursday at 6:00 p.m. at 506 Main Street and may be contacted at: (501) 371-0755. A map of the area regulated by the Historic District Commission is shown below:


| | YES | NO | RULE |
|---|---|---|---|
| 1 | | | Has the applicant received a Certificate of Appropriateness from the North Little Rock Historic District Commission? |

***NOTE*: The requirement for a Certificate of Appropriateness cannot be waived. The City of North Little Rock provides no administrative appeal from a determination of the North Little Rock Historic District Commission other than the process allowed by law.**

**SECTION D (Waiver Request)**

Requests for waivers must be submitted to the North Little Rock Planning Department for consideration by the Board of Adjustments. To be considered, the following requirements must be met:

Items required at the time of submittal:

1. Fee
2. Design of Project
3. Location of Project
4. Letter of Hardship
5. Proof of Notice to City Engineer, NLRED and affected utilities.

1. Fees. A $170 fee is due at the time of submittal.

2. Design of Project.

3. Location of Project.

4. Letter of Hardship. A letter to the board must be written explaining a hardship experienced by the applicant. The hardship letter must explain why the applicant is seeking a variance. A hardship should not be created by the owner, it should be due to unique circumstances existing on the property.

5. Letter from Property Owner. If the applicant is not the property owner, a letter from the property owner will be required stating that the applicant has permission to apply for the request.

6. Proof of Notification.

**SECTION E (REQUIRED TERMS AND CONDITIONS FOR ALL PERMITS)**

The terms and conditions of any permit issued to install a Wireless Support Structure or Wireless Communication Facility in the right-of-way are contained in the Small Wireless Regulation. Before this application may be processed, you must acknowledge and accept these requirements. Many of the most important requirements are listed below with references to specific paragraphs within the Wireless Pole Attachment Regulation. As used below, personal terms such as "I", "me", and "my" refer to you in your role as representative of the Applicant.

**Initial**

_____ 1. **APPLICATION FEES**. I understand that the application fee applicable to this permit covers all costs to receive and evaluate a complete permit application, including required maps, designs, pole loading calculations, make-ready, safety information or other review and evaluation work required by Ordinance No. 9031, as well as one post-installation inspection. I understand that I am responsible for all documented costs of additional work to evaluate an incomplete permit application. I understand that, should I elect to proceed under a permit based upon this application, that I will be responsible for all costs incurred by the City, the North Little Rock Electric Department, and others to facilitate the work described in this permit application.

_____ 2. **PERMIT FEES**. I understand that any and all permits issued pursuant to this application are conditioned upon the timely payment of fees in full. (3.1)

_____ 3. **AUTHORITY OF APPLICANT**. **I understand that I am required to defend, indemnify, and reimburse the City of North Little Rock, including the North Little Rock Electric Department, for all losses, costs, and expenses, including reasonable attorney's fees, that it may incur as a result of claims by governmental bodies, owners of private property, or other persons that I do not have sufficient rights or authority to attach Wireless Service Provider's Wireless Communication Facilities on Utility's Poles to provide particular services. (5.1)**

_____ 4. **SOLE RISK**. I understand and agree that my use of facilities owned by the City of North Little Rock, including the North Little Rock Electric Department, is at my sole risk. (23.1)

_____ 5. **INDEMNITY. I understand and agree that I am required to defend, indemnify, and hold harmless the City of North Little Rock, including the North Little Rock Electric Department, and their respective officials, officers, board members, council members, representatives, employees, agents, and contractors against any and all liability, costs, damages, fines, taxes, special charges by others, penalties, payments of every nature, and expenses (including reasonable attorney's fees of Utility and all other costs and expenses of litigation) arising in any way or in connection with the negligent construction, maintenance, repair, presence, use, relocation, transfer, removal or operation of Wireless Communication Facilities and/or Wireless Support Structures by me or any person acting for me, except to the extent that City's or Utility's negligence or willful misconduct gives rise to such claims. (23.2)**

_____ 6. **HAZARDOUS SUBSTANCE**. I represent and warrant that my use of property owned by the City of North Little Rock, including the North Little Rock Electric Department, will not generate hazardous substances, nor will I store or dispose of hazardous substances on property owned by the City of North Little Rock, including the North Little Rock Electric Department. (23.4)

_____ 7. **NO CONSEQUENTIAL DAMAGES**. I understand and agree that issuance of any permit shall be conditioned on a mutual waiver of any consequential, incidental, indirect, liquidated, or special damages, as well as lost revenue and lost profits. (23.5)

_____ 8. **CONDITION OF PROPERTY**. I understand and agree that the City of North Little Rock, including the North Little Rock Electric Department, does not warrant the condition or the safety of poles or rights-of-way. (24.1)

_____ 9. **WORKING CONDITIONS**. I represent that I am, or will become, fully acquainted with conditions relating to the work that I intend to undertake pursuant to this permit request, including the facilities, difficulties, and restrictions attending the execution of such work. (24.2)

_____ 10. **ENERGIZED LINES**. I represent that I am aware that the work I intend to undertake pursuant to this permit request may be near energized electric facilities such as power lines, transformers, and the like. I will ensure workers are informed of the inherent dangers of electricity and that they have the necessary training and expertise to perform this work safely and protect themselves and others from harm. (24.3/24.6)

_____ 11. **INSURANCE**. I represent that I will maintain insurance of the type and amount required by the Small Cell ordinance at all times and provide evidence of such insurance upon request. (25.1/25.3)

_____ 12. **RECEIVERSHIP**. I agree that under conditions stated in the Small Cell Regulation, this permit application and any permit resulting from this application may be terminated 120 days after I file bankruptcy or a receiver is appointed to operate my business. (28)

_____ 13. **PERFORMANCE BOND**. I understand and agree that prior to the issuance of any permit, I will be required to furnish the City of North Little Rock a performance bond in the amount of $50,000 that ensures proper performance and payment for labor and materials. (30)

_____ 14. **JURISDICTION**. I understand and agree that any action that is based on this permit application or any permit resulting from this application will be brought in the Circuit Court of Pulaski County, Arkansas or the Eastern District of Arkansas federal court with jurisdiction over North Little Rock, Arkansas. (32)

_____ 15. **MAINTENANCE**. I understand and agree to maintain all Wireless Support Structures I build and Wireless Communication Facilities I install pursuant to any permit issued by the City of North Little Rock, including the North Little Rock Electric Department. I will remove unused structures and inoperable attachments.

_____ 16. **OPERATION RESTRICTED**. I understand and agree that any permit issued based upon this application does NOT give authority to operate a Wireless Communication Facility until such time that final inspections are complete, except as provided in Section 8.2.

_____ 17. **SMALL WIRELESS REGULATION.** I understand and agree that the terms in this permit summarize many important obligations that I have under Ordinance No. 9031 and the regulation attached thereto. It is my obligation to read Ordinance No. 9031 and the attachment thereto, understand the requirements that attach to the permit that I request, and comply with the law.

verizon

**Danielle C. Agee**
General Counsel
South Central Market

600 Hidden Ridge
Irving, TX 75038

Phone: (972) 444-5480
danielle.agee@verizonwireless.com

December 5, 2018

**VIA FEDEX & EMAIL TO NLRLEGAL@NLR.AR.GOV**

Amy Fields
City Attorney
City of North Little Rock
116 Main Street
North Little Rock, AR 72119

Re: Ordinance No. 9031 - Small Wireless Communication Facility Regulation

Dear Ms. Fields:

We appreciate the opportunity to provide comment on Ordinance No. 9031 adopted by the City Council of North Little Rock on July 23, 2018. Respectfully, a number of provisions in the Ordinance do not comply with the Declaratory Ruling and Third Report and Order recently adopted by the Federal Communications Commission on September 26, 2018 (FCC-CIRC1809-02; hereafter referred to as "FCC Order"). There are other comments and recommended revisions we'd like to offer to facilitate a timely deployment of small wireless facilities in your City by Verizon Wireless and other wireless providers. Please note that this letter is submitted for your consideration in accordance with the notice requirements set forth in Article 32 of the Ordinance. We offer the following comments:

1. **Section 2.2.4. Grant of Permits.** This Section authorizes the City and/or Utility to review and revise permits issued to wireless service providers after eight (8) years from the original date of approval. Since it generally takes wireless service providers a minimum of ten (10) years to recoup our economic investment for each deployment, we respectfully request that this Section be revised to allow for revisions to permits only after a minimum of ten (10) years.
2. **Section 2.3.4. General Restrictions.** Limiting the height of a wireless support structure to 35' is inconsistent with the FCC Order because such limitation is "more burdensome than those the state or locality applies to similar infrastructure deployments . . . ."
3. **Article 3. Fees and Charges.** While the ROW Fee ($25/year) and Attachment Fee ($200/year) included in Appendix A together are presumptively reasonable under the guidance set forth in the FCC Order, the Standard Application Fee, Non-Standard Application Fee, Reinspection Fee, and all other fees and charges that are set forth in the Ordinance taken together (in connection with inspections, inventory, application review, pre-construction facilitation, etc.) are inconsistent with the FCC Order because such fees exceed the allowable thresholds for the authorized non-recurring fees and annual right-of-way ("ROW") rates and, therefore, would constitute an effective prohibition of wireless

telecommunications services under Section 253(a) or Section 332(c)(7) of the Communications Act. The FCC Order presumes the following fees to be fair and reasonable compensation: (a) $500 for non-recurring fees, including a single up-front application that includes up to five small wireless facilities, with an additional $100 for each small wireless facility beyond five, or $1,000 for non-recurring fees for a new pole, and (b) $270 per small wireless facility per year for all recurring fees, including a ROW use fee and a fee for attachment to municipally-owned structures in the ROW. Moreover, any increase in fees contemplated by Section 3.3.2 must be justified as necessary to recoup reasonable and actual costs incurred by the City to manage its ROW and the application process.

4. **Section 6.3.7. Submission of Application for Attachment Permit.** This provision prohibiting a wireless service provider from submitting more than one application at a time could result in a direct prohibition on the deployment of wireless services and will certainly delay deployment of small wireless facilities. Accordingly, this restriction should be deleted.
5. **Section 6.4 & 6.5. Review of Application for Attachment Permit & Review of Permit Applications for Installation in Public Right-of-Way.** These Sections should be updated to include the FCC Order's "shot clocks" or timeframes for review of applications for attachments and installation of new poles. The FCC Order adopted two new Section 332 shot clocks for small wireless facilities - 60 days for collocation of small wireless facilities on preexisting structures and 90 days for construction of new poles. Additionally, these Sections should be clarified to expressly state that whenever the City and/or Utility issues a denial of an application, the denial must include a detailed description of the reason for the denial.

In light of this review, we've also compared our existing Master Lease Agreement ("MLA") with the City to the FCC Order. As an initial matter, we note that the base rent amount of $2500 as well as the 10% increase of the rent during each extension term exceeds the presumptively reasonable rates established in the FCC Order, as outlined above. Thus, we're hopeful that the City will re-examine each fee imposed by the MLA accordingly.

We're sending this letter to you at this time because we want to densify our network within your City at a greater pace while balancing the costs associated with this effort and taking into consideration the City's need to protect the health, safety and welfare of the citizens and businesses in your community. We want to work collaboratively with your office and the members of the City Council to address the concerns raised in this letter. To that end, we'd like to schedule a meeting with you at your earliest convenience. Thank you for your attention to this matter, and we look forward to receiving your reply.

Very truly yours,

Danielle C. Agee
DCA/jdd

cc: Mr. Gerardo Carcamo, Verizon Wireless (via email Gerardo.carcamo@verizonwireless.com)