BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

STREAMLINING DEPLOYMENT OF SMALL CELL INFRASTRUCTURE BY IMPROVING WIRELESS FACILITIES SITING POLICIES;	)	WT Docket No. 16-421
MOBILITIE, LLC PETITION FOR DECLARATORY RULING	)	

REPLY COMMENTS OF SMART COMMUNITIES SITING COALITION

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SUMMARY OF COMMENTS OF THE SMART COMMUNITIES SITING COALITION

In these reply comments, the Smart Communities Siting Coalition, a collection of local governments, and associations that represent them, as well as local government agencies responsible for highway safety reiterate our commitment to ensuring our communities and our residents are fully connected in this increasingly wireless information age. This reply, which includes two additional expert declarations, demonstrates conclusively that were the Commission to accommodate the industry's requests for preemption and declaratory rulings, such actions would harm market forces that reward innovation.

Further, this reply documents that Section 253 (47 U.S.C. §253) does not apply to wireless siting disputes and should not be addressed in this proceeding. Moreover, the legal relief the industry seeks cannot be granted by the Commission in a rulemaking, let alone a declaratory ruling, as Congress chose to delegate dispute resolution over the types of complaints raised by Mobilitie (Petitioner) and industry commenters regarding public rights-of-way and wireless siting to the federal courts.

Smart Communities identifies and documents significant shortcomings in the record. For instance:

1. A review of the record reveals that Petitioner and its fellow industry commenters fail to establish that there exists a predicate for preemptive action.

2. Neither the Notice, nor any industry commenter, has addressed any of the vitally important public safety concerns over deployments of vertical infrastructure in the public rights-of-way that have been raised by multiple state and local road agencies. Smart Communities, which itself filed an expert declaration addressing the public safety concerns of such deployments, concurs with the comments of the highway community.

3. The industry's proposed definition of small cell, while it would exclude Mobilitie's typical tower package, is still anything but small. CTC, an expert in these matters, provides a response to the industry's proposed definition to document that the industry would allow fairly major installations, ignores Section 106's test for being minimally visible and does not justify shorter times to act on a complete application. The WIA definition would also retard market forces that reward innovation and technological advances.

4. Industry commenters conflate application fees with rent, and then urge the Commission to limit both to costs. Our reply documents that application fees are already limited to the recovery of costs. Further, according to our economic expert, rent, if permitted under state law, should be set at market value to ensure the most efficient use of public assets not unlike the Commission's spectrum auctions.

Finally, Smart Communities calls on the Commission to complete its work on updating RF emissions standards. Local governments are more than willing to partner with industry's densification effort, but it is in everyone's best interests to recognize that siting RF emitting equipment ever closer to the general public will heighten RF issues, and the Commission alone bears the regulatory authority and responsibility to address public concerns about siting in closer proximity to the public through updated standards.

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I. INTRODUCTION

The Smart Communities Siting Coalition ("Smart Communities") is comprised of local governments, and associations that represent them, as well as local government agencies responsible for highway safety. Collectively, the individual members and associations represent approximately1,854 communities in 10 states, serving nearly 30 million residents.[1]

[1] Individual members: Ann Arbor, MI; Atlanta, GA; Berlin, MD; Berwyn Heights, MD; Boston, MA; Capitol Heights, MD; Cary, NC; Chesapeake Beach, MD; College Park, MD; Dallas, TX; DeSoto County, MS.; Frederick, MD; Gaithersburg, MD; Greenbelt, MD; Havre de Grace, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; McAllen, TX; Monroe, MI, Montgomery County, MD; Myrtle Beach, SC; New Carrollton, MD; Perryville, MD; Pocomoke City, MD; Poolsville, MD; Portland, OR; Rockville, MD; Takoma Park, MD; University Park, MD; and Westminster, MD.

Organizations Representing Local Governments and Road Agencies: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The GVMC DAS Tower Consortium is a collaboration of over 20 Western Michigan cities, villages and townships that worked collectively with local telecommunication providers to establish a model permitting process and fee structure. The Conference of Eastern Wayne is a formal council of governments established by intergovernmental agreement consisting of the six municipalities on the eastern side of Wayne County outside of the City of Detroit. The municipalities represented are: City of Grosse Pointe, City of Grosse Pointe Farms, City of Grosse Pointe Woods, Village of Grosse Pointe Shores (a Michigan City), and the City of Harper Woods. The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of Michigan cities that focuses on protection of their citizens' governance and control over public rights-of-way. The

Collectively, the Smart Communities have significant experience in addressing the placement of wireline and wireless facilities, including wireless deployments that involve very large structures and monopoles like the Mobilitie 120 foot towers, as well as relatively small wireless structures.[2] Smart Communities members recognize that job-creating success depends not solely on having the most advanced communications infrastructure, but as importantly on creating desirable communities where people want to live and work. Achieving these goals requires a careful balancing of the needs of local businesses, utilities, residents, consumers and tourists while maintaining the safety and integrity of infrastructure within their public rights-of-way.

Michigan Townships Association ("MTA") promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed in this Brief is that of the Public Corporation Law Section only. The State Bar of Michigan takes no position. The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government. Its membership includes 524 Michigan local governments, of which 478 are members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent MML member local governments in litigation of statewide significance. The County Road Association (CRA) of Michigan works with all 83 county road agencies on matters of common interest. County road agencies in Michigan are responsible for ensuring safe, efficient transportation on 73 percent of the road miles in Michigan and are responsible for reviewing the applications for placement of facilities along the roads to ensure, among other things, that proposed facilities do not interfere with road functions, or create safety issues. The Kitch Firm represents Monroe, Michigan, DeSoto County, Mississippi and the Michigan associations identified above. Best Best & Krieger represents the others in the Smart Communities coalition.

[2] As noted in our Comments, Smart Communities celebrates that local government and industry's collective efforts permit Chairman Pai to report to the Mobile World Congress that "….98% of Americans now have access to three or more facilities-based [wireless] providers. And the United States has led the world in the deployment of 4G LTE." Address available at https://www.fcc.gov/document/chairman-pais-keynote-mobile-world-congress-barcelona

II. INDUSTRY COMMENTS FAIL TO ESTABLISH THAT THERE EXISTS A PREDICATE FOR PREEMPTIVE ACTION

The Commission has made it clear that it will not take action to change the status quo based on mere innuendo and pretext, but rather it will make data driven decisions that are supported by economic analysis. As Chairman Pai noted, such caution is warranted "… knowing that this marketplace is dynamic and that preemptive regulation may have serious unintended consequences." [3] The Commission has taken the position that new preemptive regulations should be supported by facts and by a careful cost-benefit analysis.[4]

Mobilitie and other industry commenters notably failed to demonstrate that there exists a problem of such significance as to warrant declaratory rulings of preemption. As importantly, they failed to show that there would be significant benefits from preemption that would outweigh the costs. By contrast, localities did submit economic and technical information that indicated that granting the relief requested could have significant adverse economic, safety, and technical impacts, potentially preventing localities from developing solutions that will result in more deployment, in a manner that protects public safety and the legitimate interests of communities and their residents and businesses.[5]

A. There is a Paucity of Specific, Verifiable Allegations Backing Industry Complaints.

Industry complaints of problems routinely lack specific and verifiable information. Instead, most complaints about local governments in the record are anonymous. There were

[3] *Remarks of FCC Chairman Ajit Pai at the U.S.-India Business Council* at p. 3, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0329/DOC-344124A1.pdf

[4] *See Remarks Of FCC Chairman Ajit Pai At The Hudson Institute, The Importance Of Economic Analysis At The FCC, Washington, D.C*, available at https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy

[5] Comments of Smart Communities at pp. i-v, (filed Mar. 8, 2017) ("Smart Communities Comments").

approximately twenty –two industry commenters that filed in this docket and no less than seventeen[6] of these industry filings make no reference to any specific community in alleging conduct that might lead to delays in wireless infrastructure deployment. A number of the seventeen do make allegations in a generic sense, i.e. "northeastern town,"[7] "many municipalities,"[8] and "some local governments,"[9] but it is impossible for Smart Communities or any other local government participating in this proceeding, to respond to any of these nameless allegations.[10] The Commission should therefore dismiss all of these anonymous allegations as they lack probative value in that they cannot be examined for accuracy.

Crown Castle is the primary industry commenter that actually names communities and local government practices that it feels establish a predicate for action in this proceeding. But a review of Crown's comments reveals that despite the fact that company claims to be "the nation's largest provider of shared wireless infrastructure"[11] it could only muster about 25

[6] *See* Comments of Nokia, Tech Freedom, Mobile Future, Wireless Communication Initiative, U.S. Black Chamber, Information Technology and Innovation Foundation, Wireless Internet Service Providers Association, Sprint, Lighttower Fiber Networks, U.S. Chamber, NTCH (while NTCH lists specific communities, it is alleging poor treatment for macros cells outside of right of way, not small cells within rights of way), CTIA (The Wireless Association), Mobilitie, Wireless Infrastructure Association, AT&T, Extenet, T-Mobile (with exception of citing to San Francisco ordinance in litigation), Verizon, (Verizon list three model communities, but all allegations of bad conduct are anonymous). Where complaints of conduct were made, they were made anonymously. See. E.g. "WISPA's members have encountered a patchwork of State and local policies ... regarding charges for access to broadband." Comments of WISPA at p. 6 (filed Mar. 8, 2017). Without any specificity of the claim, one cannot confirm or refute the conduct complained of and therefore has no probative value.

[7] Comments of Verizon, Appendix A (filed Mar. 7, 2017) ("Verizon Comments").

[8] Comments of T-Mobile at p. 7 (filed Mar. 8, 2017) ("T-Mobile Comments").

[9] Comments of AT&T at p. 4 (filed Mar. 8, 2017) ("AT&T Comments").

[10] As addressed *infra*, Crown Castle does list approximately twenty-five community names. A rather small universe when measured against the almost 40,000 general purpose government units in the U.S.

[11] http://www.crowncastle.com/about-us.aspx.

communities named as exercising rules and practices that Crown finds offensive.[12] And even those claims should not be taken at face value but should be evaluated after hearing from the communities themselves. Crown fails to note that in a great many of the communities named it has a thriving enterprise and is expanding on a monthly basis. In fact, as we show in later in this reply, some of the communities that Crown maligned are held up as model communities by other providers. (*See e.g.* Smart Community member Atlanta, Georgia).

But were every complaint made by Crown true, still the number of verifiable complaints is small. According to the 2012 Census of Governments, there are over 90,056 local governments in the United States.[13] Twenty-five complaints against that number represents 0.02%. If we measure the number of complaints against the 38,910 general purpose units of government, the percentage of complaints rises to a paltry 0.06%.

Surely a level of complaints that represents well under one-tenth of 1% of communities does not come close to suggesting that there is a serious, nationwide problem that requires Commission action – or a serious misunderstanding of the law that the Commission must correct.[14]

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[12] *See e.g.*, Comments of Crown Castle (filed Mar. 8, 2017) ("Crown Castle Comments"). It should be pointed out that among industry commenters naming allegedly offending communities, the Comments of Conterra Broadband (filed Mar. 8, 2017) contains complaints against the City of Baltimore, MD and Newark, NJ but not because of their wireless siting rules, but because of "Dig Once" principles endorsed by the Commission and a linear foot charge Newark seeks to impose for access to the public rights of way.

[13] 2012 Census of Governments available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[14] On the day that Comments were filed in this matter, Commissioner O'Rielly updated the Senate Commerce Committee on the status of wireless broadband infrastructure deployment. He reflected that "…the vast number of communities see the benefit of broadband deployment and welcome providers seeking to serve their citizens…Oversight Of The Federal Communications Commission," Testimony of Commissioner Michael O'Rielly before the Senate Commerce Committee (March 8, 2017) http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0308/DOC-343816A1.pdf.

Indeed adding all the complaints made in the industry's filings, both named and anonymous falls far short of that threshold. As the Virginia Department of Transportation stated: "There has been no demonstration of a nation-wide problem that warrants a "one size fits all" solution as Mobilitie, LLC requests in its Petition for Declaratory Ruling."[15] Smart Communities wholeheartedly agrees. There is no basis, then, for granting any of the relief requested in order to promote deployment (because there is a no showing of a problem), and no showing that the costs associated with preemptive action would justify the actions requested (because no cost-benefit analysis was actually provided by industry).

B. The Record Shows Deployment Has Proceeded Apace.

It is worth emphasizing that the industry's comments demonstrate there have been very few cases that turn on a failure of a community to act in a timely way. Moreover, industry has not shown that a shorter time frame is required, or would significantly cut deployment times, given, for example the time required prior to beginning construction for things such as make-ready engineering work.

One community accused by name in industry comments is Montgomery County, Maryland.[16] Montgomery County is a member of Smart Communities, but also filed Supplemental Comments[17] in which the County documented that any claims of delay or excessive fees made against the County are dwarfed by its record of success, including:

- The County has reviewed 2,900 applications in 20 years, and currently has 1,121 wireless facilities deployed at 534 unique locations throughout the County.

[15] Comments of the Virginia Department of Transportation p.1 (Mar. 8, 2017) ("VA DOT Comments").

[16] *See e.g.*, Crown Castle Comments at pp. 12-13 (burdensome application fees) and perhaps is the "Maryland locality" complained of at p. 15 of the Comments of Mobilitie ("Mobilitie Comments") as being "on hold" for eleven months.

[17] Supplemental Comments of Montgomery County, MD (filed Mar. 8, 2017) ("Montgomery County Comments").

- …The County … Department of Permitting Services processes over 60,000 permits and conducts more than 157,000 inspections annually.[18]

The record also suggests that in cases where the time between initial application and grant of the request has been longer than one might expect under the Commission's shot clock rules, the fault lies with the operator, Mobilitie being a particular complainant and culprit in this regard. While we do not know what community Mobilitie complains has had it on hold for eleven months,[19] Montgomery County's Supplemental Comments offer the Commission a detailed timeline documenting its own experience with Mobilitie, and explaining that the company repeatedly submitted incomplete applications, and abandoned its original plans for different ones. Similarly, the record shows that in some cases entities do not get necessary franchises or licenses, because they refuse to apply for them based on misreading or misunderstanding of state law requirements.[20] The resulting "delays" from choices made by the companies themselves are of course not justification for preemption.

C. Cities Are Praised in Industry Comments.

If all the named complaints listed by industry commenters are well founded (and we know they are not), it is but a micro fraction of the number of communities nationwide that worked with industry to facilitate the deployments which allowed Chairman Pai to boast that the U.S. is the world's leader in deployment of 4-G technology.[21] It is hard to square that level of

[18] *Id.* at p. i.

[19] Mobilitie Comments at p. 15 ("…[A] Maryland locality informed Mobilitie eleven months ago that an agreement would be required but put the agreement on hold.").

[20] *See* Montgomery County Comments at pp. 12-20. (" A 10 Month Odyssey And Counting: Mobilitie Has Not Put Forth A Reasonable Effort To Use The County's Telecommunications Siting Process").

[21] Smart Communities celebrates that our efforts permit Chairman Pai in a February 28, 2017 keynote address to the Mobile World Congress that "....98% of Americans now have access to three or more facilities-based [wireless] providers. And the United States has led the world in the deployment of 4G LTE." Those successes are local governments' as much as they are the industry's. Address available at https://www.fcc.gov/document/chairman-pais-keynote-mobile-world-congress-barcelona.

success with the dire circumstance most of industry claims to face at the local level. It is also hard to reconcile this collective achievement with Mobilitie's CEO Gary Jabara's view that a consultative process is a reflection of "…how stupid the elected officials — the mayor and the city councilors —are."[22] Or that "[t]here are many stupid cities around the country — really dumb. They're greedy. They have their hands out."[23]

Notably, the industry is not uniform in its distress call. The record reveals that there is praise for some U.S. cities as models for the world. For instance, Nokia[24] shares with the Commission an international study of best practices from 22 international cities. The study features Cleveland, New York City and San Francisco. In a chart to accompany the report, all three U.S. cities scored relatively high compared to the other cities studied on: smart, safe, and sustainable measures. Further, the study reveals that New York City and San Francisco are global models or "advanced smart cities." Cleveland, while characterized as being behind a number of other cities in the study, is nevertheless identified as one to be watched as the city features a number of ambitious pilot projects.[25]

Even Crown Castle highlights a number of communities for their model conduct including: Cincinnati, Ohio, Chicago, Ill., Pittsburgh, Pa., Minneapolis, Minn., Louisville-Jefferson County Metro Government, Kentucky, State College, Pennsylvania, Brookfield,

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[22] Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure,* AGL Magazine (March 2017) at p. 36 available at http://cdn.coverstand.com/39675/389411/213ff655b3e370bf9735aed1e62d36199b03bc91.3.pdf ("Jabara Interview"). It should be pointed out that a number of Smart Communities members are cited in the AGL interview as being the best of the best of communities. But even those communities have found Mobilitie's conduct and performance wanting.

[23] *Id*.

[24] Comments of Nokia (filed Mar. 8, 2017). Nowhere in Nokia's comments are there any specific allegations of wrong doing. There are general accusations about "some jurisdictions," or "one major city," but no communities are named other than the three U.S. cities singled out for praise.

[25] *Id*.

Wisconsin, Little Elm, Texas, The Colony, Texas, Texas City, Texas, New York City, NY, Philadelphia, PA., and the Borough of Sea Bright, New Jersey.[26]

So not only were the number of named communities complained about infinitesimally small, there are almost an equal number of communities that industry commenters praise and recommend to others that they serve as models to be followed, or best practices to be emulated in this developing market. This record of evidence surely demonstrates there is no need for preemptive measures on a grand scale. As importantly, it demonstrates that localities are able to craft creative solutions that allow rapid deployment within the public rights-of-way once basic design parameters are established. New York, for example, has developed standards for placement of facilities on its proprietary property that are designed to ensure that small cells visible in the public rights-of-way remain small (with equipment cabinets under 3 cu. ft).[27]

D. Industry Players Sometimes Have Inconsistent Views Of the Same Communities.

Perhaps the most revealing feature of the industry comments, and a reflection of the challenges facing local governments as they seek to meet the needs of the community and industry, are the inconsistent views of a given community in the industry comments.

Chicago,[28] San Francisco,[29] and New York City[30] are simultaneously praised as models by some commenters (*See e.g.* Nokia, Sprint and Crown) and criticized by others such as the Competitive Carriers Association "for demanding unreasonable annual and escalating pole

[26] Crown Castle Comments at pp. i-ii, 5 and 8.

[27] The New York City DoITT standards appear as appendices to the eight mobile franchises issued by the City, which can be found at https://www1.nyc.gov/site/doitt/business/mobile-telecom-franchises.page

[28] Crown Castle Comments at p. i-ii.

[29] San Francisco finds itself praised by Nokia as a model for other cities of the word, but criticized by Crown Castle (p. 15) and T-Mobile (p. 2-3) and being regulatory over bearing.

[30] Comments of Sprint at p. 18 (filed Mar. 8, 2017) ("Sprint Comments") describes New York City as responding to the needs of its residence by adopting a streamlined application process.

attachment fees."[31] Smart Communities member Atlanta, Georgia is praised by Mobilitie as a model city for deploying small cell wireless technology,[32] while Crown Castle would list Atlanta in the bad actor category for an overly expensive fee ordinance that it has yet to pass.[33] Should the city not change its policies to please Crown Castle, and if so, would it then be listed as a bad actor in Mobilitie's eyes? The fact that some entities are able to function quite effectively in cities that are identified as "bad actors" indicates that in fact, the claimed problems are not actually preventing deployment; and also indicates that the Commission should be reluctant to intercede, since effectively it would be stepping into establish a federal regulatory and preemptive regime at the behest of one competitor where local markets are functioning well for others.

[31] Comments of Competitive Carriers Association at p. 17 (filed Mar. 8, 2017) ("CCA Comments"). See also Comments of T-Mobile at p. 2-3 (filed Mar. 8, 2017) ("T-Mobile Comments") which criticizes San Francisco for adopting "…an ordinance that singles out wireless facilities in public ROWs for discretionary pre-deployment "aesthetic" review not imposed on similarly-sized landline or utility facilities.

[32] Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure,* AGL Magazine (March 2017) at p. 36 available at http://cdn.coverstand.com/39675/389411/213ff655b3e370bf9735aed1e62d36199b03bc91.3.pdf ("Jabara Interview").

[33] Crown Castle Comments at p.12 – The City of Atlanta files as part of these Reply Comments as Exhibit 1 a Letter from William Johnson, City of Atlanta, dated April 5, 2017 to Chairman Pai and Commissioners Clyburn and O'Rielly ("Atlanta Letter") that provides a different story. ("The City of Atlanta, specifically the City's Utilities Committee, is considering an ordinance that would establish reasonable fees for wireless pole attachments in the City's public right-of-way. Before moving the legislative proposal out of Committee, the City invited the Georgia Wireless Association ("GWA") to engage in discussions about the proposed ordinance. As a GWA member, Crown Castle has participated in three meetings at City Hall during a five week period, with a fourth meeting scheduled to occur in two weeks. The meetings were hosted by City officials from the Mayor's Office and the Department of Public Works, and attended by approximately 20 industry representatives from GWA. In response to industry's input, including that of Crown Castle, during the first three meetings, the City substantially restructured the proposed ordinance. None of this information, however, was included in Crown Castle's description of the City's ordinance that was shared with the Commission.")

Crown Castle appears so desperate to come up with enough complaints that it includes in its "*Parade of horribles*," complaints based upon proposed, not enacted ordinances.[34] For instance, it maligns the cities of Vista and Palos Verdes Estates, California, for merely considering draft ordinances that are identical to San Diego.[35] Yet, CTIA's Accenture Study holds San Diego out to the world as a model for integrating smart technology into its Smart Lighting initiative, which includes wireless service.[36]

Finally, Crown Castle is even guilty of internal inconsistencies. After listing the Texas cities of Little Elm, The Colony, and Texas City as good actors, it challenges the willingness of any local government in the state to work with Crown as "Texas is another jurisdiction where municipalities have challenged the validity of state-issued certificates held by network providers like Crown Castle." [37] It is, of course, unclear why challenging the status of Crown Castle under *state law* ought to be viewed as grounds for preemption.

E. The Vast Majority of Communities Want and Support Wireless Infrastructure in Their Planning.

Local government commenters, including Smart Communities, agree with Commissioner O'Rielly that the vast number of communities see the benefits of wireless connectivity and are striving to serve their citizens.[38] Smart Communities endorses the comments of diverse

[34] Crown Castle also wrongfully accuses Atlanta of overcharging for wireless deployments based upon a draft ordinance that is undergoing public and industry review, a review in which Crown has been active and yet fails to share with the Commission changes that have been made in the draft at Crown's request.

[35] Crown Castle Comments at p. 20. "For example, the cities of Vista, California, and Palos Verdes Estates, California, are considering draft ordinances (virtually identical to ordinances adopted in Irvine, Santa Monica and San Diego) governing the review process for wireless facilities that include an 'amortization' provision effectively prohibiting the grant of new EFR permits for an existing facility."

[36] CTIA *Ex Parte* Letter to Marlene Dortch (Jan. 13, 2017), Accenture Study ("Accenture Study") at p. 7.

[37] Crown Castle Comments at p. 18.

[38] *See* note 14, *supra.*

communities such as large and urban New York City[39] and San Francisco,[40] the mixed bedroom Maryland and Virginia communities near Washington D.C., small towns like Edina[41] and the geographically, topographically and historically diverse San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama and Knoxville, Tennessee[42] which all agree that deployment of wireless facilities is proceeding apace and that the industry has failed to meet it burden to show that any declaratory order is warranted.

CTC Technology & Energy is an independent communications and IT engineering consulting firm with more than 30 years of experience with public sector and non-profit clients throughout the nation. A leading example of their work can be seen in the Washington, D.C. area's regional wired and wireless communications interoperability initiative funded by the U.S. Department of Homeland Security.

[39] Comments of New York City at p. I (filed Mar. 8, 2017) ("New York Comments") ("The City, as a large population center and technology, cultural, and business hub, is committed to encouraging deployment of new technology and looks forward to advances its citizens will reap from small cell/DAS facilities.").

[40] Comments of the City and County of San Francisco at p. 1 (filed Mar. 8, 2017) ("San Francisco Comments") ("San Francisco has worked with telecommunications carriers to enable the deployment of personal wireless service facilities throughout San Francisco, particularly the deployment of Distributed Antenna Systems ("DAS") and other small-cell technology on existing utility and other poles located in the public right-of-way.").

[41] Comments of Edina, Minn. at p. 1 (filed Mar. 6, 2017) ("Upon hearing …that small cells were arriving, the City of Medina amended its ordinance…. We researched industry concerns…. We generally supported the roll out of small cells….").

[42] Comments of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee at p. 1 (filed Mar. 8, 2017) ("Cities Comments"). ("Each of the Cities already acts to promote broadband deployment through all technologies. But unlike the Commission, the Cities must also consider and balance factors other than the needs of broadband providers; they must consider public safety, right-of-way ("ROW") capacity and congestion, unique local historic and scenic neighborhoods and parks, and the obligation that taxpayers receive adequate compensation for private commercial use of public property.").

In his Declaration[43] included in our opening Comments, CTC's Afflerbach explained, many communities are working with industry to develop new approaches to deployment that take wireless into account as part of the development processes associated with new subdivisions, roadway widening, or as part of a general planning processes that is designed to provide some certainty for both localities and for providers as to what may be installed, and where.[44] This process may take some up front time, and is distinct from the procedures that apply once an application is received under Section 332(c)(7) or Section 6409.

This preliminary planning work may appear to result in a delay in deployment, as communities gather all industry players together to attempt to develop a cooperative solution. But the "upfront" time may translate into faster consideration of individual applications over the longer term, as providers gain a better understanding of what is required of them, and submit applications that are tailored to community requirements. These local consultative processes ought to be encouraged, and certainly provide no basis for additional federal regulations.

F. Delays in Deployment are Most Often Attributable to Incomplete Applications.

While the Notice cites to delays and potential delays in siting 5G technology as its predicate for action, industry commenters fail to prove claimed delays are occurring , and more importantly, the record reveals that the large majority of delays are attributable to incomplete applications, many of which are primarily assigned to Petitioner.[45]

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[43] Smart Communities Comments, Ex. 1, CTC Declaration.

[44] *Id* at pp. 23-25.

[45] The only time any industry commenter approached the presentation of any data of delay was Sprint which stated: "Mobilitie has sought access agreements in hundreds of jurisdictions. Of those, 343 have taken more than six months to reach agreement. Of those 343 jurisdictions, 75 have taken more than a year, 11 have taken more than 18 months, and two have taken more than two years." (Sprint Comments at p. 22) Sprint does not tell us how many were granted in less than 6 months, nor the reason for any delays, i.e., how many of these were the fault of Mobilitie, and the poor engineering that we and other local

The collective comments of local governments,[46] road commissions and state highway officials,[47] as well as technical experts[48] are clear: where there appear to be problems with the speed of deployment of wireless facilities, they are most often the result of some shortcoming of an applicant that failed to file a complete application or in the alternative fails to acknowledge and address the safety concerns raised by deploying infrastructure within the public rights-of-way.[49]

For instance, numerous parties commented that as a routine matter, Mobilitie has submitted cookie cutter proposals for 100-120 foot towers in the public rights-of-way, without doing any meaningful field engineering,[50] or making any significant effort to comply with state, federal or local requirements. Mobilitie CEO Gary Jabara may have explained exactly why so

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government commenters demonstrated was endemic in Mobilitie applications. For instance, as to any pending applications in Montgomery County, the County's filing documents the 10 month struggle it has engaged in with Mobilitie and its ever changing staff to develop a complete application. In addition, a number of the applications submitted by Mobilitie to Montgomery County were for locations that were in municipalities and not even subject to the County approval process.

[46] *See e.g.,* Smart Communities Comments at p. 8 ("The Cities note their experience with incomplete or otherwise deficient applications slowing down (or preventing) deployment….These delays have impacted the City's development and finalization of master lease agreements with providers for use of ROW and City-owned poles for small cell/DAS installations.")

[47] Virginia DOT Comments at p. 7; *See e.g.,* American Association of State Highway and Transportation Officials, Comments of Maine at p. 15 and Comments of Maryland at p. 21 (filed Mar. 21, 2017).

[48] *See e.g.,* Smart Communities Comments, Ex. 1, CTC Declaration at p. 20. (Most delays in processing an application are caused by incomplete applications.)

[49] An example of this devil may care attitude regarding the safety issues of deploying in the public rights of way may be found in an interview with Gary Jabara, CEO of Mobilitie. Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure,* AGL Magazine (March 2017) at p. 36 available at http://cdn.coverstand.com/39675/389411/213ff655b3e370bf9735aed1e62d36199b03bc91.3.pdf ("Jabara Interview").

[50] Comments of Michigan Road Commission (filed by Denise S. Donohue) at p. 1 (filed Mar. 9, 2017) ("Michigan Road Commission Comments"). While Michigan's local county road agencies and others recognize the importance of expanding wireless infrastructure, it is significant to note that nowhere in Mobilitie's pending Petition for a Declaratory Ruling is safety either mentioned or addressed. *See* e.g. Montgomery County Comments; Comments of Houston, TX (filed Mar. 8, 2017); New York Comments; Comments of Edina, Minn. (City established a Master License Agreement to meet needs for deployment).

many Mobilitie applications looks the same, and repeat the same deficiencies. "At Mobilitie, we've done a good job of industrializing the process. We take 20 seconds to pop out a set of drawings based on algorithms and form factors."[51] Community needs and safety considerations are not typically found in algorithms and form factors.

While Mobilitie may develop an application in 20 seconds, the impact of these "20 second applications" is extended hours of work for local government reviewers. Most often these reviews result in the application being returned as incomplete with a detailed incompletion notice, and a shifting of significant costs, both opportunity and real, not only to communities such as Smart Communities and other local government commenters,[52] but also to other wireless applicants. This latter cost shift is as a result of the time and resources that might otherwise be available to process that applicant's submission being consumed to address Mobilitie's "20 second applications."

III. THE WIRELESS INDUSTRY REQUESTS RELIEF THAT CANNOT BE GRANTED BY THE COMMISSION OR IS ALREADY AVAILABLE IN FEDERAL DISTRICT COURTS

Industry commenters repeat the errors of the Commission in its Public Notice,[53] assuming that Section 253 authorizes the Commission to take action with respect to wireless facilities siting, when Section 332(c)(7) is the sole available mechanism.[54] Further, Section 253(c) does not provide an independent means by which to regulate the rates at which local governments lease their property. And application of Section 332(c)(7) (with the exception of Section

[51] Jabara Interview at p. 42.

[52] *Id.*

[53] Public Notice.

[54] Smart Communities Comments at pp. 51-53; AT&T Comments at p. 6; Verizon Comments at pp. 19-20; CTIA Comments at pp. 19-27.

332(c)(7)(B)(iv)) is explicitly delegated exclusively to the federal courts by statute, foreclosing some of the remedies sought by industry.[55]

A. Section 253 Doesn't Apply to Wireless Siting and Should Not Be Addressed in This Proceeding.

1. *Section 253 Doesn't Apply*

As Smart Communities explained in its initial comments and other commenters affirm, Section 332's plain language makes clear it is the only provision which applies to placement of personal wireless facilities, as does the statute's legislative history.[56] None of the industry commenters suggesting use of Section 253 make any legal arguments overcoming the plain and constrictive language of Section 332. In fact, CTIA acknowledges that the Commission has historically used Section 253 preemption authority only in particular factual circumstances.[57]

As recently as last week, the D.C. Circuit warned the Commission not to infer statutory authority where there is none. In a case analogous to this one, the Commission concluded, where the statute required opt-out notices on *unsolicited* faxes but was silent about such notices on *solicited* faxes, it was free to require opt-out notices on *solicited* faxes. The court stated:

> The FCC … suggest[s] that the agency may take an action … so long as Congress has not *prohibited* the agency action in question. That theory has it backwards as a matter of basic separation of powers and administrative law. The FCC may only take action that Congress has authorized. [58]

In the present case, Section 332 is even more clear: Section 332(b)(7) is the means by which Congress directed the Commission to address wireless siting.

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[55] Smart Communities Comments at p. 52.

[56] Smart Communities Comments at p. 52, San Antonio Comments at p. 11; San Francisco Comments at p. 17.

[57] CTIA Comments at p. 20.

[58] *Bais Yaakov of Spring Valley v. FCC*, 2017 U.S. App. LEXIS 5589 (D.C. Cir. 2017) (citations omitted).

As the D.C. Circuit observed, "the fact that the agency believes its … [r]ule is good policy does not change the statute's text."[59]

Crown Castle tries to claim application of Section 253 by arguing its network includes within it fiber optic telecommunications subject to Section 253.[60] There are two answers to that claim: first, Crown Castle ignores that the Commission has already found, in response to an argument that DAS facilities include wired and wireless components, that "[d]etermining whether facilities are 'personal wireless service facilities' subject to Section 332(c)(7) does not rest on a provider's characterization in another context; rather, the analysis turns simply on whether they are facilities used to provide personal wireless services."[61] The second answer is, even were the Commission to reverse this ruling, and treat the wires as distinct from the wireless installations and not part of the wireless facilities, Crown Castle does not contend that its placement of wires has been a source of contention – and the treatment of wireline facilities is not the subject of this proceeding. Crown Castle cites the Commission's rejection of a CTIA's request for preemption in the 2009 Declaratory Ruling[62] as "suggest[ing]" a broad application of Section 253,[63] but in that case the Commission explicitly made "no interpretation of whether and

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[59] *Id.*

[60] Crown Castle Comments at p. 25 (citing *In the Matter of the Petition of the State of Minnesota for A Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transp. Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697 (1999).

[61] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting 2012 Biennial Review of Telecommunications Regulations*, WT Docket 13-238, Report and Order, *et al.*, ¶ 271 (Oct. 21, 2014).

[62] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting as Proposals as Requiring Variances*, Declaratory Ruling, 24 FCC Rcd. 13994, 14020 (2009) ("2009 Declaratory Ruling").

[63] Crown Castle Comments at pp. 25-26 (citing 2009 Declaratory Ruling at ¶67).

how a matter involving a blanket variance ordinance for personal wireless service facility siting would be treated under Section 332(c)(7) and/or Section 253 of the Act."[64] Nor does a speech by a Commissioner authorize agency action without statutory authority.[65]

2. *Even if Section 253 Did Apply, the Commission Need Not Clarify California Payphones*

Despite the clear legal barrier to application of Section 253 in this proceeding, commenters press their case for applying Section 253 to wireless siting by manufacturing a conflict among court interpretations of the section and suggesting the Commission has the power to resolve the conflict. In fact, there is no dispute, as the City and County of San Francisco stated, "Both this Commission and the federal courts generally agree that the pertinent question under section 253(a) is '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.'"[66] CTIA and Verizon cite approvingly to this standard, originating in the Commission's *California Payphones* decision.[67] However, CTIA and Verizon attempt to create ambiguity in this clear and well-accepted standard by arguing a diversity of interpretations of this provision in case law. CTIA and Verizon claim that the Eighth and Ninth Circuits have incorrectly interpreted the Commission's standard and incorrectly claim the Commission has

[64] 2009 Declaratory Ruling.

[65] Crown Castle Comments at pp. 25-26; CTIA Comments at p. 20 (citing then-Commissioner Pai's speech claiming Section 253 applies to "wired or wireless service"); more relevantly and recently, now Chairman Pai has noted that "Going forward, the Commission will strive to follow the law and exercise only the authority that has been granted to us by Congress," Statement of Chairman Ajit Pai On the Latest D.C. Circuit Rebuke of FCC Overreach (March 31, 2017), available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-344186A1.pdf. Here, Section 332(c)(7) makes clear that no other provision of the Communications Act (including Section 253) may be used to confine local authority over wireless siting.

[66] San Francisco Comments at p. 15 (citing *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) both of which quote *California Payphone*, 12 FCC Rcd. 14191 (1997) ("*California Payphone*").

[67] CTIA Comments at p. 22; Verizon Comments at p. 11 (citing *California Payphone* at 14206, ¶ 31).

authority to overturn these cases pursuant to *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).[68] That case, however, found Commission authority to act where the statute was *ambiguous*. The Eighth and Ninth Circuits decisions are explicitly based on the *plain language* of Section 253 where the Commission receives no *Chevron* deference.[69] Moreover, these interpretations are consistent with *California Payphone* so there is no need to clarify anything.[70]

Verizon suggests the First Circuit's ruling in *Puerto Rico Tel. Co. v. Guayanilla* supports its proposed standard that a local regulation has the "effect of prohibiting" where it "(1) significantly increases a carrier's costs; or (2) otherwise meaningfully strains the ability of a carrier to provide telecommunications service."[71] It is not clear what this standard actually means – and indeed, it is best read as confined to the facts of the case.[72] Applied more broadly, as proposed by Verizon, it is unsustainable as a manner of law or policy. Not only, as outlined below, does the Commission lack the authority to regulate the rent or fees paid to compensate the public for use of public land, but as explained above, the Commission also lacks authority to overturn binding judicial precedent interpreting the plain language of the statute. And even if

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[68] CTIA Comments at p. 24 (citing *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008)); Verizon Comments at p. 13, fn. 34.

[69] *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007) ("under a plain reading of the statute"); *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) ("our conclusion rests on the unambiguous text of § 253(a).").

[70] *Sprint v. San Diego*, 543 F.3d at 578 ("our interpretation is consistent with the FCC's. *See California Payphone*, 12 FCC Rcd. 14191, 14209 (holding that, to be preempted by § 253(a), a regulation "would have to actually prohibit or effectively prohibit" the provision of services); *Sprint v. San Diego*, 543 F.3d at578 ("our conclusion rests on the unambiguous text of § 253(a) …. Were the statute ambiguous, we would defer to the FCC under *Chevron*….").

[71] Verizon Comments at 12 (*Puerto Rico Tel. Co*., 450 F.3d at 19 found that it constituted an effective prohibition because it would "negatively affect [the provider's] profitability;" give rise to "a substantial increase in costs for [the provider];" and "place a significant burden on [the provider]," thereby "strain[ing the provider's] ability to provide telecommunications services.").

[72] *See*, n. 85 *infra.*

these were not bars to action, it would make little sense to upset the applecart and reinterpret Section 253 after the vast majority of the federal judiciary has adopted the Commission's view in *California Payphones*, which would only serve to cause delay through uncertainty and litigation, while presumably dampening investment in 5G networks.[73]

B. Further Commission Interpretation of Section 332(c)(7) Via Declaratory Ruling is Not Permitted or Necessary; and In Any Case this Proceeding is Fatally Flawed.

1. *Interpreting Section 332(c)(7) Must be Done Via Rulemaking*

While CTIA encourages the Commission to adopt a range of additional declaratory rulings pursuant to Section 332(c)(7)[74] and the Commission has acted in the past to adopt particular guidance pursuant to declaratory rulings under Section 332(c)(7), Section 332(c)(7) explicitly directs parties dissatisfied under Section 332(c)(7) to commence an action in any court

[73] Not only is the Commission barred from adopting Verizon's proposal, but Verizon is incorrect in its interpretation of *P.R. Tel Co.* supports a broad rule which would be met if a rule "increased a carrier's costs." This interpretation would be inconsistent with the Supreme Court's interpretation of the Act's language: the Court interpreted the word "impair" under the Communications Act to require more than a showing of an increase in costs, *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 389-390 (1999); thus the more-absolute term under the Act—effect of "prohibiting"—would require a telecommunications company complaining about a local requirement to show much more than that the local requirement increases its costs – even if doing so created a "strain" on the company. Moreover, Verizon is wrong to suggest a new test based solely on the facts in *P.R. Tel Co*. because under the facts of that case, the court accepted as given the untested assumption that the provider would see an 86 percent decrease in profit. Such a unique factual scenario is inappropriate for a generalized test to replace the widely-accepted *California Payphones* test.

[74] CTIA Comments at pp. 33-37; Crown Castle Comments at p. 31.

of competent jurisdiction,[75] and only grants authority to the Commission for considering disputes with regard to Radio Frequency ("RF") emissions.[76]

Even if the Commission believes it has authority under Section 332(c)(7), it should heed the warning of the Fifth Circuit and call this proceeding what it is: a rulemaking. When reviewing the Commission's adoption of shot clocks under Section 332, the Fifth Circuit questioned the denomination of "declaratory ruling," because it "harbor[ed] serious doubts as to the propriety of the FCC's choice of procedures," finding that the Commission should have termed the proceeding a rulemaking rather than a declaratory ruling because it " b[ore] all the hallmarks of products of a rulemaking" by affecting "the rights of broad classes of unspecified individuals."[77] Reviewing in detail a number of D.C. Circuit cases considering the appropriate use of rulemaking vs. declaratory rulings, the Fifth Circuit stated:

> these cases involved concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios. Here, by contrast, the FCC has provided guidance on the meaning of § 332(c)(7)(B)(ii) and (v) that is utterly divorced from any specific application of the statute. The time frames' effect with respect to any particular dispute arising under § 332(c)(7)(B)(ii) will only become clear after adjudication of the dispute in a court of competent jurisdiction. *This is classic rulemaking.*[78] (emphasis added)

[75] Contrary to the contention of Crown Castle and CTIA (Crown Castle Comments at fn 49; CTIA pp. 36-37, 41), the Supreme Court's ruling in *City of Arlington* did not address whether the Commission has authority to interpret Section 332(c)(7), and instead stands for the proposition that a court should grant *Chevron* deference to "an agency's determination of its own jurisdiction." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1867-68 (2013). The Supreme Court rejected a local government argument that interference with local matters implicates whether the Commission deserved Chevron deference, not whether the Commission has authority to issue local land use permits.

[76] 47 U.S.C. § 332(c)(7)(B)(v).

[77] *City of Arlington v. FCC*, 668 F.3d 229, 242 (5th Cir. 2012) aff'd in part 133 S. Ct. 1863 (2013) (quoting *Yesler Terrace Cmty Council v. 51 Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994)).

[78] *Id*. at 243 (citations omitted).

The Fifth Circuit ultimately found that because the Commission followed the procedural requirements of notice and comment rulemaking and that process was subject to judicial review pursuant to the Administrative Procedure Act, it was harmless error.[79] Nonetheless, it is inappropriate for the Commission to continue operating under a fiction that it is issuing a declaratory ruling when, in fact, it is conducting a rulemaking and a federal court has made that clear to the agency. Further, while the Fifth Circuit found the Commission's actions were harmless error in previous proceedings, there is no guarantee other circuits will concur. Here, where we do not have a clear indication as to what rules the Commission is considering – and where there are dozens of suggestions – the failure to identify rules in advance is not harmless error, particularly when combined with the other procedural errors identified.

2. *No Further Interpretation of Section 332(c)(7)'s Prohibition Standard is Necessary.*

Commenters and the Commission agree that most courts have come to a common interpretation of Section 332(c)(7): "[c]ourts generally agree that a carrier may establish that a land-use authority's denial of its siting application 'prohibits or has the effect of prohibiting' the provision of service by showing that it has a significant gap in service coverage in the area and a lack of feasible alternative locations for siting facilities."[80] According to the Commission and industry commenters, the courts have not necessarily developed consensus "about the showings needed to satisfy this standard."[81] The application of a legal standard to facts is the precise scenario where case-by-case decision-making is required—not general standards or prescriptive

[79] *Id.*

[80] Public Notice at p. 10; Verizon Comments at p. 21.

[81] *Id.*

national rules. Localized zoning decisions and their real-world impacts on provider offerings are well-suited to district court proceedings to ascertain facts and apply relevant legal standards.

Verizon argues that the federal courts have incorrectly interpreted Section 332's effective prohibition section by requiring the provision to be met only if there is a "significant gap" in wireless service, stating that a gap is no longer the standard, instead it is a gap in an ever-increasing quality level of service.[82] The Commission has already addressed the courts' interpretations of this standard, ensuring that the courts which address this issue promote competition.[83]

3. *This Proceeding Is Not Being Conducted In Accordance With Rules Governing Declaratory Rulings, and It is Doubtful Mobilitie Can Pursue a Declaratory Ruling*

In addition to the obligations established by the Communications Act[84] and the Administrative Procedures Act[85] that an applicant bears the burden of proof in a proceeding, a standard we have demonstrated in our initial Comments and above has not been met, in the instant matter. Mobilitie, as petitioner,[86] has also failed to comply with the Commission's rules on service.

Note 1 to Section 1.1206(a) of the Commission's Rules reads in full:

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[82] Verizon Comments at pp. 21-22.

[83] 2009 Declaratory Ruling.

[84] *See e.g.* 47 USC §309 "…The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant…."

[85] *See* 5 USC § 556 (d)."Except as otherwise provided by Statute, **the proponent of a rule or order has the burden of proof**." (emphasis added) What the Petitioner and industry seek in the instant matter is equivalent to a request for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. While the Commission is not a Court, and Congress made clear that it was not to serve as a Court for Section 332 or 253 matters, it should at least be aware of the standards that the proper entity reviewing this matter would apply and that is "…that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." FRAP §56(a).

[86] *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way*, WT 16-421, Petition for Declaratory Ruling (filed Nov. 15, 2016).

> In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under Sec. 1.1212(d) and the parties are so informed.

The Public Notice[87] incorporated Mobilitie's petition by reference and explicitly incorporated some of the petition's allegations as the basis for action. Neither Mobilitie nor the Commission followed Commission rules requiring service of the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. The Commission should dismiss without consideration Mobilitie's petition and withdraw the tainted Notice as both are defective.

Note 1 to Section 1.1206(a) provides for a cure by the Commission of notifying maligned parties of the allegations against them under Sec. 1.1212(d). Neither the Commission, nor Mobilitie, effected such a cure. In fact, the Commission denied a local government request[88] for additional time to alert maligned communities and seek their input.

Should the Commission choose not to dismiss this proceeding due to the violations of Note 1 to Section 1.1206(a), the Commission should nevertheless delay these proceedings until each of the maligned communities has been identified and served. If the Commission is to remain true to its mission of making data driven decisions, it is imperative that it have both

[87] Public Notice.

[88] Order Denying Extension to File Comments, WT 16-421, at ¶ 3 (Mar. 29, 2017) ("We also are not persuaded by the Petitioners' claim that the existence of non-specific allegations in the record about some local governments' conduct that do not identify the entities that allegedly engaged in such conduct is a sufficient ground for granting an extension of time for reply comments.").

sides of every story.[89] The failure of Mobilitie and other industry commenters to name, let alone serve, local maligned state and local governments also leaves any Commission action subject to a claim of being arbitrary and capricious because the inevitable result is the failure to develop a full record, particularly as many of the items it seeks to address are outside of the authority Congress has delegated to the Commission.[90]

The Supreme Court in *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*[91], (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)) was clear in its standard: "We will uphold the regulations if the FCC has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.' Agency action is arbitrary and capricious only if the agency: has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[92]

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[89] For instance, while Mobilitie complains about delays in a Maryland locality, we learn from the Comments of Montgomery County that is has spent 10 months assisting Mobilitie file a single complete application due to staff changeover and the institutional weaknesses of the Mobilitie siting practice. The Mobilitie allegation is the abstract might appear an indicatable offense, however, when seen in light of Montgomery County's detailed facts, one must question the credibility of the allegations. When further seen in light of similar stories the nation over, one becomes convinced that Montgomery County's account is the more accurate portrayal of the facts.

[90] The Petition seeks, and the Notice invites, comments on the federal preemption of state and local regulatory authority by establishing federal caps on permit costs, rents and timelines for action on zoning applications and "deeming" these applications granted if the federal timetables are not met. The vast majority of these issues have been assigned by Congress to the federal judiciary, not the Commission.

[91] *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

[92] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

In the instant proceeding, should the Commission act on unserved allegations against state and local governments without giving them notice and an opportunity to respond, it will fail to meet the Court's test to have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[93]

Moreover, recent representations by Mobilitie to local communities suggest that Mobilitie is not even in a position to assert rights under either Section 253 or 332(c)(7). Smart Communities' member, the City of Laurel, Maryland, recently asked Mobilitie, (operating as Technology MD Network Company), in response to a request to put large towers in the public rights-of-way to address whether and when it would move forward with the filings required under the Nationwide Programmatic Agreements. Mobilitie's response suggested that it was seeking approval for placement of towers, but will the treat the addition of wireless facilities as a "collocation" to an existing facility – meaning, apparently, that Mobilitie is seeking the right to build a structure divorced from the provision of any service or facility that would be governed by federal law. It can claim no rights under Section 332(c)(7) or Section 253, much less a right to declaratory relief if this is the case.

C. The Commission Should Reject Specific Proposed Standards Under Section 332(c)(7).

1. *The Commission Cannot Adopt a Deemed Granted Solution*

CTIA, Verizon and Crown Castle support Commission adoption of a "deemed granted" remedy for applications not already covered by Section 6409(a).[94] CTIA argues that the Commission has authority for such an action by citing to the Commission's general rulemaking

[93] *Id.*

[94] CTIA Comments at pp. 39-43; Verizon Comments at pp. 23-26; Crown Castle Comments at pp. 35-37.

authority,[95] and claims particular authority under Section 706(b)[96] but does not begin to address the fact that the Commission has no authority to issue local land use permits, safety inspections, or other necessary local approvals. Congress does not have the "ability to commandeer local regulatory bodies for federal purposes."[97]

Nor does the industry recognize the difference between the statutory language in Section 6409 and Section 332(c)(7). Section 332 is very different from Section 6409 and, as described below, the Fifth Circuit in *City of Arlington* explicitly found that the shot clock provisions adopted by the Commission were a presumption only to be used in fact-finding by the courts, to whom enforcement of Section 332(c)(7) is confined.[98] Further, Section 6409 contains very different statutory language from Section 332(c)(7) and is limited to a much smaller set of questions. Specifically Section 6409(a) states "a State or local government may not deny, and shall approve, any eligible facilities request" but Section 332(c)(7) does not contain the phrase "shall approve."[99] Thus, Section 6409 is very different from Section 332(c)(7) and the rules implementing Section 6409 cannot be imported into Section 332(c)(7). The Commission itself

[95] CTIA Comments at p. 40, fn 90.

[96] CTIA Comments at p. 41, fn 91. Section 706(b) does not address mandates against local governments in any form.

[97] *Cablevision, Inc. v. Public Improvement Comm'n*, 184 F.3d 88, 105 (1st Cir. 1999) (citing *Printz v. United States*, 521 U.S. 898, 934, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997) ("The Federal Government may [not] issue directives requiring the States to address particular problems . . . ."); *id.* at 961 (Stevens, J., dissenting) (agreeing that the notion of "cooperative federalism" does not include a direct "mandate to state legislatures to enact new rules"); *id.* at 975 (Souter, J., dissenting) (agreeing with the majority that "Congress may not require a state legislature to enact a regulatory scheme")). As noted above, *supra* note 75, *City of Arlington* determined the extent of *Chevron* deference and did not directly address the Commission's authority to override the Tenth Amendment rights of states and localities no matter the dicta to the contrary. CTIA Comments at p. 41.

[98] *See infra.*

[99] *Cf.* 47 U.S.C. §1455(a) *with* 47 U.S.C. § 332(c)(7).

found a "deemed granted" remedy would not be appropriate because of Congressional intent and the importance of a fact-based analysis regarding any particular challenge:

> This provision indicates *Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.* …. [T]he case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs. To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case. While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.[100]

While in considering Section 6409, the Fourth Circuit did not agree that the shot clock violated the Tenth Amendment rights of states, but the Fourth Circuit did not consider the role of the federal courts in the Section 332 scheme.[101] "The general principle is 'that Congress cannot compel the States to enact or enforce a federal regulatory program.'"[102] "The doctrine explicitly does not affect 'the power of federal courts to order state officials to comply with federal law' because 'the Constitution plainly confers this authority on the federal courts.'"[103] Congress delegated to the courts the right to enforce Section 332, thus ensuring that the appropriate branch of government would be in the position to direct the grant of a particular local land use permit.

Verizon is incorrect that the deemed granted remedy the Commission adopted pursuant to Section 621 is relevant.[104] In that instance, the Commission adopted an interim deemed granted

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[100] 2009 Declaratory Ruling at ¶39 (emphasis added).

[101] *Montgomery County v. FCC*, 811 F.3d 121, 129 (4th Cir. 2015).

[102] *Dakota, Minn. & R.R. Corp. v. South Dakota*, 362 F.3d 512, 518 (8th Cir. 2004) (quoting *Printz*, 521 U.S. at 935, reaffirming *New York*, 505 U.S. at 161).

[103] *Id.*, quoting *New York v. U.S.*, 505 U.S. 144, 179 (emphasis in the original).

[104] Verizon Comments at p. 25.

order until the local franchising authority issued a franchise.[105] An interim deemed granted remedy is a vastly different remedy from a permanent form of relief. Further, the reviewing court did not consider whether the interim deemed granted remedy improperly violated local and state governments' Tenth Amendment rights.[106]

2. *The Commission Should Not Adopt Shot Clocks for DAS .*

The Commission should not adopt new shot clocks for DAS facilities or small cells generally, or a different standard for acting upon applications. As Smart Communities showed in their initial filing, and as shown in the "Definitions of Small Cells, and the Review of Small Cell Applications, Supplemental Report"[107] by Andrew Afflerbach of CTC Technology and Energy included with this reply, there is no sound factual basis for doing so, and given the number of applications that are being filed in batch, it is wise to maintain a regime under which both parties have an incentive to work together to establish practical timelines for actions on proposed installations that may present particular issues. As the Fifth Circuit found in *City of Arlington*, that existing shot clocks operate merely as the "bursting-bubble" theory of presumption, under the Federal Rules of Evidence where "the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption *simply disappears* …."[108] This not only avoids constitutional problems and issues

[105] *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[106] *Id.* at 778-780.

[107] CTC Reply Report, Exhibit 2.

[108] *City of Arlington v. FCC*, 668 F.3d 229, 258 (5th Cir. 2012) aff'd in part 133 S. Ct. 1863 (2013) (emphasis added) ("The time frames do provide the FCC's guidance on what periods of time will generally be 'reasonable' under the statute … and they might prove dispositive in the rare case in which a state or local government submits no evidence supporting the reasonableness of its actions. But in a contested case, courts must still determine whether the state or local government acted reasonably under the circumstances surrounding the application at issue.").

of statutory interpretation, it results in both sides viewing the burdens presented by applications realistically. This limited approval of shot clocks by the courts shows, as explained above, that a more extreme version of a shot clock with a "deemed granted" component would not be appropriate or lawful for Section 332.[109]

IV. THE COMMISSION CANNOT AND SHOULD NOT DECLARE PUBLIC RIGHT-OF-WAY ACCESS MUST BE BASED ON INCREMENTAL COSTS OR ANY OTHER COST MEASURE.

A. The Commission Does Not Have Authority to Regulate Under Section 253.

1. *If the Commission Attempts to Apply Section 253 to Wireless Siting, It Must Recognize That Section 253(c) Is a Savings Clause or Safe Harbor, and Not An Authorization to Regulate.*

As discussed above in Section III.A, Section 253 does not apply to wireless siting. If the Commission nonetheless attempts to apply Section 253 to DAS, then the Commission must follow the plain language in Section 253(c), which makes clear it is a savings clause or safe harbor, working in conjunction with Section 253(a) to protect the rights of local governments to manage and charge compensation for use of public rights-of-way.[110] Comments make clear federal courts almost uniformly find Section 253(c) to be a savings clause or safe harbor which permits state or local governments to adopt rules that might otherwise be considered inconsistent with Section 253(a).[111] The Commission is not free to overturn this explicit statutory directive to

[109] Notably, the current leading federal legislative proposal to address these issues, the Mobile Now Act, adopts a 270 day deadline for federal approval of communications facility installations. Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (S.19, 115th Cong., §6(b)(5)(a) (2017)) available at https://www.commerce.senate.gov/public/_cache/files/dc139eec-a303-47bf-88f8-6abe64325cb1/B30EF9FCB7D36BB155D45356D42F5F7E.mobile-now-text.pdf (the "Mobile Now Act").

[110] Section III.B

[111] San Antonio Comments at pp. 27-28; San Francisco Comments at pp. 15-16. *Level 3 v. St. Louis* ,477 F.3d 528, 532 (8th Cir. 2007) (finding that because 253(c) begins with "nothing in this section," it is not "self-sustaining" 253(a) is a general rule of preemption and 253(c) creates a safe harbor) (citing *NJ*

regulate public right-of-way compensation. CTIA's citation to Senator Gorton's statements in the legislative history is unavailing.[112]

2. *Market Value is "Fair and Reasonable"*

If the Commission were to find Section 253(c) relevant to the placement of wireless facilities, Smart Communities' initial comments made clear that sound policy dictates compensation for use of a public right-of-way should reflect market value because it will promote competitive and economically efficient use of scarce resources.[113] Industry commenters do not refute these economically and factually sound arguments. Instead, CTIA, Verizon, Sprint, and Crown Castle attempt to use Section 253 where it does not apply and argue that the Commission should interpret Section 253 to limit localities to cost-based compensation.[114] As Smart Communities explained in our initial comments, localities' charges for the use of public rights-of-way can be divided into two categories: (1) fees which generally are limited by state or

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Payphone, 299 F.3d at 240 (3d Cir. 2002); *Bellsouth v. Palm Beach*, 252 F.3d 1169,1188 (11th Cir. 2001) ("it is clear that subsections (b) and (c) were added to the statute to preserve, rather than to limit, state and local government authority"); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002) (§ 253(c) is a savings clause)). While the Sixth Circuit found in *TCG Detroit v. Detroit*, 206 F.3d 618, 624 (6th Cir. 2000) that 253(c) creates a private right of action, it focused more on whether relief could be found in federal court. The Sixth Circuit has not directly addressed the contrary findings in other circuits.

[112] See CTIA Comments at 19. Senator Gorton was quite clear that the Commission had no role, and that challenges would be heard on a case-by-case basis: "There is no preemption, even if my second-degree amendment is adopted, Mr. President, for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way." 141 Cong. Rec. S 8206, 8212 (daily ed. June 13, 1995). At least one court has confirmed this interpretation. *Qwest Communs. Corp. v. Maryland-National Capital Park & Planning Comm'n*, 2010 U.S. Dist. LEXIS 47009 at 20 (D. Md. 2010) (Senator Gorton's comments show that the exclusion of subsection (c) was intended to restrict the preemptive authority of the FCC, not to create a right in telecommunications providers to sue for damages under subsection (c)).

[113] Smart Communities Comments at pp. 37-40; See Exhibit 3, attached, the Reply Declaration of Kevin E. Cahill, PhD, Regarding the Accenture Report and the Economics of Local Government Right of Way Fees, p. 3 ("ECONorthwest Reply Report").

[114] Verizon Comments at pp. 14-17.

local law to cost-based administrative fees for processing and (2) rent, which is determined by market value.[115]

Initial comments demonstrate that not only is market value reasonable, it is often legally required by state constitutions or by federal regulation for the just treatment of taxpayers. For example, as the Virginia Department of Transportation explains it has "spent many millions of dollars acquiring ROW throughout the Commonwealth" and because majority of these acquisitions were made using federal funds, VDOT must comply with federal rules, including a USDOT regulation that requires that all property interests obtained with funding under Title 23, the use or disposal of such interests must be for "current fair market value."[116] Further, as articulated in our initial comments, many state constitutions include "gift clauses" which prohibit a locality from subsidizing a private entity as a way to protect taxpayer funds.[117] The Commission has no authority to require state or federal taxpayers to subsidize the business plans of wireless companies.

Crown Castle acknowledges localities have proprietary control over their property in some cases, but argues that the public rights-of-way are public goods held in public trust and are not the same as leasing, for example, the roof of a school.[118] Crown Castle cites no authority for the proposition that public rights-of-way are held in public trust for its private use without full compensation (it would be an odd trust indeed that turned trust property over to third parties

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[115] Smart Communities Comments at p. 59.

[116] VA DOT Comments at pp. 3-4 (citing 23 C.F.R. §710.403(e)); AASHTO Comments at p. 2.

[117] Smart Communities Comments at p 58; *see also* Frederick Ellrod III & Nicholas P. Miller, 26 Seattle Univ. L.Rev. 475, 490 (2003); Richard Briffault, The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 Rutgers L. J. 907 (2003) ("State constitutions limit the purposes for which states and localities can spend or lend their funds…. These provisions may be said to constitutionalize a norm of taxpayer protection.")

[118] Crown Castle Comments at pp. 26-27.

without compensation, or worse, for amounts that do not even fully recover costs); or that suggests a local government, when acting as "trustee" and providing access to a private party, is not acting in a proprietary capacity. And the case Crown Castle does cite, while discussing the roof of a school, is not limited to such property and explicitly holds, "the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[119]

CTIA and Verizon attempt to rely on a Black's Law Dictionary definition of compensation to conclude that "compensation" is limited to recover injury or costs, although Verizon appropriately acknowledges that compensation also means "remuneration in return for services rendered."[120] In this instance services rendered are no different from a property owner leasing land or building space, and Section 253(c) does not use the term "cost." Importing the term "cost" into the Commission's interpretation of the statute is without statutory foundation – at least if by "cost" one uses the term (as industry does) to mean out-of-pocket costs.

CTIA relies on a variety of cases which interpret the Section 253(c) savings clause to cost-based compensation.[121] In many cases, the limitation is actually a function of state law limits on local authority, not a federal law limitation. Even if Section 253(c) were applicable to wireless facilities, Smart Communities showed in our initial comments that the legislative history

[119] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002). In fact, the cases the Second Circuit relies on this ruling are labor law cases. It is true that the court notes that this case constituted a single high school roof, but the court used the following tests, both of which point toward affirmation of most local ordinances which seek rent for use of public property because in most cases a locality will be acting as a landlord seeking to maximize value and would not be making policy through compensation schemes: "(1) whether 'the challenged action essentially reflects the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,' and (2) whether 'the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem')."

[120] Verizon Comments at p. 15; CTIA Comments at p. 29, fn 56.

[121] *Id.* at pp. 28-33.

demonstrates Congressional intent not to govern the rates which localities charge, only the fairness of the charge among competitors,[122] and several lines of cases clearly hold that municipalities have the authority to charge rent.[123] CTIA relies extensively on *Bell Atlantic v. Prince George's County*, but that decision is no longer good law.[124] Further, just because cost-based fees have been found to be reasonable in other contexts, it does not follow that *only* cost-based fees are reasonable under Section 253(c).[125] As demonstrated above, localities are often required to obtain fair market value for public property. Sprint seems to say that local taxpayers should subsidize a private, competitive service with below-market access to the physical property needed for those businesses.[126]

CTIA, Crown Castle, and Verizon further argue that the Commission should proscriptively invalidate fees that are based on a percentage of a provider's revenue.[127] This request is not grounded in the rulings of most courts considering the issue, many of which have upheld percentage-based fees, and have properly looked instead to see whether the fees violate 253(a).[128]

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[122] *Id.*

[123] Smart Communities Comments at pp. 60-61.

[124] *P.R. Tel. Co. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534 (Dist. of Puerto Rico2003) (the holding in *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland, 49 F. Supp. 2d 805 (1999),*with regard to the appropriate level of compensation under Section 253(c) is no longer good law because it has been vacated) *aff'd* 450 F.3d 9 (1st Cir. 2006).

[125] See Verizon Comments at p. 15, fn 38.

[126] Sprint Comments at p. 34.

[127] CTIA Comments at p. 32; Crown Castle Comments at p. 28; Verizon Comments at pp. 16-17. . *See e.g.*, Comments of the Texas Municipal League at pp. 5-8 (filed March 8, 2017).

[128] *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 35 (1st Cir. 2006) (most courts have not found gross revenue fees or other non-cost based fees to be per se invalid under § 253(c)) (citing *Qwest Comms. Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006); *TCG Detroit v City of Dearborn* 206 F.3d 618, 624-25 (6th Cir. 2000); *City of Santa Fe*, 380 F.3d at 1273; *TCG N.Y., Inc. v. Shite Plains*, 305 F.3d 67, 77-78 (2nd Cir. 2002)) (quotations omitted). The request is not only based on a misreading of the law, it fails to recognize that a gross revenues based fee may often be an appropriate way to obtain

Beyond arguing against percentage-based fees, Sprint and Verizon seek to have the Commission develop a comprehensive set of rules governing every aspect of what could constitute cost.[129] This extensive list demonstrates the complexity of any Commission decision to start down the road of limiting localities to cost-based compensation as Smart Communities warned in its initial comments.[130] And while Sprint argues that obtaining the full value of local government property is shortsighted,[131] the taxpayers who paid for the land might not agree even if it is within the local government's power to offer below-market rates.

Verizon argues that the phrase "fair and reasonable" is ambiguous and the Commission should receive *Chevron* deference to interpret it.[132] But, as we showed in our initial comments, the term defines a range of possible rates, and by definition permits a rate that reflects the market value of property – what a willing buyer will pay a willing seller. Section 253(c) does not authorize the Commission to set rates, or require use of a particular mechanism for calculating rates, as requested by the industry. Setting a particular formula would not only be unlawful, it would be unwise, as state constitutions and other federal agencies have interpreted their own statutes to determine what kind of compensation should be obtained by local governments for their public rights-of-way. The Commission should not (and in the case of federally-funded public rights-of-way, cannot) ignore the widespread consensus about the appropriate disposition of public property.[133]

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compensation for the value of property used – and is commonly used in competitive markets to that end. *See, e.g.* Smart Communities Comments, Declaration of ECONorthwest, Ex. 2 at ¶33.

[129] Sprint Comments at pp. 36-41; Verizon Comments at pp. 16-17.

[130] Smart Communities Comments at p. 40.

[131] Sprint Comments at p. 34.

[132] Verizon Comments at p. 15.

[133] When two agencies have jurisdiction, *Chevron* deference is, at best, uncertain. See generally Russell L. Weaver, Deference to Regulatory Interpretations: Inter-Agency Conflicts, 43 Ala. L. Rev. 35 (1991)

3. *Local Governments Do Not Possess a "Monopoly" Over Land Suitable for Wireless Facilities*

Providers seek to argue two sides of the same coin. At the same time they explain that small cell wireless facilities are small, unobtrusive and easy to place in a variety of situations, they also argue that local governments have a monopoly on land suitable for these facilities.[134] Even in the case of relatively large, facilities proposed by Mobilitie and others, it is simply not true that local governments hold a monopoly over the potential locations for towers and other facilities. In just two examples, billboards and broadcast towers exist all over the United States and these are often located outside public rights-of-way. The small size of some DAS facilities make these the perfect choice for siting on private land. Indeed, that is where the industry originated, with in-building DAS installations. Providers may complaint about the difficulty or alleged delays in dealing with local government, but nothing stops these providers from using private property for their facilities. [135]

V. INDUSTRY COMMENTERS FAIL TO ADDRESS THE CHALLENGES OF SITING WIRELESS FACILITIES IN THE PUBLIC RIGHTS-OF-WAY

The public must always be considered first and foremost when placing objects in the road right-of-way; especially large monopoles. In addition, the transfer of costs to road agencies by limiting how road agencies are able to recoup costs for managing the public right-of-way and for reviewing and issuing permits would stretch road budgets that are already spread ultra-thin. Subsidizing any industry, especially those affiliated with for-profit unregulated services, is

[134] Sprint Comments at p. 33.

[135] The Smart Communities fully addresses monopoly claims in the expert reports attached to their initial comments. The industry submits no factual or credible economic arguments that support classification of public rights of way as "monopolies" where wireless facilities are concerned.

simply not a viable option to agencies across the state, like the Ottawa County Road Commission.[136]

The concerns of the Ottawa County Road Commission are echoed in the numerous comments of state and local highway authorities that have filed in this docket.[137] The number and quality of these filings is perhaps the best evidence of the safety concerns these entities have with regard to the deployment of infrastructure within the public rights-of-way.

The concerns of these highway professionals and the engineering and planning community that serve them stands in stark contrast when juxtaposed to silence of the industry comments and Notice, which fail to even raise the issue of safety when discussing the deployment of infrastructure within the public rights-of-way. It is perhaps the failure of the Bureau and the industry to realize just how serious these issues are that resulted in the unprecedented participation of the road community in this docket.

As part of its comments, Smart Communities engaged Puuri Engineering, LLC to review for the Commission the numerous safety issues that must be addressed before allowing the placement of any new structure in the public rights-of-way, whether categorized as a small cell or not, as such a deployment can raise significant issues for roadway engineering, safety, and coordination with other utilities.[138] These same points are raised in the numerous filings of highway community[139] and strongly agrees with the numerous state and local departments of

[136] Ottawa Comments at p. 1.

[137] *See e.g.*, Comments of Kansas DOT (filed Mar. 3, 2017); VA DOT Comments; Comments of Illinois Department of Transportation (filed Mar. 22, 2017); American Association of State Highway and Transportation Officials (filed Mar. 21, 2017) including supportive statements from the state Departments of Transportation of Georgia, Maine, Maryland, Michigan, Missouri, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Vermont (collectively "Highway Community Filings").

[138] *See* Smart Cities Comments at pp. 150- 192, Ex. 4, Puuri Declaration.

[139] *See* Highway Community filings supra at note 136.

transportation that counsel that the "..Federal Communications Commission …[should] … make no changes to FCC rules that would diminish the role of the local county road agency when it comes to implementation and expansion of the local wireless infrastructure network. County road agencies are concerned first and foremost, and are statutorily charged with, the safety of the motoring public. While Michigan's local county road agencies recognize the importance of expanding wireless infrastructure, it is significant to note that nowhere in Mobilitie's pending Petition for a Declaratory Ruling is safety either mentioned or addressed."[140]

But it is not just local road agencies that counsel against preemption: "[I]ndividual states should be permitted to develop their own statutory and regulatory approaches designed to address the individual needs and circumstances of the particular state, and to protect the safety of the users of the roadways adjacent to the rights-of-way, as the Commonwealth of Virginia …has done."[141] For instance, the Virginia Department of Transportation explained: "There has been no demonstration of a nation-wide problem that warrants a "one size fits all" solution as Mobilitie, LLC requests in its Petition for Declaratory Ruling."[142]

Indeed, the Notice and industry commenters ignore the ongoing and unavoidable risks to public safety that placement of new structures in the public rights-of-way generate. They further fail to address the financial and operational impact such new facilities have, including:

- Long-term stresses on the roadbed,
- Drainage interference,
- Enhanced expenses for maintenance or expansion of the roadway, or

[140] Ottawa Comments at p. 1.

[141] Virginia DOT Comments at p. 1.

[142] *Id.* See also, Exhibit II of Virginia DOT's filing which provides diagrams of selected utility pole collisions and their impact.

- Improve other utilities.[143]

Expert testimony in the record documents each of these concerns[144] and the Commission cannot move forward in this proceeding until each has been addressed. Long term harm to roadbeds, and hazards will predictably result in billions of dollars of loss to the economy, including in small communities.[145] And, these costs do not even include the potential costs to adjoining properties and property owners, or other externalities that may be associated with the placement of wireless facilities.[146]

Commissioner Michael O'Rielly testified before the U.S. Senate Committee on Commerce, Science and Transportation that a major objective of the new Commission leadership was to "…conduct sound cost-benefit analyses as part of the Commission's consideration of new regulations…."[147] Commissioner O'Rielly explained that "[t]oo often under the prior Commission leadership, sufficient work was not done, certainly prior to votes by Commissioners, to calculate the particular costs that new burdens or obligations would impose on regulated entities… [relying on] vague or illusory benefits of these new regulatory burdens."[148]

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[143] *See* Smart Communities Comments, Ex. 4, Puuri's Declaration regarding the impacts of placement of wireless structures in the public rights-of-way. *See also* Smart Communities Comments, Ex. 1, CTC Declaration. Comments of Maryland State Highway Administration (incorporated as part of AASHTO Comments) at p. 17 ("Use fees …[must reflect]…the real costs associated with the management of ROW access, impact to infrastructure, and maintenance.")

[144] *Id.*

[145] Smart Communities Comments, Ex. 3, Report and Declaration of David E Burgoyne at pp. 8-10; Smart Communities Comments, Ex. 4, Puuri Declaration at p. 3.

[146] *Id.* Smart Communities Comments, Ex. 2, Declaration of ECONorthwest.

[147] Testimony of Commissioner Michael O'Rielly before the Senate Commerce Committee (Mar. 8, 2017) at p. 1, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0308/DOC-343816A1.pdf. *See also, Remarks Of FCC Chairman Ajit Pai At The Hudson Institute, The Importance Of Economic Analysis At The FCC, Washington, D.C.*, available at https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy

[148] *Id.*

While Smart Communities' filings and expert reports, and the filings of other commenters, have highlighted the potential costs to localities and the public of uncontrolled deployments, neither the Petitioner, nor any industry commenter has provided any such analyses to support their claims that action is needed. Nor has industry shown that specific options that they seek (such as the WIA classification of a 28 cubic foot box in front of a residential unit as small) are either necessary, or costless. As it happens, the industry proposed definitions are not required for deployment; this is a case where the costs of Commission intrusion have few clear benefits that would not be otherwise realized.[149]

Some in the industry may point to an Accenture Strategy study entitled "Smart Cities; How 5G Can Help Municipalities Become Vibrant Smart Cities"[150] filed with the Commission by CTIA,[151] as a cost benefit analysis. Such a claim would be misleading at best.

While Smart Communities generally hope that 5G will add to GDP growth and network investment, and have other public benefits, nowhere in the report is there any explanation as to how – if the benefits are real - retaining local review of siting in the public rights-of-way or allowing localities to recover all permitting costs and market value for property used, will prevent realization of those benefits. Local review *at most* means that deployers must go through steps before deploying – but it does not mean that they will not deploy (as Smart Communities have shown). To be sure, Accenture suggests that there are delays. For example, while there is a reference to applications taking as long as 24 months[152] for approval, there is no data to document the claim. In fact, page 13, the page that is dedicated to outlining the "challenges"

[149] CTC Reply Report, Exhibit 2, p. 2.

[150] The Accenture Study, claims that 5G could impact up to $275 billion in investment, create 3 million jobs and increase GDP growth by 500 billion dollars. Accenture Study.

[151] CTIA Ex Parte filed January 13, 2017.

[152] Accenture Study at p. 13.

facing small cell operators cites no empirical data and names no specific jurisdiction or practice.[153] But even assuming that its allegations of challenges were true, the report nevertheless seems to indicate that deployment is occurring, meaning benefits are being realized.

The report's claims with respect to charges preventing deployment are also not actually supported, and are not even theoretically sound. As the report by ECONorthwest attached to these reply comments explains, if the benefits that Accenture estimated are real, then the providers should be able to pay market rates for resources used; if the economic value of the benefits are so tenuous that providers cannot pay market value for property, that suggests the benefits are in fact illusory.[154]

Moreover, as Dr. Cahill explained in his initial and reply reports[155] requiring states and localities to subsidize the small cells current incumbents seek to deploy is a bad economic idea. Because if the Commission picks winners and losers through subsidies and below market access, it may encourage deployments that actually delay development of more advanced technologies by subsidizing the incumbent players. The prospects outlined in the Accenture Study are more likely to be achieved if localities recover all their costs and are entitled to charge fair market value for the property used by providers.

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[153] The absence of any real facts regarding the 24-month example is illustrative of the deficiencies in the report. The Commission has before it examples of 120-foot towers being proposed to be placed in ways that they would interfere with other utilities, create safety hazards, block handicapped access, and so on. Smart Communities also showed that facilities are being installed without complying with Section 106 procedures, and applications are being submitted without engineering. If Accenture is suggesting that society would be better off allowing the negative impacts (which include fatalities, loss of property values and so on) in order to replicate functionality already provided on private lands); or is trying to say that 24 months was unreasonable under the circumstances it examined, it surely should have examined the costs and causes of delay v. benefits afforded v. the harms avoided. It did not attempt to do so.

[154] ECONorthwest Reply Report, Ex. 3, p. 4 Dr. Cahill provides a detailed economic criticism of the Accenture Report in his comments. It is not a cost-benefit analysis that justifies imposition of any additional rules.

[155] Smart Communities Comments, Ex. 2, Cahill Declaration; ECONorthwest Reply Report, Ex. 3.

The Accenture Study is also technically inaccurate. The Accenture Study says that 5G "cells are small – the size of a shoe box."[156] As Accenture is a management consulting firm, perhaps its lack of technical expertise can be forgiven. While there may be devices that are the size of a shoe box,[157] these devices must be powered and connected to a communications network. Many times, the power connection or backhaul connection requires another component, a component that is always much larger than a shoe box.

CTC, an engineering firm, documents that some "small" cell facilities approach "macro" site facilities and electric transmission monopoles in size and weight.[158] Its supplemental report provides a description of "small cells" as actually deployed, and shows that in fact, those facilities can be quite expansive and intrusive.[159] However, the Accenture Study is revealing in one respect – it is premised in part on the assumption that very small installations can yield benefits estimated. The problem (as the Supplemental Report by CTC explains) is that industry is seeking relief that would apply to large facilities that could have impacts Accenture ignores.

[156] Smart Communities Comments, Ex. 2, Cahill Declaration at p. 1.

[157] While there are no 5G devices at the moment, it is reasonable to imagine that there will be a huge diversity of devices in size and function, just as there are now with LTE devices.

[158] Smart Communities Comments, Ex. 1, CTC Declaration at p. 6 (In some small cell deployments, the technology does not use fiber or wired infrastructure to connect to the network. The network connectivity, known as "backhaul," is done wirelessly. In order for backhaul to work effectively using a wireless approach, there needs to be a strong signal between the small cell devices and one or more master backhaul antennas. Some providers are accomplishing this by making the master backhaul antenna especially tall, potentially 70 to 120 feet, which exceeds the height of many macrocells. Mobilitie is one company that uses this architecture and has filed many applications for poles of great height.

[159] CTC Reply Report, Exhibit 2, p. 1.

VI. THE INDUSTRY-PROPOSED DEFINITION OF SMALL CELL IS ANYTHING BUT SMALL, AND CERTAINLY NOT A DEFINITION THAT JUSTIFIES SHORTER TIMES TO ACT ON A COMPLETE APPLICATION

A. Small Refers to Area Served, Not the Size of Facilities

The term "small cell" is typically used to describe an installation that serves a small area – not to distinguish between facilities that are "small v. those that are large."[160] For purposes of this Notice, it is important to recognize that what falls within the rubric of a "small cell" at any given site can actually involve many different pieces of equipment, some of which could be quite large and quite intrusive. Thus, as CTC explained, at any given location, a "small cell" may involve a support structure (ranging in size from a Mobilitie tower to a more conventional utility pole); an antenna; radio units; power supplies/electric meters/disconnects/cabling; and potentially back-up power supplies.[161] Some of these facilities may be mounted on the tower or pole; some may be placed in a vault, and some may be ground-mounted.

B. The Commission Should Not Adopt A New Definition of Small Cell As Proposed By Industry

The Wireless Infrastructure Association ("WIA") proposes a definition of "small wireless facility" that would capture both individual nodes in a DAS network and a stand-alone small wireless facility by employing the "volumetric definition contained in the Commission's First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas…."[162]

First, Smart Communities questions whether the Commission has the authority to create a new class of wireless sites. Congress has neither directed the Commission to establish such a

[160] Smart Communities Comments, Ex. 1, CTC Declaration at p. 2.

[161] Smart Communities Comments, Ex. 1, CTC Declaration at p. 6.

[162] Comments of the Wireless Infrastructure Association at p. 1, fn 2 (filed Mar. 8, 2017).

category and Congress has already provided the Commission guidance for cell sites and for collocations at cell sites. It did not authorize the Commission to create a third category of a small cell site.

Moreover, there are significant, practical reasons why a new category even if appropriately defined, is not appropriate. It complicates the siting process by adding a new layer or regulations for whatever the Commission defines as "small cells." And, because applications are being submitted in batch, there is no reason to believe that applications for many small cells could be reviewed in a shorter time than is occurring now, under existing rules.[163]

Most importantly, however, the industry's proposal uses a definition that does not actually limit placement to the sorts of small facilities that can be reviewed quickly, and its reliance on the Programmatic Agreements to support that definition involves a great deal of "cherry-picking" and reflects a misunderstanding of the Section 106 process. For example, the Section 106 standards are designed to identify situations where there is a definite risk of harm to historic properties or areas; the rights are not absolute – a locality, a tribe or any interested party could still trigger a Section 106 review by complaint.[164] That is, the rules recognize that in many instances, even when the standards the Commission adopted are followed, they could cause harm, and may require significant review..

[163] CTC Reply Report, Ex. 2.

[164] *See e.g.* Collocation Agreement (entitled "National Programmatic Agreement for the Collocation of Wireless Antennas") Stipulation V. A. 4 – A prerequisite of the Section 106 process is that there is no complaint from a member of the general public, Indian Tribe, a SHPO or the Council. *See also* Stipulation VI C, which provides there is a right of review after the collocation has taken place even if fully in compliance with Stipulations if in the opinion of a SHPO/THPO or Council the collocation has resulted in an adverse effect on the historic property.

Second, the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas is designed to discharge only the Commission's duties, not the broader duties of states and localities.

Third, the rules effectively recognize that even for small cells located outside of historical areas, a size greater than 28 cubic feet has the potential for significantly affecting an historic area.[165] One can therefore reasonably draw the inference that the same size deployment has a significant possibility of a negative impact on immediately adjacent properties. While the value of adjacent properties and the aesthetic impacts of a deployment may not be a concern of the Commission in the Section 106 Agreement, it is a major concern of localities, given both aesthetic interests and the real possibility that such large facilities could affect property values significant.[166] While adjoining property value may not be a concern for WIA and its members, such a concern must be considered by the FCC, especially on smaller communities. In other words, the Commission's own rules reflect that at the very least, a 28 cubic feet structure, even when subjected to the minimally visible rules, requires significant reviews, and is not a minor structure eligible to fast track applications.[167]

C. WIA's Definition Ignores Minimally Visible Elements of the Section 106 Test

WIA excludes from its volume test, the second portion of the *First Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, i.e. that the

[165] See Stipulation VI A.5.(b) (ii).

[166] Smart Communities provided an expert analysis to highlight for the Commission the potential impacts of wireless facilities on adjoining property values. *See* Smart Communities Comments, Ex. 3, Report and Declaration of David E Burgoyne. Burgoyne concludes many deployments of small cells could affect property values, with significant potential effects. *See also*

[167] It is also helpful to note that the *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas* does permit 21 cu ft. facilities on active utility poles in historic areas. While one can question whether that exemption was warranted, it is noteworthy that this is the maximum size permitted, despite section 6409; and such a deployment is subject to a complaint process. In other words, placements in the public rights of way subject to 6409 raise substantial issues not of concern under NHPA

device be minimally visible. As the Bureau explained in its Notice[168] announcing the agreement, "the amendment tailors the Section 106 process for small wireless deployments by excluding deployments that have minimal potential for adverse effects on historic properties." The amendment then goes to establish that a site need not only be small, but "minimally visible."

A review of the minimally visible standards would exclude a great many of the sites WIA would otherwise argue fit the cubic foot test. In order to ensure the minimal visible impacts, the *First Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas* provides:

1. The "small cell" must be deployed on a building or non-tower structure.[169] (Stipulation VI)
2. The antenna or antenna enclosure must be the only equipment that is visible from the ground level. (Stipulation VII. A)
3. The antenna or enclosure must not exceed 3 cubic feet in volume.
    a. Antenna or enclosure must be installed using concealment techniques that match or complement the structure on which or within which it is deployed. (Stipulation VII. A)
4. No other antenna on the building or non-tower structure may be visible from the ground level. (Stipulation VII. A)
5. No antenna's associated equipment may be visible from the ground level. (Stipulation VII. A)

[168] *Wireless Telecommunications Bureau Announces Execution Of First Amendment To The Nationwide Programmatic Agreement For The Collocation Of Wireless Antennas,* WT 15-180 (Rel. Aug. 8, 2016).

[169] Since the definition of Tower in the Collocation Agreement has the same meaning as for Section 6409, i.e. deployed for the "sole or primary purpose of supporting FCC-licensed antennas and their associated facilities," a Mobilitie pole, which is deployed for the just that purpose would not qualify.

6. The depth and width of any proposed ground disturbance associated with the collocation cannot exceed the original depth and width with a maximum of four lightning grounding rods.

The basic premise of the WIA proposal is that facilities of a certain size require minimal review, and therefore can be subject to a shortened shot clock. In fact, viewing the Programmatic Agreements as a whole, it is fairly clear that absent other protections, a facility of the size proposed by WIA can require significant review, and that the circumscribed definition does not provide a sound legal line (and definitely fails to identify a sound technical line) between "small" cells and other installations.

VII. NATIONAL POLICY SHOULD REWARD INNOVATION AND TECHNOLOGICAL ADVANCES; THE INDUSTRY DEFINITION OF SMALL CELL DOES NOT.

As CTC explained in its declaration, today's small cell sizes may approach or exceed the size of many monopoles or macrocells.[170] This is because many small cells utilize the same equipment that is utilized on traditional macrocells, despite some of the equipment occupying a smaller physical area due to placement or powering.

The Commission has also recognized that its rules should "neither explicitly nor implicitly express a preference for one particular entry strategy….[nor be] an attempt to indicate such a preference…[as it] may have unintended and undesirable results…. As to success or failure, we look to the market, not to regulation, for the answer."[171]

Petitioner and the industry commenters are arguing for just such an industrial policy. For instance, by fast tracking Mobilitie's 120 foot "small cell" model, or even the 28 cubic foot

[170] Smart Communities Comments, Ex. 1, CTC Declaration at pp. 6-8.

[171] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, 15508-15509 (1996) ("Interconnection Order").

model proposed by WIA, the Commission retards the development of technologies that are truly small. Tipping the scales in favor of Mobilitie's model that requires installation of a significant foundation in the public rights-of-way that and requires analysis of the soil underneath the facility and the support required to prevent the tower from falling, thwarts the day when a new technology that presents none of those costs to the community arrives.[172]

VIII. REGULATING THE PRICES CHARGED FOR ACCESS TO THE PUBLIC RIGHTS-OF-WAY OR OTHER GOVERNMENT PROPERTY AT LESS THAN FAIR MARKET VALUE IS BAD POLICY

A. Fees for Use of Government Property Should Be Priced At Fair Market Value

As ECONorthwest explains:

> if a municipality is forced to sell access to its ROW at a below-market rate, then users will not fully consider the cost of accessing the ROW and will over utilize it. One form in which this overutilization could manifest itself is that existing ROW could become overcrowded, and be unable to accommodate new, innovative technologies.[173]

Moreover, a review of the comments of the state and local highway community makes clear that many federal, state and local codes prohibit the use of governmental assets for less than property value. But the Commission need only look in the mirror and its use of spectrum auctions to see a government entity that embraces the concept that the use of public assets should

[172] Moreover, it may discourage innovations and new entrants, as Dr. Cahill points out in his Reply Comments. ECONorthwest Reply Report, Ex. 3. And this is before even addressing Commission's goals such as Historic Preservation. See, E.g. Smart Communities Comments, Ex. 5, which describes a "small cell" proposal for a historic district in Monroe, Michigan. It would have included a facility 40" in diameter with a 50" base plate, that would rise 100' above ground. Hardly a "shoebox."

[173] Smart Communities Comments, Ex. 2, Cahill Declaration at p. 5.

be at market value, for in using market value, the government agency can be assured that the government property is used for it best and highest purpose.[174]

The Commission is nearing the end of a multi-year Broadcast Incentive Auction as a means to move current occupants of government property (broadcasters), who may be underutilizing that government property, to winning wireless bidder that by their price they are offering can demonstrate a higher use of the property, i.e., the market value.

In the case of local government public rights-of-way, it would not be consistent with the Commission's own policies, or basic economic principles, to require access to property be provided at less than market value.

IX. THE COMMISSION SHOULD NOT BE FOOLED BY INDUSTRY'S EFFORT TO CONFLATE PERMIT FEES WITH MARKET RENT

A. Application Fees Are Cost Based

Almost every industry commenter[175] sought to challenge the level of fees that were being assessed for applications for building, electrical permits, or for land use permits. As explained in our initial comments, these permit fees are based on costs, and if anything, typically under-recover actual costs. Not surprisingly, the frequency and detail with which costs are analyzed and fees set depends on the size and resources available to a community, as well as state or local requirements. But, there is certainly no reason to believe that the industry is being charged unreasonable fees, or that federal action would be appropriate or permissible. Here are some thumbnails as to the way Smart Communities set fees:

[174] The Commission devotes a section of its web site to the most recent auction, the Broadcast Incentive Auction. https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions

[175] *See e.g.* See e.g. Competitive Carriers at pp. 9, 15, 16; Verizon at p. 14; Mobilitie at p. 3; Crown Castle at p. 28; T-Mobile at p. 7.

Ann Arbor, MI[176] — Each year in conjunction with the preparation of the budget,[177] Service Areas/Service Units (permitting operations) are requested to review license and fee revenues to determine if the cost of the services rendered are covered by the charges. When determining these costs, Service Units take into account increases or decreases in expenses such as: labor, material and supplies, equipment, and overhead costs.[178] The increases are generally in the range of 1% to 5% and are for purposes of full cost recovery. In some cases where fees are proposed to be higher than the nominal, explanations are provided to give a rational for the increase. Decreases are in the range of 4-54% and vary more widely due to efficiency improvements, and equipment pricing fluctuations.

In Ann Arbor, other than the fees that are based on hourly rates, rates that are established as "per unit" fees result from an annual calculation of total hours spent per fiscal year for each type of unit, and the number of units, resulting in the average cost per unit. Fee revisions are made to reflect current hourly wages and overhead, and to reflect staff time (e.g., adjustments based on total time and total # of units).

It is anticipated that at the City Council meeting of May 15, 2017, Ann Arbor's permit fees for fiscal year 2018 will go up in FY18[179] (starting July 1, 2017). While the same methodology to calculate fees is being employed, the increases are as a result of staff's hourly

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[176] http://www.a2gov.org/Pages/default.aspx

[177] Here is a URL for Ann Arbors Council resolution adopting the FY16 fees, including links to the schedules of fees:

http://a2gov.legistar.com/LegislationDetail.aspx?ID=2267182&GUID=4894D595-FA79-43A1-9195-F64ED9CB884C&Options=ID|Text|&Search=fees

[178] *See* http://www.a2gov.org/departments/engineering/Pages/Engineering-and-Contractor-Resources.aspx

[179] Here is the URL for the Ann Arbor Council resolution adopting the FY17 fees, including links to the one schedule of fees that was approved:
http://a2gov.legistar.com/LegislationDetail.aspx?ID=2694497&GUID=BDF8CBCF-82CC-4060-B3CE-AA12EC579E75&Options=ID|Text|&Search=fees.

rates having increased and some fees have been adjusted to conform to an increase in the average time actually spent.

Pocomoke City, MD[180] — Under Maryland law, fees must be roughly proportionate to costs. Among the costs traditionally include are the time required to process the fees, including any engaged experts and certain off-site costs that are included as part of a permit fee for things such as advertising costs. Expert costs may be required to be done at the applicant's expense such as an independent review of engineering plans. A review of the City's Fiscal Year 2016 adopted budget reflects that costs and revenues from the permitting sections are roughly equivalent.[181]

Cary, NC[182] — Across Cary, cost recovery for permitting fees stands at about 65% of actual cost and prices as well as explanations for the fees can be found on-line and in simple language.[183] Not unlike Ann Arbor, permit fees in Cary, are authorized by the Council based upon an annual staff calculation of how many staff professionals must review typical development plans and for how long each must dedicate to the application. The staff then develops an "average" cost for the review of a generic application based on this staffing time.

A review of the types of costs involved applications that are subject to this matter reveals that for a plan review of a new stealth tower, the fee would be $2,000. For telecommunications towers that require a special use permit, the application fee is $4,500. If there is also an associated site plan, then the $2,000 site plan fee is also required.

[180] http://www.cityofpocomoke.com/.

[181] http://www.cityofpocomoke.com/_charter_files/FY2016%20Adopted%20Budget%20for%20Website.pdf .

[182] http://www.townofcary.org/.

[183] http://www.townofcary.org/services-publications/residential-permits-inspections/faq.

The $4,500 special use fee was developed based on the City's Land Development Ordinance's provision[184] that the Town may hire outside experts to help review the application, so a certain portion of the application fee is used to cover any costs associated with hiring such experts. The $4,500 amount includes what the City of Cary determined was a state wide average for such outside assistance.

The fee to review plans for a structure mounted antenna depends on whether it is processed as a Minor Alteration (which is $125), or a site plan (which would be $2,000).[185] Again, the estimates are based on the City's experience as to time required to process applications. While it may be that some applications require more, and some less time; overall the goal has been to limit recovery of permitting type fees to costs, and the City, in practice, under recovers those costs.

B. The Commission Does Not Set Charges In the Way Industry Claims Local Governments Should Be Obligated To Set Charges.

In our initial comments, we explained that charges to wireless providers can be legally divided into fees intended to recover costs associated with managing the public rights-of-way, or performing traditional police power functions, and charges for occupancy of public property. As suggested above, the latter are not restricted to costs, and cannot and should not be restricted to cost by the Commission. The distinction between rents and fees – which industry seeks to conflate – are recognized widely, and are in fact reflected in the Commission's own actions.[186]

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[184] http://www.townofcary.org/services-publications/residential-permits-inspections/development-regulations/land-development-ordinance.

[185] Under Cary's fee schedule, if a site plan is re-submitted for review a fourth time, there is a re-review fee that is charged, and repeated for every fourth review of the plan. That cost is 50% of the initial fee. This fee would be collected at the time the plan is submitted a fourth (or eighth) time.

[186] In fact, the Federal Communications Commission recovers a fee that most local government do not collect – an annual regulatory fee.

As explained on the Commission's webpage[187] dedicated to fees, there are five types of fees collected by the Commission. These include:

1. **Application Processing Fees**[188]
2. **Annual Regulatory Fees**[189]
3. **Freedom of Information Act (FOIA) Fees** for processing requests under the Freedom of Information Act.
4. **Auction Payments**[190] for upfront payments, down payments, and subsequent payments for licenses that the FCC auctions.

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[187] https://www.fcc.gov/licensing-databases/fees.

[188] According to the FCC's website, "The Federal Communications Commission's authority to impose and collect fees is mandated by Congress. In Section 8 of the Omnibus Reconciliation Act of 1989 (Title III, Section 3001 of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101-239), Section 8, revising 47 U.S.C. 158), Congress authorized the FCC to impose and collect application processing fees and directed the Commission to prescribe charges for certain types of application processing or authorization services it provides to communications entities over which it has jurisdiction. Application processing fees are deposited in the U.S. Treasury and are not available to the Commission.

[189] The Commission explains it need for regulatory fees, in this case for cable providers, at https://apps.fcc.gov/edocs_public/attachmatch/DOC-335230A1.pdf. " Each year, the Commission is required to collect regulatory fees. Licensees and regulatees are assessed fees as set forth in Assessment and Collection of Regulatory Fees for Fiscal Year 2015, Report and Order and Further Notice of Proposed Rulemaking, (released September 2, 2015) ("FY 2015 Regulatory Fees, Report and Order and Further Notice of Proposed Rulemaking"). The Commission also publishes industry-specific guidance in Who Owes Fees & What Is My FY 2015 Fee, which can be found on the Commission website at http://www.fcc.gov/regfees.

[190] The history of auctions as a means to achieve the fairest return for government is explained by the Commission at http://wireless.fcc.gov/auctions/default.htm?job=about_auctions.

> "In 1993 Congress passed the Omnibus Budget Reconciliation Act, which gave the Commission authority to use competitive bidding to choose from among two or more mutually exclusive applications for an initial license. Prior to this historic legislation, the Commission mainly relied upon comparative hearings and lotteries to select a single licensee from a pool of mutually exclusive applicants for a license. The Commission has found that spectrum auctions more effectively assign licenses than either comparative hearings or lotteries. The auction approach is intended to award the licenses to those who will use them most effectively. Additionally, by using auctions, the Commission has reduced the average time from initial application to license grant to less than one year, and the public is now receiving the direct financial benefit from the award of licenses.
>
> In the Balanced Budget Act of 1997, Congress extended and expanded the FCC's auction authority. The Act requires the FCC to use auctions to resolve mutually exclusive applications for

5. **Forfeitures** are penalties that the FCC may assess for violations of law or noncompliance with authorizations.

Each of the parties filing in this proceeding are subjected to application and annual regulatory fee that are generally set by the Commission at the average costs such services and oversight impose on the federal government/tax payers, not incremental cost as is proposed here. And of course, none of the parties claim that they are entitled to use spectrum at the incremental cost of such a use.[191] If the Commission's pricing mechanisms do not prohibit entry, it is hard to imagine why a subsidy model can or should be required of local governments.

X. THE DOCKET IS A TESTAMENT TO WHY THE COMMISSION MUST MOVE FORWARD TO UPDATE ITS RF EMISSIONS RULES

More than four years ago (March 29, 2013), the Commission opened a proceeding to address changes in the RF emissions standards related to human exposure that received nearly a thousand comments totaling more than 20,000 pages but has yet to take action to complete its review of its RF emission rules and determine if any updates were necessary. In response to the Notice's open invitation to list actions the Commission might take to assist the deployment of wireless broadband infrastructure, Montgomery County,[192] Smart Communities and no less than eight-five percent of the parties filing in this proceeding called on the Commission to finish its work on the 2013 RF NOI.[193]

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initial licenses unless certain exemptions apply, including exemptions for public safety radio services, digital television licenses to replace analog licenses, and non-commercial educational and public broadcast stations. *Id*.

[191] *See, e.g.,* Verizon Comments at p. 14; Crown Castle at p. 11; Mobilitie at pp. 3, 9, 17; T-Mobile at pp. 3, 7.

[192] Montgomery County Comments at p. 28.

[193] See e.g. Comments of Lynn Beiber at p. 1 (filed Mar. 13, 2017) ("The informed public is STILL waiting for you to act upon 2012 recommendations from the GAO that call for reassessment of your current RF energy exposure limits.") Comments of Ben Gerdeman at p. 1 (filed Mar. 13, 2017). ("The FCC does NOT have our permission to microwave our communities, resulting in environmental and

As Montgomery County shared in its comments:

> The Commission's failure to act on RF rulemakings is resulting in growing public concern and potential opposition to 5G deployments in residential neighborhoods. The Commission has exclusive jurisdiction to regulate RF emissions.[194]

Commission action is particularly important because there are recent studies describing the impact of small cell deployments on RF exposure that are simply not reflected in existing rules.[195] To put it another way: The basic predicate for this proceeding is that it is a benefit to deploy ultra-dense wireless networks, and a basic assumption is that the deployment (which is designed to lead to greater use of wireless devices generally) does not endanger public health. We believe it will be much easier to gain public acceptance and support for deployment of wireless facilities (which will in turn lead to more private properties being opened for placement) if the Commission acts to complete its proceeding. Indeed, it is arguably required to do so before preempting local authority any further.

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health damage that has been widely documented in peer-reviewed scientific studies.") Comments of Elizabeth Kelley, MA Electromagnetic Safety Alliance (filed Mar.8, 2017) ("The FCC should not promote the deployment of 5G technologies and infrastructure until they complete their work on Docket 13-84, Reassessing RF emission guidelines, and also receive the final results of the NTP rat study later this year. - The wireless industry adamantly opposes being regulated but they are requesting privileges (access to public rights of way on our properties) that are reserved for regulated utilities. I ask you to place an hold on these proposed rules pending a complete investigation in the public interest."); Comments of Rachel Newcomb at p. 1, (filed Mar 9, 2017). ("Last year, the US government, led by the National Toxicology Program (NTP) linked cancer to cell phone radiation. Until this link has been more thoroughly researched, we don't need more wireless networks introduced."); Comments of James (filed Mar 8, 2017), ("As a County Legislator [James DiSalvo]…I understand that the FCC has not responded to its 2013 Docket 13-84 Reassessing RF emission guidelines. At a minimum, it would seem to me to be prudent, conservative policy not to allow more rollouts of transmitter infrastructure until this docket reviewed. Notwithstanding the results of Docket 13-84, home rule is very important to us in New York and I am not comfortable with the FCC gutting local regulations."), Comments of April Hurley, MD (filed Mar 8, 2017) ("I have been board certified, licensed in 3 states, 33 years treating families affected by electromagnetic radiation in their homes and places of play, work, or study. EMF density needs to be reduced not increased.("I have been board certified, licensed in 3 states, 33 years treating families affected by electromagnetic radiation in their homes and places of play, work, or study. EMF density needs to be reduced not increased.")

[194] Montgomery County comments at 28.

[195] http://onlinelibrary.wiley.com/doi/10.1002/bem.22045/full#references; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4377923/.

XI. CONCLUSIONS

For the reasons discussed above, and in the expert declarations, the Commission should not grant Mobilitie the relief it seeks, or adopt additional rules or shot clocks for "small cell" deployments.

It should clarify its rules to ensure that service and facilities providers are not incentivized to file incomplete applications; should clarify its Section 6409 rules so that small cells remain small and subject to safety guidelines applicable to roads; and should move forward to update its rules governing RF emissions.

Respectfully submitted,

/s/ Joseph Van Eaton
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Gail Karish
Gerard Lavery Lederer
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, DC 20006

On Behalf of its Clients in the Smart Communities Siting Coalition

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On Behalf of its Clients in the Smart Communities Siting Coalition

April 7, 2017
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Exhibit 1

CITY OF ATLANTA

KASIM REED
MAYOR

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ATLANTA, GEORGIA 30303-0300
TEL (404) 330-6100

April 5, 2017

Ajit Pai
Chairman
Mignon Clyburn
Commissioner
Michael O'Rielly
Commissioner
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: *Mobilitie, LLC Petition For Declaratory Ruling*, WT Docket No. 16-421

Dear Chairman Pai and Commissioners Clyburn and O'Rielly:

Crown Castle International Corp. ("Crown Castle") in a recent filing[1] in the above captioned docket alleged that the City of Atlanta was a "bad actor" based upon a proposed City of Atlanta ordinance to establish reasonable rates for deployment of wireless technology on Atlanta owned property and within Atlanta's rights-of-way. This letter, which will also be filed as an Exhibit to the Smart Communities Reply Comments, seeks to offer the Commission a more robust understanding of the circumstances.

The City of Atlanta, specifically the City's Utilities Committee, is considering an ordinance that would establish reasonable fees for wireless pole attachments in the City's public right-of-way. Before moving the legislative proposal out of Committee, the City invited the Georgia Wireless Association ("GWA") to engage in discussions about the proposed ordinance. As a GWA member, Crown Castle has participated in three meetings at City Hall during a five week period, with a fourth meeting scheduled to occur in two weeks. The meetings were hosted by City officials from the Mayor's Office and the Department of Public Works, and attended by approximately 20 industry representatives from GWA. In response to industry's input, including that of Crown Castle, during the first three meetings, the City substantially restructured the proposed ordinance. None of this information, however, was included in Crown Castle's description of the City's ordinance that was shared with the Commission.

The City is very worried about the inaccurate image that the Crown filing paints of the City of Atlanta. The record is clear. The City of Atlanta supports and encourages the deployment of small cell technology.

[1] Comments of Crown Castle at p.12 (filed Mar. 8, 2017)

The City strives to improve wireless coverage for Atlanta's residents and visitors, while enhancing the delivery of governmental services.

Atlanta has been, and remains committed to discussions with all stakeholders on how we might make our community the most connected city in America. It is therefore disappointing that Crown Castle has chosen to publicly criticize the City based on an early draft of the legislation, even while the cooperative dialogue between the City and GWA continues. The City of Atlanta's good faith efforts will continue, despite Crown Castle's inaccurate assertions.

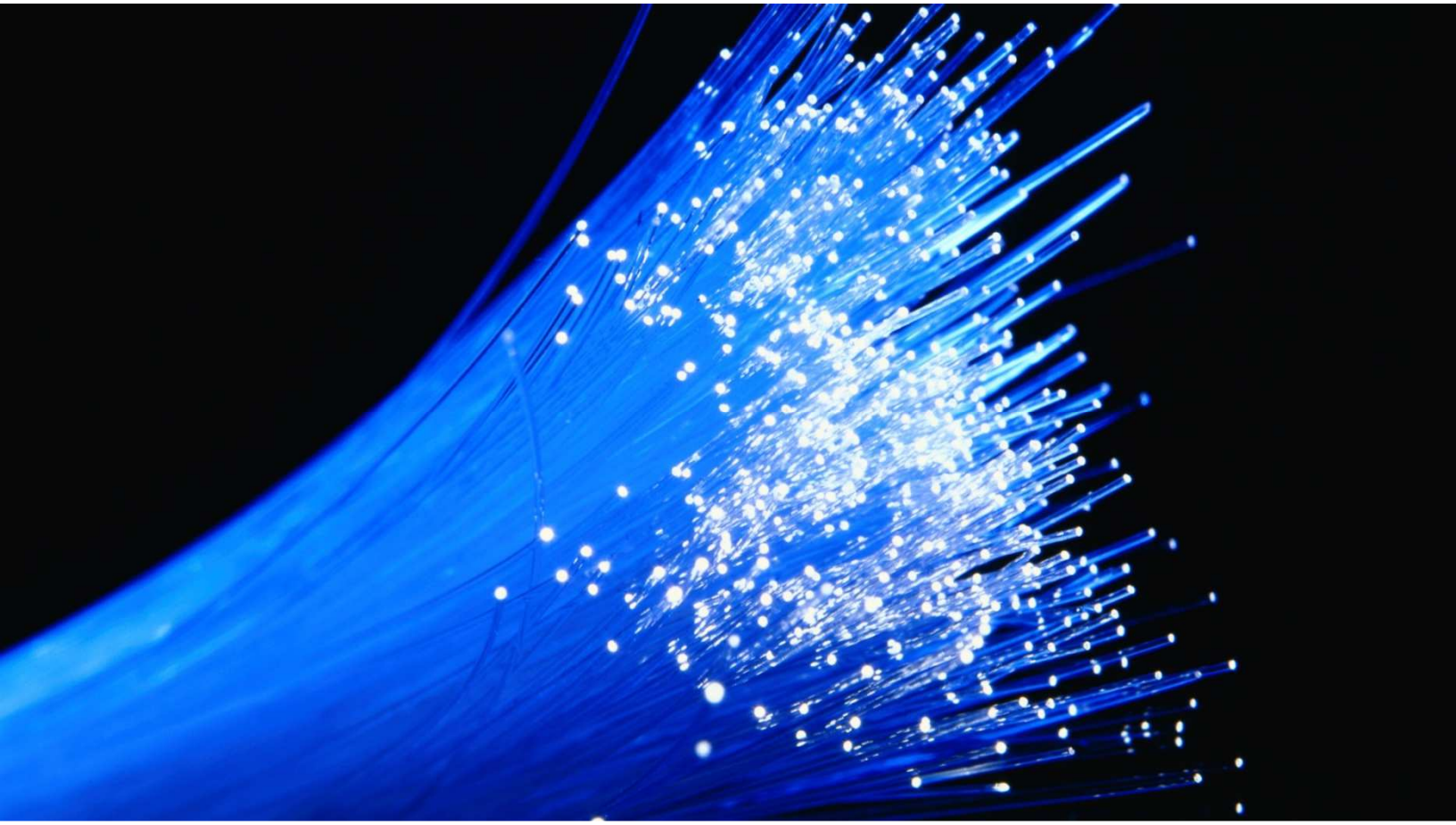
Thank you,

William Johnson,
Deputy Chief Operating Officer
Commissioner of Department of Public Works

Exhibit 2

ctc technology & energy

engineering & business consulting



Definitions of Small Cells, and the Review of Small Cell Applications

Supplemental Report

Andrew Afflerbach, Ph.D., P.E.

April 2017

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Table of Figures

This report addresses requests by industry that the Commission adopt a definition of small cell that is based on excerpts from the definitions used to define circumstances under which a collocation is exempt from the Section 106 process; and to address the related suggestion that small cell applications can be reviewed in a shorter period of time.

As I explain, the small cell definition proposed permits installation of facilities that are intrusive and may raise significant safety and other issues that require significant review. As importantly, the definition proposed is not required to permit deployment of wireless facilities. There are some types of proposed installations that can be reviewed more quickly than others where the installation is truly small, and where certain other locational and physical characteristics are satisfied. Unfortunately, as a practical matter, it is now rare that a locality will receive a single small cell application; more often, multiple applications are received at once for a larger project. As a result, while individual applications may be quickly reviewable, "bulk" applications take as much or more time than traditional applications for macrocells.

1. Any Definition of Small Cells Based on Size Should Not Put Large Obtrusive Structures in the Same Category as Small Equipment

If one decided it was appropriate to define a maximum size for a small cell, it is important that this definition include only a configuration that is truly both small and low-impact. I have seen the size of small cells and DAS systems vary widely, over a factor of ten in volume, even within the deployments by the same companies (and this is not even considering the 120-foot "small cells" proposed by Mobilitie). The definitions from NEPA and WIA do not uniquely specify a class of standard equipment. Rather, they are a somewhat arbitrary designation that includes very large equipment, along with what most people would agree is "small":

- Each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and
- All other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume.[1]

[1] I am generally responding to the definition in the Comments of the Wireless Infrastructure Association at p. 1, fn 2 (filed Mar. 8, 2017): "WIA will use the term "small wireless facility" to include both individual nodes in a DAS network and also stand-alone small wireless facility installations that are not part of a DAS network. In terms of the size of the equipment, as used in these Comments, WIA will use the volumetric definition contained in the Commission's First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Public Notice, Wireless Telecommunications Bureau Announces Execution of First Amendment to Nationwide Programmatic Agreement for Collocation of Wireless Antennas, 31 FCC Rcd 8824, 8829 (2016), as well as legislation recently passed in Ohio (SB 331) and by the Virginia Legislature on February 20, 2017 (SB 1282), which defines a small wireless facility as a facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the facility is cumulatively no more than 28

Note that this definition does not obviously include equipment that the Commission treats as part of a base station and that could add significantly to the intrusiveness of an installation, depending on the location. That equipment includes, for example, back-up power supplies, meters and disconnect boxes. Other factors that contribute to larger deployment size include the type of backhaul used (with wireless backhaul requiring more antennas and radios), the number of providers served, the number of spectrum bands connected, the types of antennas (multiple panels versus a single whip) and the service area. Deployments that connect multiple bands or providers not only need multiple antennas but also need multiple radio cabinets, power supplies and power meters. Multiple cabinets may also be needed for interconnection to backhaul.

A deployment that is of reasonable size may become substantially larger if more spectrum bands or carriers are added. Each addition of a band or carrier may require additional antennas, and additional cabinets for power and telecommunications interconnection. Transitioning from one band to two or three can double or triple the volume of equipment needed.

To provide a sense of what the WIA definitions include, Figure 1 illustrates a DAS installation with a large antenna that fits just within the six-cubic foot definition, and multiple cabinets that are well within the 28-cubic foot definition.

cubic feet in volume." This definition, of course, excludes several other limitations included in the definitions in the Programmatic Agreement that distinguish among and further limit the size of certain installations.

Figure 1: Example DAS Installation within "Small Cell" Definition

While smaller than a macro site, this installation is clearly larger than many other small cell deployments, is highly obtrusive, and is likely to require a different level of review and consideration than a truly small installation.

Figure 2 and Figure 3 illustrate a multi-band DAS deployment with seven cabinets of various sizes for radios, fiber termination, and power. Collectively, these are less than half the 28 cubic feet proposed by WIA.[2] Two items to note from this example are: 1) a highly functional DAS or small system can be deployed using much less than 28 cubic feet of cabinets—28 cubic feet is significantly more than what is needed in most cases, and 2) even this collection of cabinets is significantly larger than what is seen now on poles, and is highly obtrusive. Cabinets of 28 cubic feet, plus additional cabinets for all the excluded ancillary equipment, can create hazards by blocking views in the right of way, can block sidewalks, and will have a significant aesthetic impact.

[2] In addition, the WIA proposes to exclude a long list of ancillary equipment from the 28 cubic-foot limit. In this case, the three lower boxes would be excluded from the calculation.

Figure 2: Multi-Band DAS Deployment

Figure 3: Multi-Band DAS Deployment – Detail of Cabinet Installation

By contrast, there are deployments with significantly smaller volumes of equipment that are achieve the goals of the Commission, particularly since those systems typically work in conjunction with existing towers. Figure 4 illustrates a small cell deployment with associated backhaul radio, telecommunications interconnection, and power meter. The small cell radio size is closer to one cubic foot, and total ancillary equipment is a few cubic feet. Figure 5 shows a close-up view of the radio component. This smaller deployment, incidentally, is closer in physical size to the original vision of 5G technology, using many small devices rather than the larger equipment shown earlier. In New York, carriers have been able to deploy small cells in the rights of way that occupy less than 3 cubic feet, and as important, are installing cells so that the width of the equipment is about the width of the pole.

As discussed, equipment sizes vary depending on the application sought by the deployer. Larger equipment can do different things than smaller equipment, and there is a place in the wireless ecosphere for the larger equipment, just as there is a place for wireless macrocells. But, there are often alternatives to the placement of the larger equipment that do not raise the issues raised when physically large equipment in placed in the right of way.

What is most important to consider is that the definition proposed by WIA for a small cell includes equipment that is by no means small, and that creates a radically different impression and impact than an installation that is dramatically smaller. If the Commission does adopt a small cell definition, it would be inappropriate to treat as identical installations that take up 28 cubic feet as equipment that is one-tenth that size. It is also critical that the FCC not base rules on the assumption that facilities being proposed are or remain small while some in the wireless industry seek to treat much larger equipment as “small”.

A truly small cell – one that does not involve back-up power, has a relatively small vertical antenna (designed to minimize wind loading), and small associated equipment flush mounted to existing utility poles, and of relatively small height, width or depth - will typically be reviewable in a shorter period than a facility that does not have those characteristics – at least assuming the Commission’s rules do not mandate approvals of expansions of these small cells. However, experience suggests that localities will be receiving applications for approval of multiple small cells at once.

While it may be faster in most cases to review a single small cell application, in reality, applications received in bulk will require more time to review than contemplated by the Commission’s current rules. Likewise, there may be particular situations (historical areas, undergrounded areas or environmentally sensitive areas and intersections – discussed in the next section) where even small cells may require significant review time.

In addition, it is often possible to install small cells without excavation or movement of existing utilities. Where excavation is required – particularly in the rights of way – additional issues arise. The effect on existing utilities and infrastructure must be considered, and that is particularly time-consuming where, e.g., the work requires removal and replacement of decorative sidewalks and streets, as well as potential impacts on accessibility.

Figure 4: Small Cell Deployment with Lower Impact

Figure 5: Small Cell Deployment with Lower Impact—View of Radio

2. The Importance of Assessing Risk of Placing Infrastructure in or Near Intersections

Intelligent equipment placement in intersections enables a small cell or DAS deployment to both use a single placement to cover a greater volume of potential users at once, and also use a smaller number of cells to cover a given area. All things being equal, it is always more efficient to place small cells and DAS at intersections rather than alongside a road, away from an intersection. However, there are many other important issues to consider when placing new infrastructure, including the need to avoid existing congestion due to traffic signals and associated signal cabinets, the density of existing utilities, the importance of keeping a clear view of traffic, and the need to keep a clear path for pedestrian access to crosswalks.

According to the Federal Highway Administration, intersection-related crashes make up 23 percent of total fatal crashes, and 50 percent of combined fatal and injury crashes,[3] despite the fact that intersections make up a much smaller percentage of the total right of way—these are essentially hotspots of risk. Thus, additional scrutiny of potential hazards from a new structure or attachment in or near an intersection is warranted, and that can translate into additional review time even for truly small cells, and more complex reviews for larger facilities of the sort that fit within the WIA definition.

3. Items and Issues That Require Review in Permitting

To have a fair, uniform, and complete process; wireless permitting should take the following issues into account:

- Proximity to or potential for interference with public safety communications (where public property is being used),
- Potential options for colocation of the structure, and understanding why colocation sites were not used,
- Potential alternatives for location that are less obtrusive,
- Improvement in coverage or capacity,
- Compliance with FCC standards for RF emissions,
- Implication for surrounding area, including residents and property owners,
- Justification for height and scale of deployment,
- Completeness and accuracy of application,
- Zoning in the proposed location,
- Verification that the landowner has been contacted and approved siting,
- Verification that the surrounding community has been given notice,
- Compliance with height and setback, screening, and other zoning requirements,
- Environmental impact,
- Impact on historical areas,
- Structural engineering review,
- Traffic plan for construction,
- Excavation and restoration requirements, and
- Noise and exhaust impact (if backup power is included)

The level of effort for review depends on many factors, including: the completeness and accuracy of the original application, the characteristics of the proposed location, the consistency of the proposed siting with previous sitings, and the scale of the proposed siting. Depending on the application, review may require a site visit, and consultation with several parties--including the applicant and the landowner. For some applications, there needs to be a meeting for public comment. And, depending on the application, there may need to be review by different permitting staff including transportation, building permitting and electrical permitting.

Many of these factors apply for small as well as larger sites, and for facilities in the rights of way, there may be other coordination/sight line/safety issues that require consideration. The cost of review can be

[3] Federal Highway Administration Research and Technology, Intersection Safety, https://www.fhwa.dot.gov/research/topics/safety/intersections/, accessed March 25, 2017.

lower if the applicant provides a complete application that is compliant with applicable regulations and is submitted after a careful review of the location.

It is common that an applicant becomes accustomed to the process and greatly reduces the time and expense of the process. However, there is frequent turnover among the permitting and site acquisition staff of carrier and tower companies, which wastes considerable time and expense, both for the applicant and for the permitting authorities. Further, the process for installations that fall within the WIA definition can require significant technical analysis and many hours of work for each location.

Exhibit 3

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

STREAMLINING DEPLOYMENT OF SMALL CELL INFRASTRUCTURE BY IMPROVING WIRELESS FACILITIES SITING POLICIES; MOBILITIE, LLC PETITION FOR DECLARATORY RULING	WT Docket No. 16-421

REPLY DECLARATION OF KEVIN E. CAHILL, PHD
REGARDING THE ACCENTURE REPORT AND
THE ECONOMICS OF LOCAL GOVERNMENT RIGHT OF WAY FEES

April 7, 2017

REPLY DECLARATION OF KEVIN E. CAHILL, PHD
REGARDING THE ACCENTURE REPORT AND
THE ECONOMICS OF LOCAL GOVERNMENT RIGHT OF WAY FEES

I. INTRODUCTION

A. Author

1. My name is Kevin E. Cahill, PhD. I am a project director, senior economist, and litigation practice area lead at ECONorthwest, a public policy and economics consulting firm based in Portland, Oregon. I have published on a variety of topics related to applied microeconomics and have presented my research at academic conferences nationwide. I am also experienced in commercial litigation and antitrust matters, labor economics, and public policy and have testified numerous times in deposition and at trial. I earned my BA in mathematics and economics (with honors) from Rutgers College and MA and PhD in economics from Boston College. My professional and academic qualifications are described in my curriculum vitae, which is attached as Appendix A to my March 8, 2017 Declaration in this matter.[1]

B. Purpose

2. This Reply Declaration addresses a recent report by Accenture that was submitted during the Comment phase in this matter.[2] Specifically, I address four topics in the Accenture Report that pertain to my Declaration dated March 8, 2017. These four topics are: 1) access to public rights of way; 2) local permitting and regulations; 3) fee structures; and 4) subsidizing 5G technology.

C. Summary of Opinions

3. The efficient allocation of rights of way (ROW) comes about when municipalities can charge fair market rates for ROW access. As I explained in my Declaration dated March 8, 2017, the fair market rate should "compensate the municipality not only for the administrative costs and operations and maintenance (O&M) costs associated with ROW access, but also for the fixed costs that the municipality incurred to create the ROW, the opportunity costs associated with occupying the ROW ... and any negative externalities associated with placement of a

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[1] Declaration of Kevin E. Cahill, PhD, *The Economics of Local Government Right of Way Fees*, Before the Federal Communications Commission. In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling, WT Docket No. 16-421 (March 8, 2017) ("Cahill Declaration").

[2] Amine, M. A., Mathias, K., and Dyer, T. 2017. *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities*. Report commissioned by CTIA. Toronto, Canada: Accenture ("Accenture Report"). https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf.

facility in the rights of way …"[3, 4] Such pricing does not inefficiently limit the economic benefits of 5G technology described in the Accenture Report. Quite the contrary. Such pricing leads to the efficient allocation of ROW, a scarce resource, and can also be expected to lead to the most efficient deployment of 5G, which may or may not be within the rights of way.

4. Regarding the benefits of 5G, the authors of the Accenture Report estimate that, "This next generation of wireless technology is expected to create 3 million new jobs and boost annual GDP by $500 billion, driven by a projected $275 billion investment from telecom operators."[5] Competition within and between municipalities, and between municipalities and private land owners, implies that municipalities have little incentive to impede the rollout of 5G technology and every incentive to work with telecom operators to bring such sizable benefits to their communities.
5. Regarding local permitting and regulations, the Accenture Report largely ignores the costs to municipalities for processing and managing the volume of anticipated industry requests for 5G ROW access. My understanding is 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, and a rent that reflects, in effect, the value of the property occupied. All of these costs, including the fixed and variable costs associated with managing requests to access ROW, need to be taken into account by a municipality to achieve the efficient allocation of the ROW. Indeed, one way to ensure that municipalities have adequate resources to respond to the increase in ROW requests is by charging market rates. As noted above, this rate should include the full incremental administrative and operations and management (O&M) costs, in addition to considering fixed costs, opportunity costs, and negative externalities.

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[3] Cahill Declaration, ¶ 3.

[4] Throughout this report I use the term "market rate" in an economic sense. As I noted in my Declaration dated March 8, 2017, "[f]rom an economics perspective the term 'cost' as it pertains to access to ROW, and the 'market rate' based on this cost, incorporates both those associated with regulatory fees (e.g., administrative costs and operations and management costs) and those associated with market rents (e.g., opportunity costs and negative externalities)" (Cahill Declaration, fn. 2).

[5] Accenture Report, p. 3.

6. Regarding fee structures, the Accenture Report implies that fees structures could be a barrier to the deployment of 5G technology and make implementation financially unfeasible.[6] This statement simply does not pass any reasonable smell test. It seems implausible that the economic benefits of 5G technology are expected to increase GDP *annually* by one half *trillion* dollars but that a subsidy is required due to existing fee structures. More realistically, competitive forces will reveal the optimal fee structure for ROW access in addition to the optimal level.
7. Regarding subsidies, allowing telecom operators to access ROW at below-market rates constitutes an implicit subsidy that will result in the overutilization of ROW for the purposes of deploying 5G technology. Such overutilization would likely inhibit the rollout of subsequent generations of technology and thereby discourage the most efficient deployment of 5G in an intertemporal sense. As I understand it, based on the report by Andrew Afflerbach, no 5G standards have been adopted yet, and it is far from clear how 5G will be deployed, and with what form factors.[7] Essentially, by placing a thumb on the scale in the form of a subsidy, the FCC could be encouraging deployment with high negative externalities (e.g., deployments that reduce the value of adjoining properties or affect third party use of assets) because municipalities will be unable to charge rates that discourage such deployments.

II. COMMENTS ON ACCESS TO PUBLIC RIGHTS OF WAY

8. The Accenture Report notes the importance of access to public rights of way to the rollout of 5G technology. The report states, "Without Public Rights of Way, the deployment of next-generation small-cell technology will continue to suffer—and communities will not be able to enjoy its benefits."[8] I note at the outset of this report that, as a technical matter, my understanding is that there is evidence before the Commission, submitted in the report by

[6] Accenture Report, p. 13.

[7] Report and Declaration of Andrew Afflerbach for the Smart Communities Siting Coalition, Before the Federal Communications Commission. In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilite, LLC Petition for Declaratory Ruling. WT Docket No. 16-421 (March 8, 2017) ("Afflerbach Declaration"), p. 15.

[8] Accenture Report, p. 13.

Andrew Afflerbach, that calls this assertion into question on several basic levels.[9] For the purposes of this report, I will take this statement as true. As I explain below, even if this statement is true, it does not necessitate limiting fees that can be charged by localities (whether for permits or for rents) to administrative costs and operations and maintenance (O&M) costs.

9. As I documented in my Declaration dated March 8, 2017, a municipal ROW is a scarce economic resource.[10] As such, a municipality's choice to allocate ROW for one purpose means that, so long as the user has access to the ROW, the municipality foregoes other opportunities to use the resource.[11] The efficient allocation of this scarce resource depends on the price municipalities charge users to access the ROW. A price set too low (i.e., below the market-clearing price) will result in excess demand and an overutilization of the resource. A price set too high will lead to insufficient demand and an underutilization of the resource. Moreover, one would expect that different uses of ROW would have different impacts on surrounding properties, a point made in the report before the Commission on potential impacts on property values.[12] Underpricing right of way encourages deployments with negative externalities, because municipalities cannot charge to discourage such uses, and further discourages investment on behalf of potential users that may result in more innovative deployments.

10. Accenture estimates that, "This next generation of wireless technology is expected to create 3 million new jobs and boost annual GDP by $500 billion, driven by a projected $275 billion investment from telecom operators."[13] Municipalities have every incentive to work with telecom operators to bring such sizable benefits to their communities and have little or no incentive to impede the rollout of 5G technology. As I noted in my Declaration dated March

[9] Afflerbach Declaration, p. 16.

[10] Cahill Declaration, ¶ 8.

[11] This statement does not imply that the ROW cannot be shared. My point is that the use of ROW forecloses the use of that space by others. For example, the placement of a structure, such as a pole, in the right of way favors the pole owner and those who wish to place facilities on the pole. The presence of the pole, however, can block other uses of the ROW (e.g., the placement of a public trash can at that spot that helps keep streets clean).

[12] Report and Declaration of David E. Burgoyne for the Smart Communities Siting Coalition, Before the Federal Communications Commission. In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling. WT Docket No. 16-421 (March 7, 2017) ("Burgoyne Declaration"), pp. 1-2; 5-9.

[13] Accenture Report, p. 3.

8, 2017, competition both within and across municipalities and between municipalities and private property owners disciplines municipalities from overcharging for access to ROW.[14]

11. The determination of the fair and reasonable market price for accessing public ROW will depend on the circumstances of each municipality, including the preferences of its citizens. To be sure, some municipalities may choose to price below the market rate, an implicit subsidy, to attract telecommunications companies, just as localities sometimes subsidize new business entry into a community. Indeed, an economist would expect differences in pricing to encourage the efficient use of the rights of way, and such differences in pricing can manifest itself in many different ways (e.g., public-private financing, service subsidies). In contrast, a situation in which every community is required to charge less than market value for the deployment of a particular technology is equivalent to requiring all municipalities to offer a subsidy, regardless of whether such a subsidy is justified. Such forced subsidies (when not the outcome of a well-vetted public policy objective) will inevitably lead to an inefficient outcome with respect to the use of ROW and possibly also with respect to the use of private property.
12. In short, charging the market rate to access public ROWs will help ensure efficient allocation of the ROW resource.[15] It will also help ensure that municipalities have sufficient labor and related resources to process the expected dramatic increase in 5G ROW requests, discussed in the following section.

III. COMMENTS ON LOCAL PERMITTING AND REGULATIONS

13. The Accenture Report notes that deploying 5G technology throughout municipal ROW will "pose a tremendous challenge to both telecom operators and municipalities."[16] The remainder of this section in the Accenture Report, however, describes problems exclusively associated with telecom operators, such as slow turnaround and approval times, numerous tribunals for approval, and discretionary reviews of installations. Further, very few specifics are provided in this section, and it is not clear whether the authors of the Accenture Report have any

[14] Cahill Declaration, ¶¶ 13-18.

[15] I use the term "market rate" in an economic sense. See footnote 4 for more information.

[16] Accenture Report, p. 13.

significant basis for their assertions or whether the authors have conducted any independent effort to assess delays.

14. Setting aside these verification issues, the Accenture Report ignores the difficulties that *municipalities* will face processing and managing the volume of industry requests for 5G ROW access. The Accenture Report notes that ROW requests could be up to 100 times greater than requests for current technology.[17] Increasing such requests by a factor of 100 will place unprecedented demands on municipal staff, resources, and budgets, as shown in the Smart Communities filing, and the filing by other municipalities in this docket.[18]
15. The Accenture Report implies that 5G technology will be deployed coincidently with existing towers: "Existing towers will provide coverage for miles, while small cells will support the increased needs of a Smart City."[19] Such an approach burdens municipalities with managing existing antenna sites in the ROW, along with the rollout of 5G ROW requests, and thereby increases costs on municipalities beyond just the demands for 5G ROW access.
16. As I describe in my Declaration dated March 8, 2017, one way of ensuring that municipalities have adequate resources to respond to the increase in ROW requests is by charging market rates to access municipal ROWs.[20] In addition to taking into account fixed costs, opportunity costs, and negative externalities, the rate should also take into account the full incremental administrative and operations and management (O&M) costs that come with granting access to ROW.[21] Restricting what municipalities can charge would result in an implicit subsidy to telecom operators at the expense of municipalities and lead to an inefficient allocation of ROW.
17. A related point is that the Accenture Report, in commenting about "slow" turnaround and approval times and partial approvals, is silent about instances in which these outcomes are due to telecom operators' actions. Incomplete applications for ROW access, for example, and the increased burden this imposes on municipalities, can be a significant driver of turnaround

[17] Accenture Report, p. 13.

[18] Afflerbach Declaration, pp. 15; 20-21.

[19] Accenture Report, p. 12.

[20] Again, I use the term "market rate" in an economic sense. See footnote 4 for more information.

[21] Cahill Declaration, ¶¶ 21-22.

times for processing applications.[22] Yet such explanations are left out of the Accenture Report.

18. Finally, the Accenture Reports provides no documentation or citations to support the purported challenges that telecom operators face when having to comply with municipal permitting and regulation requirements. The Accenture Report includes statements such as, "In many cities…," and "Some cities …," without attribution or support.[23] As such, their description of alleged problems amounts to unsubstantiated anecdotes.

IV. COMMENTS ON FEE STRUCTURES

19. The Accenture Report implies that fees structures could be a barrier to the deployment of 5G technology and make implementation unfeasible. "In many instances, fees imposed on small cells are comparable to those imposed on macro cells without regard to their differences. The application fees and other acquisition fees (including rental) of macrocell sites are applied to each of the 50 to 100 small cells required resulting in costs being multiplied and deployment becoming financially unfeasible."[24]
20. As the reports prepared by the Smart Communities have shown, however, placement in the rights of way can involve significantly different and more complex issues than, say, placement of a tower on farmland.[25] While the latter undoubtedly requires important analyses, deployment of small cell technology requires coordination with other utilities, consideration of Americans with Disabilities Act (ADA) impacts, potential traffic interference/sight line, and other issues that may not arise at all for a larger facility. Likewise, the "small cell" may not be physically "small" at all as the term refers to its covering a small area. It is far from obvious that because one cell covers a large area, and another serves a small area, that issues for the placement of one are less costly to consider than the other.[26]

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[22] Afflerbach Declaration, pp. 20-21.

[23] Accenture Report, p. 13.

[24] Accenture Report, p. 13.

[25] Afflerbach Declaration, pp. 2-8; Report and Declaration of Steven M. Puuri for the Smart Communities Siting Coalition, Before the Federal Communications Commission. In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling. WT Docket No. 16-421 (March 7, 2017) ("Puuri Declaration"), pp. 1-5.

[26] Afflerbach Declaration, pp. 2-11.

21. Setting aside the issue that no supporting documentation is provided for the Accenture Report's claim regarding "small cell" fees, and that their claim is in fact contradicted by evidence before the Commission,[27] this statement indicates that 5G technology might not be financially feasible if telecom operators are required to pay the market rate. In effect, the industry needs municipalities to subsidize 5G technology for deployment to be financially feasible. This statement simply does not pass any reasonable smell test. It seems implausible that the economic benefits of 5G technology are expected to increase GDP *annually* by one half *trillion* dollars but that a subsidy is required due to existing fee structures. If the technology is as beneficial as Accenture claims, one would expect that the industry would be able to charge for services in a manner that allows it to pay fair market value for the resources it will use. If the industry will be unable to pay fair market value for its inputs, then that implies the economic benefits touted in the Accenture Report are overstated. Generally speaking, either the economic benefits are very large or the industry needs to be subsidized.
22. Another reason that arguments about fee structures do not make sense is that municipalities have every incentive to implement an efficient fee structure. As I noted in my Declaration dated March 8, 2017, competition not only reveals the market rate for ROW access, but competition also reveals the optimal form in which payments are made.[28] If the benefits of 5G are as large as Accenture claims them to be, municipalities have every incentive to work with telecom operators with respect to the level and structure of fees to facilitate the adoption of the new technology in an economically efficient manner.
23. Finally, given the competitive environment in which municipalities reside, one economically meaningful approach to assessing the validity of the industry's arguments regarding 5G ROW requests is to consider the municipalities' perspective. Does a municipality incur fewer costs to process and manage ROW requests for 5G versus existing technology? Are economies of scale possible when a municipality processes a 100-fold increase in ROW requests from multiple providers in a short timeframe? If cost savings can be obtained through a different pricing structure, a municipality will adopt that structure lest its competitors do so and gain a strategic advantage in the process.

[27] Afflerbach Declaration, pp. 2-8; 15.

[28] Cahill Declaration, ¶ 33.

V. COMMENTS ON SUBSIDIZING 5G TECHNOLOGY

24. Just because an activity has an economic benefit, however large, does not imply that the activity is worthwhile or that a subsidy is warranted. The benefits of any activity need to be weighed against the costs in order to achieve an economically efficient outcome. The Accenture Report focuses almost exclusively on the telecom industry's interests, and ignores the municipalities' perspective and the costs municipalities will incur. The fact that 5G deployment will support jobs, for example, is no reason to require municipalities to charge below-market ROW fees to promote the rollout of 5G technology.[29] Such an action would simply transfer costs from the industry—and from their customers, the consumers of 5G technology—to municipalities. Critically, if the economic impact analysis conducted by Accenture is correct, we would expect to see these economic benefits even if the market value for ROW access is charged.
25. Pricing below the market rate amounts to an implicit subsidy for 5G technology. Of course, in many instances, it is in societal interest to subsidize an industry. As noted above, for example, and as stated in my initial Declaration, some municipalities might offer discounts for ROW access in order to promote an earlier adoption of 5G technology in their communities. Further, some broad-based policy in which subsidies are applied to all communities could be socially optimal should the Commission decide that deployment of 5G technology serves some broader social interest or that some market failure exists in the industry, such as a free-rider problem. Crucially, the Accenture Report provides no justification for such a society-wide subsidy for 5G technology, yet the industry's advocacy for a below-market rate is, at its core, a request for such a subsidy. As noted throughout this report, forcing municipalities to offer a subsidy via below-market pricing for access to its ROW will inevitably result in an overutilization of ROW and an inefficient deployment of 5G technology.
26. For example, one consequence of subsidizing 5G deployment through below-market rates is that overutilization of ROW for the purposes of deploying 5G technology could very well inhibit the rollout of subsequent generations of technology. This places regulators in the

[29] The Accenture Report states, "Communities of all sizes are likely to see jobs created. Small to medium-sized cities with a population of 30,000 to 100,000 could see 300 to 1000 jobs created. In larger cities like Chicago, we could see as many as 90,000 jobs created" (p. 4).

position of picking "winning" technologies, from a chronological standpoint, rather than having market forces dictate the efficient outcome. Another consequence is that below-market pricing could inhibit innovation with respect to how ROW are used, such as a recent innovative collaborative between Philips and PG&E with respect to how a two-way communicating meter was attached to a smart pole.[30]

VI. CONCLUSION

27. The efficient allocation of ROW access comes about when municipalities can charge a market rate for public ROW access. This rate should compensate the municipality for its administrative costs and O&M costs, its fixed costs that were incurred to create the ROW, its opportunity costs of providing access to the ROW, and any negative externalities from the user. This market rate will not inhibit the efficient rollout of 5G technology, nor will it inefficiently limit the economic benefits of 5G technology described in the Accenture Report.

[30] Philips. 2015. *Philips and City of San Jose Partner to Deploy Philips SmartPoles Pilot Project Combining Energy Efficient LED Street Lighting with Wireless Broadband Technology from Ericsson*. Somerset, NJ: Philips. http://www.philips.com/a-w/about/news/archive/standard/news/press/2015/20151208-Philips-and-City-of-San-Jose-partner-to-deploy-Philips-SmartPoles-pilot-project.html.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 7, 2017.

Kevin E. Cahill, PhD
Project Director
ECONorthwest