

AGENDA

The Rolla Board of Adjustment
Rolla City Hall, 3rd Floor Conference Room, 901 North Elm Street
Thursday, October 13, 2022 @ 5:30 PM

Board Members: Matt Crowell (Chairperson), Judy Jepsen (Vice-Chairperson), Laura Stoll, Jacob Rohter, John Meusch, Jonathan Hines (Alternate)

- I. APPROVE MINUTES:**
Review of the Minutes from the Board of Adjustment meeting held on July 7, 2022.
- II. OLD BUSINESS:**
- 1. ZV2021-04:** Variance to Section 42-244.4 (h) to allow a reduction in the front yard setback for a sign in the C-1, Neighborhood Commercial district.
 - 2. ZV2022-05:** Variance to Section 42.399 (h) to allow reduced setbacks for a telecommunications tower.
- III. PUBLIC HEARING:** **NONE**
- IV. OTHER BUSINESS/REPORTS FROM THE CHAIRPERSON, COMMITTEE, OR STAFF:** **NONE**

NEXT MEETING DATE: November 3, 2022

BOARD OF ADJUSTMENT MINUTES

July 7, 2022

Rolla City Hall

<u>Presiding:</u>	Chairperson Matt Crowell
<u>Members Present:</u>	Judy Jepsen, Jacob Rohter, John Meusch
<u>Alternates Present:</u>	Jonathan Hines
<u>Members Not Present:</u>	Laura Stoll
<u>City Officials in Attendance:</u>	Tom Coots, City Planner, and Sarah West, Administrative Assistant
<u>Others in Attendance:</u>	Russell Been and Sasha Riedisser, Applicants

Chairperson **Matt Crowell** called the meeting to order at 5:30 P.M. He recognized the members who were present. **Crowell** swore in all present who intended to speak.

I. APPROVE MINUTES:

Crowell approved the minutes from the May 12, 2022 Board of Adjustment meeting as printed and distributed.

II. OLD BUSINESS:

1. **ZV2021-04:** Variance to Section 42-244.4 (h) to allow a reduction in the front yard setback for a sign in the C-1, Neighborhood Commercial district.

The applicant is requesting the case be postponed to the next scheduled meeting on August 4, 2022 at 5:30.

A motion was made by Jonathan Hines, seconded by Judy Jepsen, to grant the applicant's request to postpone the case to the next scheduled meeting on August 4, 2022. A voice vote shows all in favor.

III. PUBLIC HEARING:

1. **ZV2022-05:** Variance to Section 42.399 (h) to allow reduced setbacks for a telecommunications tower.

Tom Coots presents the staff report. **Crowell** asks why the City Council did not approve the setbacks with the Conditional Use Permit. **Coots** states City Council did not approve the setbacks because they felt the applicant did not prove the minimum criteria for that to be approved.

Judy Jepsen asks if there were any concerns from citizens. **Coots** states some concerns were brought up at the initial Conditional Use Permit request in regards to location and potential health concerns, but no concerns were brought up with this variance request. **Crowell** asks if

evidence was presented to validate health concerns. **Coots** confirms evidence was submitted, however, the applicant may clarify some of that evidence.

Jacob Rohter asks for the reasoning behind the distance of the setback on the cell tower. **Coots** states since the distance is equal to the height of the tower, if the tower fell, it would prevent impacting offsite locations.

Sasha Riedisser, the Collective Solutions attorney, is located at 211 North Broadway in St. Louis, Missouri. She mentions that the federal law states if a cell tower is needed in an area to improve services for a carrier, and no better location is available, denial of the proposed tower is a violation of federal law.

Russell Been, the owner of Collective Solutions, is located at 340 Marshall Road Valley Park, Missouri. He states Rolla needs more coverage in the area, especially 5G and FirstNet for first responders. This technology cannot be upgraded onto the current flag pole tower. The proposed tower has to meet AT&T's coverage demands, be 95 feet in height, and be within the search area.

Been claims if the proposed tower has to meet the setback requirements from the road and adjacent properties, the tower would end up very close to the existing business on the lot. He states that no other property within their search area would meet the setback requirements. He believes the City Ordinances are prohibiting them from getting coverage within this area.

John Meusch is now present.

Been presents pictures to the Board of existing cell towers surviving EF3 and EF4 tornadoes. He also presents an article from the American Cancer Society showing no known risks associated with exposure to RF waves from a cell tower.

Crowell asks if there was a location further away from the existing cell tower that met the setback requirements. **Riedisser** states the proposed tower has to be in close proximity to the current tower to keep the same coverage area. **Been** states that if the tower is moved too far away from the existing tower, there will be a gap in coverage.

Been states that no existing tower meets the current setback standard. He presents a document from Sabre Industries that states the proposed tower is designed that if it did fail, the fall radius would be less than 35 feet. **Crowell** asks how this is possible. **Been** states the towers are designed to release after so much pressure.

Crowell asks if the coverage radius of the proposed tower is greater than the current tower. **Been** states that increased capacity is needed, and this 5G technology can be put on the proposed tower. While the radius of coverage will not change, it will increase the number of customers they can service.

Crowell asks if a flag pole tower can be placed where the monopole is proposed to go, and the monopole tower be placed in a location where setbacks are met. **Been** states that AT&T cannot financially build two towers.

Riedisser mentions that federal law states that local authorities cannot dictate the way a carrier decides to structure its network. **Been** states that Missouri statutes override local statutes.

Riedisser states the application meets the requirements for a variance as there is no danger of the tower falling, so there is no need for a setback. She mentions that no towers in the area meet the current setback requirements, and that putting the tower will improve service and meet the goals of the ordinance.

Jepsen asks if the proposed tower could be built in other towns without Rolla's setback requirements. **Been** mentions that other towns in St. Louis County have zero setbacks between industrial districts. **Jepsen** asks if the applicant thought the Rolla Ordinances were excessive. **Been** confirms this, and states he believes these requirements prevent the best use of the property. He states that the ordinance was passed without looking for an overriding state statute, and that other areas are removing setbacks to meet state requirements.

Been states this issue is not a matter of health and safety, and there are no other locations available in their search area. There is a hardship because the ordinances are hindering Collective Solutions from placing a tower.

Crowell asks if the applicant could build the tower differently, but it is not financially viable. **Been** states he is trying to better coverage in area not increase the value of this property.

Crowell asks if the coverage could be increased in other ways, it would just be more expensive. **Been** states this is a question that cannot be considered under state statute. **Riedisser** states the back of the parcel is not economically viable other than by building a tower, since the owner is not using this land.

Crowell opens the public hearing.

Zach Buchheit, representing SBA Communications, located at 7700 Forsyth Boulevard Suite 1100 in St. Louis. He states this application is about saving money and meeting AT&T's

coverage objectives. There is no problem with coverage in Rolla, and Rolla denizens already have 5G and FirstNet. He states AT&T knew about the setback requirements before the application was submitted, because it is in the ordinance. He states there is nothing in the state legislature that says local authorities cannot consider setbacks. It is common to have setback requirements, and he claims no new information has been presented with this application regarding setbacks.

Buchheit states there is no difference in coverage between the current and proposed cell towers. He believes there is no reason to sacrifice safety if the coverage is not increasing. He mentions there is no economic hardship from denying this variance and that the application does not meet multiple criteria in order to be approved. He states this is a self-induced problem, as the applicant has limited themselves to a tiny search area. He implores the Board to deny the request, due to safety concerns and lack of information.

Been states he would gladly provide any more information that was needed. **Reidisser** mentions that the current tower does not meet requirements today, and neither the current nor proposed tower will be a detriment to public safety.

Jepsen asks if other locations met the criteria. **Been** mentions that other properties were available, but none met the setback requirements. **Reidisser** mentions the state statutes allow for local authorities to have setbacks, but state and federal laws step in if the local ordinances prevent a carrier from improving service.

Crowell asks what additional information would be needed to be able to provide staff recommendations. **Coots** states a more detailed site plan that shows the distances from the proposed cell tower to other locations is needed at a minimum.

Crowell asks to what degree the Board considers state and federal statutes. **Coots** states if the Board wants legal direction, an arrangement can be made.

Hines asks what other information is needed. **Coots** a better site plan that shows what variances are needed.

A motion was made by Judy Jepsen, seconded by John Meusch, to table the case to the next scheduled meeting on August 4, 2022 at 5:30. A roll call vote on the motion shows the following: Ayes: Crowell, Jepsen, Rohter, and Meusch. Nays: Hines. The motion passes.

Having no further business, the meeting was adjourned at 7:15 P.M.

Minutes prepared by **Sarah West**

NEXT MEETING:

Thursday, August 4, 2022



Report to:

Board of Adjustment

Case No.: ZV2021-04

Meeting Date: October 13, 2022

Subject: Variance to Section 42-244.4 (h) to allow a reduction in the front yard setback for a sign in the C-1, Neighborhood Commercial district.

Applicant and Notice:

Applicant/Owner- Charles Arthur and Stephen Moorkamp of Pine Tree Investments, LLC
Public Notice - Letters mailed to property owners within 300 feet; Legal ad in the Phelps County Focus; signage posted on the property; <https://www.rollacity.org/agenda.shtml>

Background: The applicants recently completed construction of a dental office on the subject property. The applicants are seeking to erect a monument sign to identify the property. The proposed sign would be located 3 feet from the front property line. The minimum front yard setback is 10 feet.

The Board of Adjustment did conduct a public hearing at the December 9, 2021 meeting. After closing the public hearing and deliberations, the Board voted to table/continue the deliberations to the next meeting to allow for a 5th Board member to be appointed by the City Council. The applicant has been waiting since that date for the Board to consist of 5 members, although the applicant did request a postponement in July 2022 due to a schedule conflict.

Property Details:

Current Zoning - C-1, Neighborhood Commercial
Current Use - Dental office

Code Reference:

Sec. 42-244.4. General Sign Provisions.

h. Setbacks. Unless exempt by Subsection 42-244.4(f), all signs, including temporary signs and exempt signs, shall conform to the side and rear setback requirements of the zoning district they are located in. However, the front of the lot shall be defined as any lot line that fronts a street. Such signs shall have a minimum rear yard setback of ten feet and a minimum side yard setback of five feet.

C-1, Neighborhood Commercial DISTRICT

Sec. 42-186.3 Area Requirements.

Minimum setback dimensions:

- **Front yard: 10 feet from the front lot line.**
- *Each side yard: 5 feet measured from side lot line.*
- Rear yard: 10 feet from the rear property line.

Variance Approval Criteria:

A variance must be reviewed to ensure that the following criteria are met:

1. The applicant must demonstrate that special circumstances or conditions applying to the land or buildings for which the variance is sought; which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the same zone or neighborhood; and that said circumstances or conditions are such that the strict application of the provisions of the regulation creates an unnecessary economic hardship by depriving the applicant of the reasonable use of such land or building.
2. The alleged hardship has not been created by any person currently having interest in the property.
3. The purpose of the variance is not based exclusively on the desire to enhance the value of the property, or increase the return or income from the property.
4. The granting of such variance will not be detrimental to the public welfare or substantially or permanently injurious to the property or improvements in such zoning or neighborhood areas in which the property is located.
5. The granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that would accomplish this purpose, and will not alter the essential character of the neighborhood.
6. The literal enforcement and strict application of the provisions of the Rolla Planning and Zoning Code will result in an unnecessary hardship inconsistent with the general provisions and intent of the regulations and that in granting such variance the spirit of the regulations will be preserved and substantial justice done.
7. (Use Variances Only) The use is consistent with the intent of the Comprehensive Plan.

Discussion: The applicant states that the property location on Pine Tree Rd is impacted by reduction in visibility from existing trees along the street. The property is also near a slight curve in the roadway. The trees and the curve does reduce visibility of the sign for drivers in either direction. Removal of enough trees to provide the visibility is not preferred by the applicant. The location of the proposed sign does not appear to impact the visibility for vehicles exiting the driveway.

Staff Recommendation:

Staff recommends that the Board further review all criteria to ensure the criteria are met. Staff concedes that some or all of the criteria may be met for this request based on maintaining proper visibility for the sign.

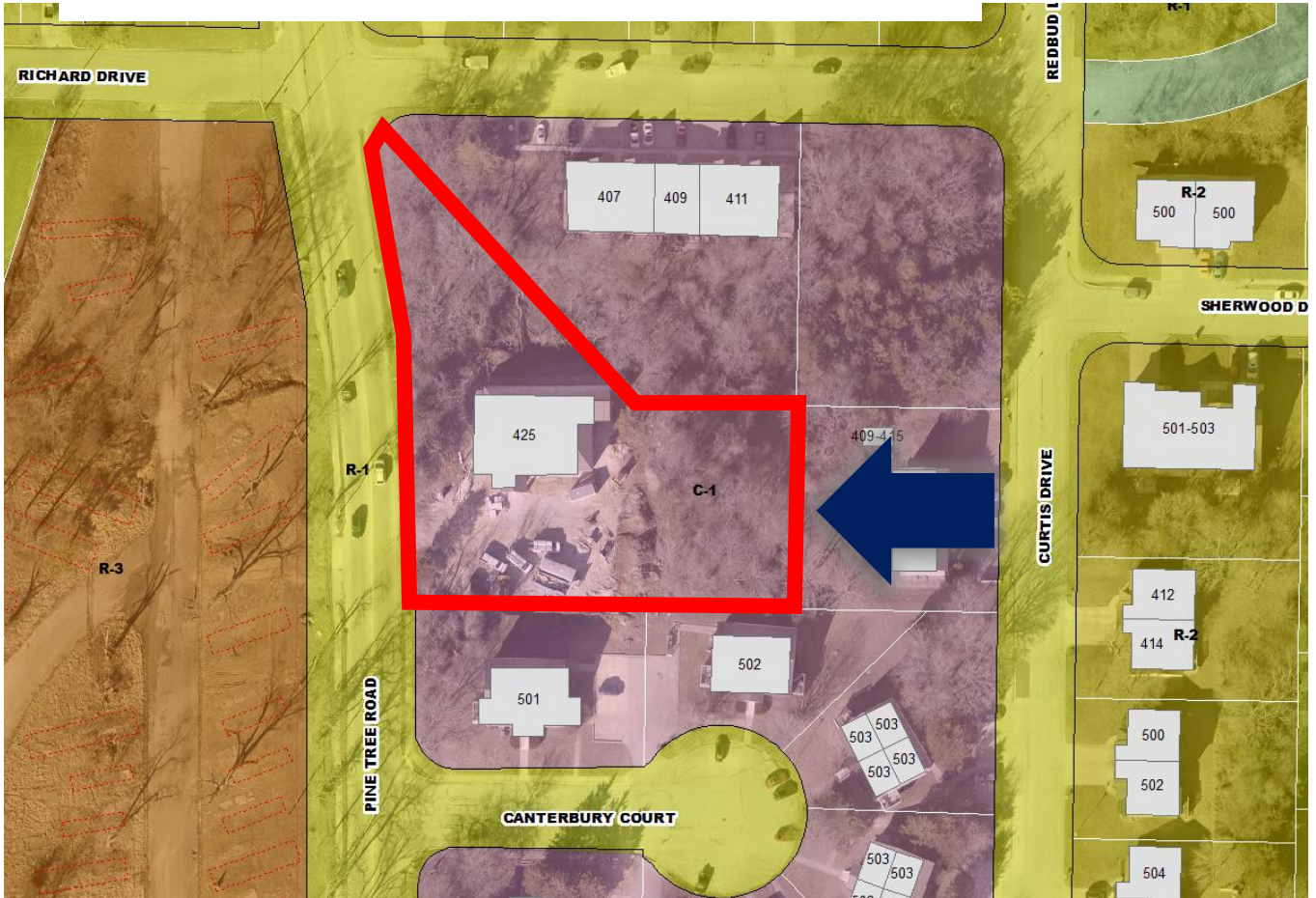
Alternatives:

The Board of Adjustment has the following alternatives of action:

1. Find that each of the criteria for approval of the variance(s) are met and explain how each criteria is met for the record.
2. Find that the criteria for approval of the variance could be met through the imposition of conditions or limitations to ensure that the criteria are met. The Board will explain how each criteria is met and grant partial, conditional, or modified approval of the variance(s).
3. Find that one or more of the criteria for approval of the request is not met and deny the request.
4. Table the discussion to a certain date to allow for additional information to be presented.

Prepared by: Tom Coots, City Planner

Attachments: Public Notice Letter, Application, Letter of Request, Sign Plan, Minutes from December 9, 2021 Board of Adjustment meeting



Project Information:

Case No: ZV21-04
 Location: 425 Pine Tree Rd
 Applicant: Moorkamp and Arthur Family Dentistry
 Request:
 Variance to allow a sign setback in the C-1, Neighborhood Commercial district



Public Hearing:

Board of Adjustment
December 2, 2021
5:30 PM
 City Hall: 1st Floor



For More Information Contact:

Tom Coots, City Planner
tcoots@rollacity.org

(573) 426-6974
 901 North Elm Street
 City Hall: 2nd Floor
 8:00 – 5:00 P.M.
 Monday - Friday



Who and What is the Board of Adjustment?

The Board of Adjustment (BOA) is an appointed group of citizens from Rolla who are charged with hearing and deciding Variances, Appeals, and Special Exceptions.

What is a Variance?

A Variance is a request for relief from a particular provision in the zoning code. A Variance should only be granted if certain criteria are met. Variances are frequently sought to allow things such as reduced setback, lot size or increased height.

What is an Appeal or Special Exception?

An Appeal is a request for an interpretation of the meaning of the zoning code from the Board of Adjustment. A Special Exception is a request to allow certain uses.

How Will This Impact My Property?

Each case is different. Adjacent properties are more likely to be impacted. Please contact the Community Development Office at (573) 364-5333 if you have any questions.

What if I Have Concerns About the Proposal?

If you have any concerns or comments, please try to attend the meeting. You may learn details about the project at the meeting. You will be given an opportunity to ask questions or make comments.

What if I Cannot Attend the Meeting?

Please try to attend the meeting if you have any questions or concerns. However, if you are unable to attend the meeting, you may provide written comments by letter or email. These comments will be presented to the Board.

What if I Have More Questions?

Please contact the Community Development Office if you have any additional questions.

LEGAL DESCRIPTION

Lot 15, Scottsdale Subdivision, Resubdivision of Lots 12 and 15-19, City of Rolla, Phelps County, Missouri



212406



COMMUNITY DEVELOPMENT DEPARTMENT
901 North Elm St
Rolla, MO 65401
P.O. Box 979

573-364-5333 + www.rollacity.org/comdev

BOARD OF ADJUSTMENT APPLICATION

Contact Information:

Property Owner:

Charles Arthur, Stephen Moorkamp

Name(s)

425 Pine Tree Rd.

Mailing Address

Rolla, MO 65401

City, State, Zip

(573) 578-7833, (573) 578-6623

Phone

charlieoarthur@gmail.com, stephenmoorkamp@gmail.com

Email

Agent/Applicant (If Different Than Property Owner):

N/A

Name

Mailing Address

City, State, Zip

Phone

Email

Property/Request Information:

Request:

- [x] Variance
[] Special Exception
[] Appeal

42-186.3 Area Requirements

Code Section (Variance/Appeal Only)

425 Pine Tree Rd.

Property Address/Location

C-1

Property Zoning

Monument Sign / Ground Sign

Proposed Development/Project

APPLICATION CHECKLIST:

Applicant Checks Boxes

- [x]
[]
[]
[]
[]
[]
[]

Completed Application Form

Agent Letter (If Applicable)

Filing Fee - \$350

Legal Description (Unplatted and Irregular Lots Only)

Site Plan/Survey (If Applicable)

Letter of Request:

Please include description of project, request, how criteria for approval are met, and any other pertinent information.

- [x]
N/A
[x]
N/A
N/A
[x]

City Staff Verifies

OFFICE USE ONLY:

Case No: 2021-04

DRC Meeting Date: 10.5.21

Advertise By: 10.23.21

Submission Date: 9.17.21

BOA Hearing Date: 11.4.21

I N F O R M A T I O N :

Variations are required to meet the following criteria:

1. The applicant must demonstrate that special circumstances or conditions applying to the land or buildings for which the variance is sought; which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the same zone or neighborhood; and that said circumstances or conditions are such that the strict application of the provisions of the regulation creates an unnecessary economic hardship by depriving the applicant of the reasonable use of such land or building.
2. The alleged hardship was not created by any person currently having an interest in the property.
3. The purpose of the variance is not based exclusively on the desire to enhance the value of the property, or increase the return or income from the property.
4. The granting of such variance will not be detrimental to the public welfare or substantially or permanently injurious to the property or improvements in such zoning or neighborhood areas in which the property is located.
5. The granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that would accomplish this purpose, and will not alter the essential character of the neighborhood.
6. The literal enforcement and strict application of the provisions of the Rolla Planning and Zoning Code will result in an unnecessary hardship inconsistent with the general provisions and intent of the regulations and that in granting such variance the spirit of the regulations will be preserved and substantial justice done.
7. (Use Variations Only) The use is consistent with the intent of the Comprehensive Plan.

Appeals are required to meet the following criteria:

1. The Appeal was filed within 15 days or after the administrative officer has rendered a decision.
2. The interpretation of the code as made by the administrative officer was incorrect or unclear.

Special Exceptions are required to meet the following criteria:

1. The request is consistent with the general spirit and intent of the regulations.
2. The request is consistent with the general and specific rules for the Special Exception.
3. The request serves the general welfare and preserves the community interest.

Acknowledgement and Authorization:

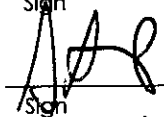
The owner(s) understand and agree that the application will be placed on hold until a complete application and all required items on the checklist are received. The owner(s) understand and agree to permitting employees of the City of Rolla to enter the subject property for purposes of posting a yard sign(s), retrieving the yard sign(s), taking photographs of the property/building(s), and investigating the property for pertinent information related to the request. Should ownership of the property change after the application is submitted, authorization is required from the new owner to continue with the review of the request, or the request will be withdrawn from consideration. The undersigned understands that refunds may be provided if the request is withdrawn prior to the Board of Adjustment hearing, less any costs already incurred.

Property Owner(s):

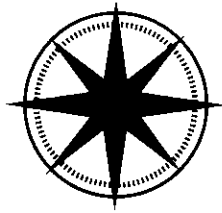
Applicant/Agent (If Different From Owner)

 _____
Charles Arthur
Sign Print

Sign Print

 _____
Stephen Markcup
Sign Print

Sign Print



Moorkamp & Arthur

FAMILY DENTISTRY

Stephen V. Moorkamp, D.D.S.
Charles O. Arthur, D.D.S.
William B. Moorkamp, D.D.S.

Board of Adjustments,

We are requesting a variance for a ground/monument sign for our dental office at 425 Pine Tree Rd. We are requesting to place our sign closer than regulated to our property line on the north side of our entrance from Pine Tree Rd. Due to the unique layout of our lot, it would be necessary to remove the majority of the trees that line Pine Tree Rd to allow visibility of our sign for convenient viewing from passing vehicles approaching from the north and prevent sudden stops to enter our parking lot. Removing so many trees along the roadside would also significantly alter the character of Pine Tree Road and provide less barrier for our surrounding residential neighbors to the south as well. Please see attached layout plans and feel free to reach out to us at any time for any questions or concerns. We appreciate your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "Charles Arthur".

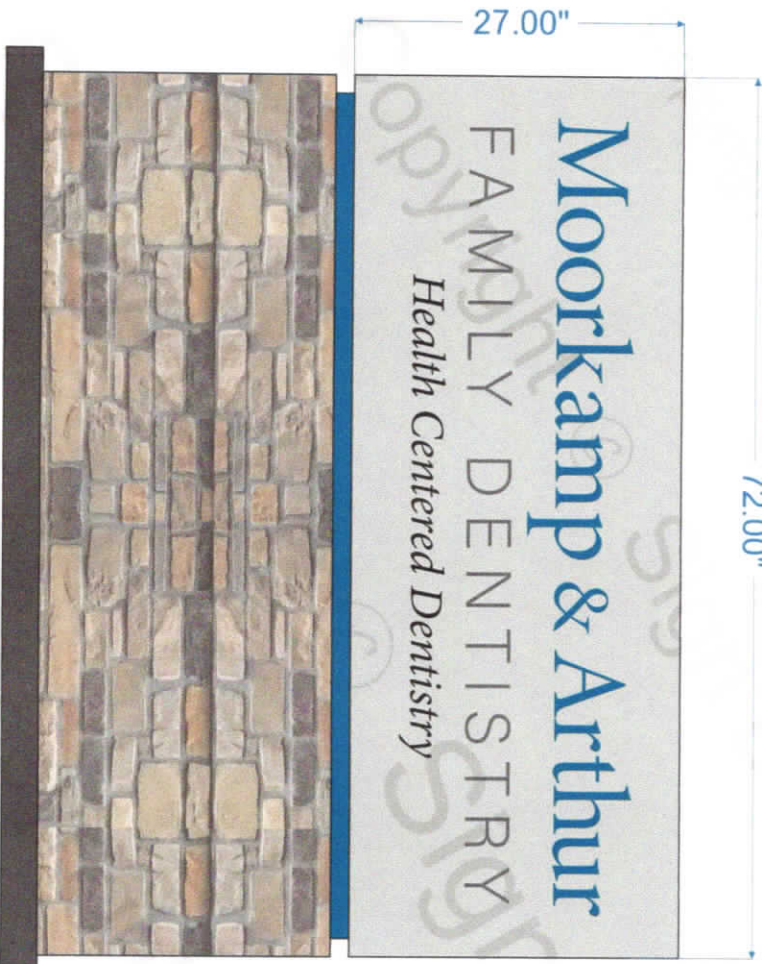
Charles Arthur, DDS

A handwritten signature in black ink, appearing to read "Stephen Moorkamp".

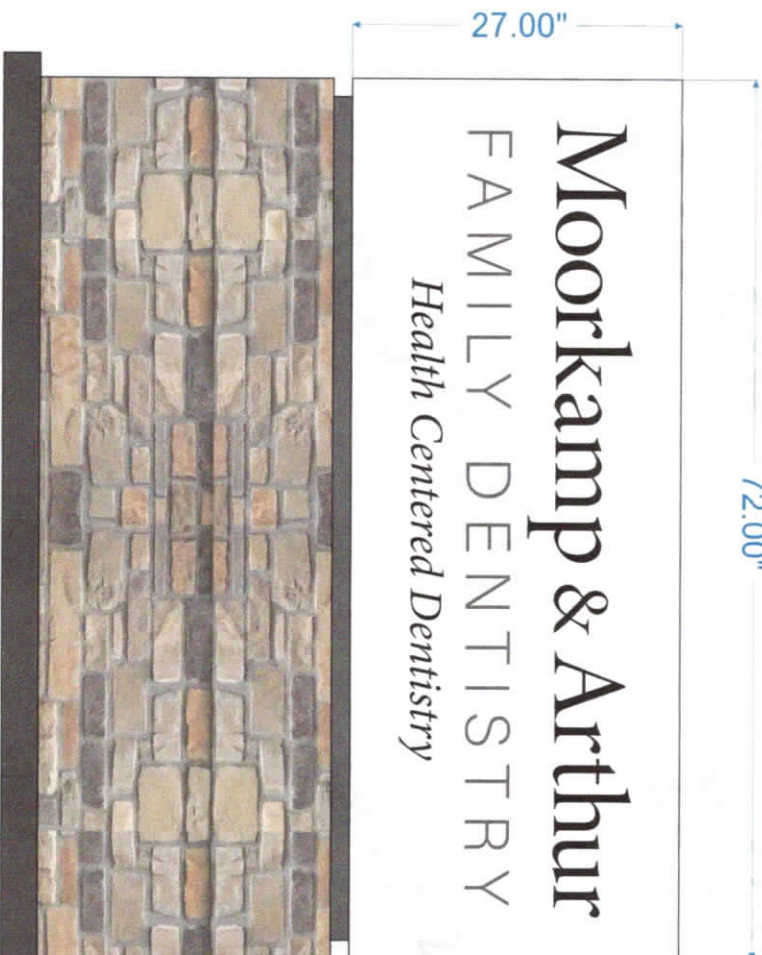
Stephen Moorkamp, DDS

Option 1: 27" X 6' Double Sided LED Lit Aluminum Sign With Push Through Acrylic Letters
 2" Reveal, Stone Base By Others
 Option 2: 27" X 6' Double Sided Non Lit Aluminum Sign 2" Reveal, Stone Base By Others

Design Option 1



Design Option 2



CLIENT APPROVAL: Please review art proofs carefully! Check for correct spelling and information. Colors viewed on monitors may vary slightly from actual colors in final production. If color critical, please provide accurate color samples (ie: Pantone, Paint Swatches, CMYK, RGB etc.) Your signature indicates review and acceptance of the proof as is. Once this proof is signed and returned with approval, Sign Dimensions LLC is not responsible for any discrepancies regarding color, spelling or materials used in production. Production will not begin until approval and 1/2 down payment is received. This original design is the exclusive property of Sign Dimensions LLC and is copyright protected.

FURTHER REVISIONS REQUIRED

I VERIFY THAT THIS IS EXACTLY HOW I WOULD LIKE IT TO BE PRODUCED

SIGNATURE: _____

DATE: ___ / ___ / ___

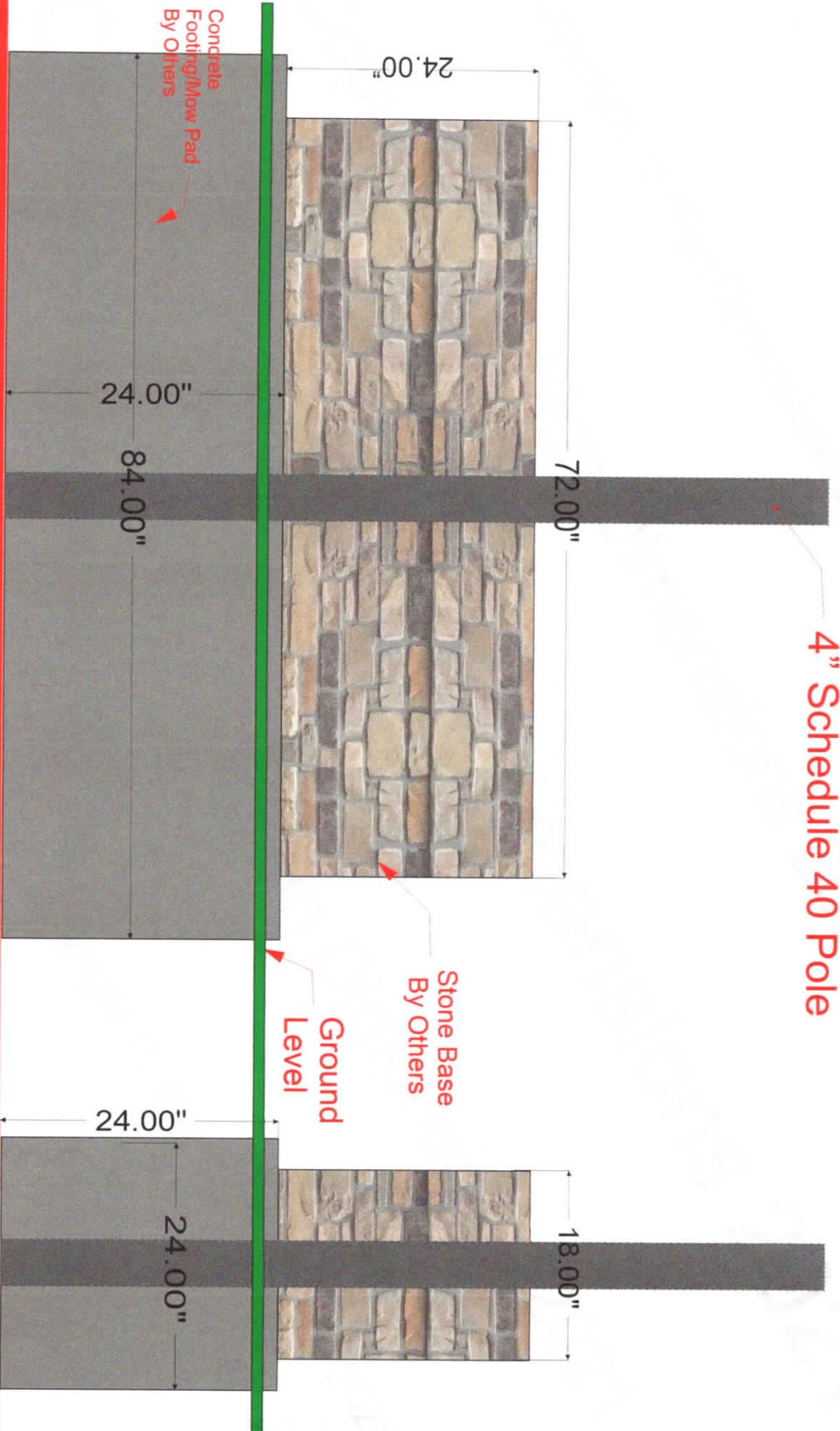
REVISION # _____

Quote # 014463

SIGN DIMENSIONS
 www.signdimensions.net
 11820 CR 3080
 Rolla, MO

(P) 573-368-3600
 (F) 573-368-3800

4" Schedule 40 Pole



CLIENT APPROVAL: Please review art proofs carefully! Check for correct spelling and information. Colors viewed on monitors may vary slightly from actual colors in final production. If color critical, please provide accurate color samples (ie: Pantone, Paint Swatches, CMYK, RGB etc.) Your signature indicates review and acceptance of the proof as is. Once this proof is signed and returned with approval, Sign Dimensions LLC is not responsible for any discrepancies regarding color, spelling or materials used in production. Production will not begin until approval and 1/2 down payment is received. This original design is the exclusive property of Sign Dimensions LLC and is copyright protected.

FURTHER REVISIONS REQUIRED

I VERIFY THAT THIS IS EXACTLY HOW I WOULD LIKE IT TO BE PRODUCED

SIGNATURE: _____

DATE: ___ / ___ / ___

REVISION # _____
QUOTE # 014463

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 (F) 573-368-3800

BOARD OF ADJUSTMENT MINUTES
December 9th, 2021
Rolla City Hall

<u>Presiding:</u>	Chairperson Thomas Sutton
<u>Members Present:</u>	Laura Stoll, Judy Jepsen, Matt Crowell
<u>Alternates Present:</u>	None
<u>Members Not Present:</u>	None
<u>City Officials in Attendance:</u>	Tom Coots, City Planner, Steve Flowers, Community Development Director, and Sarah West, Administrative Assistant
<u>Others in Attendance:</u>	Charles Arthur, Applicant, Stephen Moorkamp, Applicant, Jason Smith, Applicant, Jennifer Smith, Applicant

Note: The meeting location was changed to the 4th Floor Conference Room to allow for Thomas Sutton to attend via Zoom. The meeting started late due to technical difficulties.

Chairperson **Thomas Sutton** called the meeting to order at 5:45 P.M. He recognized the members who were present. **Sutton** swore in all present who intended to speak.

I. OTHER BUSINESS/REPORTS FROM THE CHAIRPERSON, COMMITTEE, OR STAFF:

Introduction of new Board member, Matt Crowell.

II. APPROVE MINUTES:

Sutton approved the minutes from the August 5th, 2021 Board of Adjustment meeting as printed and distributed.

III. OLD BUSINESS: NONE

IV. PUBLIC HEARING:

1. **Request: ZV2021-04:** Variance to Section 42-244.4 (h) to allow a reduction in the front yard setback for a sign in the C-1, Neighborhood Commercial district.

Tom Coots introduced the variance request ZV2021-04 for a property located at 425 Pine Tree Road and presented the information in the staff report.

Judy Jepsen commented on the sight line issue, as people would be looking for the sign if they had previously made a dentist appointment. **Matt Crowell** asked if the applicants were to place the sign where it would currently be allowed, what would tree removal entail. **Coots** states this would be something the applicant should be able to answer.

Sutton opens the public hearing.

Charles Arthur, located at 1328 Chelsea Lane, and **Stephen Moorkamp** are the applicants. They confirmed they were sworn in.

Arthur gives the dimensions of the proposed sign, as well as the proposed area. He mentions if the variance is granted, the sign would be 7 feet from the sidewalk, and 15 ½ feet from the road. He stated that customers have voiced concerns over the sudden stopping from both directions due to lack of visibility of the current sign.

Moorkamp states they want to keep the natural beauty of the area, and while it is possible to cut down trees on the southbound side, they would prefer not to. They cannot cut down trees on the northbound side.

Stoll commented that she could not see their building or their sign. **Jepsen** thought the building was very visible.

Jepsen asked if the sign would be lit. **Arthur** stated there would be subtle ground lighting, but no internal lighting. He states the base of the sign is only about 2 foot tall. **Moorkamp** states their sign would be similar to City park signs.

Sutton closes the public hearing and moves into Board deliberation.

Jepsen asks if the proposed sign was the only commercial sign on Pine Tree Road. **Arthur** states there are other signs along the roadway that are closer to the street than the proposed sign.

Stoll comments the sign would blend with the area. **Crowell** asks to what extent the board considers aesthetics as a factor. **Coots** states it likely could be in some of the criteria.

Coots asks the board to go over the criteria for approval.

1st Criterion: **Crowell** expresses concern that the trees hindering visibility is not a unique circumstance to this lot. **Jepsen** asks if the applicant wishes to be one foot closer than the standard. **Coots** seven feet closer. **Sutton** commented the he thought the first criterion was met. **Crowell** stated if the safety problem was only due to trees on the northbound side hindering visibility, then this was not a unique issue. If the safety issue was caused due to the trees on the southbound side, which the applicant couldn't remove, then there would be an issue that would be unique to the property. **Coots** states that due to the trees, the visibility on the south side begins at 130 feet from the driveway. **Crowell** asks if it is possible to move the sign to the north to gain visibility. **Coots** states it is possible to move the sign, but moving farther from the driveway would work against providing added visibility to allow people to see the sign and turn to the driveway. **Crowell** is 130 feet not safe? **Coots** says it would be ideal for a 200-300 foot range at this speed of traffic.

All Board members agreed the 1st criterion was met.

2nd Criterion: **Sutton and Stoll** expressed that they thought the hardship was not created by the applicant. **Jepsen** objected, stating the applicant bought the site and planned the building there. **Crowell** asks if it would have been reasonable to place the driveway somewhere else? **Coots** says the building could not have shifted further north; the applicant will have to say if the building could have been placed elsewhere on the lot. The building was built at that location on this lot due to the beauty of the area. **Crowell** in reality the building could have been placed somewhere else, and the driveway could have been redirected. **Coots** states no zoning issues would have stopped that. **Arthur** states that the building was best placed in the current position due to the size of the building and uniqueness of the lot. In operatory rooms, north facing windows are best to keep the sun out of everyone's eyes. **Crowell** there is land to the east, is there a reason nothing was built there? **Moorkamp** there was a sewage issue. **Crowell** you couldn't have built in that area due to the current existing utilities? **Jepsen** there was an issue with the sewer connection? **Moorkamp** yes. **Crowell** when picking the site, was there consultation with the City or did you submit plans without consultation? **Arthur** yes, with Archer-Elgin, the City, and the architect. If any sign was moved north, you would lose visibility due to the slope of the roadway. **Steve Flowers** commented there were elevation problems with moving the building as they did not have the proper slope to get to the sewer.

Stoll, Crowell and Sutton agreed the 2nd criterion was met. **Jepsen** voted no.

All Board members agreed the 3rd criterion was met.

4th Criterion: **Sutton** have we heard from any neighbors? **Coots** no issues.

All Board members agreed the 4th criterion was met.

5th Criterion: **Coots** stated the applicant placed the sign as far from the sidewalk as they could. There could be alternatives to the applicant's sign placement and size. **Crowell** what would be the impact of moving the sign further from the road? Is this the minimum for safety purposes? **Arthur** stated they wanted their sign to fit in with the neighborhood. **Moorkamp** stated patients have complained about not being able to see their sign.

Stoll, Crowell and Sutton agreed the 5th criterion was met. **Jepsen** voted no.

All Board members agreed the 6th criterion was met.

Crowell asked the applicant their timeframe, and if it was a hardship to delay this issue. **Arthur** just more delay. **Crowell** due to disagreement, it would be beneficial to table the issue, possibly gaining another member's insight, as it does not appear that you will have enough votes for approval of the request.

(Note: A variance requires at least 4 votes for approval to approve the request. Since only 4 members are present, all 4 must vote to approve to be able to approve the request. A 5th Board member may be appointed prior to the next meeting)

Arthur commented that an alternative pole sign would not be beneficial as all their neighbors are two-story residential duplexes, so the sign would be in direct line of sight.

A motion was made by Laura Stoll, seconded by Matt Crowell, to table the issue to the next meeting scheduled for January 6th, 2022. A vote on the motion showed the following: Ayes: Crowell, Stoll, Jepsen, and Sutton. Nays: None. The motion passes unanimously.

2. **Request: ZV2021-05:** Variance to Section 42-177.2 to allow a reduction in the side yard setback in the R-3, Multi-family district.

Tom Coots introduced the variance request ZV2021-05 for a property located at 1206 Bardsley Road and presented the information in the staff report.

Sutton opens the public hearing.

Jason Smith, located at 18500 Deep Woods Trail, is the applicant. He confirmed he was sworn in. He is proposing that the building would be built five feet from the property line with a five foot wooden deck up against the property line.

Sutton asked how long the applicant owned the property. **Smith** stated the property was purchased in 2019.

Jepsen asked if the property was surveyed prior to being purchased. **Smith** stated he paid for a survey after purchase. The purchase was through tax sale, which takes one year to gain ownership of the property.

Crowell asked if there was a way to shift the building south and west to avoid the issue. **Smith** not if we are going to meet the City Code for parking. In order to create the needed parking spots, the building can't be moved south. **Jepsen** commented about the requirement for green space as well.

Sutton asked if the apartment complex as a whole could be smaller. **Smith** stated a smaller complex could be built.

Mike Dees, located at 110 South Elm Street, owns the property adjacent to the subject property. He expressed concern with the property lines backing up against 405 East 12th street, and whether he would have access to his property. **Smith** confirms his property line goes across an alleyway, and he states he intends to improve and asphalt the alleyway and not restrict access.

Jennifer Smith, who partners in ownership of the subject building, states that the property lines do not impact Dees from getting to his property.

Jepsen is that a widely used alleyway? **Smith** yes, it is used for parking.

Susan Harmon, who owns 407 East 12th Street, also expressed concern about the alleyway access.

Sutton closes the public hearing and moves into Board deliberation.

Coots asks the board to go over the criteria for approval.

All Board members agreed the 1st criterion was met.

All Board members agreed the 2nd criterion was met.

3rd Criterion: **Crowell** the applicant could build a smaller unit. **Stoll** states safety being an issue as a corner of the building will be very close to the roadway. She also asks for confirmation about the deck on the back of the house being covered under the Code. **Coots** states the code allows for uncovered decks to encroach into a front yard, but does not for a side or rear yard. **Flowers** stated the Code allows concrete to be poured right up to the property line.

All Board members agreed the 3rd criterion was met.

4th Criterion: **Crowell** commented about the setbacks being right up against the neighbors to the east. **Smith** commented that the neighbors on the eastern side have not said anything opposing the variance. He also stated it would not be beneficial to the citizens of Rolla to have a building five feet closer to a major thoroughfare. He pointed out the building itself would not be up against the property line, instead it would be the edge of the porch. **Stoll** asked if shortening the porch would be plausible. **Smith** stated it might not be useable. **Jepsen** stated that a small porch would be a safety issue.

Stoll, Jepsen, and Sutton agreed the 4th criterion was met. **Crowell** voted no.

5th Criterion: **Crowell** comments that he believes there are other reasonable uses of this land. **Jepsen** is that ours to determine? **Crowell** states the Board is there to determine if this variance is necessary. The applicant can build without the variance, and can also provide alternatives that does not violate the setback. He states that safety is not the only factor to consider. **Smith** comments that this is a special circumstance, and he believes his request to be reasonable. He states that he applied for the variance at the recommendation of Tom Coots.

Stoll, Jepsen, and Sutton agreed the 5th criterion was met. **Crowell** voted no.

6th Criterion: **Crowell** states this is not simply a safety issue; there are setbacks for a reason.

Stoll, Jepsen, and Sutton agreed the 6th criterion was met. **Crowell** voted no.

Stoll asked the applicant about the timeframe, and would delaying create a hardship. **Smith** stated yes, as waiting would result in losing contractors.

Crowell stated he was not opposed to a compromise. He expressed concern over no buffers between future owners of the properties.

Smith asks what the current Code says about how close each structure can be. **Flowers** states it depends on the zoning and what fire separation is required. Some lots allow for zero lot lines. In this case, there is a 5 foot setback required between both property lines, thus buildings can be no closer than 10 feet. **Smith** states there is currently at least a 15 foot separation between buildings.

Crowell how high off the ground is the planned deck? **Smith** about four feet. **Crowell** asked if a condition could be made for a fence. **Sutton** asks if there was room for a fence. **Flowers** a fence can be built right up against the property line, or attached to the deck if they wish. **Stoll** asks if the applicant can build a privacy fence on the deck instead of railing. **Flowers** confirms this to be true.

Crowell states there are competing interests. **Stoll** asks if the applicant would be willing to compromise. **Smith** yes. Would one foot off the property line be a reasonable compromise? **Crowell** states he would prefer two feet instead. He asks if adverse possession plays a role in decision making. **Coots** states that if the public is using the property, the public can maintain that use. **Crowell** states the setbacks would stay with the original property lines. **Jepsen** asks if the City replaced the sidewalk, could they move it back off the property line. **Coots** states they could replace it in the same spot.

Crowell proposes a two foot setback from the neighboring property. **Flowers** asked if a two foot area could be maintained. **Crowell** withdraws his objection and motion, and supports the application.

A motion was made by Matt Crowell, seconded by Laura Stoll, to approve the application as submitted. A roll call vote on the motion showed the following: Ayes: Crowell, Stoll, Jepsen, and Sutton. Nays: None. The motion passes unanimously.

Having no further business, the meeting was adjourned at 7:57 P.M.

Minutes prepared by **Sarah West**

NEXT MEETING:

Thursday, January 6, 2022



Report to:

Board of Adjustment

Case No.: ZV2022-05

Meeting Date: October 13, 2022

Subject: Variance to Section 42-399 to allow reductions in the setbacks for a telecommunications tower.

Applicant and Notice:

Applicant- Russell Been of Celective Solutions, LLC
Owner- B Dunnigan Tours, LLC
Public Notice - Letters mailed to property owners within 300 feet; Legal ad in the Phelps County Focus; signage posted on the property; <https://www.rollacity.org/agenda.shtml>

Background: The applicant seeks to construct a telecommunications tower on the subject property. A Conditional Use Permit was reviewed in 2021 to allow a telecommunications tower on the property. The CUP was denied by the City Council. The CUP was reconsidered and approved by City Council in April 2022. One of the approved conditions was that the applicant seek variances from the setbacks in the wireless communications facilities regulations. The property was also rezoned to the M-1, Light Manufacturing district in June 2022.

The applicant seeks variances from the setback requirements from the right-of-way of Old Saint James Rd; from the sidewalk on Old Saint James Rd; from parking areas; from other buildings; and from adjacent properties.

The Board held the public hearing at the July 2022 meeting and tabled the discussion to allow for the applicant to present additional information.

Property Details:

Current Zoning - M-1, Light Manufacturing
Current Use - Vacant

Code Reference:

SUBDIVISION IIa. WIRELESS COMMUNICATIONS FACILITIES CODE

Sec. 42-399. General Requirements.

8. Design.

7. Setbacks. All Support Structures, including any portions of any Wireless Communications Facilities thereon and associated structures, fences, and walls (except for parking associated with the Wireless Communications Facility) shall be separated from any rights-of-way, sidewalk or street, alley, parking area, playground, or other building, and from the property line of any adjacent property at least a horizontal distance equal to the height of the Support Structure, including any portions of any Wireless Communications Facilities thereon.

Variance Approval Criteria:

A variance must be reviewed to ensure that the following criteria are met:

1. The applicant must demonstrate that special circumstances or conditions applying to the land or buildings for which the variance is sought; which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the same zone or neighborhood; and that said circumstances or conditions are such that the strict application of the provisions of the regulation creates an unnecessary economic hardship by depriving the applicant of the reasonable use of such land or building.
2. The alleged hardship has not been created by any person currently having interest in the property.
3. The purpose of the variance is not based exclusively on the desire to enhance the value of the property, or increase the return or income from the property.
4. The granting of such variance will not be detrimental to the public welfare or substantially or permanently injurious to the property or improvements in such zoning or neighborhood areas in which the property is located.
5. The granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that would accomplish this purpose, and will not alter the essential character of the neighborhood.
6. The literal enforcement and strict application of the provisions of the Rolla Planning and Zoning Code will result in an unnecessary hardship inconsistent with the general provisions and intent of the regulations and that in granting such variance the spirit of the regulations will be preserved and substantial justice done.

Discussion: The applicant seeks several variances. The proposed tower is 95 feet tall, plus does have a 5 foot tall lightning rod mounted on top. The setback should be measured from the tower enclosure.

The Board should review each type of variance separately, but could consider the various instances of variances of each type at the same time.

1. Variance for setback to right-of-way of Old Saint James Rd: Tower is located 78 feet from the street right-of-way.
2. Variance for setback to the sidewalk along Old Saint James Rd: Tower is located 70 feet from the sidewalk along the street.
3. Variance for the adjacent buildings: Tower is located approximately 75.5 feet from 1850 Old Saint James Rd; and 38 feet/85 feet from 801 E 18th Street; and 81 feet from 1900 Old Saint James Rd (subject property).
4. Variance for the property lines of adjacent property: Tower is located approximately 25 feet from 1850 Old Saint James Rd; 0 feet from 801 E 18th Street; and 71 feet from 809 E 18th Street.

Staff Recommendation:

Staff recommends that the Board review each type of variance request separately. Evidence that the tower should not impact Criteria 4 seems to have been presented for each request. Criteria 5 appears to be met based on the evidence and specific location. Staff recommends that the Board further review Criteria 1, 2, 3, and 6 to ensure that the variance(s) may be approved.

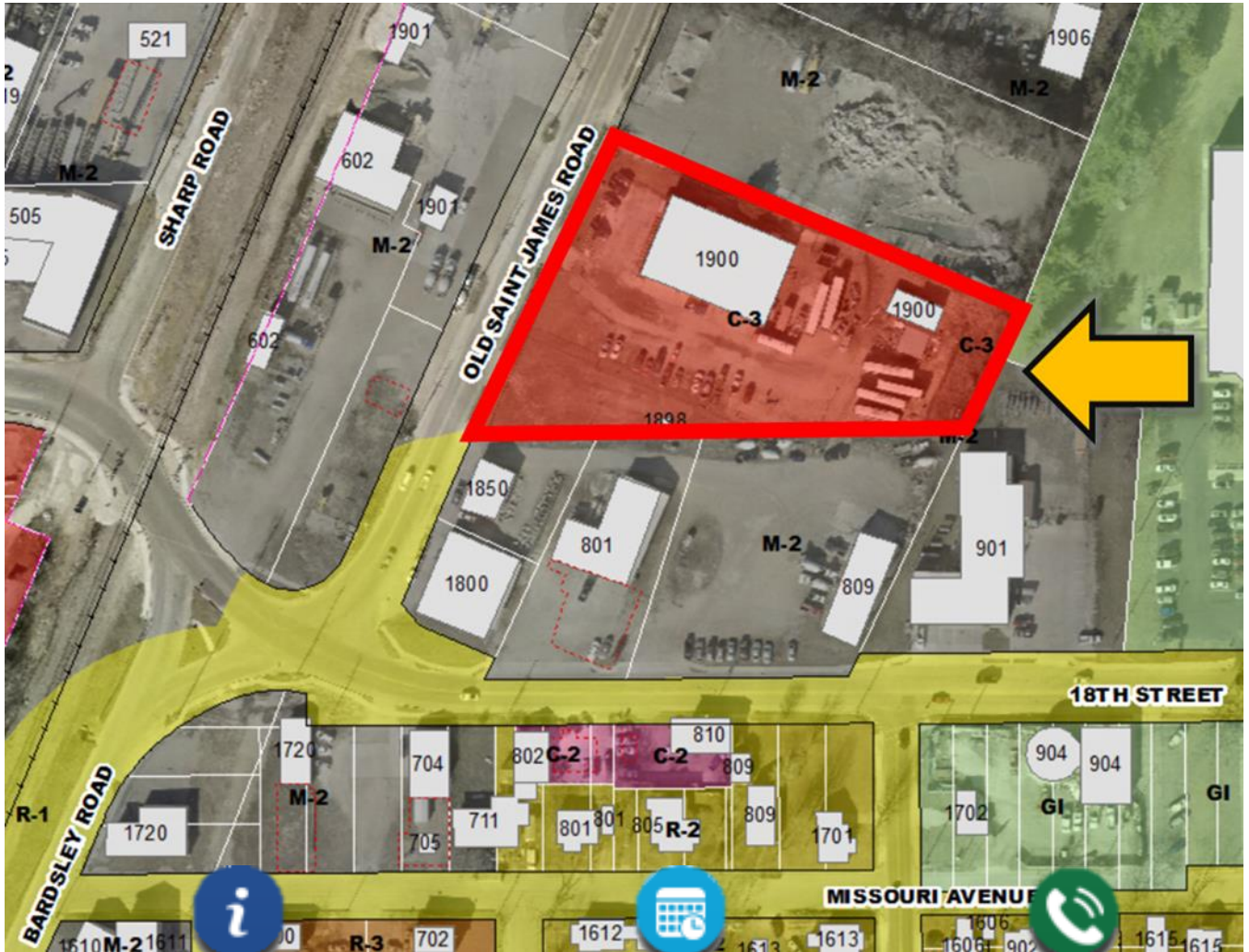
Alternatives:

The Board of Adjustment has the following alternatives of action:

1. Find that each of the criteria for approval of the variance(s) are met and explain how each criteria is met for the record.
2. Find that the criteria for approval of the variance could be met through the imposition of conditions or limitations to ensure that the criteria are met. The Board will explain how each criteria is met and grant partial, conditional, or modified approval of the variance(s).
3. Find that one or more of the criteria for approval of the request is not met and deny the request.
4. Table the discussion to a certain date to allow for additional information to be presented.

Prepared by: Tom Coots, City Planner

Attachments: Public Notice Letter, Application, Letter of Request (revised), Site Plan/Elevation (revised); Submittals from applicant and SBA



Project Information:

Case No: ZV22-05
 Location: 1898/1900 Old Saint James Rd
 Applicant: Collective Solutions
 Request:
 Variance from Section 42-399 (h) to allow reduced setbacks for a telecommunications tower

Public Hearing:

Board of Adjustment
June 2, 2022
5:30 PM
 City Hall: 1st Floor

For More Information Contact:

Tom Coots, City Planner
tcoots@rollacity.org

(573) 426-6974
 901 North Elm Street
 City Hall: 2nd Floor
 8:00 – 5:00 P.M.
 Monday - Friday



Who and What is the Board of Adjustment?

The Board of Adjustment (BOA) is an appointed group of citizens from Rolla who are charged with hearing and deciding Variances, Appeals, and Special Exceptions.

What is a Variance?

A Variance is a request for relief from a particular provision in the zoning code. A Variance should only be granted if certain criteria are met. Variances are frequently sought to allow things such as reduced setback, lot size or increased height.

What is an Appeal or Special Exception?

An Appeal is a request for an interpretation of the meaning of the zoning code from the Board of Adjustment. A Special Exception is a request to allow certain uses.

How Will This Impact My Property?

Each case is different. Adjacent properties are more likely to be impacted. Please contact the Community Development Office at (573) 364-5333 if you have any questions.

What If I Have Concerns About the Proposal?

If you have any concerns or comments, please try to attend the meeting. You may learn details about the project at the meeting. You will be given an opportunity to ask questions or make comments.

What If I Cannot Attend the Meeting?

Please try to attend the meeting if you have any questions or concerns. However, if you are unable to attend the meeting, you may provide written comments by letter or email. These comments will be presented to the Board.

What If I Have More Questions?

Please contact the Community Development Office if you have any additional questions.

LEGAL DESCRIPTION

A LEASED PREMISES BEING PART OF SECTION 1 IN TOWNSHIP 37 NORTH, RANGE 8 WEST IN PHELPS COUNTY, MISSOURI AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 1, TOWNSHIP 37 NORTH, RANGE 8 WEST; THENCE SOUTH 78 DEGREES 54 MINUTES 10 SECONDS EAST, 902.63 FEET TO A POINT IN THE EAST RIGHT OF WAY LINE OF OLD ST. JAMES ROAD, SAID POINT BEING THE NORTHWEST CORNER OF SURVEY RECORD BOOK 12 PAGE 130; THENCE ALONG SAID RIGHT OF WAY LINE, NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 63.76 FEET TO THE SOUTHWEST CORNER OF THE PARENT PARCEL DESCRIBED IN DOC#2018-5993 12/31/2018; THENCE LEAVING SAID RIGHT OF WAY LINE, ALONG THE SOUTH LINE OF SAID PARENT PARCEL; NORTH 89 DEGREES 47 MINUTES 30 SECONDS EAST, 21.76 FEET TO THE POINT OF BEGINNING OF SAID LEASE PREMISES; THENCE NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 100.00 FEET TO A POINT; THENCE SOUTH 62 DEGREES 51 MINUTES 12 SECONDS EAST, 200.00 FEET TO THE SAID SOUTH LINE; THENCE SOUTH 89 DEGREES 47 MINUTES 30 SECONDS WEST, 217.06 FEET TO THE POINT OF BEGINNING. CONTAINING 9974 SQUARE FEET OR 0.23 ACRES, MORE OR LESS.

AND A PROPERTY COMMENCING AT THE NORTHWEST CORNER OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 1, TOWNSHIP 37 NORTH, RANGE 8 WEST; THENCE SOUTH 78 DEGREES 54 MINUTES 10 SECONDS EAST, 902.63 FEET TO A POINT IN THE EAST RIGHT OF WAY LINE OF OLD ST. JAMES ROAD, SAID POINT BEING THE NORTHWEST CORNER OF SURVEY RECORD BOOK 12 PAGE 130; THENCE ALONG SAID RIGHT OF WAY LINE, NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 127.85 FEET TO THE POINT OF BEGINNING OF UTILITY/ACCESS EASEMENT; THENCE CONTINUING NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 45.94 FEET TO A POINT; THENCE SOUTH 62 DEGREES 51 MINUTES 12 SECONDS EAST, 20.05 FEET TO THE NORTHWEST CORNER OF A LEASED PREMISES; THENCE ALONG THE WEST LINE OF SAID LEASED PREMISES, SOUTH 23 DEGREES 00 MINUTES 40 SECONDS WEST, 44.49 FEET TO A POINT; THENCE LEAVING SAID LEASED PREMISES, NORTH 66 DEGREES 59 MINUTES 20 SECONDS WEST, 20.00 FEET TO THE POINT OF BEGINNING. CONTAINING 904 SQUARE FEET OR 0.02 ACRES, MORE OR LESS.





pd ec

BOARD OF ADJUSTMENT APPLICATION

Contact Information:

Property Owner:
B. Dunnigan Tours, LLC

Name(s)
1900 Old St. James Road

Mailing Address
Rolla, MO 65401

City, State, Zip
(573) 202-3949

Phone

Email

Agent/Applicant (If Different Than Property Owner):

Russell Been, Collective Solutions, LLC

Name
340 Marshall Road

Mailing Address
Valley Park, MO 63088

City, State, Zip
(314) 989-9810

Phone
russ@collectivesolutions.com

Email

Property/Request Information:

Request: X Variance
 Special Exception
 Appeal

Sec. 42-399, subsec: 8, subsubsec: 7

Code Section (Variance/Appeal Only)

1900 Old St. James Road, Rolla MO 65401

Property Address/Location

M-1

Property Zoning

Wireless Communications Facility

Proposed Development/Project

APPLICATION CHECKLIST:

Applicant Checks Boxes	<input type="checkbox"/>	Completed Application Form	<input type="checkbox"/>	City Staff Verifies
	<input type="checkbox"/>	Agent Letter (If Applicable)	<input type="checkbox"/>	
	<input type="checkbox"/>	Filing Fee - \$350	<input type="checkbox"/>	
	<input type="checkbox"/>	Legal Description (Unplatted and Irregular Lots Only)	<input type="checkbox"/>	
	<input type="checkbox"/>	Site Plan/Survey (If Applicable)	<input type="checkbox"/>	
	<input type="checkbox"/>	Letter of Request: <i>Please include description of project, request, how criteria for approval are met, and any other pertinent information.</i>	<input type="checkbox"/>	

OFFICE USE ONLY:

Case No: 2022-05	DRC Meeting Date: 5.17.22	Advertise By: 5.12.22
Submission Date: 4.27.22	BOA Hearing Date: 6.2.22	

INFORMATION:

Variations are required to meet the following criteria:

1. The applicant must demonstrate that special circumstances or conditions applying to the land or buildings for which the variance is sought; which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the same zone or neighborhood; and that said circumstances or conditions are such that the strict application of the provisions of the regulation creates an unnecessary economic hardship by depriving the applicant of the reasonable use of such land or building.
2. The alleged hardship was not created by any person currently having an interest in the property.
3. The purpose of the variance is not based exclusively on the desire to enhance the value of the property, or increase the return or income from the property.
4. The granting of such variance will not be detrimental to the public welfare or substantially or permanently injurious to the property or improvements in such zoning or neighborhood areas in which the property is located.
5. The granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that would accomplish this purpose, and will not alter the essential character of the neighborhood.
6. The literal enforcement and strict application of the provisions of the Rolla Planning and Zoning Code will result in an unnecessary hardship inconsistent with the general provisions and intent of the regulations and that in granting such variance the spirit of the regulations will be preserved and substantial justice done.
7. (Use Variations Only) The use is consistent with the intent of the Comprehensive Plan.

Appeals are required to meet the following criteria:

1. The Appeal was filed within 15 days or after the administrative officer has rendered a decision.
2. The interpretation of the code as made by the administrative officer was incorrect or unclear.

Special Exceptions are required to meet the following criteria:

1. The request is consistent with the general spirit and intent of the regulations.
2. The request is consistent with the general and specific rules for the Special Exception.
3. The request serves the general welfare and preserves the community interest.

Acknowledgement and Authorization:

The owner(s) understand and agree that the application will be placed on hold until a complete application and all required items on the checklist are received. The owner(s) understand and agree to permitting employees of the City of Rolla to enter the subject property for purposes of posting a yard sign(s), retrieving the yard sign(s), taking photographs of the property/building(s), and investigating the property for pertinent information related to the request. Should ownership of the property change after the application is submitted, authorization is required from the new owner to continue with the review of the request, or the request will be withdrawn from consideration. The undersigned understands that refunds may be provided if the request is withdrawn prior to the Board of Adjustment hearing, less any costs already incurred.

Property Owner(s):

Applicant/Agent (If Different From Owner)

Sign Print

Sign Print *Collective Solutions LLC agent for Parallel Infrastructure*

Sign Print

Sign Print



memo

Collective Solutions, LLC

To: Tom Coots
From: Russell S. Been, Collective Solutions, LLC, agent for Parallel Infrastructure
CC: City of Rolla Missouri Planning and Zoning Commission
Date: 9/9/2022
Re: Request for relief of setbacks for wireless telecommunications facility located at 1900 Old St. James Road

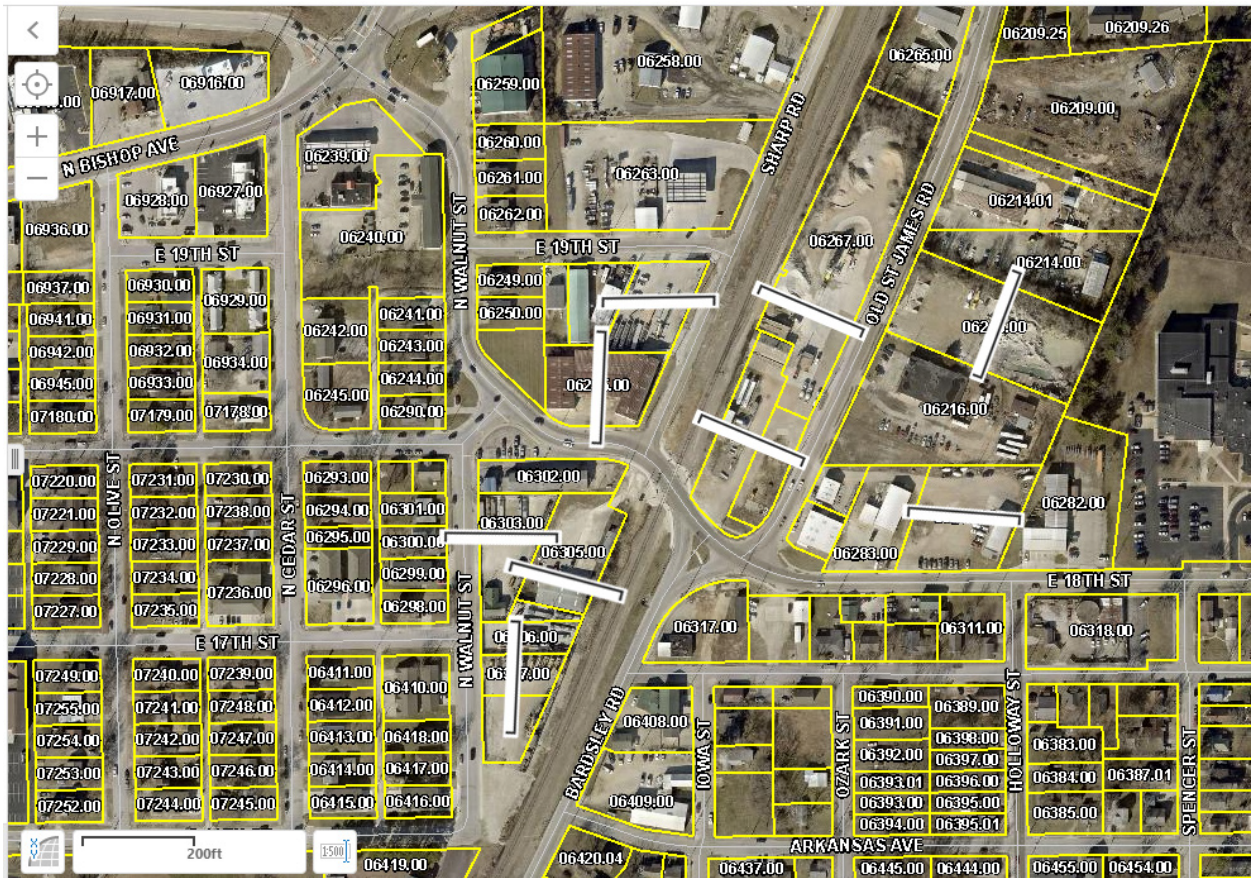
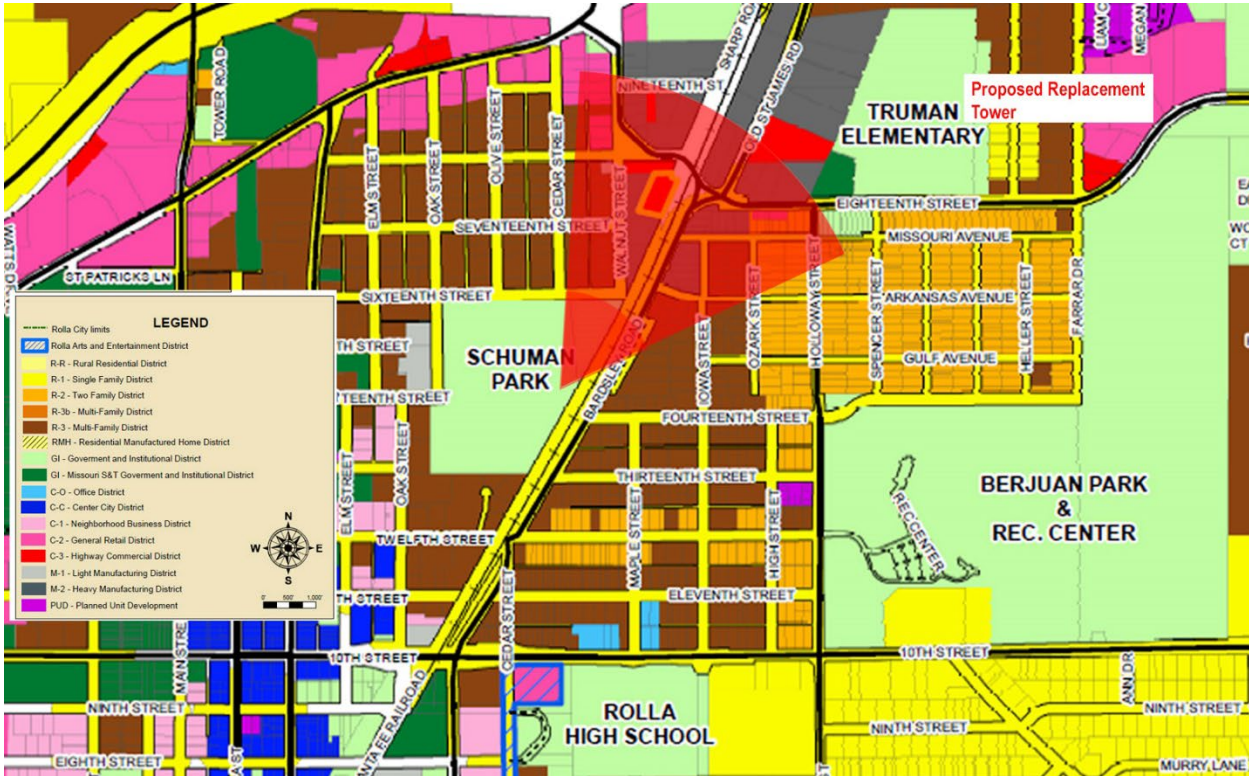
AT&T, in order to improve service and capacity in the Rolla, Missouri area, has contracted with Parallel Infrastructure to construct a 95' tall monopole style wireless communications facility. This facility will include a lighting rod and associated fencing and ground equipment. At the suggestion of the City of Rolla planning department, privacy slats have been added to the fencing.

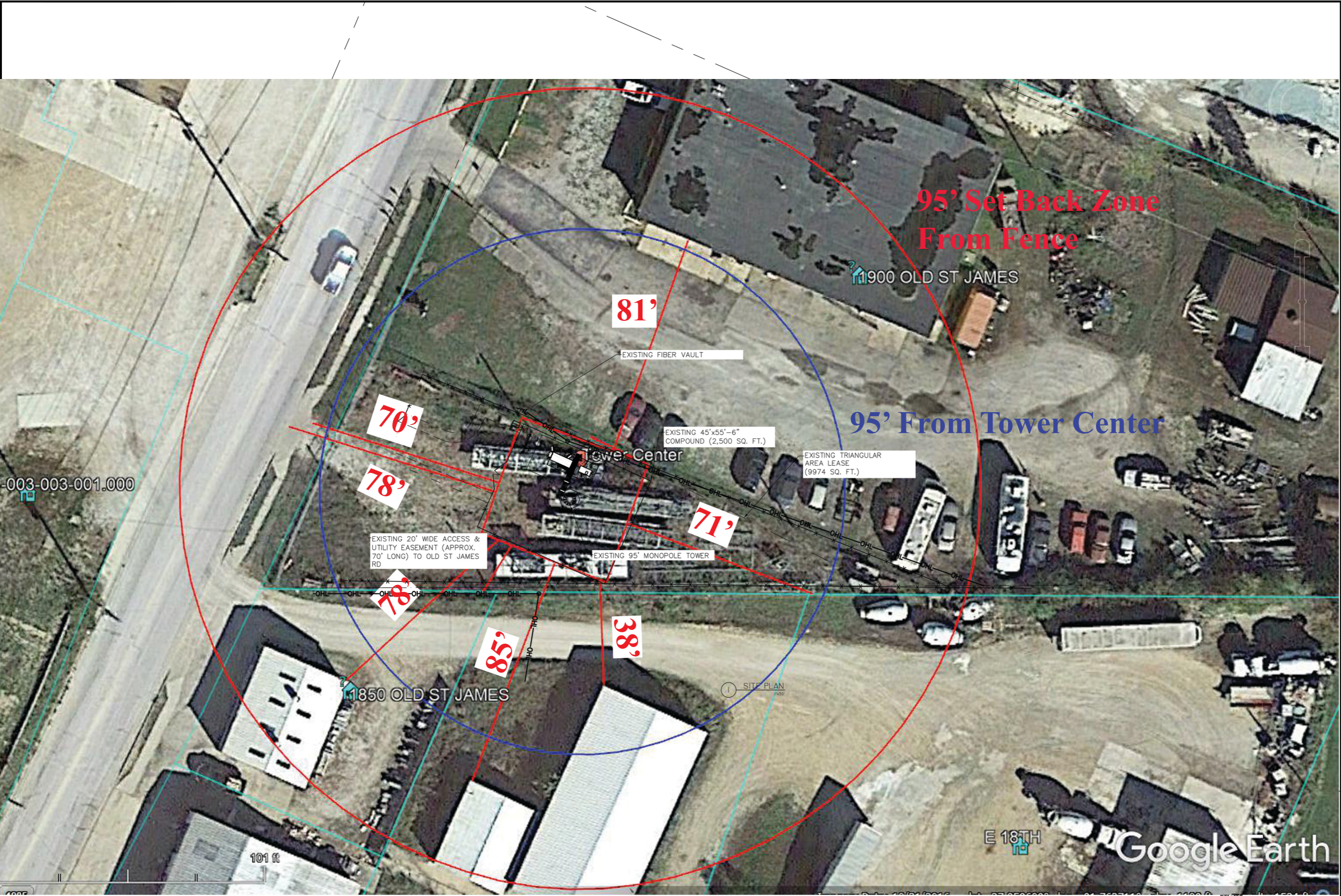
Sec. 42-399, Subsection 8, subsection 7 requires a wireless communications tower be set back from the property lines the height of the telecommunications tower. In order to locate the tower in the area recently rezoned per the request of the Rolla City Council, Collective Solutions, LLC requests on behalf of Parallel Towers, LLC, relief from the setback requirements listed in said section of the Rolla City Zoning code. We are requesting a setback of 35 feet from the southern property line and 93 feet from the western property lines. The tower will meet the required setbacks from the northern and eastern property lines.

Parallel request the following minimum setbacks:

- 0' from the tower fence to the southern property line
- 70' from the tower fence to the side walk on East Side of Old St. James Road
- 78' from tower fence to right of way for Old St. James Road
- 75.5' from Tower Fence to Building at 1850 Old St. James Road
- 38' from Tower fence to Large Building at 801 E. 18th
- 85' From Tower fence to Small building at 801 E. 18th
- 0' from Tower Fence to On Site parking lot
- 81' From Tower Fence to On site building
- 71' From Tower Fence to Property line at [Parcel ID: 71-09-1.0-01-003-002-010.000](#)

1. Federal Courts have determined that the minimum height needed for a cell tower is the height that allows the tower to meet the carrier's coverage objectives. In the case of this proposed tower, AT&T's Radio Frequency engineers have determined that in order to meet the coverage objectives for this area of Rolla and for FirstNet, their antennas would need to be 95' above ground level. In order to meet this coverage objective, the property would need to be zoned industrial. If the strict application of the ordinance were applied there would be no property in the area of the required tower that would allow a tower of a height that would be able to meet the coverage objective. In order to meet the coverage objective a tower would have to be located on a property that met three specific requirements: 1. The property would have to be located on our search area. 2. The property would need to be zoned M industrial and 3. The property would have to be more than 200' x 200' wide. Within our search area as described in the map below, there are several "M" zoned properties. There are none however, that are wide enough to meet the required setbacks as indicated in the second exhibit. Therefore the setback variance would not be specific to just the subject property. Also, should the strict setbacks be applied, the tower would be placed in the center of the driveway in front of the landowner's garage bays thereby creating an unnecessary economic hardship by depriving the owner of the reasonable use of the land and building on the property.
2. The hardship has to do with the size, shape and location of the "M" zoned section of the property and by the coverage objective need by AT&T and FirstNet was not created by anyone having interest in the property.
3. The purpose of the variance is to allow for a wireless communications facility to be built that will allow for the latest technology to be built in the area and to enhance FirstNet coverage in the area. Not to enhance the value of the property or increase the return of the or income of the property.
4. The granting of such variance will not be detrimental to the public welfare or substantially or permanently injurious to the property or improvements in such zoning or neighborhood areas in which the property is located, but in truth just the opposite. By allowing the variance and thereby allowing the new tower, AT&T will be able to install and enhance their public safety system, FirstNet, which is in use by the Rolla police department, and will allow better coverage to first responders in times of emergency. It will also allow AT&T to install their 5G network which will bring the most up to date technology to the area. As companies and individuals become more and more reliant on technology such as 5G and IOT coverage of the most up to date technology is crucial. Companies and individuals are taking a harder look at the existing wireless infrastructure as they are moving into new cities and new houses they are considering wireless infrastructure above things such as schools. The recent pandemic has taught us that it is vital to the public welfare that wireless infrastructure be at its peak capacity and technology.
5. One of the reasons the location was picked was due to the industrial nature of the neighborhood. Should a tower of the minimum height to reach our carriers coverage objective be allowed in the industrially zoned section of this property, this is the minimum variance needed to accomplish this. The essential character of the neighborhood would remain unchanged.
6. The literal enforcement and strict application of the Rolla zoning code would result in a hardship inconsistent with the general provisions and intent of the regulations and that in granting such variance the spirit of the regulations will be preserved and substantial justice done. The strict application of the zoning code would not allow a tower with the ability to meet AT&T's coverage objectives to be built. As mentioned, to meet our coverage objectives the tower would need to be 95' tall with a 5' lighting rod in the area highlighted by our search area. The property would need to be zoned as "M" to allow a tower to be the height needed to meet our coverage objective and the property would have to be 200' x 200' and there is no property within our search area that meets all three criteria. Up to this point there is no tower within the city of Rolla that has been subject to a strict application of a 1 to 1 setback. Section 704 of the Federal Telecommunications Act of 1996 does not allow a jurisdiction to "discriminate among providers of functionally equivalent services" so by allowing this tower to meet the same criteria as those providers of equivalent services, justice shall be done.





PLANS PREPARED FOR:
Parallel
 INFRASTRUCTURE
 15105 JOHN J. DELANEY DRIVE
 SUITE D-3
 CHARLOTTE, NC 28277

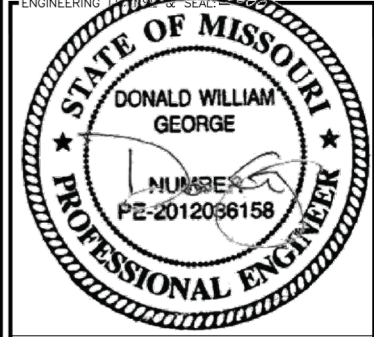
PLANS PREPARED FOR:

 208 S AKARD STREET
 DALLAS, TX 75202

PLANS PREPARED BY:
 FA #: 15456793
 AT&T SITE ID: MOLO2400
 SITE NAME : UMR
 SCHUMAN PARK RS
 PI TOWER ID: PIMO632
 1900 OLD ST JAMES RD
 ROLLA, MO 65401
 PHELPS COUNTY

REVISIONS:

DESCRIPTION	DATE	BY	REV
FINAL CDS	8.29.22	KE	2
REVISED CDS	8.3.22	KE	1
ISSUED FOR REVIEW	9.14.21	JDD	0



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SHEET TITLE:
 SITE PLAN

SHEET NUMBER: 01
 REV.: 2
 46299

**PARENT PARCEL
PAGE 1 OF 3**

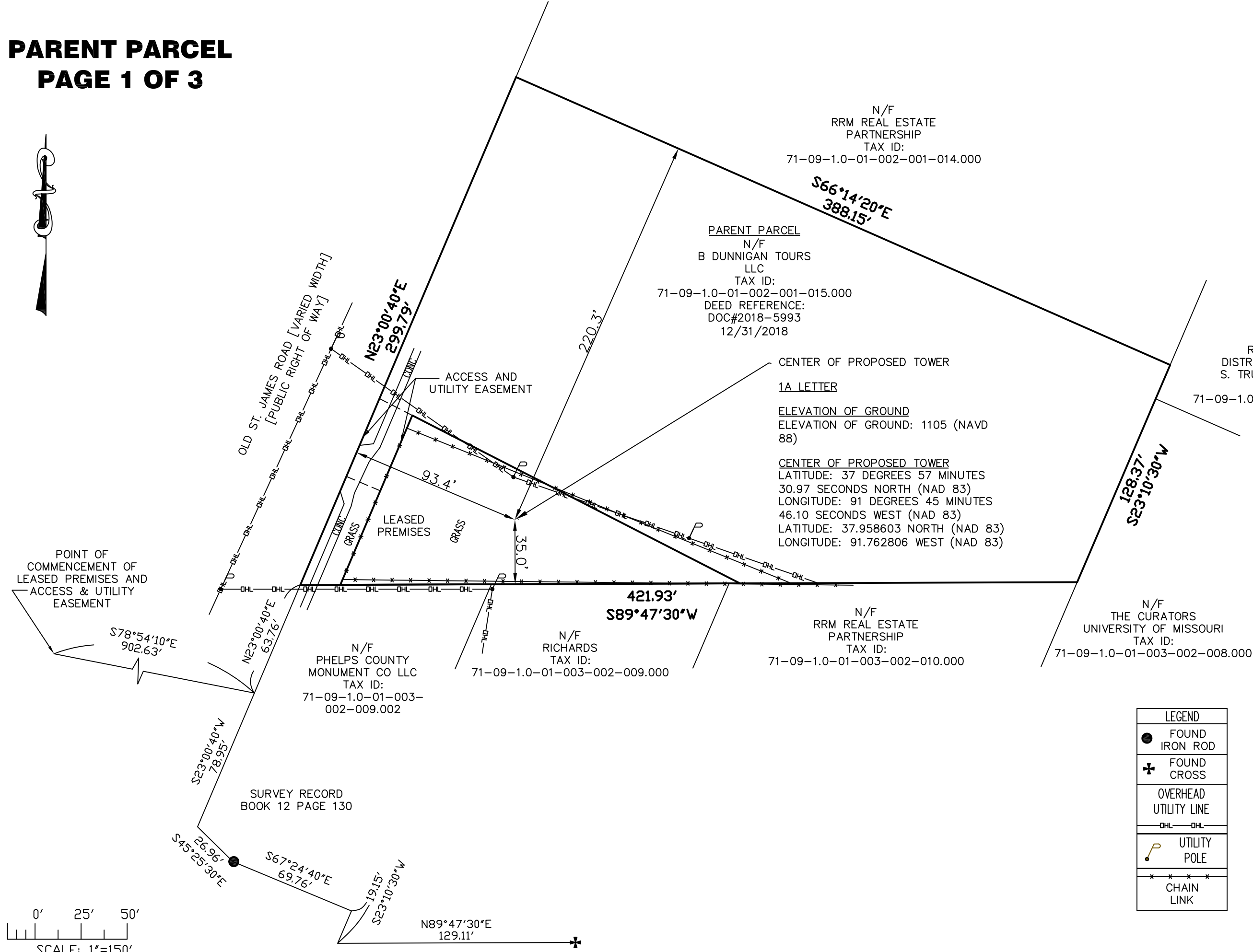


SURVEY
SITE NUMBER: PIM0632

PARENT PARCEL
N/F: B DUNNIGAN TOURS LLC
TAX ID:
71-09-1.0-01-002-001-015.000
DEED REFERENCE: DOC#2018-5993
12/31/2018

MINNICK SURVEYING, LLC
LC-2009001156

3520 HAMPTON AVE.
ST. LOUIS, MO 63139
(314) 721-9500
MINNICKSURVEYING.COM

N/F
RRM REAL ESTATE
PARTNERSHIP
TAX ID:
71-09-1.0-01-002-001-014.000

PARENT PARCEL
N/F
B DUNNIGAN TOURS
LLC
TAX ID:
71-09-1.0-01-002-001-015.000
DEED REFERENCE:
DOC#2018-5993
12/31/2018

N/F
ROLLA SCHOOL
DISTRICT NO. 31 HARRY
S. TRUMAN ELEMENTARY
TAX ID:
71-09-1.0-01-002-001-010.000

N/F
RRM REAL ESTATE
PARTNERSHIP
TAX ID:
71-09-1.0-01-003-002-010.000

N/F
THE CURATORS
UNIVERSITY OF MISSOURI
TAX ID:
71-09-1.0-01-003-002-008.000

N/F
PHELPS COUNTY
MONUMENT CO LLC
TAX ID:
71-09-1.0-01-003-
002-009.002

N/F
RICHARDS
TAX ID:
71-09-1.0-01-003-002-009.000

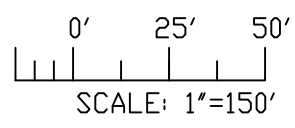
CENTER OF PROPOSED TOWER
1A LETTER
ELEVATION OF GROUND
ELEVATION OF GROUND: 1105 (NAVD 88)
CENTER OF PROPOSED TOWER
LATITUDE: 37 DEGREES 57 MINUTES
30.97 SECONDS NORTH (NAD 83)
LONGITUDE: 91 DEGREES 45 MINUTES
46.10 SECONDS WEST (NAD 83)
LATITUDE: 37.958603 NORTH (NAD 83)
LONGITUDE: 91.762806 WEST (NAD 83)

SITE ADDRESS:
1900 OLD ST. JAMES ROAD,
ROLLA, MO 65401, PHELPS
COUNTY
PROJECT NUMBER 8581

LEGEND	
●	FOUND IRON ROD
+	FOUND CROSS
—OHL—OHL—	OVERHEAD UTILITY LINE
⌋	UTILITY POLE
—*—*—*—*	CHAIN LINK

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BE CONSIDERED A
CERTIFIED DOCUMENT

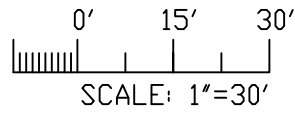
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IMPLEMENTATION



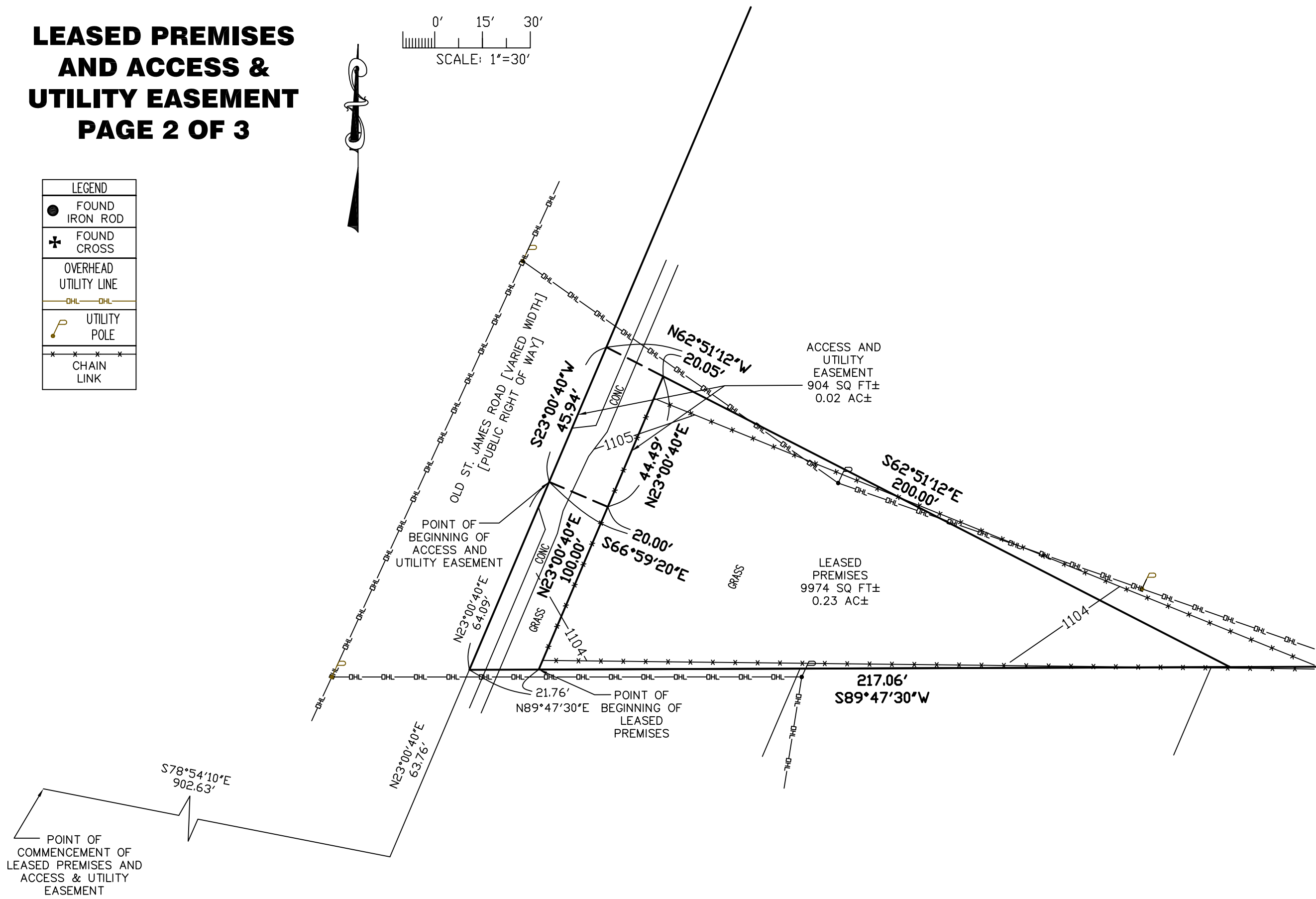
JARED MINNICK
LAND SURVEYOR
PLS-2007017968

6/22/21

LEASED PREMISES AND ACCESS & UTILITY EASEMENT PAGE 2 OF 3



LEGEND	
	FOUND IRON ROD
	FOUND CROSS
	OVERHEAD UTILITY LINE
	UTILITY POLE
	CHAIN LINK



SURVEY
SITE NUMBER: PIM0632

PARENT PARCEL
N/F: B DUNNIGAN TOURS LLC
TAX ID:
71-09-1.0-01-002-001-015.000
DEED REFERENCE: DOC#2018-5993
12/31/2018

MINNICK SURVEYING, LLC
LC-2009001156

3520 HAMPTON AVE.
ST. LOUIS, MO 63139
(314) 721-9500
MINNICKSURVEYING.COM

SITE ADDRESS:
1900 OLD ST. JAMES ROAD,
ROLLA MO, 65401, PHELPS
COUNTY

PROJECT NUMBER 8581

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JARED MINNICK
LAND SURVEYOR
PLS-2007017968

6/22/21

PARENT PARCEL DESCRIPTION
PAGE 3 OF 3

SURVEY
SITE NUMBER: PIM0632

PARENT PARCEL
N/F: B DUNNIGAN TOURS LLC
TAX ID:
71-09-1.0-01-002-001-015.000
DEED REFERENCE: DOC#2018-5993
12/31/2018

MINNICK SURVEYING, LLC
LC-2009001156
3520 HAMPTON AVE.
ST. LOUIS, MO 63139
(314) 721-9500
MINNICKSURVEYING.COM



PARENT PARCEL
SITUATED IN THE COUNTY OF PHELPS, STATE OF MISSOURI:

COMMENCING AT THE INTERSECTION OF THE CENTER LINE OF THE MAIN TRACK OF THE ST. LOUIS & SAN FRANCISCO RAILROAD WITH THE EAST AND WEST CENTERLINE OF SECTION ONE (1), IN TOWNSHIP THIRTY-SEVEN (37) NORTH, RANGE EIGHT (8) WEST, THENCE SOUTHWESTERLY ALONG THE CENTER LINE OF TRACK, A DISTANCE OF 332 FEET, THENCE SOUTHEASTERLY AT RIGHT ANGLES TO THE LAST DESCRIBED COURSE A DISTANCE OF 162 FEET, THENCE DUE EAST A DISTANCE OF 33 FEET AND 4 INCHES FOR A POINT OF BEGINNING, THENCE NORTHEASTERLY PARALLEL TO CENTER LINE OF MAIN TRACK, A DISTANCE OF 466 FEET AND 8 INCHES; THENCE SOUTHWESTERLY PARALLEL TO AFORESAID CENTER LINE MAIN TRACK A DISTANCE OF 700 FEET, THENCE DUE WEST A DISTANCE OF 466 FEET AND 8 INCHES TO THE POINT OF BEGINNING, EXCEPT A STRIP 35 FEET WIDE OFF SOUTH SIDE OF SAID TRACK. EXCEPTING ALL THAT PART CONVEYED TO THE CITY OF ROLLA, MISSOURI VIA WARRANTY DEED DATED DECEMBER 15, 1955, FILED JANUARY 6TH, 1956 IN BOOK 144 AT PAGE 26 OF THE PHELPS COUNTY DEED RECORDS. ALSO EXCEPTING ALL THAT PART CONVEYED TO CHARLES A. BLINNE AND MARY BLINNE, HIS WIFE, VIA WARRANTY DEED DATED SEPTEMBER 14TH, 1955, FILED JULY 24, 1956 IN BOOK 144 AT PAGE 485 OF THE PHELPS COUNTY DEED RECORDS, ALSO EXCEPTING ALL THAT PART CONVEYED TO C, A, BLINNE AND MARY BLINNE, HIS WIFE, VIA WARRANTY DEED DATED DECEMBER 20TH, 1960, FILED MAY 4TH, 1961 IN BOOK 158 AT PAGES 440.441 OF THE PHELPS COUNTY DEED RECORDS.

ALSO EXCEPTING ALL THAT PART CONVEYED TO MARY L. BLINNE, VIA QUIT CLAIM DEED DATED DECEMBER 15, 1980, FILED JUNE 30, 1981, IN BOOK 311, PAGE 41, OF THE PHELPS COUNTY RECORDS.

ALSO EXCEPTING THAT PROPERTY CONVEYED IN THE DEEDS RECORDED IN BOOK 207, PAGE 273, AND BOOK 182, PAGE 428, OF THE PHELPS COUNTY RECORDS.

TAX ID: 71-09-1.0-01-002-001-015.000

BEING THE SAME PROPERTY CONVEYED TO B DUNNIGAN TOURS LLC, GRANTEE, FROM MARY H. OGLE, A SINGLE PERSON, GRANTOR, BY DEED RECORDED 12/31/2018, AS DOCUMENT NO. 2018-5993, OF THE PHELPS COUNTY RECORDS

LEASED PREMISES

A LEASED PREMISES BEING PART OF SECTION 1 IN TOWNSHIP 37 NORTH, RANGE 8 WEST IN PHELPS COUNTY, MISSOURI AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 1, TOWNSHIP 37 NORTH, RANGE 8 WEST; THENCE SOUTH 78 DEGREES 54 MINUTES 10 SECONDS EAST, 902.63 FEET TO A POINT IN THE EAST RIGHT OF WAY LINE OF OLD ST. JAMES ROAD, SAID POINT BEING THE NORTHWEST CORNER OF SURVEY RECORD BOOK 12 PAGE 130; THENCE ALONG SAID RIGHT OF WAY LINE, NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 63.76 FEET TO THE SOUTHWEST CORNER OF THE PARENT PARCEL DESCRIBED IN DOC#2018-5993 12/31/2018; THENCE LEAVING SAID RIGHT OF WAY LINE, ALONG THE SOUTH LINE OF SAID PARENT PARCEL; NORTH 89 DEGREES 47 MINUTES 30 SECONDS EAST, 21.76 FEET TO THE POINT OF BEGINNING OF SAID LEASE PREMISES; THENCE NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 100.00 FEET TO A POINT; THENCE SOUTH 62 DEGREES 51 MINUTES 12 SECONDS EAST, 200.00 FEET TO THE SAID SOUTH LINE; THENCE SOUTH 89 DEGREES 47 MINUTES 30 SECONDS WEST, 217.06 FEET TO THE POINT OF BEGINNING. CONTAINING 9974 SQUARE FEET OR 0.23 ACRES, MORE OR LESS.

ACCESS/UTILITY EASEMENT

AN ACCESS/UTILITY EASEMENT BEING PART OF SECTION 1 IN TOWNSHIP 37 NORTH, RANGE 8 WEST IN PHELPS COUNTY, MISSOURI AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 1, TOWNSHIP 37 NORTH, RANGE 8 WEST; THENCE SOUTH 78 DEGREES 54 MINUTES 10 SECONDS EAST, 902.63 FEET TO A POINT IN THE EAST RIGHT OF WAY LINE OF OLD ST. JAMES ROAD, SAID POINT BEING THE NORTHWEST CORNER OF SURVEY RECORD BOOK 12 PAGE 130; THENCE ALONG SAID RIGHT OF WAY LINE, NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 127.85 FEET TO THE POINT OF BEGINNING OF UTILITY/ACCESS EASEMENT; THENCE CONTINUING NORTH 23 DEGREES 00 MINUTES 40 SECONDS EAST, 45.94 FEET TO A POINT; THENCE SOUTH 62 DEGREES 51 MINUTES 12 SECONDS EAST, 20.05 FEET TO THE NORTHWEST CORNER OF A LEASED PREMISES; THENCE ALONG THE WEST LINE OF SAID LEASED PREMISES, SOUTH 23 DEGREES 00 MINUTES 40 SECONDS WEST, 44.49 FEET TO A POINT; THENCE LEAVING SAID LEASED PREMISES, NORTH 66 DEGREES 59 MINUTES 20 SECONDS WEST, 20.00 FEET TO THE POINT OF BEGINNING. CONTAINING 904 SQUARE FEET OR 0.02 ACRES, MORE OR LESS.

NOTES:
- THE PURPOSE OF THIS SURVEY IS TO DESCRIBE A LEASED PREMISES AND 20' WIDE ACCESS AND UTILITY EASEMENT.
-BASIS OF BEARING: SURVEYORS RECORD BOOK 12 PAGE 130
-UTILITIES SHOWN BASED ON ABOVEGROUND OBSERVATIONS, THIS IS NOT A COMPLETE INVENTORY OF UTILITIES IN THE AREA. NO UNDERGROUND UTILITIES SHOWN.
- ACCORDING TO FEDERAL EMERGENCY MANAGEMENT AGENCY MAPS, THE PROPOSED TELECOMMUNICATIONS SITE IS LOCATED IN ZONE X, COMMUNITY PANEL NO. 29161C0234D, DATED 2/20/08.
- NO WETLANDS AREAS HAVE BEEN INVESTIGATED BY THIS SURVEY
- THE LEASED PREMISES IS CONTIGUOUS ALONG ITS COMMON BOUNDARIES TO THE ACCESS AND UTILITY EASEMENT, WHICH IN TURN IS CONTIGUOUS ALONG ITS COMMON BOUNDARIES TO THE OLD ST. JAMES ROAD RIGHT OF WAY, AND THERE ARE NO GAPS, GORES, SPACES OR OVERLAPS BETWEEN OR AMONG ANY OF SAID PARCELS OF LAND.
- THIS SURVEY DOES NOT CONSTITUTE A TITLE SEARCH BY SURVEYOR. MINNICK SURVEYING, LLC HAS RECEIVED AND REVIEWED THE TITLE COMMITMENT PREPARED BY OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, DATED EFFECTIVE 1/26/2021, BEING COMMITMENT NO. 01-21004711-01T FOR THE SUBJECT PROPERTY, TO DETERMINE THE IMPACTS OF EXISTING TITLE EXCEPTIONS. ANY ADDITIONAL EASEMENTS AND/OR EXCEPTIONS REPORTED IN THE ABOVE REFERENCED TITLE SHOWN OR NOTED ON THIS SURVEY:
9. DEED FOR HIGHWAY PURPOSES IN FAVOR OF THE CITY OF ROLLA, MISSOURI, RECORDED 01/06/1956, IN BOOK 144, PAGE 26, OF THE PHELPS COUNTY RECORDS.[PART OF OLD ST. JAMES RIGHT OF WAY. AFFECTS PARENT PARCEL. DOES NOT AFFECT LEASED PREMISES OR ACCESS/UTILITY EASEMENT]
10. SUBJECT TO THE RESTRICTION SET FORTH IN THE DEED, RECORDED 07/24/1956, IN BOOK 144, PAGE 485, OF THE PHELPS COUNTY RECORDS.[PART OF OLD ST. JAMES RIGHT OF WAY. AFFECTS PARENT PARCEL. DOES NOT AFFECT LEASED PREMISES OR ACCESS/UTILITY EASEMENT]
11. SEWER EASEMENT DEED IN FAVOR OF THE CITY OF ROLLA, MISSOURI, RECORDS 06/05/1962, IN BOOK 166, PAGE 355, OF THE PHELPS COUNTY RECORDS.[DOES NOT AFFECT PARENT PARCEL, LEASED PREMISES OR ACCESS/UTILITY EASEMENT]
12. SUBJECT TO THE RESERVATION SET FORTH IN THE DEED, RECORDED 06/30/1981, IN BOOK 311, PAGE 41, OF THE PHELPS COUNTY RECORDS.[DOES NOT AFFECT PARENT PARCEL, LEASED PREMISES OR ACCESS/UTILITY EASEMENT]

TO: PARALLEL TOWERS III LLC, A DELAWARE LIMITED LIABILITY COMPANY ('PT3'); SUCCESSOR BY NAME CHANGE TO LENDLEASE TOWERS III LLC, A DELAWARE LIMITED LIABILITY COMPANY ('PT3'), ITS SUCCESSORS, ASSIGNS AND/OR DESIGNEES AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

I, _____, A MISSOURI PROFESSIONAL LAND SURVEYOR, CERTIFY THAT THE INFORMATION SHOWN HEREON WAS COMPILED USING DATA FROM AN ACTUAL FIELD SURVEY MADE UNDER MY DIRECT SUPERVISION AND THAT THE FIELD SURVEY AND THE COMPILATION OF INFORMATION SHOWN HEREIN WERE CONDUCTED IN ACCORDANCE WITH THE MISSOURI STANDARDS FOR PROPERTY BOUNDARY SURVEYS FOR THE LEASED PREMISES AND ASSOCIATED EASEMENT. THE FIELD WORK WAS COMPLETED ON 5/28/2021.

JARED MINNICK, PLS-2007017968

DATED: 6/22/21

D:\Users\jstart\gallery\Desktop\work\16-1-21\template\Parallel Infrastructure_Logs\JKLog...

SITE ADDRESS:
1900 OLD ST. JAMES ROAD,
ROLLA, MO 65401, PHELPS
COUNTY
PROJECT NUMBER 8581

THIS MEDIA SHOULD NOT
BE CONSIDERED A
CERTIFIED DOCUMENT

PRELIMINARY, NOT FOR
CONSTRUCTION,
RECORDING PURPOSES OR
IMPLEMENTATION

JARED MINNICK
LAND SURVEYOR
PLS-2007017968
6/22/21

NOTE:
THESE PLANS ARE FOR REFERENCE
ONLY AND SUBJECT TO CHANGE.

PLANS PREPARED FOR:
Parallel
INFRASTRUCTURE
15105 JOHN J. DELANEY DRIVE
SUITE D-3
CHARLOTTE, NC 28277

PLANS PREPARED BY:
T²
T-SQUARED
SITE SERVICES
2500 HIGHLAND ROAD, SUITE 201
HERMITAGE, PA 16148
724.308.7855
www.t-sqrd.com

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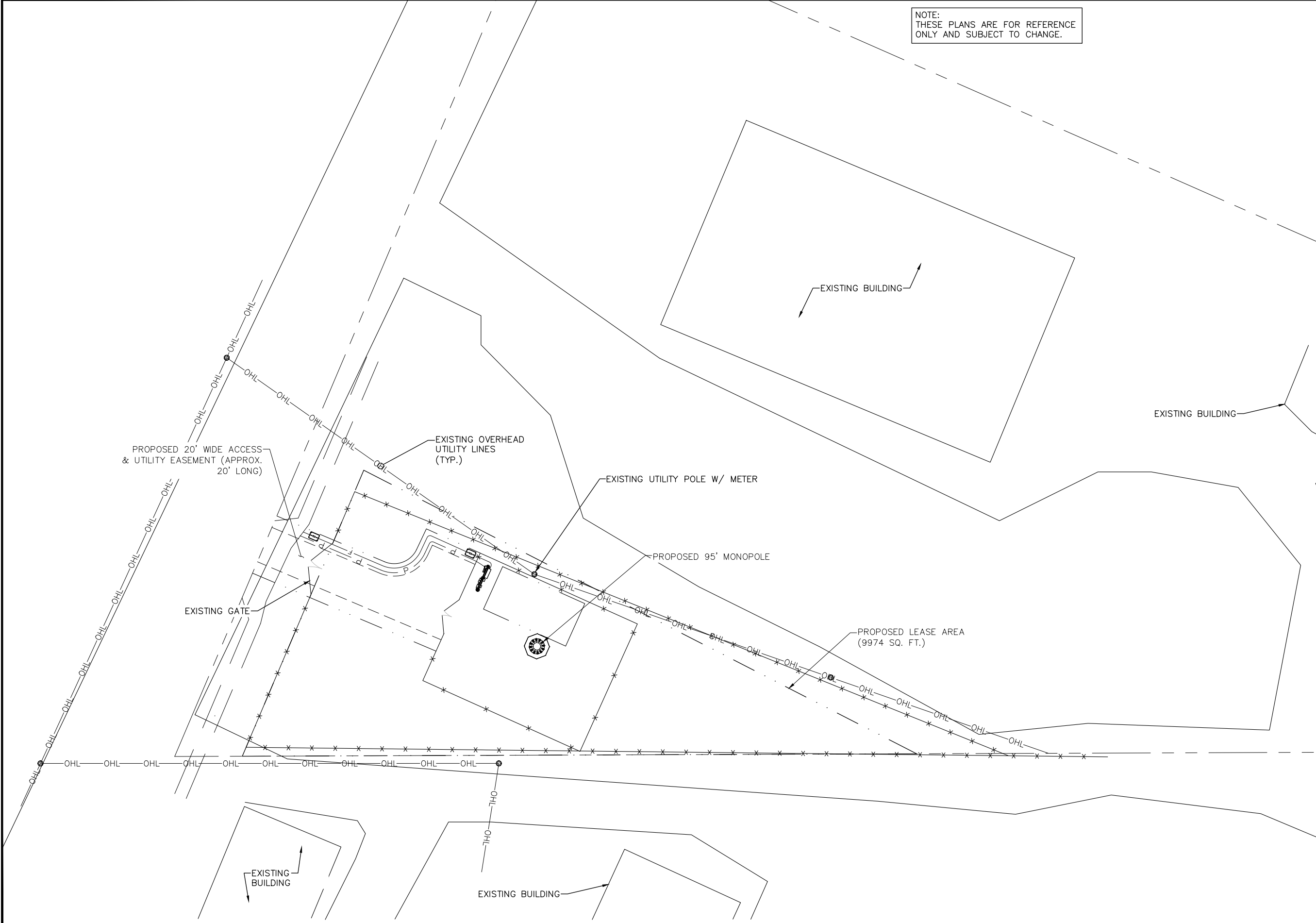
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REVISIONS:	DESCRIPTION	DATE	BY	REV
	ISSUED FOR REVIEW	8.12.21	KE	0
	REVISED ZDs	9.14.21	KE	1

PROJECT INFO:

SITE NAME:
ROLLA
PI # : PIMO632
FA #: 15456793
1900 OLD ST JAMES RD
ROLLA, MO
PROPOSED
95' MONOPOLE TOWER
37.958550° -91.762672°

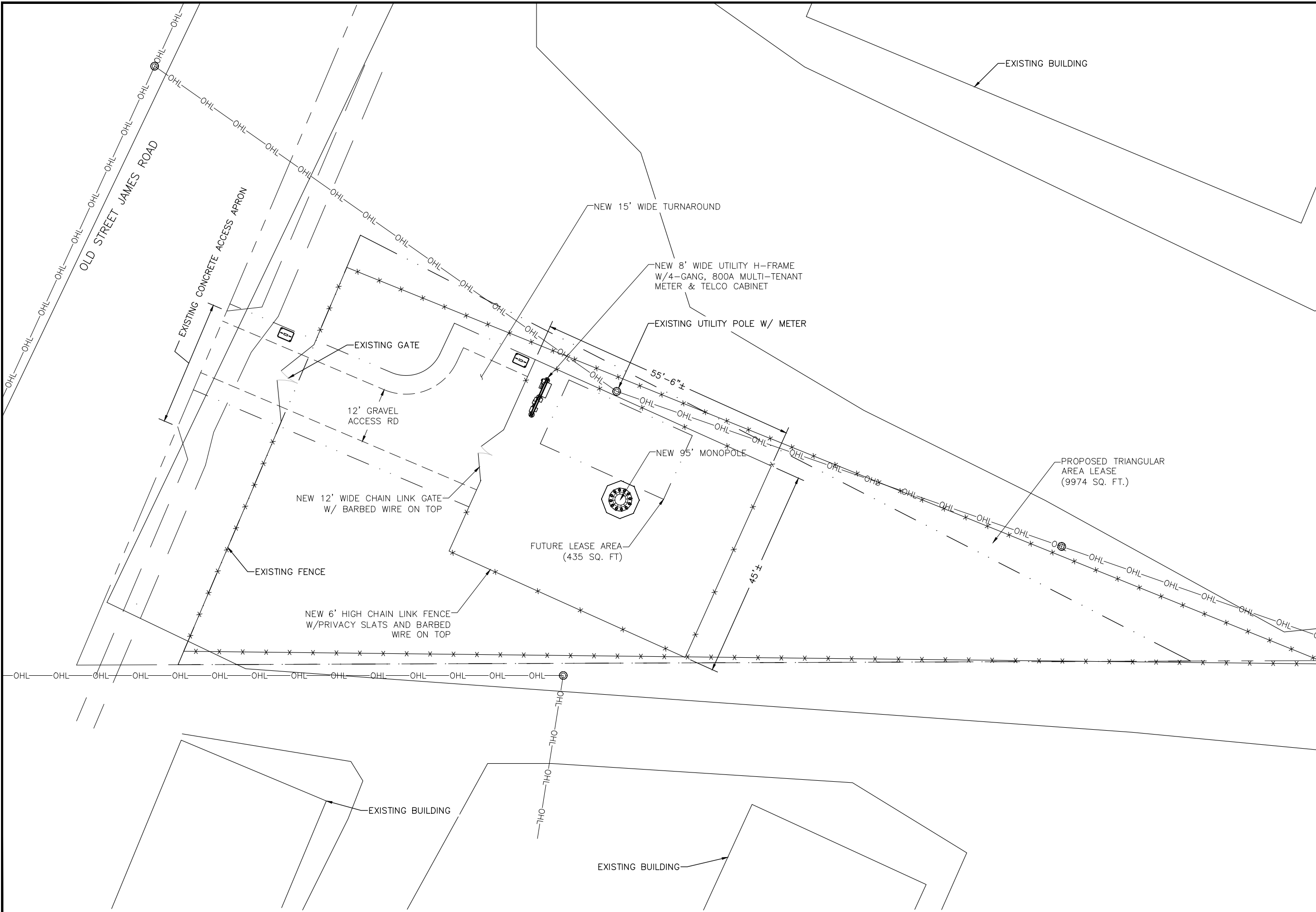
SHEET NUMBER:	REV.:
ZD-1	0
	46299



PLAN VIEW

1"=30'

A



PLANS PREPARED FOR:

Parallel
INFRASTRUCTURE

15105 JOHN J. DELANEY DRIVE
SUITE D-3
CHARLOTTE, NC 28277

PLANS PREPARED BY:

T²
T-SQUARED
SITE SERVICES

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REVISIONS:	DESCRIPTION	DATE	BY	REV
	ISSUED FOR REVIEW	8.12.21	KE	0
	REVISED ZDs	9.14.21	KE	1

PROJECT INFO:

SITE NAME:
ROLLA

PI # : PIMO632

FA #: 15456793

1900 OLD ST JAMES RD
ROLLA, MO

PROPOSED
95' MONOPOLE TOWER

37.958550° -91.762672°

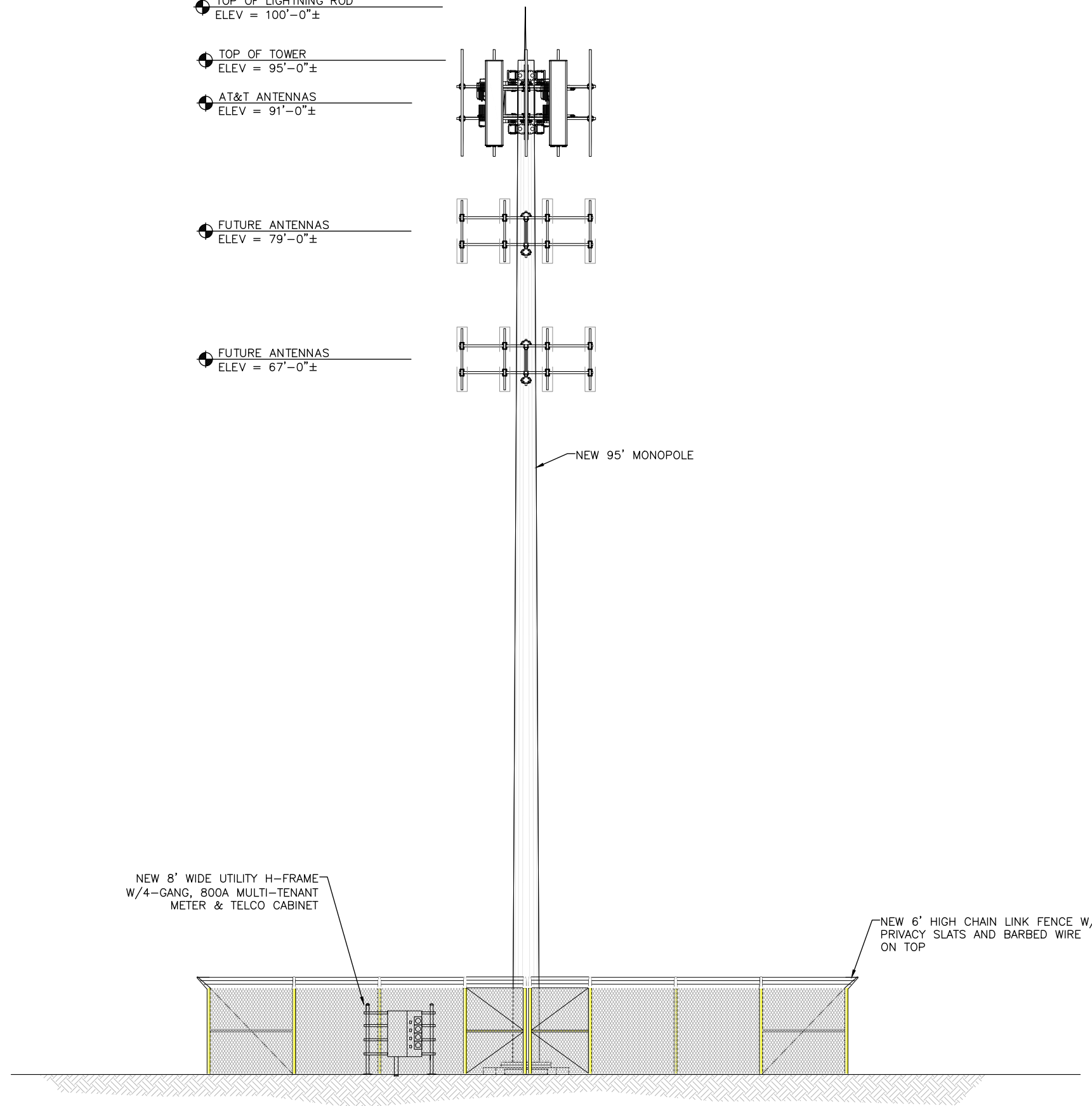
SHEET NUMBER:	REV.:
ZD-2	0
	46299

ENLARGED SITE PLAN

1" = 20'-0"

A

- TOP OF LIGHTNING ROD
ELEV = 100'-0"±
- TOP OF TOWER
ELEV = 95'-0"±
- AT&T ANTENNAS
ELEV = 91'-0"±
- FUTURE ANTENNAS
ELEV = 79'-0"±
- FUTURE ANTENNAS
ELEV = 67'-0"±



ELEVATION

N.T.S.

A

PLANS PREPARED FOR:

Parallel

INFRASTRUCTURE

15105 JOHN J. DELANEY DRIVE
SUITE D-3
CHARLOTTE, NC 28277

PLANS PREPARED BY:

**T-SQUARED
SITE SERVICES**

2500 HIGHLAND ROAD, SUITE 201
HERMITAGE, PA 16148
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REVISIONS:

DESCRIPTION	DATE	BY	REV
ISSUED FOR REVIEW	8.12.21	KE	0
REVISED ZDs	9.14.21	KE	1

PROJECT INFO:

SITE NAME:
ROLLA

PI # : PIMO632

FA #: 15456793

1900 OLD ST JAMES RD
ROLLA, MO

PROPOSED
95' MONOPOLE TOWER

37.958550° -91.762672°

SHEET NUMBER:	REV.:
ZD-3	0
	46299

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

CELLCO PARTNERSHIP d/b/a	:	CIVIL ACTION NO. 4:20-CV-2438
VERIZON WIRELESS,	:	
	:	(Judge Conner)
Plaintiff	:	
	:	
v.	:	
	:	
THE WHITE DEER TOWNSHIP	:	
ZONING HEARING BOARD	:	
	:	
Defendant	:	

MEMORANDUM

Plaintiff Cellco Partnership doing business as Verizon Wireless (“Verizon”) brings this action against defendant the White Deer Township Zoning Hearing Board (“Zoning Board”) under the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(v). Verizon and Zoning Board both move for summary judgment pursuant to Federal Rule of Civil Procedure 56.

I. Factual Background & Procedural History¹

Verizon is a cell phone service provider licensed by the Federal Communications Commission (“FCC”). (See Doc. 25-1 ¶¶ 2-4). Verizon has

¹ Local Rule 56.1 requires that a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 be supported “by a separate, short, and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried.” M.D. PA. L.R. 56.1. A party opposing a motion for summary judgment must file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party’s statement and identifying genuine issues to be tried. *Id.* Unless otherwise noted, the factual background herein derives from the parties’ Rule 56.1 statements of material facts. (See Docs. 25-1, 29-2, 30-1, 32). To the extent the parties’ statements are undisputed or supported by uncontroverted record evidence, the court cites directly to the statements of material facts.

identified a four-mile area along Interstate 80 (“I-80”) in the northern portion of Union County, Pennsylvania, where its wireless service is lacking. (See Doc. 25-20 at 3-4). Within the four-mile area, Verizon subscribers are likely to suffer from dropped calls, garbled audio, a lack of data connectivity, and—in case of an emergency—difficulty contacting 911. (See Doc. 25-20 at 1; Doc. 25-27, Zoning Hearing Bd. Tr. 97:8-98:23 (“ZHB Tr.”)). Verizon seeks to construct a cell phone tower in the northwestern corner of White Deer Township to alleviate this service gap. (See Doc. 25-1 at 6; Doc. 25-20 at 3-4; see also Doc. 25-5).

The northwestern corner of White Deer Township along I-80 is a sparsely populated area where the vast majority of land is controlled by the Pennsylvania Department of Conservation and Natural Resources (“DCNR”). (See Doc. 25-1 ¶¶ 26-27, 33; Doc. 30-1 ¶ 26; see also ZHB Tr. 58:21-23). DCNR has a longstanding moratorium on leasing land for construction of cell phone towers. (See Doc. 25-1 ¶¶ 28-29; Docs. 25-11, 25-12; see also ZHB Tr. 58:17-60:10, 65:14-21, 76:11-82:4, 88:7-91:1). Consequently, the number of available locations for building a tower capable of alleviating the gap, at least on private land, are very limited. (See ZHB Tr. 58:17-23, 81:1-11). After conducting an examination of the area, Verizon determined there is precisely one suitable location—a small parcel along White Deer Pike owned by

Willard E. Simpler, III, and Nancy S. Messimer.² (See Doc. 25-1 ¶¶ 28-29; ZHB Tr. 56:12-83:2, 88:7-91:1; Doc. 25-20 at 5).

Verizon subsequently negotiated a lease agreement with Simpler and Messimer. (See Doc. 25-1 ¶ 7). The lease agreement grants Verizon the right to build a tower on a 65' by 40' (0.0597 acre) subsection of the parcel. (See id.) Verizon seeks to use the subsection to construct a 195-foot monopole cell phone tower capped by a four-foot lightning rod. (See Doc. 25-1 ¶ 9; Doc. 29-2 ¶ 15).

White Deer Township has enacted a zoning ordinance in accordance with Pennsylvania's municipal planning code. (See Doc. 25-1 ¶ 8; Doc. 29-2 ¶¶ 3, 8, 10-14). The subject parcel is zoned "Woodland," one of several zoning districts in White Deer Township. (See Doc. 25-1 ¶ 24). Cell phone towers are permissible structures within Woodland districts provided the tower meets certain requirements. (See id. ¶ 25). Most relevant to the controversy *sub judice*, the ordinance sets a minimum lot size of one acre and a minimum setback requirement of the tower's height plus ten percent. (See Doc. 25-28 at 4).

Verizon applied to Zoning Board on August 18, 2020, seeking variances necessary to allow construction of the tower on the leased portion of the parcel. (See Doc. 29-2 ¶ 17; Doc. 32 ¶ 17). Zoning Board held a hearing on Verizon's

² Verizon refers to the property at issue as being located at 9880 White Deer Pike, New Columbia, Pennsylvania. (See Doc. 25-1 ¶ 7; Doc. 25-2 at 1). Zoning Board, on the other hand, identifies the property as being located at 8779 White Deer Pike. (See Doc. 29-2 ¶ 7; Doc. 29-1 at 1). Neither party ever asserts or implies there is a dispute over which property is at issue. (See Doc. 25-1 ¶ 7; Doc. 30-1 ¶ 7; Doc. 29-2 ¶ 7; Doc. 32 ¶ 7). Accordingly, we assume the difference in address is inconsequential clerical confusion.

application on October 14, 2020. (See Doc. 25-1 ¶ 11). In support of the application, Verizon provided copious documentation establishing the tower’s necessity and compliance with various regulatory and permitting criteria. (See id. ¶ 12). Verizon also presented testimony from four witnesses, including Andrew Petersohn, a radio frequency design expert, and Matthew Burtner, a siting consultant. (See id. ¶ 13; see also Doc. 25-20 at 10). Additionally, Verizon asserted that to deny the requested variances would constitute a violation of the Telecommunications Act of 1996. (See Doc. 25-1 ¶ 10).

Zoning Board denied Verizon’s application orally at the conclusion of the hearing. (See id. ¶ 15). Zoning Board then issued a written decision articulating its findings of fact, conclusions of law, and rationale for denying the variances. (See Doc. 25-28). The written opinion describes Verizon as having presented a large volume of “factual information” showing “compliance with virtually all criteria required for permitting the proposed use.” (See id. at 4). It also acknowledges Verizon had shown ample evidence for finding the existence of a significant gap in service. (See id.) Nevertheless, Zoning Board found that Verizon had not met the statutory requirements for granting a variance under the Commonwealth’s Municipal Planning Code, namely, that Verizon had not shown that compliance with the lot-size and setback minimums prevented “any possibility of development in strict conformity to the Ordinance.” (See id. at 4-9). The opinion also expresses concern over the danger posed to public safety should the tower suffer a structural failure. (See id. at 5-9).

Following denial of the variance application, Verizon filed the pending lawsuit alleging Zoning Board's denial violates the Telecommunications Act and requesting the court reverse the denial. The parties have filed cross-motions for summary judgment on all counts of Verizon's complaint. The motions are fully briefed and ready for disposition.

II. Legal Standard

Through summary adjudication, the court may dispose of those claims that do not present a "genuine dispute as to any material fact" and for which a jury trial would be an empty and unnecessary formality. FED. R. CIV. P. 56(a). The burden of proof tasks the nonmoving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. See Pappas v. City of Lebanon, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The court is to view the evidence "in the light most favorable to the non[]moving party and draw all reasonable inferences in that party's favor." Thomas v. Cumberland County, 749 F.3d 217, 222 (3d Cir. 2014). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the nonmoving party on the claims. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89 (1986). Only if this threshold is met may the cause of action proceed. See Pappas, 331 F. Supp. 2d at 315.

Courts may resolve cross-motions for summary judgment concurrently. See Lawrence v. City of Philadelphia, 527 F.3d 299, 310 (3d Cir. 2008); see also Johnson v. FedEx, 996 F. Supp. 2d 302, 312 (M.D. Pa. 2014); 10A CHARLES ALAN WRIGHT ET

AL., FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 2015). When doing so, the court is bound to view the evidence in the light most favorable to the nonmoving party with respect to each motion. See FED. R. CIV. P. 56; Lawrence, 527 F.3d at 310 (quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968)).

III. Discussion

Congress enacted the Telecommunications Act to facilitate expansion of cell phone service across the United States and encourage competition between cell phone service providers. See Verizon Commc'ns, Inc. v. F.C.C., 535 U.S. 467, 491-92 (2002); APT Pittsburgh Ltd. P'ship v. Penn Township Butler County, 196 F.3d 469, 473 (3d Cir. 1999); Ogden Fire Co. No. 1 v. Upper Chichester Township, 504 F.3d 370, 377-78 (3d Cir. 2007). To achieve this purpose, the Act, *inter alia*, places certain limitations on the traditional power of state and local authorities to regulate the placement of “personal wireless service facilities,” *i.e.*, cell phone towers. See APT Pittsburgh, 196 F.3d at 473, 476-78; see also 47 U.S.C. § 332(c)(7). Specifically, the Act forbids state and local governments from regulating “the placement, construction, and modification of personal wireless service facilities” so as to “prohibit or have the effect of prohibiting the provision of personal wireless services.” See 47 U.S.C. § 332(c)(7)(B)(i)(II). The Act also requires that any decision denying a request to “place, construct, or modify personal wireless service facilities” be in writing and “supported by substantial evidence contained in a written record.” See id. § 332(c)(7)(B)(iii). The Act empowers any person adversely affected by action (or inaction) inconsistent with these limitations to bring suit in any court of competent jurisdiction. See id. § 332(c)(7)(B)(v). We review whether

the state or local regulation violates the Act *de novo*. See Sprint Spectrum, L.P. v. Zoning Bd. of Adjustment of Paramus N.J., 606 F. App'x 669, 671 (3d Cir. 2015) (nonprecedential) (citing APT Pittsburgh, 196 F.3d at 475).

Verizon argues that Zoning Board's denial violates the Telecommunications Act because the denial of the requested variances has the effect of prohibiting the provision of personal wireless services in the four-mile area along the I-80 corridor.³ (See Doc. 25-2 at 4-24). The standard for an "effect-of-prohibiting claim" is currently unsettled in our circuit. Our court of appeals previously held that to succeed on an effect-of-prohibiting claim, Verizon must show its proposed tower (1) fills a "significant gap" in service and (2) does so in a manner that is "least intrusive" on the values Zoning Board's denial sought to serve. See Sprint Spectrum, 606 F. App'x at 671 (citing APT Pittsburgh, 196 F.3d at 480). However, the Telecommunications Act also empowers the FCC to institute binding regulations implementing the Act. See MCI Telecomm. Corp. v. Bell Atl. Pa., 271 F.3d 491, 516 (3d Cir. 2001). In 2018, the FCC promulgated a new test for determining when state or local government regulation effectively prohibits the provision of personal wireless service, see In the Matter of Accelerating Wireless

³ Verizon also argues Zoning Board's decision violates Section 332(c)(7)(B)(iii) of the Act because it is unsupported by substantial evidence. (See Doc. 25-2 at 24-28 (citing, *inter alia*, 47 U.S.C. § 332(c)(7)(B)(iii))). Because we find Zoning Board's decision has the effect of prohibiting the provision of wireless service under Section 332(c)(7)(B)(i)(II), we need not reach Verizon's claim under Section 332(c)(7)(B)(iii). See id. § 332(c)(7)(B)(i), (iii).

Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Rcd. 9088 (2018) (“2018 Declaratory Ruling”).

Under the FCC’s test, a state or local government prohibits the provision of personal wireless service whenever it “materially inhibits” a provider’s ability to, *inter alia*, enter a new area, provide new services in an area, or improve service in an area. See id. at 9102-05. The FCC’s test specifically rejects our court of appeals’ two-pronged test as “unduly narrow” in the light of the current wireless marketplace. See id. at 9106-08 (rejecting, among others, APT Pittsburgh, 196 F.3d at 478-79). The FCC’s test does not require wireless service providers to show a significant gap in coverage or that the challenged regulation creates a “complete” or “insurmountable” barrier to providing service. See id. at 9106-10. Even the mere imposition of a “financial burden” on the service provider, under the correct circumstances, can have the effect of prohibiting the provision of service. See id. at 9106.

Compared to our court of appeals’ test, the FCC’s test places a far lower burden on a provider claiming a zoning decision has the effect of prohibiting the provision of personal wireless service. Our court of appeals has yet to consider whether it will grant deference to the FCC’s regulation or maintain its two-pronged test, but at least two district courts have assumed our court of appeals will defer to the new FCC regulation. See T-Mobile, Ne., LLC v. City of Wilmington, No. CV 16-1108-ER, 2020 WL 1245306, at *5 (D. Del. Mar. 16, 2020) (assuming FCC merits deference but declining to apply the test because of retroactivity concerns); New Cingular Wireless PCS LLC v. Zoning Bd. of Adjustment of N. Haledon, 469 F.

Supp. 3d 262, 277 (D.N.J. 2020) (same); see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005). We find it unnecessary to decide whether the FCC's regulation merits deference because Zoning Board's decision to deny Verizon's variance application meets the more stringent standard set by our court of appeals. Any circumstance satisfying our court of appeals' effect-of-prohibiting test unquestionably satisfies the FCC's "materially inhibits" standard. Thus, consideration of the deference question is unnecessary.

A. Significant Gap

Verizon asserts that a significant gap in service exists within the four-mile area along the I-80 corridor. (See Doc. 25-2 at 9-13). A "gap" exists when a user of wireless service is unable to connect with the national telephone network or "maintain a connection capable of supporting a reasonably uninterrupted communication." See Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus, 197 F.3d 64, 70 (3d Cir. 1999). When it initially established our circuit's standard for a significant gap, our court of appeals held that the perspective of the user, not the wireless service provider, is the proper measure. See APT Pittsburgh, 196 F.3d at 480. Under this holding, deemed the "one-provider rule," providers can only claim a significant gap in service exists if no other provider covers the area in question. See id.; see also Omnipoint Commc'ns Enters., L.P. v. Newtown Township, 219 F.3d 240, 244 (3d Cir. 2000); see also T-Mobile Cent., LLC v. Charter Township, 691 F.3d 794, 806 (6th Cir. 2012) (discussing development of one-provider rule across circuits).

As the case law surrounding the Telecommunications Act developed, some courts of appeals adopted the one-provider rule, see Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 640 (2d Cir. 1999); AT & T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423, 428 (4th Cir. 1998), while others rejected it, holding significant gaps could exist within a particular provider's own service, see Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 632-34 (1st Cir. 2002); MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d 715, 733 (9th Cir. 2005), abrogated on other grounds by T-Mobile S., LLC v. City of Roswell, 574 U.S. 293 (2015). The FCC, seeking to resolve this circuit split, promulgated a declaratory ruling in 2009 repudiating the one-provider rule and holding that Section 332(c)(7)(B)(i)(II) "applies not just to the first carrier to enter into the market, but also to all subsequent entrants." See In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b), 24 FCC Rcd. 13994, 14014-19 (2009) ("2009 Declaratory Ruling").

Our court of appeals has yet to formally address the FCC's repudiation, but both parties assume the one-provider rule no longer applies. (See Doc. 25-2 at 9-13; Doc. 30 at 8). The parties' position is supported by several district court decisions granting the 2009 Declaratory Ruling deference, see, e.g., Liberty Towers, LLC v. Zoning Hearing Bd. of Lower Makefield, 748 F. Supp. 2d 437, 444-45 (E.D. Pa. 2010); Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of Paramus, No. CIV.A. 09-4940 JLL, 2010 WL 4868218, at *9 (D.N.J. Nov. 22, 2010), and at least one instance where our court of appeals affirmed a district court decision finding a significant gap existed in the plaintiffs' own coverage, see Sprint Spectrum, 606 F. App'x 669 at 671,

678. We therefore join the parties in assuming a significant gap can exist within a provider's own coverage.

At the zoning hearing, Verizon provided a report and testimony from Petersohn, a "radio frequency design engineer." (See Doc. 25-20; ZHB Tr. 92:21-23). In both his report and testimony, Petersohn describes the presence of a "four-mile stretch along I-80" where Verizon subscribers are likely to suffer dropped calls, garbled audio, a lack of data connectivity, and difficulty contacting emergency services. (See ZHB Tr. 97:1-99:5; see also Doc. 25-20 at 1). Petersohn's expert testimony speaks precisely to the connectivity issues necessary for showing the existence of a "significant gap" in service. See Ho-Ho-Kus, 197 F.3d at 70. Zoning Board's decision denying Verizon's variance requests even acknowledges Verizon "adequately demonstrates there is a 'gap' in wireless communication services that the proposal is designed to alleviate." (See Doc. 25-28 at 6). In response to Verizon's motion, Zoning Board does not go so far as to admit the gap exists, (see Doc. 30-1 ¶ 5), but provides no evidence or reasoning challenging the accuracy of Verizon's evidence. Accordingly, we have no difficulty finding Verizon, as a matter of law, has established the existence of a significant gap in its service along the I-80 corridor.

B. Least Intrusive Means

A provider does not need to eliminate every conceivable alternative to show that a proposed personal wireless service facility is the least intrusive means of addressing a significant gap in service. See APT Pittsburgh, 196 F.3d at 480. *Per contra*, the provider only needs to establish that "a good faith effort has been made

to identify and evaluate less intrusive alternatives” in terms of the values the denial sought to serve. See id. Zoning Board’s written decision identifies a single value as motivating Zoning Board’s decision—safety. (See Doc. 25-28 at 5-6). The decision explains that the lot-size and setback requirements exist to protect structures and individuals from injury should the tower suffer a structural failure. (See id. at 4-6). Hence, granting the variances would place the public in danger. (See id. at 5-6). At the zoning hearing, Burtner, Verizon’s siting expert, testified that Verizon considered virtually every other privately held property in the area around the service gap and explained, property by property, why Verizon rejected each as a viable location for a tower. (See ZHB Tr. 56:12-83:2, 88:7-91:1). Burtner specifically testified that all the other plausible locations for the tower on privately held land would require even greater variances from the zoning ordinance’s requirements than the White Deer Pike parcel. (See id. at 60:14-20).

Zoning Board questioned in its written decision whether Verizon had truly shown no alternative existed to constructing the tower on the parcel because Verizon had not challenged the legality of DCNR’s moratorium, (see Doc. 25-28 at 6-9), but it does not renew that argument before this court. In fact, Zoning Board provides neither evidence nor argument suggesting another location or technological means to address the service gap. Nor does it attack the accuracy or credibility of Burtner’s testimony. We conclude without hesitation that Verizon made a good faith effort to find an alternative site and established, as a matter of law, that the 195-foot monopole is the least intrusive means of addressing the service gap along the I-80 corridor. See APT Pittsburgh, 196 F.3d at 480.

C. Fairview Township

In contesting Verizon’s invocation of the Telecommunications Act, Zoning Board relies entirely on a single decision by the Pennsylvania Commonwealth Court. (See Doc. 30 at 7-12 (citing Fairview Township v. Fairview Twp. Zoning Hearing Bd., 233 A.3d 958, 969 (Pa. Commw. Ct. 2020))). In Fairview Township, the Commonwealth Court reversed the trial court’s decision granting two variance applications. See Fairview Township, 233 A.3d at 960-61. Relying on the FCC’s 2009 Declaratory Ruling, the trial court reasoned the Telecommunications Act mandated granting the applications because denial of either would have had the effect of prohibiting the provision of personal wireless service. See id. at 964-66. The Commonwealth Court’s reversal focuses on the FCC’s statements that its repudiation of the one-provider rule leaves “[s]tate and local authority to base zoning regulation on other grounds . . . intact” and that when “a *bona fide* local zoning concern, rather than the mere presence of other carriers, drives a zoning decision, it should be unaffected by our ruling today.” See id. at 970-71 (quoting 2009 Declaratory Ruling at 14016). According to the Commonwealth Court, these statements indicate that as long as the zoning board grounds its decision in a “*bona fide* local zoning concern,” the zoning decision does not violate the effect-of-prohibiting clause. See id. at 969-70.

At the outset, we note that this matter is not before us in diversity jurisdiction; thus, the Commonwealth Court’s decision is not binding on this court. See Surrick v. Killion, 449 F.3d 520, 535 (3d Cir. 2006) (citations omitted). Nor are we persuaded by its *ratio decidendi*. The Commonwealth Court reads too much

substance into the FCC’s boilerplate regulatory disclaimers. The Commonwealth Court holds the Telecommunications Act never obliges local zoning boards to grant variances to personal wireless service providers as long as the board provides some zoning-related reasoning justifying its decision.⁴ But this cannot be so. The Commonwealth Court’s statement contradicts our court of appeals, which consistently—and logically—concludes that denials of variances grounded in *bona fide* zoning concerns can violate the effect-of-prohibiting clause of the Telecommunications Act. See APT Pittsburgh, 196 F.3d at 477 (envisioning certain “individual adverse zoning decision[s]” as having “the ‘effect’ of violating § 332(c)(7)(B)(i)(II)”); Sprint Spectrum, 606 F. App’x at 676 (finding district court “correctly concluded that the ZBA’s denial of the variance requested was an ‘effective prohibition’ under the [Telecommunications Act].”). The Fairview Township holding also contradicts the plain text of the 2009 Declaratory Ruling, which concludes its discussion of Section 332(c)(7)(B)(ii) with the following passage:

[T]he *denial of an application may sometimes establish a violation of Section 332(c)(7)(B)(ii)* if it demonstrates a policy that has the effect of prohibiting the provision of personal wireless services as interpreted herein. Whether the denial of a *single application* indicates the presence of such a policy will be dependent on the facts of the particular case.

⁴ Subsequent Commonwealth Court decisions confirm our reading of Fairview Township as effectively mandating judicial approval of these variance denials. See, e.g., SBA Towers II, LLC v. Zoning Hearing Bd. of Logan Twp., 247 A.3d 1194 (Pa. Commw. Ct. 2021); Horvath Towers V, LLC v. Indiana Twp. Bd. of Supervisors, No. 1579 C.D. 2019, 2020 WL 3068737, at *8 (Pa. Commw. Ct. June 10, 2020).

2009 Declaratory Ruling, 24 FCC Rcd. at 14019 (emphasis added). The FCC, like our court of appeals, envisions certain variance denials under certain circumstances constituting violations of Section 332(c)(7)(B)(ii) regardless of whether the denial is motivated by a *bona fide* local zoning concern. See id.

The Commonwealth Court’s interpretation is further undermined by the conflict it creates with the Telecommunications Act’s goal of limiting the ability of state and local governments to block expansion and improvement of wireless service. See APT Pittsburgh, 196 F.3d at 473; Ogden Fire, 504 F.3d at 378; 2009 Declaratory Ruling, 24 FCC Rcd. at 14018. The FCC’s intent to curtail state and local regulatory power—not expand it as Fairview Township contends—comes across clearly in the FCC’s subsequent declaratory ruling in 2018, lowering the bar for invalidating state and local regulatory actions. See 2018 Declaratory Ruling, 33 FCC Rcd. at 9102-09. The Commonwealth Court suggests that the FCC simultaneously holds any zoning board action that “materially inhibits” personal wireless service, including the mere imposition of financial burdens, as violating Section 332(c)(7)(B)(ii), see id. at 9106, but also any action that genuinely prevents the provision of service is acceptable when justified by a “bona fide zoning concern,” see Fairview Township, 233 A.3d at 970-71. The Commonwealth Court’s reading of the FCC’s declaratory rulings simply defies common sense.

We read the FCC’s 2009 Declaratory Ruling as doing only what it purports to do—resolve the circuit split by repudiating the one-provider rule—and nothing more. See 2009 Declaratory Ruling, 24 FCC Rcd. at 14016 (“We agree with the Petitioner that the fact that another carrier or carriers provide service to an area is

an inadequate defense under a claim that a prohibition exists.”); see also Liberty Towers, 748 F. Supp. 2d at 444-45 (similarly interpreting 2009 Declaratory Ruling). The statements cited by the Commonwealth Court merely seek to cabin the FCC’s repudiation of the one-provider rule to avoid any additional effect on the existing case law regarding the circumstances in which state and local regulation has the effect of prohibiting personal wireless service. For all of these reasons, we find Zoning Board’s extensive citations to Fairview Township unpersuasive.

IV. Conclusion

The undisputed facts establish that Verizon has met our court of appeals’ requirements for succeeding on an effect-of-prohibiting claim under the Telecommunications Act. See APT Pittsburgh, 196 F.3d at 480. We will reverse Zoning Board’s decision on Verizon’s variance application and grant said application. We will grant Verizon’s motion for summary judgment and deny Zoning Board’s motion. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

Dated: June 29, 2022

33 FCC Rcd. 9088 (F.C.C.), 33 F.C.C.R. 9088, 2018 WL 4678555

NOTE: An Erratum is attached to the end of this document

Federal Communications Commission (F.C.C.)
Declaratory Ruling and Third Report and Order

IN THE MATTER OF ACCELERATING WIRELESS BROADBAND DEPLOYMENT
BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

WT Docket Nos. 17-79, 17-84

FCC 18-133

Released: September 27, 2018

Adopted: September 26, 2018

****1 *9088** By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement.

TABLE OF CONTENTS

Heading

I. INTRODUCTION

II. BACKGROUND

A. Legal Background

B. The Need for Commission Action

III. DECLARATORY RULING

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

B. State and Local Fees

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

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

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

IV. THIRD REPORT AND ORDER

A. New Shot Clocks for Small Wireless Facility Deployments

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

2. Batched Applications for Small Wireless Facilities

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

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

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

2. Codification of Section 332 Shot Clocks

3. Collocations on Structures Not Previously Zoned for Wireless Use

4. When Shot Clocks Start and Incomplete Applications

V. PROCEDURAL MATTERS

VI. ORDERING CLAUSES

APPENDIX A — Final Rules

APPENDIX B — Comments and Reply Comments

APPENDIX C — Final Regulatory Flexibility Analysis

***9089 I. INTRODUCTION**

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

2. Supporting the deployment of 5G and other next-generation wireless services through smart infrastructure policy is critical. Indeed, upgrading to these new services will, in many ways, represent a more fundamental change than the transition to prior generations of wireless service. 5G can enable increased competition for a range of services—including broadband—support new healthcare and Internet of Things applications, speed the transition to life-saving connected car technologies, and create jobs. It is estimated that wireless providers will invest \$275 billion¹ over the next decade in next-generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation's GDP by half a trillion dollars.² Moving quickly to enable this transition is important, as a new report forecasts that speeding 5G infrastructure deployment by even one year would unleash an additional \$100 billion to the U.S. economy.³ Removing barriers can also ensure that every community gets a fair shot at these deployments and the opportunities they enable.

****2** 3. The challenge for policymakers is that the deployment of these new networks will look different than the 3G and 4G deployments of the past. Over the last few years, providers have been increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack. From a regulatory perspective, these raise

different issues than the construction of large, 200-foot towers that marked the 3G and 4G deployments of the past. Indeed, estimates predict that upwards of 80 percent of all new deployments will be small cells going forward.⁴ To support advanced 4G or 5G offerings, providers must build out small cells at a faster pace and at a far greater density of deployment than before.

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

5. Many states and localities have acted to update and modernize their approaches to small cell deployments. They are working to promote deployment and balance the needs of their communities. At the same time, the record shows that problems remain. In fact, many state and local officials have urged the FCC to continue our efforts in this proceeding and adopt additional reforms. Indeed, we have ***9090** heard from a number of local officials that the excessive fees or other costs associated with deploying small scale wireless infrastructure in large or otherwise “must serve” cities are materially inhibiting the buildout of wireless services in their own communities.

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

7. Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches.⁶ We have carefully considered these views, but nevertheless find our actions here necessary and fully supported. By building on state and local ideas, today's action boosts the United States' standing in the race to 5G. According to a study submitted by Corning, our action would eliminate around \$2 billion in unnecessary costs, which would stimulate around \$2.4 billion of additional buildouts.⁷ And that study shows that such new service would be ***9091** deployed where it is needed most: 97 percent of new deployments would be in rural and suburban communities that otherwise would be on the wrong side of the digital divide.⁸

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

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

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

11. Second, we note, as numerous courts and prior FCC cases have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in Sections 253

and 332. We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision.⁹ Namely, fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs. In this section, we also identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation over fees.

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

***9092** 13. Next, we issue a Report and Order that addresses the “shot clocks” governing the review of wireless infrastructure deployments. We take three main steps in this regard. First, we create a new set of shot clocks tailored to support the deployment of Small Wireless Facilities. In particular, we read Sections 253 and 332 as allowing 60 days for reviewing the application for attachment of a Small Wireless Facility using an existing structure and 90 days for the review of an application for attachment of a small wireless facility using a new structure. Second, while we do not adopt a “deemed granted” remedy for violations of our new shot clocks, we clarify that failing to issue a decision up or down during this time period is not simply a “failure to act” within the meaning of applicable law. Rather, missing the deadline also constitutes a presumptive prohibition. We would thus expect any locality that misses the deadline to issue any necessary permits or authorizations without further delay. We also anticipate that a provider would have a strong case for quickly obtaining an injunction from a court that compels the issuance of all permits in these types of cases. Third, we clarify a number of issues that are relevant to all of the FCC's shot clocks, including the types of authorizations subject to these time periods.

II. BACKGROUND

A. Legal Background

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

15. Several provisions of the 1996 Act speak directly to Congress's determination that certain state and local regulations are unlawful. Section 253(a) provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁵ Courts have observed that Section 253 represents a “broad preemption of laws that inhibit competition.”¹⁶

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

telecommunications services, it ***9093** “consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹⁷

17. Similar to Section 253, Congress specified in Section 332(c)(7) that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”¹⁸ Clause (B)(ii) of that section further provides that “[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.”¹⁹ Section 332(c)(7) generally preserves state and local authority over the “placement, construction, and modification of personal wireless service facilities” but with the important limitations described above.²⁰ Section 332(c)(7) also sets forth a judicial remedy, stating that “[a]ny person adversely affected by any final action or failure to act by a State or local government” that is inconsistent with the requirements of Section 332(c)(7) “may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.”²¹ The provision further directs the court to “decide such action on an expedited basis.”²²

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

***9094** 13. In the *2009 Declaratory Ruling*, the Commission acted to speed the deployment of then- new 4G services and concluded that, “[g]iven the evidence of unreasonable delays [in siting decisions] and the public interest in avoiding such delays,” it should offer guidance regarding the meaning of the statutory phrases “reasonable period of time” and “failure to act” “in order to clarify when an adversely affected service provider may take a dilatory State or local government to court.”²⁶ The Commission interpreted “reasonable period of time” under Section 332(c)(7)(B)(ii) to be 90 days for processing collocation applications and 150 days for processing applications other than collocations.²⁷ The Commission further determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days.²⁸ In litigation involving the 90-day and 150-day time frames, the locality may attempt to “rebut the presumption that the established timeframes are reasonable.”²⁹ If the agency fails to make such a showing, it may face “issuance of an injunction granting the application.”³⁰ In its *2014 Wireless Infrastructure Order*,³¹ the Commission clarified that the time frames under Section 332(c)(7) are presumptively reasonable and begin to run when the application is submitted, not when it is found to be complete by a siting authority.³²

****6** 20. In 2012, Congress adopted Section 6409 of the Middle Class Tax Relief and Job Creation Act (the Spectrum Act), which provides further evidence of Congressional intent to limit state and local laws that operate as barriers to infrastructure deployment. It states that, “[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified as 47 U.S.C. § 332(c)(7)] or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”³³ Subsection (a)(2) defines the term “eligible facilities request” as any request for modification of an

existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.³⁴ In implementing Section 6409 and in an effort to “advance[e] Congress's goal *9095 of facilitating rapid deployment,”³⁵ the Commission adopted rules to expedite the processing of eligible facilities requests, including documentation requirements and a 60-day period for states and localities to review such requests.³⁶ The Commission further determined that a “deemed granted” remedy was necessary for cases in which the reviewing authority fails to issue a decision within the 60-day period in order to “ensur[e] rapid deployment of commercial and public safety wireless broadband services.”³⁷ The Fourth Circuit, affirming that remedy, explained that “[f]unctionally, what has occurred here is that the FCC—pursuant to properly delegated Congressional authority—has preempted state regulation of wireless towers.”³⁸

21. Consistent with these broad federal mandates, courts have recognized that the Commission has authority to interpret Sections 253 and 332 of the Act to further elucidate what types of state and local legal requirements run afoul of the statutory parameters Congress established.³⁹ For instance, the Fifth Circuit affirmed the *2009 Declaratory Ruling in City of Arlington*. The court concluded that the Commission possessed the “authority to establish the 90— and 150—day time frames” and that its decision was not arbitrary and capricious.⁴⁰ More generally, as the agency charged with administering the Communications Act, the Commission has the authority, responsibility, and expert judgment to issue interpretations of the statutory language and to adopt implementing regulations that clarify and specify the scope and effect of the Act. Such interpretations are particularly appropriate where the statutory language is ambiguous, or the subject matter is “technical, complex, and dynamic,” as it is in the Communications Act, as recognized by the Supreme Court.⁴¹ Here, the Commission has ample experience monitoring and regulating the telecommunications sector. It is well-positioned, in light of this experience and the record in this proceeding, to issue a clarifying interpretation of Sections 253 and 332(c)(7) that accounts both for the changing needs of a dynamic wireless sector that is increasingly reliant on Small Wireless Facilities and for state and local oversight that does not materially inhibit wireless deployment.

**7 22. The congressional and FCC decisions described above point to consistent federal action, particularly when faced with changes in technology, to ensure that our country's approach to wireless infrastructure deployment promotes buildout of the facilities needed to provide Americans with next-generation services. Consistent with that long-standing approach, in the 2017 *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether the FCC should again update its approach to infrastructure deployment to ensure that regulations are not operating as prohibitions in violation of Congress's decisions and federal policy.⁴² In August 2018, the Commission concluded that state and local moratoria on telecommunications services and facilities deployment are barred by Section 253(a).⁴³

*9096 B. The Need for Commission Action

23. In response to the opportunities presented by offering new wireless services, and the problems facing providers that seek to deploy networks to do so, we find it necessary and appropriate to exercise our authority to interpret the Act and clarify the preemptive scope that Congress intended. The introduction of advanced wireless services has already revolutionized the way Americans communicate and transformed the U.S. economy. Indeed, the FCC's most recent wireless competition report indicates that American demand for wireless services continues to grow exponentially. It has been reported that monthly data usage per smartphone subscriber rose to an average of 3.9 gigabytes per subscriber per month, an increase of approximately 39 percent from year-end 2015 to year-end 2016.⁴⁴ As more Americans use more wireless services, demand for new technologies, coverage and capacity will necessarily increase, making it critical that the deployment of wireless infrastructure, particularly Small Wireless Facilities, not be stymied by unreasonable state and local requirements.

24. 5G wireless services, in particular, will transform the U.S. economy through increased use of high-bandwidth and low-latency applications and through the growth of the Internet of Things.⁴⁵ While the existing wireless infrastructure in the

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

****8** 25. Some states and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure, looking to bring greater connectivity to their communities through forward-looking policies. Leaders in these states are working hard to meet the needs of their communities and balance often competing interests. At the same time, outlier conduct persists. The record here suggests that the legal requirements in place in other state and local jurisdictions are materially impeding that deployment in various ways.⁴⁸ Crown Castle, for example, describes “excessive and unreasonable” “fees *9097 to access the [rights-of-way] that are completely unrelated to their maintenance or management.” It also points to barriers to market entry “for independent network and telecommunications service providers,” including municipalities that “restric[t] access to the [right-of-way] only to providers of commercial mobile services” or that impose “onerous zoning requirements on small cell installations when other similar [right of way] utility installations are erected with simple building permits.”⁴⁹ Crown Castle is not alone in describing local regulations that slow deployment. AT&T states that localities in Maryland, California, and Massachusetts have imposed fees so high that it has had to pause or decrease deployments.⁵⁰ Likewise, AT&T states that a Texas city has refused to allow small cell placement on any structures in a right-of-way (ROW).⁵¹ T-Mobile states that the Town of Hempstead, New York requires service providers who seek to collocate or upgrade equipment on existing towers that have been properly constructed pursuant to Class II standards to upgrade and certify these facilities under Class III standards that apply to civil and national defense and military facilities.⁵² Verizon states that a Minnesota town has proposed barring construction of new poles in rights-of-way and that a Midwestern suburb where it has been trying to get approval for small cells since 2014 has no established procedures for small cell approvals.⁵³ Verizon states that localities in New York and Washington have required special use permits involving multiple layers of approval to locate small cells in some or all zoning districts.⁵⁴ While some localities dispute some of these characterizations, their submissions do not persuade us that there is no basis or need for the actions we take here.

26. Further, the record in this proceeding demonstrates that many local siting authorities are not complying with our existing [Section 332](#) shot clock rules.⁵⁵ WIA states that its members routinely face lengthy delays and specifically cite localities in New Jersey, New Hampshire, and Maine as being *9098 problematic.⁵⁶ Similarly, AT&T identified an instance in which it took a locality in California 800 days to process an application.⁵⁷ GCI provides an example in which it took an Alaska locality nine months to decide an application.⁵⁸ T-Mobile states that a community in Colorado and one in California have lengthy pre-application processes for all small cell installations that include notification to all nearby households, a public meeting, and the preparation of a report, none of which these jurisdictions view as triggering a shot clock.⁵⁹ Similarly, Lightower provides examples of long delays in processing siting applications.⁶⁰ Finally, Crown Castle describes a case in which a “town took approximately two years and nearly twenty meetings, with constantly shifting demands, before it would even “‘deem complete’ Crown Castle’s application.”⁶¹

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

to deployment of broadband infrastructure, many of which are addressed here.⁶² We also considered input from numerous state and local officials about their concerns, and how they have approached wireless deployment, much of which we took into account here. Our action is also consistent with congressional efforts to hasten deployment, including bi-partisan legislation pending in Congress like the STREAMLINE Small Cell Deployment Act and SPEED Act. The STREAMLINE Small Cell Deployment Act proposes to streamline wireless infrastructure deployments by requiring siting agencies to act on deployment requests within specified time frames and by limiting the imposition of onerous ***9099** conditions and fees.⁶³ The SPEED Act would similarly streamline federal permitting processes.⁶⁴ In the same vein, the Model Code for Municipalities adopts streamlined infrastructure siting requirements while other BDAC reports and recommendations emphasize the negative impact of high fees on infrastructure deployments.⁶⁵

28. As do members of both parties of Congress and experts on the BDAC, we recognize the urgent need to streamline regulatory requirements to accelerate the deployment of wireless infrastructure for current needs and for the next generation of wireless service in 5G.⁶⁶ State government officials also have urged us to act to expedite the deployment of 5G technology, in particular, by streamlining overly burdensome regulatory processes to ensure that 5G technology will expand beyond just urban centers. These officials have expressed their belief that reducing high regulatory costs and delays in urban areas would leave more money and encourage development in rural areas.⁶⁷ “[G]etting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure.”⁶⁸ State officials have acknowledged that current regulations are “outdated” and “could hinder the timely arrival of 5G throughout the country,” and urged the FCC “to push for more reforms that will streamline infrastructure rules from coast to coast.”⁶⁹ Although many states and localities support our efforts, we acknowledge that there are others who advocated for different approaches, arguing, among other points, ***9100** that the FCC lacks authority to take certain actions.⁷⁰ We have carefully considered these views, but nevertheless find our actions here necessary and fully supported.

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

III. DECLARATORY RULING

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

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

32. Second, in Part III.B, we note, as numerous courts have recognized, that state and local fees and other charges associated with the deployment of wireless infrastructure can effectively prohibit the provision of service. At the same time, courts have articulated various approaches to determining the types of fees that run afoul of Congress's limits in [Sections 253](#) and [332](#). We thus clarify the particular standard that governs the fees and charges that violate [Sections 253](#) and [332](#) when it comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they represent a reasonable approximation of the local government's objectively reasonable costs, and are non-discriminatory.⁷¹ In this section, we also

identify specific fee levels for the deployment of Small Wireless Facilities that presumptively comply with this standard. We do so to help avoid unnecessary litigation, while recognizing that it is the standard itself, not the particular, presumptive fee levels we articulate, that ultimately will govern whether a particular fee is allowed under [Sections 253](#) and [332](#). So fees above *9101 those levels would be permissible under [Sections 253](#) and [332](#) to the extent a locality's actual, reasonable costs (as measured by the standard above) are higher.

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

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

34. In [Sections 253\(a\)](#) and [332\(c\)\(7\)\(B\)](#) of the Act, Congress determined that state or local requirements that prohibit or have the effect of prohibiting the provision of service are unlawful and thus preempted.⁷³ [Section 253\(a\)](#) addresses “any interstate or intrastate telecommunications service,” while [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) addresses “personal wireless services.”⁷⁴ Although the provisions contain identical “effect of prohibiting” language, the Commission and different courts over the years have each employed inconsistent approaches to deciding what it means for a state or local legal requirement to have the “effect of prohibiting” services under these two sections of the Act. This has caused confusion among both providers and local governments about what legal requirements are permitted under [Sections 253](#) and [332\(c\)\(7\)](#). For example, despite Commission decisions to the contrary construing such language under [Section 253](#), some courts have held that a denial of a wireless siting application will “prohibit or have the effect of prohibiting” the provision of a personal wireless service under [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) only if the provider can establish that it has a significant gap in service coverage in the *9102 area and a lack of feasible alternative locations for siting facilities.⁷⁵ Other courts have held that evidence of an already-occurring or complete inability to offer a telecommunications service is required to demonstrate an effective prohibition under [Section 253\(a\)](#).⁷⁶ Conversely, still other courts like the First, Second, and Tenth Circuits have endorsed prior Commission interpretations of what constitutes an effective prohibition under [Section 253\(a\)](#) and recognized that, under that analytical framework, a legal requirement can constitute an effective prohibition of services even if it is not an insurmountable barrier.⁷⁷

****12** 35. In this Declaratory Ruling, we first reaffirm, as our definitive interpretation of the effective prohibition standard, the test we set forth in *California Payphone*, namely, that a state or local legal requirement constitutes an effective prohibition if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁷⁸ We then explain how this ““material inhibition” standard applies in the context of state and local fees and aesthetic requirements. In doing so, we confirm the First, Second, and Tenth Circuits' understanding that under this analytical framework, a legal requirement can “materially inhibit” the provision of services even if it is not an insurmountable barrier.⁷⁹ We also resolve the conflicting court interpretations of the *9103 ‘effective prohibition’ language so that continuing confusion on the meaning of [Sections 253](#) and [332\(c\)\(7\)](#) does not materially inhibit the critical deployments of Small Wireless Facilities and our nation's drive to deploy 5G.⁸⁰

36. As an initial matter, we note that our Declaratory Ruling applies with equal measure to the effective prohibition standard that appears in both [Sections 253\(a\)](#) and [332\(c\)\(7\)](#).⁸¹ This ruling is consistent with the basic canon of statutory interpretation that identical words appearing in neighboring provisions of the same statute generally should be interpreted to have the same meaning.⁸² Moreover, both of these provisions apply to wireless telecommunications services⁸³ as well as to commingled services and facilities.⁸⁴

***9104** 37. As explained in *California Payphone* and reaffirmed here, a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service.⁸⁵ This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service ***9105** capabilities.⁸⁶ Under the *California Payphone* standard, a state or local legal requirement could materially inhibit service in numerous ways—not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services.⁸⁷

****13** 38. Our reading of [Section 253\(a\)](#) and [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) reflects and supports a marketplace in which services can be offered in a multitude of ways with varied capabilities and performance characteristics consistent with the policy goals in the 1996 Act and the Communications Act. To limit [Sections 253\(a\)](#) and [332\(c\)\(7\)\(B\)\(i\)\(II\)](#) to protecting only against coverage gaps or the like would be to ignore Congress's contemporaneously-expressed goals of “promot[ing] competition[,] ... secur[[[ing] ... higher quality services for American telecommunications consumers and encourage[ing] the rapid deployment of new telecommunications technologies.”⁸⁸ In addition, as the Commission recently explained, the implementation of the Act “must factor in the fundamental objectives of the Act, including the deployment of a ‘rapid, efficient ... wire and radio communication service with adequate facilities at reasonable charges’ and ‘the development and rapid deployment of new technologies, products and services for the benefit of the public ... without administrative or judicial delays[, and] efficient and ***9106** intensive use of the electromagnetic spectrum.’”⁸⁹ These provisions demonstrate that our interpretation of [Section 253](#) and [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) is in accordance with the broader goals of the various statutes that the Commission is entrusted to administer.

39. *California Payphone* further concluded that providers must be allowed to compete in a “fair and balanced regulatory environment.”⁹⁰ As reflected in decisions such as the Commission's *Texas PUC Order*, a state or local legal requirement can function as an effective prohibition either because of the resulting “financial burden” in an absolute sense, or, independently, because of a resulting competitive disparity.⁹¹ We clarify that “[a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the disfavored facilities will experience prohibition.”⁹² This conclusion is consistent with both Commission and judicial precedent recognizing the prohibitory effect that results from a competitor being treated materially differently than similarly-situated providers.⁹³ We provide our authoritative interpretation below of the circumstances in which a “financial burden,” as described in the *Texas PUC Order*, constitutes an effective prohibition in the context of certain state and local fees.

****14** 40. As we explained above, we reject alternative readings of the effective prohibition language that have been adopted by some courts and used to defend local requirements that have the effect of prohibiting densification of networks. Decisions that have applied solely a “coverage gap”-based approach under [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace.⁹⁴ Those cases, including some that formed the foundation for ***9107** “coverage gap”-based analytical approaches, appear to view wireless service as if it were a single, monolithic offering provided only via traditional wireless towers.⁹⁵ By contrast, the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies.⁹⁶ As Crown Castle explains, coverage gap-based approaches are “simply ***9108** incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage.”⁹⁷ Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings.⁹⁸

41. Likewise, we reject the suggestion of some courts like the Eighth and Ninth Circuits that evidence of an existing or complete inability to offer a telecommunications service is required under 253(a).⁹⁹ Such an approach is contrary to the material inhibition standard of *California Payphone* and the correct recognition by courts “that a prohibition does not have to be complete or ‘insurmountable’” to constitute an effective prohibition.¹⁰⁰ Commission precedent beginning with *California Payphone* itself makes clear that an insurmountable barrier is not required to find an effective prohibition under Section 253(a).¹⁰¹ The “effectively prohibit” *9109 language must have some meaning independent of the “prohibit” language, and we find that the interpretation of the First, Second, and Tenth Circuits reflects that principle, while being more consistent with the *California Payphone* standard than the approach of the Eighth and Ninth Circuits.¹⁰² The reasonableness of our interpretation that ‘effective prohibition’ does not require a showing of an insurmountable barrier to entry is demonstrated not only by a number of circuit courts’ acceptance of that view, but in the Supreme Court’s own characterization of Section 253(a) as “prohibit[ing] state and local regulation that impedes the provision of “telecommunications service.”¹⁰³

**15 42. The Eighth and Ninth Circuits’ suggestion that a provider must show an insurmountable barrier to entry in the jurisdiction imposing the relevant regulation is at odds with relevant statutory purposes and goals, as well. Section 253(a) is designed to protect “any entity” seeking to provide telecommunications services from state and local barriers to entry, and Sections 253(b) and (c) emphasize the importance of “competitively neutral” and “nondiscriminatory” treatment of providers.¹⁰⁴ Yet focusing on whether the carrier seeking relief faces an insurmountable barrier to entry would lead to disparities in statutory protections among providers based merely on considerations such as their access to capital and the breadth or narrowness of their entry strategies.¹⁰⁵ In addition, the Commission has observed in connection with Section 253: “Each local government may believe it is simply protecting the *9110 interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress’ recognition of this fact was the genesis of its grant of preemption authority to this Commission.”¹⁰⁶ As illustrated by our consideration of effective prohibitions flowing from state and local fees, there also can be cases where a narrow focus on whether an insurmountable barrier can be shown within the jurisdiction imposing a particular legal requirement would neglect the serious effects that flow through in other jurisdictions as a result, including harms to regional or national deployment efforts.¹⁰⁷

B. State and Local Fees

43. Federal courts have long recognized that the fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed in the effective prohibition standard embodied in Sections 253 and 332.¹⁰⁸ In *Municipality of Guayanilla*, for example, the First Circuit addressed whether a city could lawfully charge a 5 percent gross revenue fee. The court found that the “5% gross revenue fee would constitute a substantial increase in costs” for the provider, and that the ordinance consequently “will negatively affect [the provider’s] profitability.”¹⁰⁹ The fee, together with other requirements, thus “place a significant burden” on the provider.¹¹⁰ In light of this analysis, the First Circuit agreed that the fee “materially inhibits or limits the ability” of the provider “to compete in a fair and balanced legal and regulatory environment.”¹¹¹ The court thus held that the fee does not survive scrutiny under Section 253. In doing so, the First Circuit also noted that the inquiry is not limited to the impact that a fee would have on deployment in the jurisdiction that imposes the fee. Rather, the court noted the aggregate effect of fees when totaled across all relevant jurisdictions.¹¹² At the same time, the First Circuit did not decide whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or, at the very least, related to the actual use of the ROW.¹¹³

**16 44. In *City of White Plains*, the Second Circuit likewise faced a 5 percent gross revenue fee, which it found to be “[t]he most significant provision” in a franchise agreement implementing an ordinance that the court concluded effectively prohibited service in violation of Section 253.¹¹⁴ While the court noted that “compensation is ... sometimes used as a synonym

for cost,”¹¹⁵ it ultimately did not resolve whether fair and reasonable compensation “is limited to cost recovery, or whether it also extends to a reasonable rent,” relying instead on the fact that “White Plains has not attempted to charge Verizon *9111 the fee that it seeks to charge TCG,” thus failing Section 253’s “competitively neutral and nondiscriminatory” standard.¹¹⁶ But the court did observe that “Section 253(c) requires compensation to be reasonable essentially to prevent monopolist pricing by towns.”¹¹⁷

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

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

****17** 47. *Record Evidence on Costs Associated with Small Wireless Facilities.* Keeping pace with the demands on current 4G networks and upgrading our country’s wireless infrastructure to 5G require *9112 the deployment of many more Small Wireless Facilities.¹²³ For example, Verizon anticipates that network densification and the upgrade to 5G will require 10 to 100 times more antenna locations than currently exist. AT&T estimates that providers will deploy hundreds of thousands of wireless facilities in the next few years alone—equal to or more than the number providers have deployed in total over the last few decades.¹²⁴ Sprint, in turn, has announced plans to build at least 40,000 new small sites over the next few years.¹²⁵ A report from Accenture estimates that, overall, during the next three or four years, 300,000 small cells will need to be deployed—a total that it notes is “roughly double the number of macro cells built over the last 30 years.”¹²⁶

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

49. Cognizant of the changing technology and its interaction with regulations created for a previous generation of service, the *2017 Wireline Infrastructure NPRM/NOI* sought comment on whether government-imposed fees could act as a prohibition within the meaning of Section 253, and if so, what fees would qualify for 253(c)’s savings clause.¹²⁷ The *2017 Wireless Infrastructure NPRM/NOI* similarly sought comment on the scope of Sections 253 and 332(c)(7) and on any new or updated guidance the Commission should provide, potentially through a Declaratory Ruling.¹²⁸ In particular, the Commission sought comment on whether it should provide further guidance on how to interpret and apply the phrase “prohibit or have the effect of prohibiting.”¹²⁹

50. We conclude that ROW access fees, and fees for the use of government property in the ROW,¹³⁰ such as light poles, traffic lights, utility poles, and other similar property suitable for hosting *9113 Small Wireless Facilities, as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small

Wireless Facilities inside and outside the ROW, violate [Sections 253](#) or [332\(c\)\(7\)](#) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs,¹³¹ (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.¹³²

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

52. *Text and Structure.* We start our analysis with a consideration of the text and structure of [Section 253](#). That section contains several related provisions that operate in tandem to define the roles that Congress intended the federal government, states, and localities to play in regulating the provision of telecommunications services. [Section 253\(a\)](#) sets forth Congress's intent to preempt state or local legal requirements that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹³³ [Section 253\(b\)](#), in turn, makes clear Congress's intent that state “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights *9114 of consumers” are not preempted.¹³⁴ Of particular importance in the fee context, [Section 253\(c\)](#) reflects a considered policy judgment that “[n]othing in this section” shall prevent states and localities from recovering certain carefully delineated fees. Specifically, [Section 253\(c\)](#) makes clear that fees are not preempted that are “fair and reasonable” and imposed on a “competitively neutral and nondiscriminatory basis,” for “use of public rights-of-way on a ““nondiscriminatory basis,” so long as they are ““publicly disclosed” by the government.¹³⁵ [Section 253\(d\)](#), in turn, provides one non-exclusive mechanism by which a party can obtain a determination from the Commission of whether a specific state or local requirement is preempted under [Section 253\(a\)](#)—namely, by filing a petition with the Commission.¹³⁶

****19** 53. In reviewing this statutory scheme, the Commission previously has construed [Section 253\(a\)](#) as “broadly limit[ing] the ability of state[s] to regulate,” while the remaining subsections set forth “defined areas in which states may regulate.”¹³⁷ We reaffirm this conclusion, consistent with the view of most courts to have considered the issue—namely, that [Sections 253\(b\)](#) and [\(c\)](#) make clear that certain state or local laws, regulations, and legal requirements are not preempted under the expansive scope of [Section 253\(a\)](#).¹³⁸ Our interpretation of [Section 253\(a\)](#) is informed by this statutory context,¹³⁹ and the observation of courts that when a preemption provision precedes a narrowly-tailored savings clause, it is reasonable to infer that Congress intended a broad preemptive scope.¹⁴⁰ We need not decide today whether [Section 253\(a\)](#) preempts all fees not expressly saved by [Section 253\(c\)](#) with respect to all types of deployments. Rather, we conclude, based on the record before us, that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on deployment,¹⁴¹ particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment.¹⁴² Against this backdrop, and in light of significant evidence, set forth herein, that Congress intended [Section 253](#) to preempt legal requirements that effectively prohibit service, including wireless infrastructure deployment, we view the substantive standards for fees that Congress sought to insulate from preemption in [Section 253\(c\)](#) as an appropriate ceiling for state and local fees that apply to the deployment of Small Wireless Facilities in public ROWs.¹⁴³

***9115** 54. In addition, notwithstanding that [Section 253\(c\)](#) only expressly governs ROW fees, we find it appropriate to look to its substantive standards as a ceiling for other state and local fees addressed by this *Declaratory Ruling*.¹⁴⁴ For one, our evaluation of the material effects of fees on the deployment of Small Wireless Facilities does not differ whether the fees are for ROW access, use of government property within the ROW, or one-time application and review fees or the like—any of which drain limited capital resources that otherwise could be used for deployment—and we see no reason why the Act would

tolerate a greater prohibitory effect in the case of application or review fees than for ROW fees.¹⁴⁵ In addition, elements of the substantive standards for ROW fees in [Section 253\(c\)](#) appear at least analogous to elements of the *California Payphone* standard for evaluating an effective prohibition under [Section 253\(a\)](#). In pertinent part, both incorporate principles focused on the legal requirements to which a provider may be fairly subject,¹⁴⁶ and seek to guard against competitive disparities.¹⁴⁷ Without resolving the precise interplay of those concepts in [Section 253\(c\)](#) and the *California Payphone* standard, their similarities support our use of the substantive standards of [Section 253\(c\)](#) to inform our evaluation of fees at issue here that are not directly governed by that provision.

****20** 55. From the foregoing analysis, we can derive the three principles that we articulate in this Declaratory Ruling about the types of fees that are preempted. As explained in more detail below, we also interpret [Section 253\(c\)](#)'s "fair and reasonable compensation" provision to refer to fees that represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being passed on are themselves objectively reasonable.¹⁴⁸ Although there is precedent that "fair and reasonable" compensation could mean not only cost-based charges but also market-based charges in certain instances,¹⁴⁹ the statutory context persuades us to adopt a cost-based interpretation here. In particular, while the general purpose of [Section 253\(c\)](#) is to preserve certain state and local conduct from preemption, it includes qualifications and limitations to cabin state and local action under that savings clause in ways that ensure appropriate protections for service providers. The reasonableness of interpreting the qualifications and limitations in the [Section 253\(c\)](#) savings clause as designed to protect the interests of service providers is emphasized by the statutory language. The "competitively neutral and ***9116** nondiscriminatory" and public disclosure qualifications in [Section 253\(c\)](#) appear most naturally understood as protecting the interest of service providers from fees that otherwise would have been saved from preemption under [Section 253\(c\)](#) absent those qualifiers. Under the *noscitur a sociis* canon of statutory interpretation, that context persuades us that the "fair and reasonable" qualifier in [Section 253\(c\)](#) similarly should be understood as focused on protecting the interest of providers.¹⁵⁰ As discussed in greater detail below, while it might well be fair for providers to bear basic, reasonable costs of entry,¹⁵¹ the record does not reveal why it would be fair or reasonable from the standpoint of protecting providers to require them to bear costs beyond that level, particularly in the context of the deployment of Small Wireless Facilities. In addition, the text of [Section 253\(c\)](#) provides that ROW access fees must be imposed on a "competitively neutral and nondiscriminatory basis." This means, for example, that fees charged to one provider cannot be materially higher than those charged to a competitor for similar uses.¹⁵²

****21** 56. Other considerations support our approach, as well. By its terms, [Section 253\(a\)](#) preempts state or local legal requirements that "prohibit" or have the "effect of prohibiting" the provision of services, and we agree with court precedent that "[m]erely allowing the [local government] to recoup its processing costs ... cannot in and of itself prohibit the provision of services."¹⁵³ The Commission has long understood that [Section 253\(a\)](#) is focused on state or local barriers to entry for the provision of service,¹⁵⁴ and we conclude that states and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market.¹⁵⁵ We decline to interpret a government's recoupment of such fundamental costs of entry as having the effect of prohibiting the provision of services, nor has any commenter argued that recovery of cost by a government would prohibit service in a manner restricted by [Section 253\(a\)](#).¹⁵⁶ Reasonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for ***9117** communications services by protecting property rights and guarding against conflicting deployments that could harm or otherwise interfere with others' use of property.¹⁵⁷ By contrast, fees that recover more than the state or local costs associated with facilities deployment—or that are based on unreasonable costs, such as exorbitant consultant fees or the like—go beyond such governmental recovery of fundamental costs of entry. In addition, interpreting [Section 253\(a\)](#) to prohibit states and localities from recovering a reasonable approximation of reasonable costs could interfere with the ability of states to exercise the police powers reserved to them under the Tenth Amendment.¹⁵⁸ We therefore conclude that [Section 253\(a\)](#) is circumscribed to permit states and localities to recover a reasonable approximation of their costs related to the deployment of Small Wireless Facilities.

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

****22** 58. *California Payphone* and *Texas PUC* separately support the conclusion that fees cannot be discriminatory or introduce competitive disparities, as such fees would be inconsistent with a “balanced” regulatory marketplace. Thus, fees that treat one competitor materially differently than other competitors in similar situations are themselves grounds for finding an effective prohibition—even in the case of fees that are a reasonable approximation of the actual and reasonable costs incurred by the state or locality. Indeed, the Commission has previously recognized the potential for subsidies provided to one ***9118** competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a).¹⁶² We reaffirm that conclusion here.

59. *Legislative History.* While our interpretation follows directly from the text and structure of the Act, our conclusion finds further support in the legislative history, which reflects Congress's focus on the ability of states and localities to recover the reasonable costs they incur in maintaining the rights of way.¹⁶³ Significantly, Senator Dianne Feinstein, during the floor debate on Section 253(c), “offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including [to] ‘require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation.’”¹⁶⁴ Representative Bart Stupak, a sponsor of the legislation, similarly explained during the debate on Section 253 that “if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings,” making clear that the compensation described in the statute is related to the burden, or cost, from a provider's use of the ROW.¹⁶⁵ These statements buttress our interpretation of the text and structure of Section 253 and confirm Congress's apparent intent to craft specific safe harbors for states and localities, and to permit recovery of reasonable costs related to the ROW as “fair and reasonable compensation,” while preempting fees above a reasonable approximation of cost that improperly inhibit service.¹⁶⁶

60. *Capital Expenditures.* Apart from the text, structure, and legislative history of the 1996 Act, an additional, independent justification for our interpretation follows from the simple, logical premise, supported by the record, that state and local fees in one place of deployment necessarily have the effect of reducing the amount of capital that providers can use to deploy infrastructure elsewhere, whether the reduction takes place on a local, regional or national level.¹⁶⁷ We are persuaded that providers and infrastructure builders, like all economic actors, have a finite (though perhaps fluid)¹⁶⁸ amount of resources to use for the deployment of infrastructure. This does not mean that these resources are limitless, however. We conclude that fees imposed by localities, above and beyond the recovery of localities' reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere.¹⁶⁹ This and regulatory uncertainty created by such effectively prohibitive conduct¹⁷⁰ creates an ***9119** appreciable impact on resources that materially limits plans to deploy service. This record evidence emphasizes the importance of evaluating the effect of fees on Small Wireless Facility deployment on an aggregate basis. Consistent with the First Circuit's analysis in *Municipality of Guayanilla*, the record persuades us that fees associated with Small Wireless Facility deployment lead to “a substantial increase in costs”—particularly when considered in the aggregate—thereby “plac[ing] a significant burden” on carriers and materially inhibiting their provision of service contrary to Section 253 of the Act.¹⁷¹

****23** 61. The record is replete with evidence that providers have limited capital budgets that are constrained by state and local fees.¹⁷² As AT&T explains, “[a]ll providers have limited capital dollars to invest, funds that are quickly depleted when drained by excessive ROW fees.”¹⁷³ AT&T added that “[c]ompetitive demands will force carriers to deploy small cells in the largest cities. But, when those largest cities charge excessive fees to access ROWs and municipal ROW structures, carriers' finite capital dollars are prematurely depleted, leaving less for investment in mid-level cities and smaller communities. Larger municipalities have little incentive to not overcharge, and mid-level cities and smaller ***9120** municipalities have no ability to avoid this harm.”¹⁷⁴ As to areas that might not be sufficiently crucial to deployment to overcome high fees, AT&T identified jurisdictions in Maryland, California, and Massachusetts where high fees have directly resulted in paused or decreased deployments.¹⁷⁵ Limiting localities to reasonable cost recovery will “allow[] AT&T and other providers to stretch finite capital dollars to additional communities.”¹⁷⁶ Verizon similarly explains that “[c]apital budgets are finite. When providers are forced to spend more to deploy infrastructure in one locality, there is less money to spend in others. The leverage that some cities have to extract high fees means that other localities will not enjoy next generation wireless broadband services as quickly, if at all.”¹⁷⁷ Sprint, too, affirms that, because “all carriers face limited capital budgets, they are forced to limit the number and pace of their deployment investments to areas where the delays and impediments are the least onerous, to the detriment of their customers and, ultimately and ironically, to the very jurisdictions that imposed obstacles in the first place.”¹⁷⁸ Sprint gives a specific example of its deployments in two adjacent jurisdictions—the City of Los Angeles and Los Angeles County—and describes how high fees in the county prevented Sprint from activating any small cells there, while more than 500 deployments occurred in the city, which had significantly lower fees.¹⁷⁹ Similarly, Conterra Broadband states that “[w]hen time and capital are diverted away from actual facility installation and instead devoted to clearing regulatory roadblocks, consumers and enterprises, including local small businesses, schools and healthcare centers, suffer.”¹⁸⁰ Based on the record, we find that fees charged by states and localities are causing *actual* delays and restrictions on deployments of Small Wireless Facilities in a number of places across the country in violation of [Section 253\(a\)](#).¹⁸¹

****24** 62. Our conclusion finds further support when one considers the aggregate effects of fees imposed by individual localities, including, but not limited to, the potential limiting implications for a nationwide wireless network that reaches all Americans, which is among the key objectives of the statutory provisions in the 1996 Act that we interpret here.¹⁸² When evaluating whether fees result in an effective prohibition of service due to financial burden, we must consider the marketplace regionally and nationally and thus must consider the cumulative effects of state or local fees on service in multiple geographic areas that providers serve or potentially would serve. Where providers seek to operate on a regional or national basis, they have constrained resources for entering new markets or introducing, expanding, or improving existing services, particularly given that a provider's capital budget for a given ***9121** period of time is often set in advance.¹⁸³ In such cases, the resources consumed in serving one geographic area are likely to deplete the resources available for serving other areas.¹⁸⁴ The text of [Section 253\(a\)](#) is not limited by its terms only to effective prohibitions within the geographic area targeted by the state or local fee. Where a fee in a geographic area affects service outside that geographic area, the statute is most naturally read to encompass consideration of all affected areas.

63. A contrary, geographically-restrictive interpretation of [Section 253\(a\)](#) would exacerbate the digital divide by giving dense or wealthy states and localities that might be most critical for a provider to serve the ability to leverage their unique position to extract fees for their own benefit at the expense of regional or national deployment by decreasing the deployment resources available for less wealthy or dense jurisdictions.¹⁸⁵ As a result, the areas likely to be hardest hit by excessive government fees are not necessarily jurisdictions that charge those fees, but rather areas where the case for new, expanded, or improved service was more marginal to start—and whose service may no longer be economically justifiable in the near-term given the resources demanded by the “must-serve” areas. To cite some examples of harmful aggregate effects, AT&T notes that high annual recurring fees are particularly harmful because of their “continuing and compounding nature.”¹⁸⁶ It also states that, “if, as S&P Global Market Intelligence estimates, small-cell deployments reach nearly 800,000 by 2026, a ROW fee of \$1000

per year ...would result in nearly \$800 million annually in forgone investment.”¹⁸⁷ Yet another commenter notes that, “[f]or a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible,” and “far exceed[ing] any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure.”¹⁸⁸ Endorsing such a result would thwart the purposes underlying [Section 253\(a\)](#). As Crown Castle observes, “[e]ven where the fees do not result in a direct lack of service in a high-demand area like a city or urban core, the high cost of building and operating facilities in these jurisdictions consume [sic] capital and revenue that could otherwise be used to expand wireless infrastructure in higher cost areas. This impact of egregious fees is prohibitory and should be taken into account in any prohibition analysis.”¹⁸⁹

****25** 64. Some municipal commenters endorse a cost-based approach to “ensure that localities are fully compensated for their costs [and that] fees should be reasonable and non-discriminatory, and should ensure that localities are made whole”¹⁹⁰ in recognition that “getting [5G] infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources.”¹⁹¹ Commenters from smaller municipalities recognize that “thousands and thousands of small cells are needed for 5G... [and] ***9122** old regulations could hinder the timely arrival of 5G throughout the country”¹⁹² and urge the Commission to “establish some common-sense standards insofar as it relates to fees associated with the deployment of small cells [[[due to] a cottage industry of consultants [] who have wrongly counseled communities to adopt excessive and arbitrary fees.”¹⁹³ Representatives from non-urban areas in particular caution that, “if the investment that goes into deploying 5G on the front end is consumed by big, urban areas, it will take longer for it to flow outwards in the direction of places like Florence, [[[SC].”¹⁹⁴ “[R]educing the high regulatory costs in urban areas would leave more dollars to development in rural areas [because] most of investment capital is spent in the larger urban areas [since] the cost recovery can be made in those areas. This leaves the rural areas out.”¹⁹⁵ We agree with these commenters, and we further agree with courts that have considered “the *cumulative effect* of future similar municipal [fees ordinances]” across a broad geographic area when evaluating the effect of a particular fee in the context of [Section 253\(a\)](#).¹⁹⁶ To the extent that other municipal commenters argue that our interpretation gives wireless providers preferential treatment compared to other users of the ROW, the record does not contain data about other users that would support such a conclusion.¹⁹⁷ In any event, Section 253 of the Communications Act expressly bars legal requirements that effectively prohibit telecommunications service without regard to whether it might result in preferential treatment for providers of that service.¹⁹⁸

65. Applying this approach here, the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated Small Wireless Facility deployment.¹⁹⁹ The record reveals that these effects can take several forms. In some cases, the fees in a particular jurisdiction will lead to reduced or entirely forgone deployment of Small Wireless Facilities in the near term for that ***9123** jurisdiction.²⁰⁰ In other cases, where it is essential for a provider to deploy in a given area, the fees charged in that geographic area can deprive providers of capital needed to deploy elsewhere, and lead to reduced or forgone near-term deployment of Small Wireless Facilities in other geographic areas.²⁰¹ In both of those scenarios the bottom-line outcome on the national development of 5G networks is the same— diminished deployment of Small Wireless Facilities critical for wireless service and building out 5G networks.²⁰²

****26** 66. Some have argued that our decision today regarding [Sections 253](#) and [332](#) should not be applied to preempt agreements (or provisions within agreements) entered into prior to this Declaratory Ruling.²⁰³ We note that courts have upheld the Commission's preemption of the enforcement of provisions in private agreements that conflict with our decisions²⁰⁴ We therefore do not exempt existing agreements (or particular provisions contained therein) from the statutory requirements that we interpret here. That said, however, this Declaratory Ruling's effect on any particular existing agreement will depend upon all the facts and circumstances of that specific case.²⁰⁵ Without examining the particular features of an agreement, including

any exchanges of value that might not be reflected by looking at fee provisions alone, we cannot state that today's decision does or does not impact any particular agreement entered into before this decision.

67. *Relationship to Section 332.* While the above analysis focuses on the text and structure of the Act, legislative history, Commission orders, and case law interpreting Section 253(a), we reiterate that in the fee context, as elsewhere, the statutory phrase “prohibit or have the effect of prohibiting” in Section 332(c)(7)(B)(i)(II) has the same meaning as the phrase “prohibits or has the effect of prohibiting” in Section 253(a). As noted in the prior section, there is no evidence to suggest that Congress intended for virtually identical language to have different meanings in the two provisions.²⁰⁶ Instead, we find it ***9124** more reasonable to conclude that the language in both sections generally should be interpreted to have the same meaning and to reflect the same standard, including with respect to preemption of fees that could “prohibit” or have “the effect of prohibiting” the provision of covered service. Both sections were enacted to address concerns about state and local government practices that undermined providers' ability to provide covered services, and both bar state or local conduct that prohibits or has the effect of prohibiting service.

68. To be sure, Sections 253 and 332(c)(7) may relate to different categories of state and local fees. Ultimately, we need not resolve here the precise interplay between Sections 253 and 332(c)(7). It is enough for us to conclude that, collectively, Congress intended for the two provisions to cover the universe of fees charged by state and local governments in connection with the deployment of telecommunications infrastructure. Given the analogous purposes of both sections and the consistent language used by Congress, we find the phrase “prohibit or have the effect of prohibiting” in Section 332(c)(7)(B)(i)(II) should be construed as having the same meaning and governed by the same preemption standard as the identical language in Section 253(a).²⁰⁷

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

70. Applying the principles established in this Declaratory Ruling, a variety of fees not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7) in the context of Small Wireless Facility deployments.²⁰⁸ For example, we agree with courts that have recognized that gross ***9125** revenue fees generally are not based on the costs associated with an entity's use of the ROW,²⁰⁹ and where that is the case, are preempted under Section 253(a). In addition, although we reject calls to preclude a state or locality's use of third party contractors or consultants, or to find all associated compensation preempted,²¹⁰ we make clear that the principles discussed herein regarding the reasonableness of cost remain applicable. Thus, fees must not only be limited to a reasonable approximation of costs, but in order to be reflected in fees, the *costs themselves* must also be reasonable. Accordingly, any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual “cost” to the government. If a locality opts to incur unreasonable costs, Sections 253 and 332(c)(7) do not permit it to pass those costs on to providers. Fees that depart from these principles are not saved by Section 253(c), as we discuss below.

71. *Interpretation of Section 253(c) in the Context of Fees.* In this section, we turn to the interpretation of several provisions in Section 253(c), which provides that state or local action that otherwise would be subject to preemption under Section 253(a) may be permissible if it meets specified criteria. Section 253(c) expressly provides that state or local governments may require

telecommunications providers to pay “fair and reasonable compensation” for use of public ROWs but requires that the amounts of any such compensation be “competitively neutral and nondiscriminatory” and “publicly disclosed.”²¹¹

****28** 72. We interpret the ambiguous phrase “fair and reasonable compensation,” within the statutory framework we outlined for [Section 253](#), to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs. We conclude that an appropriate yardstick for “fair and reasonable compensation,” and therefore an indicator of whether a fee violates [Section 253\(c\)](#), is whether it recovers a reasonable approximation of a state or local government's objectively reasonable costs of, respectively, maintaining the ROW, maintaining a structure within the ROW, or processing an application or permit.²¹²

73. We disagree with arguments that “fair and reasonable compensation” in [Section 253\(c\)](#) should somehow be interpreted to allow state and local governments to charge “any compensation,” and we give weight to BDAC comments that, “[a]s a policy matter, the Commission should recognize that local fees designed to maximize profit are barriers to deployment.”²¹³ Several commenters argue, in ***9126** particular, that [Section 253\(c\)](#)'s language must be read as permitting localities latitude to charge any fee at all²¹⁴ or a “market-based rent.”²¹⁵ Many of these arguments seem to suggest that [Section 253](#) or [332](#) have not previously been read to impose limits on fees, but as noted above courts have long read these provisions as imposing such limits. Still others argue that limiting the fees state and local governments may charge amounts to requiring taxpayers to subsidize private companies' use of public resources.²¹⁶ We find little support in the record, legislative history, or case law for that position.²¹⁷ Indeed, our approach to compensation ensures that cities are not going into the red to support or subsidize the deployment of wireless infrastructure.

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

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

***9128** 76. Because we interpret fair and reasonable compensation as a *reasonable approximation* of costs, we do not suggest that localities must use any specific accounting method to document the costs they may incur when determining the fees they charge for Small Wireless Facilities within the ROW. Moreover, in order to simplify compliance, when a locality charges both types of recurring fees identified above (i.e., for access to the ROW and for use of or attachment to property in the ROW), we see no reason for concern with how it has allocated costs between those two types of fees. It is sufficient under the statute that the total of the two recurring fees reflects the total costs involved.²²⁴ Fees that cannot ultimately be shown by a state or locality to be a reasonable approximation of its costs, such as high fees designed to subsidize local government costs in

another geographic area or accomplish some public policy objective beyond the providers' use of the ROW, are not “fair and reasonable compensation...for use of the public rights-of-way” under [Section 253\(c\)](#).²²⁵ Likewise, we agree with both industry and municipal commenters that excessive and arbitrary consulting fees or other costs should not be recoverable as “fair and reasonable compensation,”²²⁶ because they are not a function of the provider's “use” of the public ROW.

77. In addition to requiring that compensation be “fair and reasonable,” [Section 253\(c\)](#) requires that it be “competitively neutral and nondiscriminatory.” The Commission has previously interpreted this language to prohibit states and localities from charging fees on new entrants and not on incumbents.²²⁷ Courts have similarly found that states and localities may not impose a range of fees on one provider but not on another²²⁸ and even some municipal commenters acknowledge that governments should not discriminate as to the fees charged to different providers.²²⁹ The record reflects continuing concerns from providers, however, that they face discriminatory charges.²³⁰ We reiterate the Commission's previous determination that state and local governments may not impose fees on some providers that they do not impose on others. We would also be concerned about fees, whether one-time or recurring, related to Small Wireless Facilities, that exceed the fees for other wireless telecommunications infrastructure in similar situations, and to the extent that different fees are charged *9129 for similar use of the public ROW.²³¹

****30** 78. *Fee Levels Likely to Comply with Section 253.* Our interpretation of [Section 253\(a\)](#) and “fair and reasonable compensation” under [Section 253\(c\)](#) provides guidance for local and state fees charged with respect to one-time fees generally, and recurring fees for deployments in the ROW. Following suggestions for the Commission to “establish a presumptively reasonable ‘safe harbor’ for certain ROW and use fees,”²³² and to facilitate the deployment of specific types of infrastructure critical to the rollout of 5G in coming years, we identify in this section three particular types of fee scenarios and supply specific guidance on amounts that presumptively are not prohibited by [Section 253](#). Informed by our review of information from a range of sources, we conclude that fees at or below these amounts presumptively do not constitute an effective prohibition under [Section 253\(a\)](#) or [Section 332\(c\)\(7\)](#), and are presumed to be “fair and reasonable compensation” under [Section 253\(c\)](#).

79. Based on our review of the Commission's pole attachment rate formula, which would require fees below the levels described in this paragraph, as well as small cell legislation in twenty states, local legislation from certain municipalities in states that have not passed small cell legislation, and comments in the record, we presume that the following fees would not be prohibited by [Section 253](#) or [Section 332\(c\)\(7\)](#): (a) \$500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond five, or \$1,000 for non-recurring fees for a new pole (*i.e.*, not a collocation) intended to support one or more Small Wireless Facilities; and (b) \$270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.²³³

80. By presuming that fees at or below the levels above comply with [Section 253](#), we assume *9130 that there would be almost no litigation by providers over fees set at or below these levels. Likewise, our review of the record, including the many state small cell bills passed to date, indicate that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of [Section 253](#). In those limited circumstances, a locality could prevail in charging fees that are above this level by showing that such fees nonetheless comply with the limits imposed by [Section 253](#)—that is, that they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory.²³⁴ Allowing localities to charge fees above these levels upon this showing recognizes local variances in costs.²³⁵

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

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

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

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

84. *Aesthetics*. The *Wireless Infrastructure NPRM/NOI* sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how [Sections 253](#) and [332\(c\)\(7\)](#) should be applied to them.²³⁹ Parties describe a wide range of such requirements that allegedly restrict deployment of Small Wireless Facilities. For example, many providers criticize ***9131** burdensome requirements to deploy facilities using “stealth” designs or other means of camouflage,²⁴⁰ as well as unduly stringent mandates regarding the size of equipment, colors of paint, and other details.²⁴¹ Providers also assert that the procedures some localities use to evaluate the appearance of proposed facilities and to decide whether they comply with applicable land-use requirements are overly restrictive.²⁴² Many providers are particularly critical of the use of unduly vague or subjective criteria that may apply inconsistently to different providers or are only fully revealed after application, making it impossible for providers to take these requirements into account in their planning and adding to the time necessary to deploy facilities.²⁴³ At the same time, we have heard concerns in the record about carriers deploying unsightly facilities that are significantly out of step with similar, surrounding deployments.

****32** 85. State and local governments add that many of their aesthetic restrictions are justified by factors that the providers fail to mention. They assert that their zoning requirements and their review and enforcement procedures are properly designed to, among other things, (1) ensure that the design, appearance, and other features of buildings and structures are compatible with nearby land uses; (2) manage ROW so as to ensure traffic safety and coordinate various uses; and (3) protect the integrity of ***9132** their historic, cultural, and scenic resources and their citizens' quality of life.²⁴⁴

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

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

reasonable and directed at remedying the impact of the wireless infrastructure deployment. For example, a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service.

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

****33 *9133** 89. We appreciate that at least some localities will require some time to establish and publish aesthetics standards that are consistent with this Declaratory Ruling. Based on our review and evaluation of commenters' concerns, we anticipate that such publication should take no longer than 180 days after publication of this decision in the Federal Register.

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

91. *Minimum Spacing Requirements.* Some parties complain of municipal requirements regarding the spacing of wireless installations—*i.e.*, mandating that facilities be sited at least 100, 500, or 1,000 feet, or some other minimum distance, away from other facilities, ostensibly to avoid excessive overhead “clutter” that would be visible from public areas.²⁵⁰ We acknowledge that while some such requirements may violate 253(a), others may be reasonable aesthetic requirements.²⁵¹ For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use. Such a rule change with retroactive effect would ***9134** almost certainly have the effect of prohibiting service under the standards we articulate here. Therefore, such requirements should be evaluated under the same standards for aesthetic requirements as those discussed above.²⁵²

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

****34** 92. We confirm that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.²⁵³ As explained below, for two alternative and independent reasons, we disagree with state and local government commenters who

assert that, in providing or denying access to government-owned structures, these governmental entities function solely as “market participants” whose rights cannot be subject to federal preemption under [Section 253\(a\)](#) or [Section 332\(c\)\(7\)](#).²⁵⁴

93. First, this effort to differentiate between such governmental entities’ “regulatory” and “proprietary” capacities in order to insulate the latter from preemption ignores a fundamental feature of the market participant doctrine.²⁵⁵ As the Ninth Circuit has observed, at its core, this doctrine is “a *9135 presumption about congressional intent,” which “may have a different scope under different federal statutes.”²⁵⁶ The Supreme Court has likewise made clear that the doctrine is applicable only “[i]n the absence of any express or implied indication by Congress.”²⁵⁷ In contrast, where state action conflicts with express or implied federal preemption, the market participant doctrine does not apply, whether or not the state or local government attempts to impose its authority over use of public rights-of-way by permit or by lease or contract.²⁵⁸ Here, both [Sections 253\(a\)](#) and [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) expressly address preemption, and neither carves out an exception for proprietary conduct.²⁵⁹

94. Specifically, [Section 253\(a\)](#) expressly preempts certain state and local “legal requirements” and makes no distinction between a state or locality’s regulatory and proprietary conduct. Indeed, as the Commission has long recognized, [Section 253\(a\)](#)’s sweeping reference to “State [and] local statute[s] [and] regulation[s]” and “other State [and] local legal requirement[...][s]” demonstrates Congress’s intent “to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services.”²⁶⁰ [Section 253\(b\)](#) mentions “requirement[s],” a phrase that is even broader than that used in [Section 253\(a\)](#) but covers “universal service,” “public safety and welfare,” “continued quality of telecommunications,” and “safeguard[s] for the] rights of consumers.” The subsection does not recognize a distinction between regulatory and proprietary. [Section 253\(c\)](#), which expressly insulates from preemption certain state and local government activities, refers in relevant part to “manag[ing] the public rights-of-way” and “requir[ing] fair and reasonable compensation,” while eliding any distinction between regulatory and proprietary action in either context. The Commission has previously observed that [Section 253\(c\)](#) “makes explicit a local government’s continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public *9136 rights-of-way.”²⁶¹ We conclude here that, as a general matter, “manage[ment]” of the ROW includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary.²⁶² This reading, coupled with [Section 253\(c\)](#)’s narrow scope, suggests that Congress’s omission of a blanket proprietary exception to preemption was intentional, and thus, that such conduct can be preempted under [Section 253\(a\)](#). We therefore construe [Section 253\(c\)](#)’s requirements, including the requirement that compensation be “fair and reasonable,” as applying equally to charges imposed via contracts and other arrangements between a state or local government and a party engaged in wireless facility deployment.²⁶³ This interpretation is consistent with [Section 253\(a\)](#)’s reference to “State or local legal requirement[s],” which the Commission has consistently construed to include such agreements.²⁶⁴ In light of the foregoing, whatever the force of the market participant doctrine in other contexts,²⁶⁵ we believe the language, legislative history, and purpose of [Sections 253\(a\)](#) and [\(c\)](#) are incompatible with the application of this doctrine in this context. We observe once more that “[o]ur conclusion that Congress intended this language to be interpreted broadly is reinforced by the scope of [section 253\(d\)](#),” which “directs the Commission to preempt any statute, regulation, or legal requirement *permitted* or imposed by a state or local government if it contravenes [sections 253\(a\)](#) or [\(b\)](#). A more restrictive interpretation of the term ‘other legal requirements’ easily could permit state and local restrictions on competition to escape preemption based solely on the way in which [state] action was structured. We do not believe that Congress intended this result.”²⁶⁶

****35** 95. Similarly, and as discussed elsewhere,²⁶⁷ we interpret [Section 332\(c\)\(7\)\(B\)\(ii\)](#)’s references to “any request[s] for authorization to place, construct, or modify personal wireless service facilities” broadly, consistent with Congressional intent. As described below, we find that “any” is unqualifiedly broad, and that “request” encompasses anything required to secure all authorizations necessary for the deployment of personal wireless services infrastructure. In particular, we find that [Section 332\(c\)\(7\)](#) includes authorizations relating to access to a ROW, including but not limited to the *9137 “place[ment], construct[ion], or modif[ication]” of facilities on government-owned property, for the purpose of providing “personal wireless service.” We

observe that this result, too, is consistent with Commission precedent such as the *Minnesota Order*, which involved a contract that provided exclusive access to a ROW. As but one example, to have limited that holding to exclude government-owned property within the ROW even if the carrier needed access to that property would have the effect of diluting or completely defeating the purpose of [Section 332\(c\)\(7\)](#).²⁶⁸

96. Second, and in the alternative, even if [Section 253\(a\)](#) and [Section 332\(c\)\(7\)](#) were to permit leeway for states and localities acting in their proprietary role, the examples in the record would be excepted because they involve states and localities fulfilling regulatory objectives.²⁶⁹ In the proprietary context, “a State acts as a ‘market participant with no interest in setting policy.’”²⁷⁰ We contrast state and local governments' purely proprietary actions with states and localities acting with respect to managing or controlling access to property within public ROW, or to decisions about where facilities that will provide personal wireless service to the public may be sited. As several commenters point out, courts have recognized that states and localities “hold the public streets and sidewalks in trust for the public” and “manage public ROW in their regulatory capacities.”²⁷¹ These decisions could be based on a number of regulatory objectives, such as aesthetics or public safety and welfare, some of which, as we note elsewhere, would fall within the preemption scheme envisioned by Congress. In these situations, the state or locality's role seems to us to be indistinguishable from its function and objectives as a regulator.²⁷² To ***9138** the extent that there is some distinction, the temptation to blend the two roles for purposes of insulating conduct from federal preemption cannot be underestimated in light of the overarching statutory objective that telecommunications service and personal wireless services be deployed without material impediments.

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

***9139 E. Responses to Challenges to Our Interpretive Authority and Other Arguments**

98. We reject claims that we lack authority to issue authoritative interpretations of [Sections 253](#) and [332\(c\)\(7\)](#) in this Declaratory Ruling. As explained above, we act here pursuant to our broad authority to interpret key provisions of the Communications Act, consistent with our exercise of that interpretive authority in the past.²⁷⁸ In this instance, we find that issuing a Declaratory Ruling is necessary to remove what the record reveals is substantial uncertainty and to reduce the number and complexity of legal controversies regarding certain fee and non-fee state and local legal requirements in connection with Small Wireless Facility infrastructure. We thus exercise our authority in this Declaratory Ruling to interpret [Section 253](#) and [Section 332\(c\)\(7\)](#) and explain how those provisions apply in the specific scenarios at issue here.²⁷⁹

****37** 99. Nothing in [Sections 253](#) or [332\(c\)\(7\)](#) purports to limit the exercise of our general interpretive authority.²⁸⁰ Congress's inclusion of preemption provisions in [Section 253\(d\)](#) and [Section 332\(c\)\(7\)\(B\)\(v\)](#) does not limit the Commission's ability pursuant to other sections of the Act to construe and provide its authoritative interpretation as to the meaning of

those provisions.²⁸¹ Any preemption under [Section 253](#) and/or [Section 332\(c\)\(7\)\(B\)](#) that subsequently occurs will proceed in accordance with the enforcement mechanisms available in each context. But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in [Section 253](#) or [Section 332\(c\)\(7\)](#) prevents the Commission from declaring that a category of state or local laws is inconsistent with [Section 253\(a\)](#) or [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) because it prohibits or has the effect of prohibiting the relevant covered service.²⁸²

***9140** 100. Although some commenters contend in general terms that differences in judicial approaches to [Section 253](#) are limited and thus there is little need for Commission guidance,²⁸³ the interpretations we offer in this Declaratory Ruling are intended to help address certain specific scenarios that have caused significant uncertainty and legal controversy, irrespective of the degree to which this uncertainty has been reflected in court decisions. We also reject claims that a Supreme Court brief joined by the Commission demonstrates that there is no need for the interpretations in this Declaratory Ruling.²⁸⁴ To the contrary, that brief observed that some potential interpretations of certain court decisions “would create a serious conflict with the Commission’s understanding of [Section 253\(a\)](#), and [] would undermine the federal competition policies that the provision seeks to advance.”²⁸⁵ The brief also noted that, if warranted, “the Commission can restore uniformity by issuing authoritative rulings on the application of [Section 253\(a\)](#) to particular types of state and local requirements.”²⁸⁶ Rather than cutting against the need for, or desirability of, the interpretations we offer in this Declaratory Ruling, the brief instead presaged them.²⁸⁷

****38 *9141** 101. Our interpretations of [Sections 253](#) and [Section 332\(c\)\(7\)](#) are likewise not at odds with the Tenth Amendment and constitutional precedent, as some commenters contend.²⁸⁸ In particular, our interpretations do not directly “compel the states to administer federal regulatory programs or pass legislation.”²⁸⁹ The outcome of violations of [Section 253\(a\)](#) or [Section 332\(c\)\(7\)\(B\)](#) of the Act are no more than a consequence of “the limits Congress already imposed on State and local governments” through its enactment of [Section 332\(c\)\(7\)](#).²⁹⁰

102. We also reject the suggestion that the limits [Section 253](#) places on state and local ROW fees and management will unconstitutionally interfere with the relationship between a state and its political subdivisions.²⁹¹ As relevant to our interpretations here, it is not clear, at first blush, that such concerns would be implicated.²⁹² Because state and local legal requirements can be written and structured in myriad ways, and challenges to such state or local activities could be framed in broad or narrow terms, we decline to resolve such questions here, divorced from any specific context.

IV. THIRD REPORT AND ORDER

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

***9142 A. New Shot Clocks for Small Wireless Facility Deployments**

104. In 2009, the Commission concluded that we should use shot clocks to define a presumptive “reasonable period of time” beyond which state or local inaction on wireless infrastructure siting applications would constitute a “failure to act” within the meaning of [Section 332](#).²⁹³ We adopted a 90-day clock for reviewing collocation applications and a 150-day clock for reviewing siting applications other than collocations. The record here suggests that our two existing [Section 332](#) shot clocks have increased the efficiency of deploying wireless infrastructure. Many localities already process wireless siting applications in less time than required by those shot clocks, and a number of states have enacted laws requiring that collocation applications

be processed in 60 days or less.²⁹⁴ Some siting agencies acknowledge that they have worked to gain efficiencies in processing siting applications and welcome the addition of new shot clocks tailored to the deployment of small scale facilities.²⁹⁵ Given siting agencies' increased experience with existing shot clocks, the greater need for rapid siting of Small Wireless Facilities nationwide, and the lower burden siting of these facilities places on siting agencies in many cases, we take this opportunity to update our approach to speed the deployment of Small Wireless Facilities.²⁹⁶

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

****39** 105. In this section, using authority confirmed in *City of Arlington*, we adopt two new Section 332 shot clocks for Small Wireless Facilities—60 days for review of an application for collocation of Small Wireless Facilities using a preexisting structure and 90 days for review of an application for attachment of Small Wireless Facilities using a new structure. These new Section 332 shot clocks carefully balance the well-established authority that states and local authorities have over review of wireless siting applications with the requirements of Section 332(c)(7)(ii) to exercise that authority “within a reasonable period of time... taking into account the nature and scope of the request.”²⁹⁷ Further, our decision is consistent with the BDAC's Model Code for Municipalities' recommended timeframes, which utilize this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures²⁹⁸ and are similar to shot clocks enacted in state level small cell bills and the real world ***9143** experience of many municipalities which further supports the reasonableness of our approach.²⁹⁹ Our actions will modernize the framework for wireless facility siting by taking into consideration that states and localities should be able to address the siting of Small Wireless Facilities in a more expedited review period than needed for larger facilities.³⁰⁰

106. We find compelling reasons to establish a new presumptively reasonable Section 332 shot clock of 60 days for collocations of Small Wireless Facilities on existing structures. The record demonstrates the need for, and reasonableness of, expediting the siting review of these collocations.³⁰¹ Notwithstanding the implementation of the current shot clocks, more streamlined procedures are both reasonable and necessary to provide greater predictability for siting applications nationwide for the deployment of Small Wireless Facilities. The two current Section 332 shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the existing Section 332 shot clocks were adopted nine years ago. Since 2009, localities have gained significant experience processing wireless siting applications.³⁰² Indeed, many localities already process wireless siting applications in less than the required time³⁰³ and several ***9144** jurisdictions require by law that collocation applications be processed in 60 days or less.³⁰⁴ With the passage of time, siting agencies have become more efficient in processing siting applications.³⁰⁵ These facts demonstrate that a shorter, 60-day shot clock for processing collocation applications for Small Wireless Facilities is reasonable.³⁰⁶

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

108. Further, we find no reason to believe that applying a 60-day time frame for Small Wireless Facility collocations under Section 332 creates confusion with collocations that fall within the scope of “eligible facilities requests” under Section 6409 of the Spectrum Act, which are also subject to a 60-day review.³¹¹ The type of facilities at issue here are distinctly different and the definition of a Small Wireless Facility is clear. Further, siting authorities are required to process Section 6409 applications involving the swap out of certain equipment in 60 days, and we see no meaningful difference in processing these applications than processing Section 332 collocation applications in 60 days. There is ***9145** no reason to apply different time periods (60

vs. 90 days) to what is essentially the same review: modification of an existing structure to accommodate new equipment.³¹² Finally, adopting a 60-day shot clock will encourage service providers to collocate rather than opting to build new siting structures which has numerous advantages.³¹³

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

****41** 110. While some commenters argue that additional shot clock classifications would make the siting process needlessly more complex without any proven benefits,³¹⁸ any additional administrative burden from increasing the number of [Section 332](#) shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.³¹⁹ We ***9146** also reject the assertion that revising the period of time to review siting decisions would amount to a nationwide land use code for wireless siting.³²⁰ Our approach is consistent with the Model Code for Municipalities that recognizes that the shot clocks that we are adopting for the review of Small Wireless Facility deployment applications correctly balance the needs of local siting agencies and wireless service providers.³²¹ Our balance of the relevant considerations is informed by our experience with the previously adopted shot clocks, the record in this proceeding, and our predictive judgment about the effectiveness of actions taken here to promote the provision of personal wireless services.

111. For similar reasons as set forth above, we also find it reasonable to establish a new 90 day [Section 332](#) shot clock for new construction of Small Wireless Facilities. Ninety days is a presumptively reasonable period of time for localities to review such siting applications. Small Wireless Facilities have far less visual and other impact than the facilities we considered in 2009, and should accordingly require less time to review.³²² Indeed, some state and local governments have already adopted 60-day maximum reasonable periods of time for review of *all* small cell siting applications, and, even in the absence of such maximum requirements, several are already reviewing and approving small-cell siting applications within 60 days or less after filing.³²³ Numerous industry commenters advocated a 90-day shot clock for all non- collocation deployments.³²⁴ Based on this record, we find it reasonable to conclude that review of an application to deploy a Small Wireless Facility using a new structure warrants more review time than a mere collocation, but less than the construction of a macro tower.³²⁵ For the reasons explained below, we ***9147** also specify today a provision that will initially reset these two new shot clocks in the event that a locality receives a materially incomplete application.

112. Finally, we note that our 60- and 90-day approach is similar to that in pending legislation that has bipartisan congressional support, and is consistent with the Model Code for Municipalities. Specifically, the draft STREAMLINE Small Cell Deployment Act, would apply a 60-day shot clock to collocation of small personal wireless service facilities and a 90-day shot clock to any other action relating to small personal wireless service facilities.³²⁶ Further, the Model Code for Municipalities recommended by the FCC's Broadband Deployment Advisory Committee also utilizes this same 60-day and 90-day framework for collocation of Small Wireless Facilities and new structures.³²⁷

2. Batched Applications for Small Wireless Facilities

****42** 113. Given the way in which Small Wireless Facilities are likely to be deployed, in large numbers as part of a system meant to cover a particular area, we anticipate that some applicants will submit “batched” applications: multiple separate applications

filed at the same time, each for one or more sites or a single application covering multiple sites.³²⁸ In the *Wireless Infrastructure NPRM/NOI*, the Commission asked whether batched applications should be subject to either longer or shorter shot clocks than would apply if each component of the batch were submitted separately.³²⁹ Industry commenters contend that the shot clock applicable to a batch or a class of applications should be no longer than that applicable to an individual application of the same class.³³⁰ On the other hand, several commenters, contend that batched applications have often been proposed in historic districts and historic buildings (areas that require a more complex review process), and given the complexities associated with reviews of that type, they urge the Commission not to apply shorter shot clocks to batched applications.³³¹ Some localities also argue that a single, national shot clock for batched applications would fail to account for unique local circumstances.³³²

114. We see no reason why the shot clocks for batched applications to deploy Small Wireless Facilities should be longer than those that apply to individual applications because, in many cases, the batching of such applications has advantages in terms of administrative efficiency that could actually ***9148** make review easier.³³³ Our decision flows from our current [Section 332](#) shot clock policy. Under our two existing [Section 332](#) shot clocks, if an applicant files multiple siting applications on the same day for the same type of facilities, each application is subject to the same number of review days by the siting agency.³³⁴ These multiple siting applications are equivalent to a batched application and therefore the shot clocks for batching should follow the same rules as if the applications were filed separately. Accordingly, when applications to deploy Small Wireless Facilities are filed in batches, the shot clock that applies to the batch is the same one that would apply had the applicant submitted individual applications. Should an applicant file a single application for a batch that includes both collocated and new construction of Small Wireless Facilities, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites.

115. We recognize the concerns raised by parties arguing for a longer time period for at least some batched applications, but conclude that a separate rule is not necessary to address these concerns. Under our approach, in extraordinary cases, a siting authority, as discussed below, can rebut the presumption of reasonableness of the applicable shot clock period where a batch application causes legitimate overload on the siting authority's resources.³³⁵ Thus, contrary to some localities' arguments,³³⁶ our approach provides for a certain degree of flexibility to account for exceptional circumstances. In addition, consistent with, and for the same reasons as our conclusion below that [Section 332](#) does not permit states and localities to prohibit applicants from requesting multiple types of approvals simultaneously,³³⁷ we find that [Section 332\(c\)\(7\)\(B\)\(ii\)](#) similarly does not allow states and localities to refuse to accept batches of applications to deploy Small Wireless Facilities.

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

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

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

118. State or local inaction by the end of the Small Wireless Facility shot clock will function not only as a [Section 332\(c\)\(7\)\(B\)\(v\)](#) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#). Accordingly, we would expect the state or local government to issue all necessary permits without

further delay. In cases where such action is not taken, we assume, for the reasons discussed below, that the applicant ***9149** would have a straightforward case for obtaining expedited relief in court.³³⁸

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

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

121. Consistent with those sensible considerations reflected in prior precedent, we expect that ***9150** courts will typically find expedited and preliminary and permanent injunctive relief warranted for violations of [Sections 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) and [332\(c\)\(7\)\(B\)\(ii\)](#) of the Act when addressing the circumstances discussed in this Order. Prior findings that preliminary and permanent injunctive relief best advances Congress’s intent in assuring speedy resolution of issues encompassed by [Section 332\(c\)\(7\)\(B\)](#) appear equally true in the case of deployments of Small Wireless Facilities covered by our interpretation of [Section 332\(c\)\(7\)\(B\)\(ii\)](#) in this Third Report and Order.³⁴⁵ Although some courts, in deciding whether an injunction is the appropriate form of relief, have considered whether a siting authority’s delay resulted from bad faith or involved other abusive conduct,³⁴⁶ we do not read the trend in court precedent overall to treat such considerations as more than relevant (as opposed to indispensable) to an injunction. We believe that this approach is sensible because guarding against barriers to the deployment of personal wireless facilities not only advances the goal of [Section 332\(c\)\(7\)\(B\)](#) but also policies set out elsewhere in the Communications Act and 1996 Act, as the Commission recently has recognized in the case of Small Wireless Facilities.³⁴⁷ This is so whether or not these barriers stem from bad faith. Nor do we anticipate that there would be unresolved issues implicating the siting authority’s expertise and therefore requiring remand in most instances.

****45** 122. In light of the more detailed interpretations that we adopt here regarding reasonable time frames for siting authority action on specific categories of requests—including guidance regarding circumstances in which longer time frames nonetheless can be reasonable—we expect that litigation generally will involve issues that can be resolved entirely by the relevant court. Thus, as the Commission has stated in the past, “in the case of a failure to act within the reasonable time frames set forth in our rules, and absent some compelling need for additional time to review the application, we believe that it would also be

appropriate for the courts to treat such circumstances as significant factors weighing in favor of [injunctive] relief.”³⁴⁸ We therefore caution those involved in potential future disputes in this area against placing too much weight on the Commission's recognition that a siting authority's failure to act within the associated timeline might not always result in a preliminary or permanent injunction under the Section 332(c)(7)(B) framework while placing too little weight on the Commission's recognition that policies established by federal communications laws are advanced by streamlining the process for deploying wireless facilities.

123. We anticipate that the traditional requirements for awarding preliminary or permanent injunctive relief would likely be satisfied in most cases and in most jurisdictions where a violation of 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is found. Typically, courts require movants to establish the following elements of preliminary or permanent injunctive relief: (1) actual success on the merits for permanent injunctive relief and likelihood of success on the merits for preliminary injunctive relief, (2) continuing irreparable injury, (3) the absence of an adequate remedy at law, (4) the injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (5) award of injunctive relief would not be adverse to the public interest.³⁴⁹ Actual success on the merits would be *9151 demonstrated when an applicant prevails in its failure-to-act or effective prohibition case; likelihood of success would be demonstrated because, as discussed, missing the shot clocks, depending on the type of deployment, presumptively prohibits the provision of personal wireless services and/or violates Section 332(c)(7)(B)(ii)'s requirement to act within a reasonable period of time.³⁵⁰ Continuing irreparable injury likely would be found because remand to the siting authority “would serve no useful purpose” and would further delay the applicant's ability to provide personal wireless service to the public in the area where deployment is proposed, as some courts have previously determined.³⁵¹ There also would be no adequate remedy at law because applicants “have a federal statutory right to participate in a local [personal wireless services] market free from municipally-imposed barriers to entry,” and money damages cannot directly substitute for this right.³⁵² The public interest and the balance of harms also would likely favor the award of a preliminary or permanent injunction because the purpose of Section 332(c)(7) is to encourage the rapid deployment of personal wireless facilities while preserving, within bounds, the authority of states and localities to regulate the deployment of such facilities, and the public would benefit if further delays in the deployment of such facilities—which a remand would certainly cause—are prevented.³⁵³ We also expect that the harm to the siting authority would be minimal because the only right of which it would be deprived by a preliminary or permanent injunction is the right to act on the siting application beyond a reasonable time period,³⁵⁴ a right that “is not legally cognizable, because under [Sections 332(c)(7)(B)(i)(II) and 332(c)(7)(B)(ii)], the [siting authority] has no right to exercise this power.”³⁵⁵ Thus, in the context of Small Wireless Facilities, we expect that the most appropriate remedy in typical cases involving a violation of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is the award of injunctive relief in the form of an order to issue all necessary authorizations.³⁵⁶

****46** 124. Our approach advances Section 332(c)(7)(B)(v)'s provision that certain siting disputes, including those involving a siting authority's failure to act, shall be heard and decided by a court of competent jurisdiction on an expedited basis. The framework reflected in this Order will provide the courts with substantive guiding principles in adjudicating Section 332(c)(7)(B)(v) cases, but it will not dictate the result or the remedy appropriate for any particular case; the determination of those issues will remain within the courts' domain.³⁵⁷ This accords with the Fifth Circuit's recognition in *City of Arlington* *9152 that the Act could be read “as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision.”³⁵⁸

125. The guidance provided here should reduce the need for, and complexity of, case-by-case litigation and reduce the likelihood of vastly different timing across various jurisdictions for the same type of deployment.³⁵⁹ This clarification, along with the other actions we take in this Third Report and Order, should streamline the courts' decision-making process and reduce the

possibility of inconsistent rulings. Consequently, we believe that our approach helps facilitate courts' ability to "hear and decide such [lawsuits] on an expedited basis," as the statute requires.³⁶⁰

126. Reducing the likelihood of litigation and expediting litigation where it cannot be avoided should significantly reduce the costs associated with wireless infrastructure deployment. For instance, WIA states that if one of its members were to challenge every shot clock violation it has encountered, it would be mired in lawsuits with forty-six localities.³⁶¹ And this issue is likely to be compounded given the expected densification of wireless networks. Estimates indicate that deployments of small cells could reach up to 150,000 in 2018 and nearly 800,000 by 2026.³⁶² If, for example, 30 percent (based on T-Mobile's experience)³⁶³ of these expected deployments are not acted upon within the applicable shot clock ***9153** period, that would translate to 45,000 violations in 2018 and 240,000 violations in 2026.³⁶⁴ These sheer numbers would render it practically impossible to commence [Section 332\(c\)\(7\)\(B\)\(v\)](#) cases for all violations, and litigation costs for such cases likely would be prohibitive and could virtually bar providers from deploying wireless facilities.³⁶⁵

****47** 127. Our updated interpretation of [Section 332\(c\)\(7\)](#) for Small Wireless Facilities effectively balances the interest of wireless service providers to have siting applications granted in a timely and streamlined manner³⁶⁶ and the interest of localities to protect public safety and welfare and preserve their authority over the permitting process.³⁶⁷ Our specialized deployment categories, in conjunction with the acknowledgement that in rare instances, it may legitimately take longer to act, recognize that the siting process is complex and handled in many different ways under various states' and localities' long-established codes. Further, our approach tempers localities' concerns about the inflexibility of the *Wireless Infrastructure NPRM/NOI's* deemed granted proposal because the new remedy we adopt here accounts for the breadth of potentially unforeseen circumstances that individual localities may face and the possibility that additional review time may be needed in truly exceptional circumstances.³⁶⁸ We further find that our interpretive framework will not be unduly burdensome on localities because a number of states have already adopted even more stringent deemed granted remedies.³⁶⁹

128. At the same time, there may be merit in the argument made by some commenters that the FCC has the authority to adopt a deemed granted remedy.³⁷⁰ Nonetheless, we do not find it necessary to decide that issue today, as we are confident that the rules and interpretations adopted here will provide substantial relief, effectively avert unnecessary litigation, allow for expeditious resolution of siting applications, and strike the appropriate balance between relevant policy considerations and statutory ***9154** objectives³⁷¹ guiding our analysis.³⁷²

129. We expect that our decision here will result in localities addressing applications within the applicable shot clocks in a far greater number of cases. Moreover, we expect that the limited instances in which a locality does not issue a decision within that time period will result in an increase in cases where the locality then issues all needed permits. In what we expect would then be only a few cases where litigation commences, our decision makes clear the burden that localities would need to clear in those circumstances.³⁷³ Our updated interpretation of [Section 332](#) for Small Wireless Facilities will help courts to decide failure-to-act cases expeditiously and avoid delays in reaching final dispositions.³⁷⁴ Placing this burden on the siting authority should address the concerns raised by supporters of a deemed granted remedy—that filing suit in court to resolve a siting dispute is burdensome and expensive on applicants, the judicial system, and citizens—because our interpretations should expedite the courts' ***9155** decision-making process.

****48** 130. We find that the more specific deployment categories and shot clocks, which presumptively represent the reasonable period within which to act, will prevent the outcome proponents of a deemed granted remedy seek to avoid: that siting agencies would be forced to reject applications because they would be unable to review the applications within the prescribed shot clock period.³⁷⁵ Because the more specific deployment categories and shot clocks inherently account for the nature and scope of a variety of deployment applications, our new approach should ensure that siting agencies have adequate time to process and decide applications and will minimize the risk that localities will fail to act within the established shot clock periods. Further,

in cases where a siting authority misses the deadline, the opportunity to demonstrate exceptional circumstances provides an effective and flexible way for siting agencies to justify their inaction if genuinely warranted. Our overall framework, therefore, should prevent situations in which a siting authority would feel compelled to summarily deny an application instead of evaluating its merits within the applicable shot clock period.³⁷⁶ We also note that if the approach we take in this Order proves insufficient in addressing the issues it is intended to resolve, we may again consider adopting a deemed granted remedy in the future.

131. Some commenters also recommend that the Commission issue a list of “Best Practices” or “Recommended Practices.”³⁷⁷ The joint comments filed by NATOA and other government associations suggest the “development of an informal dispute resolution process to remove parties from an adversarial relationship to a partnership process designed to bring about the best result for all involved” and the development of “a mediation program which could help facilitate negotiations for deployments for parties who seem to have reached a point of intractability.”³⁷⁸ Although we do not at this time adopt these proposals, we note that the steps taken in this order are intended to facilitate cooperation between parties to reach mutually agreed upon solutions. For example, as explained below, mutual agreement between the parties will toll the running of the shot clock period, thereby allowing parties to resolve disagreements in a collaborative, instead of an adversarial, setting.³⁷⁹

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

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

132. As indicated above, Section 332(c)(7)(B)(ii) requires state and local governments to act “within a reasonable period of time” on “any request for authorization to place, construct, or modify personal wireless service facilities.”³⁸⁰ Neither the 2009 *Declaratory Ruling* nor the 2014 *Wireless Infrastructure Order* addressed the specific types of authorizations subject to this requirement. Industry commenters contend that the shot clocks should apply to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment.³⁸¹ Local siting authorities, on the other hand, argue that a broad application of Section 332 will harm public safety and welfare by not *9156 giving them enough time to evaluate whether a proposed deployment endangers the public.³⁸² They assert that building and encroachment permits should not be subsumed within the shot clocks because these permits incorporate essential health and safety reviews.³⁸³ After carefully considering these arguments, we find that “any request for authorization to place, construct, or modify personal wireless service facilities” under Section 332(c)(7)(B)(ii) means all authorizations necessary for the deployment of personal wireless services infrastructure. This interpretation finds support in the record and is consistent with the courts’ interpretation of this provision and the text and purpose of the Act.

**49 133. The starting point for statutory interpretation is the text of the statute,³⁸⁴ and here, the statute is written broadly, applying to “any” request for authorization to place, construct, or modify personal wireless service facilities. The expansive modifier “any” typically has been interpreted to mean “one or some indiscriminately of whatever kind,” unless Congress “add[ed] any language limiting the breadth of that word.”³⁸⁵ The title of Section 332(c)(7) (“Preservation of local zoning authority”) does not restrict the applicability of this section to zoning permits in light of the clear text of Section 332(c)(7)(B)(ii).³⁸⁶ The text encompasses not only requests for authorization to *place* personal wireless service facilities, e.g., zoning requests, but also requests for authorization to *construct* or *modify* personal wireless service facilities. These activities typically require more than just zoning permits. For example, in many instances, localities require building permits, road closure permits, and the like to make construction or modification possible.³⁸⁷ Accordingly, the fact that the title standing alone could be read *9157 to limit Section 332(c)(7) to zoning decisions does not overcome the specific language of Section 332(c)(7)(B)(ii), which explicitly applies to a variety of authorizations.³⁸⁸

134. The purpose of the statute also supports a broad interpretation. As noted above, the Supreme Court has stated that the 1996 Act was enacted “to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies” by, *inter alia*, reducing “the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.”³⁸⁹ A narrow reading of the scope of Section 332 would frustrate that purpose by allowing local governments to erect impediments to the deployment of personal wireless services facilities by using or creating other forms of authorizations outside of the scope of Section 332(c)(7)(B)(ii).³⁹⁰ This is especially true in jurisdictions requiring multi-departmental siting review or multiple authorizations.³⁹¹

135. In addition, our interpretation remains faithful to the purpose of Section 332(c)(7) to balance Congress's competing desires to preserve the traditional role of state and local governments in regulating land use and zoning, while encouraging the rapid development of new telecommunications technologies.³⁹² Under our interpretation, states and localities retain their authority over personal wireless facilities deployment. At the same time, deployment will be kept on track by ensuring that the entire approval process necessary for deployment is completed within a reasonable period of time, as defined by the shot clocks addressed in this Third Report and Order.

****50** 136. A number of courts have either explicitly or implicitly adopted the same view, that all necessary permits are subject to Section 332. For example, in *Cox Communications PCS, L.P. v. San Marcos*, the court considered an excavation permit application as falling within the parameters of Section 332.³⁹³ In *USCOC of Greater Missouri, LLC v. County of Franklin*, the Eighth Circuit reasoned that “[t]he issuance of the requisite building permits” for the construction of a personal wireless services facility arises under Section 332(c)(7).³⁹⁴ In *Ogden Fire Co. No. 1 v. Upper Chichester Township*, the Third Circuit affirmed the district court's order compelling the township to issue a building permit for the ***9158** construction of a wireless facility after finding that the township had violated Section 332(c)(7).³⁹⁵ In *Upstate Cellular Network v. Auburn*, the court directed the city to approve the application, including site plan approval by the planning board, granting a variance by the zoning authority, and “any other municipal approval or permission required by the City of Auburn and its boards or officers, including but not limited to, a building permit.”³⁹⁶ And in *PI Telecom Infrastructure V, LLC v. Georgetown—Scott County Planning Commission*, the court ordered that the locality grant “any and all permits necessary for the construction of the proposed wireless facility.”³⁹⁷ Our interpretation is also consistent with judicial precedents involving challenges under Section 332(c)(7)(B) to denials by a wide variety of governmental entities, many of which involved variances,³⁹⁸ special use/conditional use permits,³⁹⁹ land disturbing activity and excavation permits,⁴⁰⁰ building permits,⁴⁰¹ and a state department of education permit to install an antenna at a high school.⁴⁰² Notably, a lot of cases have involved local agencies that are separate and distinct from the local zoning authority,⁴⁰³ confirming that Section 332(c)(7)(B) is not limited in application to decisions of zoning authorities. Our interpretation also reflects the examples in the record where providers are required to obtain other types of authorizations besides zoning permits before they can “place, construct, or modify personal wireless service facilities.”⁴⁰⁴

****51** 137. We reject the argument that this interpretation of Section 332 will harm the public because it would “mean that building and safety officials would have potentially only a few days to ***9159** evaluate whether a proposed deployment endangers the public.”⁴⁰⁵ Building and safety officials will be subject to the same applicable shot clock as all other siting authorities involved in processing the siting application, with the amount of time allowed varying in the rare case where officials are unable to meet the shot clock because of exceptional circumstances.

2. Codification of Section 332 Shot Clocks

138. In addition to establishing two new Section 332 shot clocks for Small Wireless Facilities, we take this opportunity to codify our two existing Section 332 shot clocks for siting applications that do not involve Small Wireless Facilities. In the *2009 Declaratory Ruling*, the Commission found that 90 days is a reasonable time frame for processing collocation applications and 150 days is a reasonable time frame to process applications other than collocations.⁴⁰⁶ Since these Section 332 shot clocks

were adopted as part of a declaratory ruling, they were not codified in our rules. In the *Wireless Infrastructure NPRM/NOI*, the Commission sought comment on whether to modify these shot clocks.⁴⁰⁷ We find no need to modify them here and will continue to use these shot clocks for processing [Section 332](#) siting applications that do not involve Small Wireless Facilities.⁴⁰⁸ We do, though, codify these two existing shot clocks in our rules alongside the two newly-adopted shot clocks so that all interested parties can readily find the shot clock requirements in one place.⁴⁰⁹

139. While some commenters argue for a 60-day shot clock for all collocation categories,⁴¹⁰ we conclude that we should retain the existing 90-day shot clock for collocations not involving Small Wireless Facilities. Collocations that do not involve Small Wireless Facilities include deployments of ***9160** larger antennas and other equipment that may require additional time for localities to review and process.⁴¹¹ For similar reasons, we maintain the existing 150-day shot clock for new construction applications that are not for Small Wireless Facilities. While some industry commenters such as WIA, Samsung, and Crown Castle argue for a 90-day shot clock for macro cells and small cells alike, we agree with commenters such as the City of New Orleans that there is a significant difference between the review of applications for a single 175-foot tower versus the review of a Small Wireless Facility with much smaller dimensions.⁴¹²

3. Collocations on Structures Not Previously Zoned for Wireless Use

****52** 140. Wireless industry commenters assert that they should be able to take advantage of the [Section 332](#) collocation shot clock even when collocating on structures that have not previously been approved for wireless use.⁴¹³ Siting agencies respond that the wireless industry is effectively seeking to have both the collocation definition and a reduced shot clock apply to sites that have never been approved by the local government as suitable for wireless facility deployment.⁴¹⁴ We take this opportunity to clarify that for purposes of the [Section 332](#) shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities. As the Commission stated in the *2009 Declaratory Ruling*, “an application is a request for collocation if it does not involve a ‘substantial increase in the size of a tower’ as defined in the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas.”⁴¹⁵ The definition of “[c]ollocation” in the NPA provides for the “mounting or installation of an antenna on an existing tower, *building or structure* for the purpose of transmitting and/or receiving radio frequency signals for communications purposes, *whether or not there is an existing antenna on the structure.*”⁴¹⁶ The NPA’s definition of collocation explicitly encompasses collocations on structures and buildings that have not yet been zoned for wireless use. To interpret the NPA any other way would be unduly narrow and there is no persuasive reason to accept a narrower interpretation. This is particularly true given that the NPA definition of collocation stands in direct contrast with the definition of collocation in the ***9161** Spectrum Act, pursuant to which facilities only fall within the scope of an “eligible facilities request” if they are attached to towers or base stations that have already been zoned for wireless use.⁴¹⁷

4. When Shot Clocks Start and Incomplete Applications

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

****53** 142. With the limited exception described in the next paragraph, we find no cause or basis in the record to alter the Commission's prior determinations, and we now codify them in our rules. Codified rules, easily accessible to applicants and localities alike, should provide helpful clarity. The complaints by states and localities about the sufficiency of some of the applications they receive are adequately addressed by our current policy, particularly as amended below, which preserves the states' and localities' ability to pause review when they find an application to be incomplete.⁴²⁴ We do not find it necessary at this point to shorten our 30-day initial review period for completeness because, as was the case when this review period was adopted in the *2009 Declaratory Ruling*, it remains consistent with review periods for completeness under existing state wireless infrastructure deployment statutes⁴²⁵ and still “gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants ***9162** from a last minute decision that an application should be denied as incomplete.”⁴²⁶

143. However, for applications to deploy Small Wireless Facilities, we implement a modified tolling system designed to help ensure that providers are submitting complete applications on day one. This step accounts for the fact that the shot clocks applicable to such applications are shorter than those established in the *2009 Declaratory Ruling* and, because of which, there may be instances where the prevailing tolling rules would further shorten the shot clocks to such an extent that it might be impossible for siting authorities to act on the application.⁴²⁷ For Small Wireless Facilities applications, the siting authority has 10 days from the submission of the application to determine whether the application is incomplete. The shot clock then resets once the applicant submits the supplemental information requested by the siting authority. Thus, for example, for an application to collocate Small Wireless Facilities, once the applicant submits the supplemental information in response to a siting authority's timely request, the shot clock resets, effectively giving the siting authority an additional 60 days to act on the Small Wireless Facilities collocation application. For subsequent determinations of incompleteness, the tolling rules that apply to non-Small Wireless Facilities would apply—that is, the shot clock would toll if the siting authority provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information.

144. As noted above, multiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities.⁴²⁸ All of these permits are subject to [Section 332](#)'s requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here.

****54** 145. We also find that mandatory pre-application procedures and requirements do not toll the shot clocks.⁴²⁹ Industry commenters claim that some localities impose burdensome pre-application requirements before they will start the shot clock.⁴³⁰ Localities counter that in many instances, applicants submit applications that are incomplete in material respects, that pre-application interactions smooth the application process, and that many of their pre-application requirements go to important health and safety matters.⁴³¹ We conclude that the ability to toll a shot clock when an application is found incomplete or by ***9163** mutual agreement by the applicant and the siting authority should be adequate to address these concerns. Much like a requirement to file applications one after another, requiring pre-application review would allow for a complete circumvention of the shot clocks by significantly delaying their start date. An application is not ruled on within “a reasonable period of time after the request is duly filed” if the state or locality takes the full ordinary review period after having delayed the filing in the first instance due to required pre-application review. Indeed, requiring a pre-application review before an application may be filed is similar to imposing a moratorium, which the Commission has made clear does not stop the shot clocks from running.⁴³² Therefore, we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed,⁴³³ the shot clock begins to run when the application is proffered. In other words, the request is “duly filed” at that time,⁴³⁴ notwithstanding the locality's refusal to accept it.

146. That said, we encourage *voluntary* pre-application discussions, which may well be useful to both parties. The record indicates that such meetings can clarify key aspects of the application review process, especially with respect to large submissions or applicants new to a particular locality's processes, and may speed the pace of review.⁴³⁵ To the extent that an applicant voluntarily engages in a pre-application review to smooth the way for its filing, the shot clock will begin when an application is filed, presumably after the pre-application review has concluded.

147. We also reiterate, consistent with the *2009 Declaratory Ruling*, that the remedies granted under [Section 332\(c\)\(7\)\(B\)\(v\)](#) are independent of, and in addition to, any remedies that may be available under state or local law.⁴³⁶ Thus, where a state or locality has established its own shot clocks, an applicant may pursue any remedies granted under state or local law in cases where the siting authority fails to act within those shot clocks.⁴³⁷ However, the applicant must wait until the Commission shot clock period has expired to bring suit for a "failure to act" under [Section 332\(c\)\(7\)\(B\)\(v\)](#).⁴³⁸

V. PROCEDURAL MATTERS

****55** 148. *Final Regulatory Flexibility Analysis*. With respect to this Third Report and Order, a Final Regulatory Flexibility Analysis (FRFA) is contained in Appendix C. As required by Section 603 of ***9164** the Regulatory Flexibility Act, the Commission has prepared a FRFA of the expected impact on small entities of the requirements adopted in this Third Report and Order. The Commission will send a copy of the Third Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

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

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

VI. ORDERING CLAUSES

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

152. IT IS FURTHER ORDERED that Part 1 of the Commission's Rules is AMENDED as set forth in Appendix A, and that these changes SHALL BE EFFECTIVE 90 days after publication in the Federal Register.

153. IT IS FURTHER ORDERED that this Third Report and Order SHALL BE effective 90 days after its publication in the Federal Register. The Declaratory Ruling and the obligations set forth therein ARE EFFECTIVE on the same day that this Third Report and Order becomes effective. It is our intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

****56** 154. IT IS FURTHER ORDERED that, pursuant to [47 CFR § 1.4\(b\)\(1\)](#), the period for filing petitions for reconsideration or petitions for judicial review of this Declaratory Ruling and Third Report and Order will commence on the date that a summary of this Declaratory Ruling and Third Report and Order is published in the Federal Register.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Erratum

Erratum Released: November 29, 2018

By the Chief, Wireless Telecommunications Bureau:

On September 27, 2018, the Commission released a *Declaratory Ruling and Third Report and Order*, FCC 18-133, in the above-captioned proceedings. This Erratum amends the *Declaratory Ruling and Third Report and Order* as indicated below:

1. Footnote 427, on page 75, is corrected to read as follows:

“*See, e.g.,* Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter at 1; Letter from Brad Cole, Executive Director, Illinois Municipal League, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al. at 1 (filed Sept. 14, 2018); Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 2.”

This Erratum also amends Appendix A of the *Declaratory Ruling and Third Report and Order* as indicated below:

2. Paragraph 3 is corrected to read as follows:

“Redesignate § 1.40001 as § 1.6100, remove and reserve paragraph (a) of newly redesignated § 1.6100, and revise paragraph (b)(7)(vi) of newly redesignated § 1.6100 by changing “1.40001(b)(7)(i)(iv)” to “1.6100(b)(7)(i)-(iv).”DD'DD'

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale
Chief
Wireless Telecommunications Bureau

***9165 APPENDIX A**

Final Rules

Streamlining State and Local Review of Wireless Facility Siting Applications

****57** Part 1—Practice and Procedure

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

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

§ 1.6001 Purpose.

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

§ 1.6002 Definitions.

Terms used in this subpart have the following meanings:

- (a) *Action* or *to act* on a siting application means a siting authority's grant of a siting application or issuance of a written decision denying a siting application.
- (b) *Antenna*, consistent with section 1.1320(d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this title.
- (c) *Antenna equipment*, consistent with section 1.1320(d), means equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.
- (d) *Antenna facility* means an antenna and associated antenna equipment.
- (e) *Applicant* means a person or entity that submits a siting application and the agents, employees, and contractors of such person or entity.
- (f) *Authorization* means any approval that a siting authority must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit.
- (g) *Collocation*, consistent with section 1.1320(d) and the Nationwide Programmatic Agreement (NPA) for the Collocation of Wireless Antennas, Appendix B of this part, section I.B, means—
 - (1) Mounting or installing an antenna facility on a pre-existing structure, and/or
 - (2) Modifying a structure for the purpose of mounting or installing an antenna facility on that structure.
 - (3) The definition of “collocation” in paragraph (b)(2) of section 1.6100 applies to the term as used in that section.

***9166** (h) *Deployment* means placement, construction, or modification of a personal wireless service facility.

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

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

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

(l) *Small wireless facilities*, consistent with section 1.1312(e)(2), are facilities that meet each of the following conditions:

(1) The facilities—

(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or

(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

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

(5) The facilities are not located on Tribal lands, as defined under [36 CFR 800.16\(x\)](#); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in [section 1.1307\(b\)](#).

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

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

***9167 § 1.6003 Reasonable periods of time to act on siting applications**

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

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

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

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

(c) *Presumptively reasonable periods of time.*

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

(i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.

(ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.

(iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days.

(iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.

(2) *Batching.*

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

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

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

(d) *Tolling period.* Unless a written agreement between the applicant and the siting authority provides otherwise, the tolling period for an application (if any) is as set forth below.

(1) *For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after submission that the application is materially incomplete, and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information, the shot clock date calculation shall restart at zero on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete.*

***9168** (2) *For all other initial applications, the tolling period shall be the number of days from —*

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

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

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

****60** (3) *For resubmitted applications following a notice of deficiency*, the tolling period shall be the number of days from—
(i) The day after the date when the siting authority notifies the applicant in writing that the applicant's supplemental submission was not sufficient to render the application complete and clearly and specifically identifies the missing documents or information that need to be submitted based on the siting authority's original request under paragraph (d)(1) or paragraph (d)(2) of this section, until

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

(iii) But only if the notice pursuant to paragraph (d)(3)(i) is effectuated on or before the 10th day after the date when the applicant makes a supplemental submission in response to the siting authority's request under paragraph (d)(1) or paragraph (d)(2) of this section.

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

3. Redesignate [section 1.40001](#) as section 1.6100, and remove and reserve paragraph (a).

4. Remove subpart CC.

***9169 APPENDIX B**

Comments and Reply Comments

Comments

5G Americas

Aaron Rosenzweig

ACT ~ The App Association

Advisory Council on Historic Preservation

Advisors to the International EMF Scientist Appeal

African American Mayors Association

Agua Caliente Band of Cahuilla Indians Tribal Historic Preservation Office

Alaska Department of Transportation & Public Facilities

Alaska Native Health Board

Alaska Office of History and Archaeology

Alexandra Ansell

American Association of State Highway and Transportation Officials

American Bird Conservancy

American Cable Association

American Petroleum Institute

American Public Power Association

Angela Fox

Arctic Slope Regional Corporation

Arizona State Parks & Trails, State Historic Preservation Office

Arkansas SHPO

Arnold A. McMahon

Association of American Railroads

****61** AT&T

B. Golomb

Bad River Band of Lake Superior Tribe of Chippewa Indians

Benjamin L. Yousef

BioInitiative Working Group

Blue Lake Rancheria

Board of County Road Commissioners of the County of Oakland

Bristol Bay Area Health Corporation

Cahuilla Band of Indians

California Office of Historic Preservation, Department of Parks and Recreation

California Public Utilities Commission

Cape Cod Bird Club, Inc.

Catawba Indian Nation Tribal Historic Preservation Office

Charter Communications, Inc.

Cheyenne River Sioux Tribe Cultural Preservation Office

Chickasaw Nation

Chippewa Cree Tribe

Choctaw Nation of Oklahoma

Chuck Matzker

Cindy Li

Cindy Russell

Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee

Citizen Potawatomi Nation

Citizens Against Government Waste

***9170** City and County of San Francisco

City of Alexandria, Virginia; Arlington County, Virginia; and Henrico County, Virginia

City of Arlington, Texas

City of Austin, Texas

City of Bellevue, City of Bothell, City of Burien, City of Ellensburg, City of Gig Harbor, City of Kirkland, City of Mountlake Terrace, City of Mukilteo, City of Normandy Park, City of Puyallup, City of Redmond, and City of Walla Walla

City of Chicago

City of Claremont (Tony Ramos, City Manager)

City of Eden Prairie, MN

City of Houston

City of Irvine, California

City of Kenmore, Washington, and David Baker, Vice-Chair, National League of Cities Information Technology and Communications Committee

City of Lansing, Michigan City of Mukilteo

City of New Orleans, Louisiana City of New York

City of Philadelphia

City of Springfield, Oregon

Cityscape Consultants, Inc.

Coalition for American Heritage, Society for American Archaeology, American Cultural Resources Association, Society for Historical Archaeology, and American Anthropological Association

Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)

Colorado River Indian Tribes

Colorado State Historic Preservation Office

Comcast Corporation

Commissioner Sal Pace, Pueblo Board of County Commissioners

Community Associations Institute

Competitive Carriers Association

CompTIA (The Computing Technology Industry Association)

Computer & Communications Industry Association (CCIA)

Confederated Tribes of the Colville Reservation

Confederated Tribes of the Umatilla Indian Reservation Cultural Resources Protection Program

Consumer Technology Association

Conterra Broadband Services, Southern Light, LLC, and Uniti Group, Inc.

Critical Infrastructure Coalition

Crow Creek Sioux Tribe

Crown Castle

****62** CTIA

CTIA and Wireless Infrastructure Association

David Roetman, Minnehaha County GOP Chairman

Defenders of Wildlife

Department of Arkansas Heritage (Arkansas Historic Preservation Program)

DuPage Mayors and Managers Conference

East Bay Municipal Utility District

Eastern Shawnee Tribe of Oklahoma

Edward Czelada

Elijah Mondy

Elizabeth Doonan

***9171** Ellen Marks

EMF Safety Network, Ecological Options Network

Environmental Health Trust

ExteNet Systems, Inc.

Fairfax County, Virginia

FibAire Communications, LLC d/b/a AireBeam

Florida Coalition of Local Governments

Fond du Lac Band of Lake Superior Chippewa

Forest County Potawatomi Community of Wisconsin

Fort Belknap Indian Community

Free State Foundation

General Communication, Inc.

Georgia Department of Transportation

Georgia Historic Preservation Division

Georgia Municipal Association, Inc.

Gila River Indian Community

Greywale Advisors

History Colorado (Colorado State Historic Preservation Office)

Hongwei Dong

Hualapai Department of Cultural Resources

Illinois Department of Transportation

Illinois Municipal League

INCOMPAS

Information Technology and Innovation Foundation

International Telecommunications Users Group

Jack Li

Jackie Cale

Jerry Day

Joel M. Moskowitz, Ph.D.

Jonathan Mirin

Joyce Barrett

Karen Li

Karen Spencer

Karon Gubbrud

Kate Kheel

Kaw Nation

Kevin Mottus

Keweenaw Bay Indian Community

Kialegee Tribal Town

League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities League of Minnesota Cities

Leo Cashman

Lower Brule Sioux Tribe Li Sun

Lightower Fiber Networks Lisbeth Britt

Lower Brule Sioux Tribe

Maine Department of Transportation Marty Feffer

Mary Whisenand, Iowa Governor's Commission on Community Action Agencies

Mashantucket (Western) Pequot Tribe

Mashpee Wampanoag Tribe

***9172** Matthew Goulet

Mayor Patrick Furey, City of Torrance, California

McLean Citizens Association

Miami Tribe of Oklahoma

Missouri State Historic Preservation Office

Mobile Future

Mobilitie, LLC

Mohegan Tribe of Indians of Connecticut

Montana State Historic Preservation Office

Monte R. Lee and Company

Muckleshoot Indian Tribe

Muscogee (Creek) Nation

National Association of Tower Erectors (NATE)

National Association of Tribal Historic Preservation Officers

National Black Caucus of State Legislators

National Conference of State Historic Preservation Officers

National Congress of American Indians

National Congress of American Indians, National Association of Tribal Historic Preservation Officers, and United South and Eastern Tribes Sovereignty Protection Fund

National Congress of American Indians and United South and Eastern Tribes Sovereignty Protection Fund

****63** National League of Cities

National League of Cities, United States Conference of Mayors, International Municipal Lawyers Association, Government Finance Officers Association, National Association of Counties, National Association of Regional Councils, National Association of Towns and Townships, and National Association of Telecommunications Officers and Advisors

National Tribal Telecommunications Association

National Trust for Historic Preservation

Native Public Media

NATOA

Natural Resources Defense Council

Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission

Naveen Albert

NCTA—The Internet & Television Association

nepsa solutions LLC

New Mexico Department of Cultural Affairs, Historic Preservation Division

Nez Perce Tribe

Nina Beety

Nokia

North Carolina State Historic Preservation Office

Northern Cheyenne Tribal Historic Preservation Office

NTCA—The Rural Broadband Association

Office of Historic Preservation for the Mashantucket Pequot Tribal Nation of Connecticut

Ohio State Historic Preservation Office

Oklahoma History Center State Historic Preservation Office

Olemara Peters

Omaha Tribe of Nebraska

ONE Media, LLC

Oregon State Historic Preservation Office

Osage Nation

Otoe-Missouria Tribe

Pala Band of Mission Indians

***9173** Patrick Wronkiewicz

Pechanga Band of Luiseno Indians

Pennsylvania State Historic Preservation Office

Prairie Island Indian Community

PTA-FLA, Inc.

Pueblo of Laguna

Pueblo of Pojoaque Pueblo of Tesuque

Puerto Rico State Historic Preservation Office

Quad Cities Cable Communications Commission

Quapaw Tribe of Oklahoma

R Street Institute

Rebecca Carol Smith

Red Cliff Band of Lake Superior Chippewa

Representative Tom Sloan, State of Kansas House of Representatives

Representatives Anna G. Eshoo, Frank Pallone, Jr., and Raul Ruiz, U.S. House of Representatives

Rhode Island Historical Preservation and Heritage Commission

Rosebud Sioux Tribe Tribal Historic Preservation Cultural Resource Management Office

Ronald M. Powell, Ph.D.

S. Quick

Sacred Wind Communications, Inc.

Samsung Electronics America, Inc.

Santa Clara Pueblo

Sault Ste. Marie Tribe of Chippewa Indians

SCAN NATOA, Inc.

Seminole Nation of Oklahoma

Seminole Tribe of Florida

Senator Duane Ankney, Montana State

Senate Shawnee Tribe

Sisseton Wahpeton Oyate

Skokomish Indian Tribe Tribal Historic Preservation Office

Skull Valley Band of Goshute

Smart Communities and Special Districts Coalition

Soula Culver

Sprint

Standing Rock Sioux Tribe

Starry, Inc.

State of Washington Department of Archaeology & Historic Preservation

Sue Present

Swinomish Indian Tribal Community

Table Mountain Rancheria Tribal Government Office

Tanana Chiefs Conference

****64** Telecommunications Industry Association

Texas Department of Transportation

Texas Historical Commission

Thlopthlocco Tribal Town

T-Mobile USA, Inc.

Tonkawa Tribe of Oklahoma

Triangle Communication System, Inc.

Twenty-Nine Palms Band of Mission Indians

United Keetoowah Band of Cherokee Indians In Oklahoma

Utah Department of Transportation

***9174** Ute Mountain Ute Tribe

Utilities Technology Council

Verizon

Wampanoag Tribe of Gay Head (Aquinnah)

WEC Energy Group, Inc.

Wei Shen

Wei-Ching Lee, MD, California Medical Association Delegate of Los Angeles County

Winnebago Tribe of Nebraska

Wireless Infrastructure Association

Wireless Internet Service Providers Association

Xcel Energy Services Inc.

Reply Comments

Alaska State Historic Preservation Office

American Cable Association

American Public Power Association

Association of American Railroads

California Public Utilities Commission

Catherine Kleiber

Chippewa Cree Tribe

Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee

City of Baltimore, Maryland

City of New York

City of Philadelphia

Colorado Communications and Utility Alliance (CCUA), Rainier Communications Commission (RCC), City of Seattle, Washington, City of Tacoma, Washington, King County, Washington, Jersey Access Group (JAG), and Colorado Municipal League (CML)

Comcast Corporation

Communications Workers of America

Competitive Carriers Association

Consumer Technology Association

Conterra Broadband Services, Southern Light, LLC, and Uniti Group Inc.

Critical Infrastructure Coalition

CTIA

Dan Kleiber

Enterprise Wireless Alliance

Environmental Health Trust

ExteNet Systems, Inc.

Florida Coalition of Local Governments

Confederated Tribes of Grand Ronde Community of Oregon Historic Preservation Department

INCOMPAS

Irregulators

League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities

National Association of Regulatory Utility Commissioners

National Association of Telecommunications Officers and Advisors, National League of Cities, National Association of Towns and Townships, National Association of Regional Councils, United States Conference of Mayors, and Government Finance Officers Association

National Congress of American Indians, United South and Eastern Tribes Sovereignty Protection Fund, and National Association of Tribal Historic Preservation Officers

National Organization of Black Elected Legislative (NOBEL) Women

National Rural Electric Cooperative Association

***9175** Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission

NCTA—The Internet & Television Association

Pueblo of Acoma

Puerto Rico Telephone Company, Inc., d/b/a Claro

****65** Quintillion Networks, LLC, and Quintillion Subsea Operations, LLC

Rebecca Carol Smith

SDN Communications

Skyway Towers, LLC

SmallCellSite.Com

Smart Communities and Special Districts Coalition

Sue Present

The Greenlining Institute

T-Mobile USA, Inc.

Triangle Communication System, Inc.

United States Conference of Mayors

Verizon

Washington, D.C. Office of the Chief Technology Officer

Wireless Internet Service Providers Association

Xcel Energy Services Inc.

*9176 APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (NPRM)*, released in April 2017.² The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are addressed below in Section B. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for and Objectives of the Rules

2. In the *Third Report and Order*, the Commission continues its efforts to promote the timely buildout of wireless infrastructure across the country by eliminating regulatory impediments that unnecessarily delay bringing personal wireless services to consumers. The record shows that lengthy delays in approving siting applications by siting agencies has been a persistent problem.⁴ With this in mind, the *Third Report and Order* establishes and codifies specific rules concerning the amount of time siting agencies may take to review and approve certain categories of wireless infrastructure siting applications. More specifically, the Commission addresses its [Section 332](#) shot clock rules for infrastructure applications which will be presumed reasonable under the Communications Act. As an initial matter, the Commission establishes two new shot clocks for Small Wireless Facilities applications. For collocation of Small Wireless Facilities on preexisting structures, the Commission adopts a 60-day shot clock which applies to both individual and batched applications. For applications associated with Small Wireless Facilities new construction we adopt a 90-day shot clock for both individual and batched applications.⁵ The Commission also codifies two existing [Section 332](#) shot clocks for all other Non-Small Wireless Facilities that were established in the *2009 Declaratory Ruling* without codification.⁶ These existing shot clocks require 90-days for processing of all other Non-Small Wireless Facilities collocation applications, and 150-days for processing of all other Non-Small Wireless Facilities applications other than collocations.

****66** 3. The *Third Report and Order* addresses other issues related to both the existing and new shot clocks. In particular we address the specific types of authorizations subject to the “Reasonable Period of Time” provisions of [Section 332\(c\)\(7\)\(B\)\(ii\)](#), finding that “any request for authorization to place, construct, or modify personal wireless service facilities” under [Section 332\(c\)\(7\)\(B\)\(ii\)](#) means all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment of personal wireless services infrastructure.⁷ The Commission also addresses collocation on structures not previously zoned for wireless use,⁸ when the four [Section 332](#) shot clocks begin to run,⁹ ***9177** the impact of incomplete applications on our [Section 332](#) shot clocks,¹⁰ and how state imposed shot clocks remedies effect the Commission's [Section 332](#) shot clocks remedies.¹¹

4. The Commission discusses the appropriate judicial remedy that applicants may pursue in cases where a siting authority fails to act within the applicable shot clock period.¹² In those situations, applicants may commence an action in a court of competent jurisdiction alleging a violation of [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) and seek injunctive relief granting the application.

Notwithstanding the availability of a judicial remedy if a shot clock deadline is missed, the Commission recognizes that the [Section 332](#) time frames might not be met in exceptional circumstances and has refined its interpretation of the circumstances when a period of time longer than the relevant shot clock would nonetheless be a reasonable period of time for action by a siting agency.¹³ In addition, a siting authority that is subject to a court action for missing an applicable shot clock deadline has the opportunity to demonstrate that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services thereby rebutting the effective prohibition presumption.

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

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

****67** 6. Only one party—the Smart Communities and Special Districts Coalition—filed comments specifically addressing the rules and policies proposed in the IRFA. They argue that any shortening or alteration of the Commission's existing shot clocks or the adoption of a deemed granted remedy will adversely affect small local governments, special districts, property owners, small developers, and others by placing their siting applications behind wireless provider siting applications.¹⁴ Subsequently, NATOA filed comments concerning the draft FRFA.¹⁵ NATOA argues that the new shot clocks impose burdens on local governments and particularly those with limited resources. NATOA asserts that the new shot clocks will spur more deployment applications than localities currently process.

7. These arguments, however, fail to acknowledge that [Section 332](#) shot clocks have been in place for years and reflect Congressional intent as seen in the statutory language of [Section 332](#). The record in this proceeding demonstrates the need for, and reasonableness of, expediting the siting review of certain facility deployments.¹⁶ More streamlined procedures are both reasonable and necessary to provide greater predictability. The current shot clocks do not reflect the evolution of the application review process and evidence that localities can complete reviews more quickly than was the case when the original shot clocks were adopted nine years ago. Localities have gained significant experience processing wireless siting applications and several jurisdictions already have in place laws that require applications to be processed in less time than the Commission's new shot clocks. With the passage of time, siting agencies have become more efficient in processing siting applications and this, in turn, should reduce any economic burden the Commission's new shot clock provisions have on them.

8. The Commission has carefully considered the impact of its new shot clocks on siting authorities and has established shot clocks that take into consideration the nature and scope of siting requests by establishing shot clocks of different lengths of time that depend on the nature of the siting request at issue.¹⁷ The length of these shot clocks is based in part on the need to ensure that local governments have ample time to take any steps needed to protect public safety and welfare and to process other pending utility applications.¹⁸ Since local siting authorities have gained experience in processing siting requests in an expedited fashion, they should be able to comply with the Commission's new shot clocks.

9. The Commission has taken into consideration the concerns of the Smart Communities and Special Districts Coalition and NATOA. It has established shot clocks that will not favor wireless providers over other applicants with pending siting applications. Further, instead of adopting a deemed granted remedy that would grant a siting application when a shot clock lapses without a decision on the merits, the Commission provides guidance as to the appropriate judicial remedy that applicants may pursue and examples of exceptional circumstance where a siting authority may be justified in needing additional time to review a siting application then the applicable shot clock allows.¹⁹ Under this approach, the applicant may seek injunctive relief as long as several minimum requirements are met. The siting authority, however, can rebut the presumptive reasonableness of

the applicable shot clock under certain circumstances. The circumstances under which a sitting authority might have to do this will be rare. Under this carefully crafted approach, the interests of siting applicants, siting authorities, and citizens are protected.

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

****68** 10. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.²⁰

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

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

12. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.²¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²³ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²⁴

13. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.²⁵ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.²⁶ These types of small businesses represent 99.9 percent of all businesses in the United States which translates to 28.8 million businesses.²⁷

14. Next, the type of small entity described as a “small organization” is generally “any not- for-profit enterprise which is independently owned and operated and is not dominant in its field.”²⁸ Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).²⁹

15. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”³⁰ U.S. Census Bureau data from the 2012 Census of Governments³¹ indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.³² Of this number there were ***9180** 37, 132 General purpose governments (county,³³ municipal and town or township)³⁴ with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts³⁵ and special districts)³⁶ with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.³⁷ Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”³⁸

****69** 16. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless Internet access, and wireless video services.³⁹ The appropriate size standard under SBA rules is that such a business

is small if it has 1,500 or fewer employees.⁴⁰ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁴¹ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁴² Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications *9181 carriers (except satellite) are small entities.

17. The Commission's own data—available in its Universal Licensing System— indicate that, as of May 17, 2018, there are 264 Cellular licensees that will be affected by our actions.⁴³ The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.⁴⁴ Of this total, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁴⁵ Thus, using available data, we estimate that the majority of wireless firms can be considered small.

18. *Personal Radio Services.* Personal radio services provide short-range, low-power radio for personal communications, radio signaling, and business communications not provided for in other services. Personal radio services include services operating in spectrum licensed under Part 95 of our rules.⁴⁶ These services include Citizen Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service.⁴⁷ There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. All such entities in this category are wireless, therefore we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which the SBA's small entity size standard is defined as those entities employing 1,500 or fewer persons.⁴⁸ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁴⁹ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁵⁰ Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. We note however that many of the licensees in this category are individuals and not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities that may be affected by our actions in this proceeding.

****70** 19. *Public Safety Radio Licensees.* Public Safety Radio Pool licensees as a general matter, include police, fire, local government, forestry conservation, highway maintenance, and emergency *9182 medical services.⁵¹ Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁵² For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁵³ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁵⁴ Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small. With respect to local governments, in particular, since many governmental entities comprise the licensees for these services, we include under public safety services the number of government entities affected. According to Commission records, there are a total of approximately 133,870 licenses within these services.⁵⁵ There are 3,121 licenses in the 4.9 GHz band, based on an FCC Universal Licensing System search of March 29, 2017.⁵⁶ We estimate that fewer than 2,442 public safety radio licensees hold these licenses because certain entities may have multiple licenses.

20. *Private Land Mobile Radio Licensees*. Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications.⁵⁷ The appropriate size standard for this category under SBA rules is that such a business *9183 is small if it has 1,500 or fewer employees.⁵⁸ For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁵⁹ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁶⁰ Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

**71 21. According to the Commission's records, a total of approximately 400,622 licenses comprise PLMR users.⁶¹ Of this number there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by the *Third Report and Order*.⁶² The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

22. *Multiple Address Systems*. Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define "small entity" for MAS licensees as an entity that has average annual gross revenues of less than \$15 million over the three previous calendar years.⁶³ A "Very small business" is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than \$3 million over the preceding three calendar years.⁶⁴ The SBA has approved these definitions.⁶⁵ The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications.

23. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS *9184 licenses in 176 EAs was conducted.⁶⁶ Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

24. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The closest applicable definition of a small entity is the "Wireless Telecommunications Carriers (except Satellite)" definition under the SBA rules.⁶⁷ The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁶⁸ For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.⁶⁹ Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.⁷⁰ Thus under this category and the associated small business size standard, the Commission estimates that the majority of firms that may be affected by our action can be considered small.

****72** 25. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high-speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).⁷¹

26. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.⁷² The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent ***9185** BRS licensees do not meet the small business size standard).⁷³ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

27. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.⁷⁴ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.⁷⁵ Auction 86 concluded in 2009 with the sale of 61 licenses.⁷⁶ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

****73** 28. *EBS* - The Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.⁷⁷ The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees.⁷⁸ U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.⁷⁹ Of this total, 3,083 operated with fewer than 1,000 employees.⁸⁰ Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census Bureau data, the Commission's Universal Licensing System indicates that as of October 2014, there are 2,206 active EBS licenses. The Commission estimates that of these 2,206 licenses, the majority are held by non-profit educational ***9186** institutions and school districts, which are by statute defined as small businesses.⁸¹

29. *Location and Monitoring Service (LMS)*. LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$15 million.⁸² A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed \$3 million.⁸³ These definitions have been approved

by the SBA.⁸⁴ An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

30. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”⁸⁵ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.⁸⁶ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.⁸⁷ The 2012 Economic Census reports that 751 firms in this category operated in that year.⁸⁸ Of that number, 656 had annual receipts of \$25,000,000 or less, 25 had annual receipts between \$25,000,000 and \$49,999,999 and 70 had annual receipts of \$50,000,000 or more.⁸⁹ Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

****74** 31. The Commission has estimated the number of licensed commercial television stations to be 1,377.⁹⁰ Of this total, 1,258 stations (or about 91 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384.⁹¹ Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how ***9187** many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations.⁹² Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

32. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations must be included.⁹³ Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

33. *Radio Stations.* This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.”⁹⁴ The SBA has established a small business size standard for this category as firms having \$38.5 million or less in annual receipts.⁹⁵ Economic Census data for 2012 show that 2,849 radio station firms operated during that year.⁹⁶ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.⁹⁷ Therefore, based on the SBA's size standard the majority of such entities are small entities.

****75** 34. According to Commission staff review of the BIA/Kelsey, LLC's Publications, Inc. Media Access Pro Radio Database (BIA) as of January 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition.⁹⁸ The Commission has estimated the number of

licensed commercial AM radio stations to be 4,633 stations and the number of commercial FM radio stations to be 6,738, for a total number of 11,371.⁹⁹ We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128.¹⁰⁰ Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

***9188** 35. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.¹⁰¹ The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation.¹⁰² We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

36. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.¹⁰³ This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.¹⁰⁴ Programming may originate in their own studio, from an affiliated network, or from external sources.¹⁰⁵ The SBA has established a small business size standard which consists of all radio stations whose annual receipts are \$38.5 million dollars or less.¹⁰⁶ U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.¹⁰⁷ Of that number, 2,806 operated with annual receipts of less than \$25 million per year, 17 with annual receipts between \$25 million and \$49,999,999 million and 26 with annual receipts of \$50 million or more.¹⁰⁸ Therefore, based on the SBA's size standard, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

****76** 37. *Multichannel Video Distribution and Data Service (MVDDS).* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.¹⁰⁹ These definitions were approved by the SBA.¹¹⁰ On January 27, 2004, the Commission ***9189** completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.¹¹¹ Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.¹¹²

38. *Satellite Telecommunications.* This category comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."¹¹³ Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of \$32.5 million or less in average annual receipts, under SBA rules.¹¹⁴ For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.¹¹⁵ Of this total, 299 firms had annual receipts of less than \$25 million.¹¹⁶ Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

39. *All Other Telecommunications*. The “All Other Telecommunications” category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.¹¹⁷ This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.¹¹⁸ Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.¹¹⁹ The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.¹²⁰ For this category, U.S. Census data for 2012 show that there *9190 were 1,442 firms that operated for the entire year.¹²¹ Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million and 42 firms had annual receipts of \$25 million to \$49, 999,999.¹²² Thus, a majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

**77 40. *Fixed Microwave Services*. Microwave services include common carrier,¹²³ private- operational fixed,¹²⁴ and broadcast auxiliary radio services.¹²⁵ They also include the Local Multipoint Distribution Service (LMDS),¹²⁶ the Digital Electronic Message Service (DEMS),¹²⁷ the 39 GHz Service (39 GHz),¹²⁸ the 24 GHz Service,¹²⁹ and the Millimeter Wave Service¹³⁰ where licensees can choose between common carrier and non-common carrier status.¹³¹ At present, there are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.¹³² The Commission has not yet defined a small business size standard for microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.¹³³ U.S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year.¹³⁴ Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

41. The Commission notes that the number of firms does not necessarily track the number of *9191 licensees. The Commission also notes that it does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. The Commission estimates however, that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

42. *Non-Licensee Owners of Towers and Other Infrastructure*. Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration (“ASR”) system and comply with applicable rules regarding review for impact on the environment and historic properties.

**78 43. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a “Constructed” status and 13,987 registration records reflecting a “Granted, Not Constructed” status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.¹³⁵ Regarding towers that do not require ASR registration, we do not collect information as to the number

of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category “Tower Owners.” Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

44. The closest applicable SBA category is All Other Telecommunications, and the appropriate size standard consists of all such firms with gross annual receipts of \$32.5 million or less.¹³⁶ For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.¹³⁷ Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million and 15 firms had annual receipts of \$25 million to \$49,999,999.¹³⁸ Thus, under this SBA size standard a majority of the firms potentially affected by our action can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

45. The *Third Report and Order* does not establish any reporting, recordkeeping, or other ***9192** compliance requirements for companies involved in wireless infrastructure deployment.¹³⁹ In addition to not adopting any reporting, recordkeeping or other compliance requirements, the Commission takes significant steps to reduce regulatory impediments to infrastructure deployment and, therefore, to spur the growth of personal wireless services. Under the Commission's approach, small entities as well as large companies will be assured that their deployment requests will be acted upon within a reasonable period of time and, if their applications are not addressed within the established time frames, applicants may seek injunctive relief granting their siting applications. The Commission, therefore, has taken concrete steps to relieve companies of all sizes of uncertainty and has eliminated unnecessary delays.

****79** 46. The *Third Report and Order* also does not impose any reporting or recordkeeping requirements on state and local governments. While some commenters argue that additional shot clock classifications would make the siting process needlessly complex without any proven benefits, the Commission concludes that any additional administrative burden from increasing the number of [Section 332](#) shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.¹⁴⁰ The Commission's actions are consistent with the statutory language of [Section 332](#) and therefore reflect Congressional intent. Further, siting agencies have become more efficient in processing siting applications and will be able to take advantage of these efficiencies in meeting the new shot clocks. As a result, the additional shot clocks that the Commission adopts will foster the deployment of the latest wireless technology and serve consumer interests.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

47. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”¹⁴¹

48. The steps taken by the Commission in the *Third Report and Order* eliminate regulatory burdens for small entities as well as large companies that are involved with the deployment of personal wireless services infrastructure. By establishing shot clocks and guidance on injunctive relief for personal wireless services infrastructure deployments, the Commission has standardized and streamlined the permitting process. These changes will significantly minimize the economic burden of the siting process on all entities, including small entities, involved in deploying personal wireless services infrastructure. The record shows

that permitting delays imposes significant economic and financial burdens on companies with pending wireless infrastructure permits. Eliminating permitting delays will remove the associated cost burdens and enabling significant public interest benefits by speeding up the deployment of personal wireless services and infrastructure. In addition, siting agencies will be able to utilize the efficiencies that they have gained over the years processing siting applications to minimize financial impacts.

****80** 49. The Commission considered but did not adopt proposals by commenters to issue “Best Practices” or “Recommended Practices,”¹⁴² and to develop an informal dispute resolution process and ***9193** mediation program,¹⁴³ noting that the steps taken in the *Third Report and Order* address the concerns underlying these proposals to facilitate cooperation between parties to reach mutually agreed upon solutions.¹⁴⁴ The Commission anticipates that the changes it has made to the permitting process will provide significant efficiencies in the deployment of personal wireless services facilities and this in turn will benefit all companies, but particularly small entities, that may not have the resources and economies of scale of larger entities to navigate the permitting process. By adopting these changes, the Commission will continue to fulfill its statutory responsibilities, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of personal wireless services facilities and infrastructure across the country.

Report to Congress

50. The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.¹⁴⁵ In addition, the Commission will send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order* and FRFA (or summaries thereof) also will be published in the *Federal Register*.¹⁴⁶

***9194** STATEMENT OF CHAIRMAN AJIT PAI

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84

Perhaps the defining characteristic of the communications sector over the past decade is that the world is going wireless. The smartphone's introduction in 2007 may have seemed an interesting novelty to some at the time, but it was a precursor of a transformative change in how consumers access and use the Internet. 4G LTE was a key driver in that change.

Today, a new transition is at hand as we enter the era of 5G. At the FCC, we're working hard to ensure that the United States leads the world in developing this next generation of wireless connectivity so that American consumers and our nation's economy enjoy the immense benefits that 5G will bring.

Spectrum policy of course features prominently in our 5G strategy. We're pushing a lot more spectrum into the commercial marketplace. On November 14, for example, our 28 GHz band spectrum auction will begin, and after it ends, our 24 GHz band spectrum auction will start. And in 2019, we plan to auction off three additional spectrum bands.

****81** But all the spectrum in the world won't matter if we don't have the infrastructure needed to carry 5G traffic. New physical infrastructure is vital for success here. That's because 5G networks will depend less on a few large towers and more on numerous small cell deployments—deployments that for the most part don't exist today.

But installing small cells isn't easy, too often because of regulations. There are layers of (sometimes unnecessary and unreasonable) rules that can prevent widespread deployment. At the federal level, we acted earlier this year to modernize our regulations and make our own review process for wireless infrastructure 5G fast. And many states and localities have similarly taken positive steps to reform their own laws and increase the likelihood that their citizens will be able to benefit from 5G networks.

But as this *Order* makes clear, there are outliers that are unreasonably standing in the way of wireless infrastructure deployment. So today, we address regulatory barriers at the local level that are inconsistent with federal law. For instance, big-city taxes on 5G slow down deployment there and also jeopardize the construction of 5G networks in suburbs and rural America. So today, we find that all fees must be non-discriminatory and cost-based. And when a municipality fails to act promptly on applications, it can slow down deployment in many other localities. So we mandate shot clocks for local government review of small wireless infrastructure deployments.

I commend Commissioner Carr for his leadership in developing this *Order*. He worked closely with many state and local officials to understand their needs and to study the policies that have worked at the state and local level. It should therefore come as no surprise that this *Order* has won significant support from mayors, local officials, and state legislators.

To be sure, there are some local governments that don't like this *Order*. They would like to continue extracting as much money as possible in fees from the private sector and forcing companies to navigate a maze of regulatory hurdles in order to deploy wireless infrastructure. But these actions are not only unlawful, they're also short-sighted. They slow the construction of 5G networks and will delay if not prevent the benefits of 5G from reaching American consumers. And let's also be clear about one thing: When you raise the cost of deploying wireless infrastructure, it is those who live in areas where the ***9195** investment case is the most marginal—rural areas or lower-income urban areas—who are most at risk of losing out. And I don't want 5G to widen the digital divide; I want 5G to help close that divide.

In conclusion, I'd like to again thank Commissioner Carr for leading this effort and his staff for their diligent work. And I'm grateful to the hardworking staff across the agency who have put many hours into this *Order*. In particular, thanks to Jonathan Campbell, Stacy Ferraro, Garnet Hanly, Leon Jackler, Eli Johnson, Jonathan Lechter, Kate Matraves, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Dana Shaffer, Jiaming Shang, David Sieradzki, Michael Smith, Don Stockdale, Cecilia Sulhoff, Patrick Sun, Suzanne Tetreault, and Joseph Wyer from the Wireless Telecommunications Bureau; Matt Collins, Adam Copeland, Dan Kahn, Deborah Salons, and John Visclosky from the Wireline Competition Bureau; Chana Wilkerson from the Office of Communications Business Opportunities; and Ashley Boizelle, David Horowitz, Tom Johnson, Marcus Maher, Bill Richardson, and Anjali Singh from the Office of General Counsel.

***9196 STATEMENT OF COMMISSIONER MICHAEL O'RIELLY**

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

****82** I enthusiastically support the intent of today's item and the vast majority of its content, as it will lower the barriers that some localities place to infrastructure siting. By tackling exorbitant fees, ridiculous practices, and prolonged delays, we are taking the necessary steps to expedite deployment and make it more cost efficient. Collectively, these provisions will help facilitate the deployment of 5G and enable providers to expand services throughout our nation, with ultimate beneficiaries being the American people.

While this is a tremendous step in the right direction, there are some things that could have been done to improve the situation further. For instance, the agreement reached by all parties in the 1996 Telecommunications Act was that states and localities would have no role over radio frequency emission issues, could not regulate based on the aesthetics of towers and antennas, and were prohibited from imposing any moratoriums on processing wireless siting applications. State and localities did not honor this agreement and the courts have sadly enabled their efforts via harmful and wrongly decided cases. Accordingly, I would have preferred that the aesthetics related provisions in the item be deleted, but I will have to swallow it recognizing that I can't get the rest without it. At the very least, I do appreciate that, at my request, it was clarified that the aesthetic requirements, which must be published in advance, must be objective.

I am also concerned that by setting application and recurring fees that are presumed to be reasonable, the Commission is inviting localities to adopt these rates, even if they are not cost based. Providers should be explicitly provided the right to challenge these rates if they believe they are not cost based. Even if not stated, I hope that providers will challenge unreasonable rates. I thank my colleagues for agreeing to my edits that the application fee presumption applies to all non-recurring costs, not just the application fee.

Further, I think there should be a process and standards in place if a locality decides that it needs more time to review batched applications. Objective criteria are needed regarding what are considered “exceptional circumstances” or “exceptional cases” warranting a longer review period for batch processing, when localities need to inform the applicant that they need more time, how this notification will occur, and how much time they will get. For instance, the item appears to excuse a locality that does not act within the shot clocks for any application if there are “extraordinary circumstances,” but there are no parameters on what circumstances we are envisioning. Is a lack of adequate staff or having processing rules or policies in place a sufficient excuse? Such things should be determined upfront, as opposed to allowing courts to decide such matters. Without further clarity, I fear that we may be creating unnecessary loopholes, resulting in further delay.

****83** Finally, I would have liked today's item to be broader and cover the remaining infrastructure issues in the record. First, the Commission's new interpretation of [sections 253 and 332](#) applies beyond small cells. While our focus has been on these newer technologies, there needs to be a recognition that macro towers will continue to play a crucial role in wireless networks. One tower provider states that “[m]acro cell sites will continue to be a central component of wireless infrastructure ...,” because 80 [percent] of the population lives in suburban or rural areas where “macro sites are the most efficient way ***9197** to transmit wireless signals.”¹⁴⁷ Further, many of the interpretations in today's item apply not only to these macro towers, but also to other telecommunications services, including those provided by traditional wireline carriers and potentially cable companies.

Second, the Commission needs to close loopholes in section 6409 that some localities have been exploiting. While these rules pertaining to the modification of existing structures are clear, some localities are trying to undermine Congress's intent and our actions. For instance, localities are refusing ancillary permissions, such as building or highway permits, to slow down or prevent siting; using the localities' concealment and aesthetic additions to increase the size of the facility or requiring that poles be replaced with stealth infrastructure for the purpose of excluding facilities from section 6409; placing improper conditions on permits; and forcing providers to sign agreements that waive their rights under section 6409. And, I have been told that some are claiming that section 6409 does not apply to their siting processes. This must stop. I appreciate the Chairman's firm commitment to my request for an additional item to address such matters, and I expect that it will be coming in the very near future.

Third, there is a need to harmonize our rules regarding compound expansion. Currently, an entity seeking to replace a structure is allowed to expand the facility's footprint by 30 feet, but if the same entity seeks to expand the tower area to hold new equipment associated with a collocation, a new review is needed. It doesn't make sense that these situations are treated differently. And while we are at it, the Commission should also harmonize its shot clocks and remedies. These issues should also be added to any future item.

Lastly, the Commission also must finish its review of the comments filed in response to the twilight towers notice, make the revisions to the program comment, and submit it to Advisory Council on Historic Preservation for their review and vote. These towers are eligible, yet not permitted, to hold an estimated 6,500 collocations that will be needed for next-generation services and FirstNet. It is time to bring this embarrassment, which started in 2001, to an end.

****84** Not only do I thank the Chairman for agreeing to additional infrastructure items, but I also thank the Chairman and Commissioner Carr for implementing several of my edits to the item today. Besides those already mentioned, they include applying the aesthetic criteria, including that any requirements must be reasonable, objective, and published in advance, to undergrounding; stating that undergrounding requirements that apply to some, but not all facilities, will be considered an effective prohibition if they materially inhibit wireless service; and adding similar language to the minimum spacing section of the item. Further, the minimum spacing requirements will not apply to replacement facilities or prevent collocations on existing

structures. Additionally, localities claiming that an application is incomplete will need to specifically state what rule requires the submission of the missing information.

With this, I approve.

***9198 STATEMENT OF COMMISSIONER BRENDAN CARR**

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

The United States is on the cusp of a major upgrade in wireless technology to 5G. The WALL STREET JOURNAL has called it transformative from a technological and economic perspective. And they're right. Winning the global race to 5G— seeing this new platform deployed in the U.S. first—is about economic leadership for the next decade. Those are the stakes, and here's how we know it.

Think back ten years ago when we were on the cusp of upgrading from 3G to 4G. Think about the largest stocks and some of the biggest drivers of our economy. It was big banks and big oil. Fast forward to today: U.S.-based technology companies, from FAANG (Facebook, Apple, Amazon, Netflix, and Google) down to the latest startup, have transformed our economy and our lives.

Think about your own life. A decade ago, catching a ride across town involved calling a phone number, waiting 20 minutes for a cab to arrive, and paying rates that were inaccessible to many people. Today, we have Lyft, Uber, Via, and other options.

A decade ago, sending money meant going to a brick-and-mortar bank, standing in that rope line, getting frustrated when that pen leashed to the table was out of ink (again!), and ultimately conducting your transaction with a teller. Now, with Square, Venmo, and other apps you can send money or deposit checks from anywhere, 24 hours a day.

A decade ago, taking a road trip across the country meant walking into your local AAA office, telling them the stops along your way, and waiting for them to print out a TripTik booklet filled with maps that you would unfold as you drove down the highway. Now, with Google Maps and other apps you get real-time updates and directions right on your smartphone.

****85** American companies led the way in developing these 4G innovations. But it's not by chance or luck that the United States is the world's tech and innovation hub. We have the strongest wireless economy in the world because we won the race to 4G. No country had faster 4G deployment and more intense investment than we did. Winning the race to 4G added \$100 billion to our GDP. It led to \$125 billion in revenue for U.S. companies that could have gone abroad. It grew wireless jobs in the U.S. by 84 percent. And our world-leading 4G networks now support today's \$950 billion app economy. That history should remind policymakers at all levels of government exactly what is at stake. 5G is about our leadership for the next decade.

And being first matters. It determines whether capital will flow here, whether innovators will start their new businesses here, and whether the economy that benefits is the one here. Or as Deloitte put it: "First-adopter countries ... could sustain more than a decade of competitive advantage."

We're not the only country that wants to be first to 5G. One of our biggest competitors is China. They view 5G as a chance to flip the script. They want to lead the tech sector for the next decade. And they are moving aggressively to deploy the infrastructure needed for 5G.

Since 2015, China has deployed 350,000 cell sites. We've built fewer than 30,000. Right now, China is deploying 460 cell sites a day. That is twelve times our pace. We have to be honest about this infrastructure challenge. The time for empty statements about carrots and sticks is over. We need a concrete plan to close the gap with China and win the race to 5G.

***9199** We take this challenge seriously at the FCC. And we are getting the government out of the way, so that the private sector can invest and compete.

In March, we held that small cells should be treated differently than large, 200-foot towers. And we're already seeing results. That decision cut \$1.5 billion in red tape, and one provider reports that it is now clearing small cells for construction at six times the pace as before.

So we're making progress in closing the infrastructure gap with China. But hurdles remain. We've heard from dozens of mayors, local officials, and state lawmakers who get what 5G means—they understand the economic opportunity that comes with it. But they worry that the billions in investment needed to deploy these networks will be consumed by the high fees and long delays imposed by big, “must-serve” cities. They worry that, without federal action, they may not see 5G. I'd like to read from a few of the many comments I've received over the last few months.

Duane Ankney is a retired coal miner from Montana with a handlebar mustache that would be the envy of nearly any hipster today. But more relevantly, he's a Member of the Montana State Legislature and chairs its Energy and Telecommunications Committee. He writes: “Where I see the problem is, that most of investment capital is spent in the larger urban areas. This is primarily due to the high regulatory cost and the cost recovery [that] can be made in those areas. This leaves the rural areas out.”

****86** Mary Whisenand, an Iowa commissioner, writes: “With 99 counties in Iowa, we understand the need to streamline the network buildout process so it's not just the big cities that get 5G but also our small towns. If companies are tied up with delays and high fees, it's going to take that much longer for each and every Iowan to see the next generation of connectivity.”

Ashton Hayward, the Mayor of Pensacola, Florida, writes: “[E]xcessive and arbitrary fees ... result[] in nothing more than telecom providers being required to spend limited investment dollars on fees as opposed to spending those limited resources on the type of high-speed infrastructure that is so important in our community.”

And the entire board of commissioners from a more rural area in Michigan writes: “Smaller communities such as those located in St. Clair County would benefit by having the [FCC] reduce the costly and unnecessary fees that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage. By making small cell deployment less expensive, the FCC will send a clear message that all communities, regardless of size, should share in the benefits of this crucial new technology.”

They're right. When I think about success—when I think about winning the race to 5G—the finish line is not the moment we see next-gen deployments in New York or San Francisco. Success can only be achieved when all Americans, no matter where they live, have a fair shot at fast, affordable broadband.

So today, we build on the smart infrastructure policies championed by state and local leaders. We ensure that no city is subsidizing 5G. We prevent excessive fees that would threaten 5G deployment. And we update our shot clocks to account for new small cell deployments. I want to thank Commissioner Rosenworcel for improving the new shot clocks with edits that protect municipalities from providers that submit incomplete applications and provide localities with more time to adjust their operations. Her ideas improved this portion of the order.

More broadly, our decision today has benefited from the diverse views expressed by a range of stakeholders. On the local government side, I met with mayors, city planners, and other officials in their home communities and learned from their perspectives. They pushed back on the proposed ““deemed ***9200** granted” remedy, on regulating rents on their property outside of rights-of-way, and on limits to reasonable aesthetic reviews. They reminded me that they're the ones that get pulled aside at the grocery store when an unsightly small cell goes up. Their views carried the day on all of those points. And

our approach respects the compromises reached in state legislatures around the country by not preempting nearly any of the provisions in the 20 state level small cells bills.

This is a balanced approach that will help speed the deployment of 5G. Right now, there is a cottage industry of consultants spurring lawsuits and disputes in courtrooms and city halls around the country over the scope of Sections 253 and 332. With this decision, we provide clear and updated guidance, which will eliminate the uncertainty inspiring much of that litigation.

****87** Some have also argued that we unduly limit local aesthetic reviews. But allowing reasonable aesthetic reviews—and thus only preventing unreasonable ones—does not strike me as a claim worth lodging.

And some have asked whether this reform will make a real difference in speeding 5G deployment and closing the digital divide. The answer is yes. It will cut \$2 billion in red tape. That's about \$8,000 in savings per small cell. Cutting these costs changes the prospects for communities that might otherwise get left behind. It will stimulate \$2.4 billion in new small cell deployments. That will cover 1.8 million more homes and businesses—97% of which are in rural and suburban communities. That is more broadband for more Americans.

* * *

In closing, I want to thank my colleagues for working to put these ideas in place. I want to thank Chairman Pai for his leadership in removing these regulatory barriers. And I want to recognize the exceptionally hard-working team at the FCC that helped lead this effort, including, in the Wireless Telecommunications Bureau, Donald Stockdale, Suzanne Tetrault, Garnet Hanly, Jonathan Campbell, Stacy Ferraro, Leon Jackler, Eli Johnson, Jonathan Lechter, Marcus Maher, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Jiaming Shang, and David Sieradzki. I also want to thank the team in the Office of General Counsel, including Tom Johnson, Ashley Boizelle, Bill Richardson, and Anjali Singh.

***9201 STATEMENT OF COMMISSIONER JESSICA
ROSENWORCEL APPROVING IN PART, DISSENTING IN PART**

***Re: Accelerating Wireless Broadband Deployment by Removing Barriers to
Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband
Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84***

A few years ago, in a speech at a University of Colorado event, I called on the Federal Communications Commission to start a proceeding on wireless infrastructure reform. I suggested that if we want broad economic growth and widespread mobile opportunity, we need to avoid unnecessary delays in the state and local approval process. That's because they can slow deployment.

I believed that then. I still believe it now.

So when the FCC kicked off a rulemaking on wireless infrastructure last year, I had hopes. I hoped we could provide a way to encourage streamlined service deployment nationwide. I hoped we could acknowledge that we have a long tradition of local control in this country but also recognize more uniform policies across the country will help us in the global race to build the next generation of wireless service, known as 5G. Above all, I hoped we could speed infrastructure deployment by recognizing the best way to do so is to treat cities and states as our partners.

In one respect, today's order is consistent with that vision. We shorten the time frames permitted under the law for state and local review of the deployment of small cells—an essential part of 5G networks. I think this is the right thing to do because the shot clocks we have now were designed in an earlier era for much bigger wireless facilities. At the same time, we retain the right of state and local authorities to pursue court remedies under Section 332 of the Communications Act. This strikes an appropriate balance. I appreciate that my colleagues were willing to work with me to ensure that localities have time to update

their processes to accommodate these new deadlines and that they are not unfairly prejudiced by incomplete applications. I support this aspect of today's order.

****88** But in the remainder of this decision, my hopes did not pan out. Instead of working with our state and local partners to speed the way to 5G deployment, we cut them out. We tell them that going forward Washington will make choices for them—about which fees are permissible and which are not, about what aesthetic choices are viable and which are not, with complete disregard for the fact that these infrastructure decisions do not work the same in New York, New York and New York, Iowa. So it comes down to this: three unelected officials on this dais are telling state and local leaders all across the country what they can and cannot do in their own backyards. This is extraordinary federal overreach.

I do not believe the law permits Washington to run roughshod over state and local authority like this and I worry the litigation that follows will only slow our 5G future. For starters, the Tenth Amendment reserves powers to the states that are not expressly granted to the federal government. In other words, the constitution sets up a system of dual sovereignty that informs all of our laws. To this end, [Section 253](#) balances the interests of state and local authorities with this agency's responsibility to expand the reach of communications service. While [Section 253\(a\)](#) is concerned with state and local requirements that may prohibit or effectively prohibit service, [Section 253\(d\)](#) permits preemption only on a case-by-case basis after notice and comment. We do not do that here. Moreover, the assertion that fees above cost or local aesthetic requirements in a single city are tantamount to a service prohibition elsewhere stretches the statute beyond what Congress intended and legal precedent affords.

In addition, this decision irresponsibly interferes with existing agreements and ongoing deployment across the country. There are thousands of cities and towns with agreements for infrastructure deployment—including 5G wireless facilities—that were negotiated in good faith. So ***9202** many of them could be torn apart by our actions here. If we want to encourage investment, upending commitments made in binding contracts is a curious way to go.

Take San Jose, California. Earlier this year it entered into agreements with three providers for the largest small cell-driven broadband deployment of any city in the United States. These partnerships would lead to 4,000 small cells on city-owned light poles and more than \$500 million of private sector investment. Or take Little Rock, Arkansas, where local reforms to the permitting process have put it on course to become one of the first cities to benefit from 5G service. Or take Troy, Ohio. This town of under 26,000 spent time and energy to develop streamlined procedures to govern the placement, installation, and maintenance of small cell facilities in the community. Or take Austin, Texas. It has been experimenting with smart city initiatives to improve transportation and housing availability. As part of this broader effort, it started a pilot project to deploy small cells and has secured agreements with multiple providers.

****89** This declaratory ruling has the power to undermine these agreements— and countless more just like them. In fact, too many municipalities to count— from Omaha to Overland Park, Cincinnati to Chicago and Los Angeles to Louisville—have called on the FCC to halt this federal invasion of local authority. The National Governors Association and National Conference of State Legislatures have asked us to stop before doing this damage. This sentiment is shared by the United States Conference of Mayors, National League of Cities, National Association of Counties, and Government Finance Officers Association. In other words, every major state and municipal organization has expressed concern about how Washington is seeking to assert national control over local infrastructure choices and stripping local elected officials and the citizens they represent of a voice in the process.

Yet cities and states are told to not worry because with these national policies wireless providers will save as much as \$2 billion in costs which will spur deployment in rural areas. But comb through the text of this decision. You will not find a single commitment made to providing more service in remote communities. Look for any statements made to Wall Street. Not one wireless carrier has said that this action will result in a change in its capital expenditures in rural areas. As Ronald Reagan famously said, “trust but verify.” You can try to find it here, but there is no verification. That's because the hard economics of rural deployment do not change with this decision. Moreover, the asserted \$2 billion in cost savings represents no more than 1 percent of investment needed for next-generation networks.

It didn't have to be this way. So let me offer three ideas to consider going forward.

First, we need to acknowledge we have a history of local control in this country but also recognize that more uniform policies can help us be first to the future. Here's an idea: Let's flip the script and build a new framework. We can start with developing model codes for small cell and 5G deployment—but we need to make sure they are supported by a wide range of industry and state and local officials. Then we need to review every policy and program—from universal service to grants and low-cost loans at the Department of Commerce, Department of Agriculture, and Department of Transportation and build in incentives to use these models. In the process, we can create a more common set of practices nationwide. But to do so, we would use carrots instead of sticks.

Second, this agency needs to own up to the impact of our trade policies on 5G deployment. In this decision we go on at length about the cost of local review but are eerily silent when it comes to the consequences of new national tariffs on network deployment. As a result of our escalating trade war with China, by the end of this year we will have a 25 percent duty on antennas, switches, and routers—the essential network facilities needed for 5G deployment. That's a real cost and there is no doubt it will diminish our ability to lead the world in the deployment of 5G.

****90 *9203** Finally, in this decision the FCC treats the challenge of small cell deployment with a bias toward more regulation from Washington rather than more creative marketplace solutions. But what if instead we focused our efforts on correcting the market failure at issue? What if instead of micromanaging costs we fostered competition? One innovative way to do this involves dusting off our 20-year old over-the-air-reception-device rules, or OTARD rules.

Let me explain. The FCC's OTARD rules were designed to protect homeowners and renters from laws that restricted their ability to set up television and broadcast antennas on private property. In most cases they accomplished this by providing a right to install equipment on property you control—and this equipment for video reception was roughly the size of a pizza box.

Today OTARD rules do not contemplate 5G deployment and small cells. But we could change that by clarifying our rules. If we did, a lot of benefits would follow. By creating more siting options for small cells, we would put competitive pressure on public rights-of-way, which could bring down fees through competition instead of the government ratemaking my colleagues offer here. Moreover, this approach would create more opportunities for rural deployment by giving providers more siting and backhaul options and creating new use cases for signal boosters. Add this up and you get more competitive, more ubiquitous, and less costly 5G deployment.

We don't explore these market-based alternatives in today's decision. We don't say a thing about the real costs that tariffs impose on our efforts at 5G leadership. And we don't consider creative incentive-based systems to foster deployment, especially in rural areas.

But above all we neglect the opportunity to recognize what is fundamental: if we want to speed the way for 5G service we need to work with cities and states across the country because they are our partners. For this reason, in critical part, I dissent.

***9232 STATEMENT OF CHAIRMAN AJIT PAI**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84

Perhaps the defining characteristic of the communications sector over the past decade is that the world is going wireless. The smartphone's introduction in 2007 may have seemed an interesting novelty to some at the time, but it was a precursor of a transformative change in how consumers access and use the Internet. 4G LTE was a key driver in that change.

Today, a new transition is at hand as we enter the era of 5G. At the FCC, we're working hard to ensure that the United States leads the world in developing this next generation of wireless connectivity so that American consumers and our nation's economy enjoy the immense benefits that 5G will bring.

****91** Spectrum policy of course features prominently in our 5G strategy. We're pushing a lot more spectrum into the commercial marketplace. On November 14, for example, our 28 GHz band spectrum auction will begin, and after it ends, our 24 GHz band spectrum auction will start. And in 2019, we plan to auction off three additional spectrum bands.

But all the spectrum in the world won't matter if we don't have the infrastructure needed to carry 5G traffic. New physical infrastructure is vital for success here. That's because 5G networks will depend less on a few large towers and more on numerous small cell deployments—deployments that for the most part don't exist today.

But installing small cells isn't easy, too often because of regulations. There are layers of (sometimes unnecessary and unreasonable) rules that can prevent widespread deployment. At the federal level, we acted earlier this year to modernize our regulations and make our own review process for wireless infrastructure 5G fast. And many states and localities have similarly taken positive steps to reform their own laws and increase the likelihood that their citizens will be able to benefit from 5G networks.

But as this *Order* makes clear, there are outliers that are unreasonably standing in the way of wireless infrastructure deployment. So today, we address regulatory barriers at the local level that are inconsistent with federal law. For instance, big-city taxes on 5G slow down deployment there and also jeopardize the construction of 5G networks in suburbs and rural America. So today, we find that all fees must be non-discriminatory and cost-based. And when a municipality fails to act promptly on applications, it can slow down deployment in many other localities. So we mandate shot clocks for local government review of small wireless infrastructure deployments.

I commend Commissioner Carr for his leadership in developing this *Order*. He worked closely with many state and local officials to understand their needs and to study the policies that have worked at the state and local level. It should therefore come as no surprise that this *Order* has won significant support from mayors, local officials, and state legislators.

To be sure, there are some local governments that don't like this *Order*. They would like to continue extracting as much money as possible in fees from the private sector and forcing companies to navigate a maze of regulatory hurdles in order to deploy wireless infrastructure. But these actions are not only unlawful, they're also short-sighted. They slow the construction of 5G networks and will delay if not prevent the benefits of 5G from reaching American consumers. And let's also be clear about one ***9233** thing: When you raise the cost of deploying wireless infrastructure, it is those who live in areas where the investment case is the most marginal—rural areas or lower-income urban areas—who are most at risk of losing out. And I don't want 5G to widen the digital divide; I want 5G to help close that divide.

****92** In conclusion, I'd like to again thank Commissioner Carr for leading this effort and his staff for their diligent work. And I'm grateful to the hardworking staff across the agency who have put many hours into this *Order*. In particular, thanks to Jonathan Campbell, Stacy Ferraro, Garnet Hanly, Leon Jackler, Eli Johnson, Jonathan Lechter, Kate Mataves, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Dana Shaffer, Jiaming Shang, David Sieradzki, Michael Smith, Don Stockdale, Cecilia Sulhoff, Patrick Sun, Suzanne Tetreault, and Joseph Wyer from the Wireless Telecommunications Bureau; Matt Collins, Adam Copeland, Dan Kahn, Deborah Salons, and John Visclosky from the Wireline Competition Bureau; Chana Wilkerson from the Office of Communications Business Opportunities; and Ashley Boizelle, David Horowitz, Tom Johnson, Marcus Maher, Bill Richardson, and Anjali Singh from the Office of General Counsel.

9234 STATEMENT OF COMMISSIONER MICHAEL O'RIELLY*Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84**

I enthusiastically support the intent of today's item and the vast majority of its content, as it will lower the barriers that some localities place to infrastructure siting. By tackling exorbitant fees, ridiculous practices, and prolonged delays, we are taking the necessary steps to expedite deployment and make it more cost efficient. Collectively, these provisions will help facilitate the deployment of 5G and enable providers to expand services throughout our nation, with ultimate beneficiaries being the American people.

While this is a tremendous step in the right direction, there are some things that could have been done to improve the situation further. For instance, the agreement reached by all parties in the 1996 Telecommunications Act was that states and localities would have no role over radio frequency emission issues, could not regulate based on the aesthetics of towers and antennas, and were prohibited from imposing any moratoriums on processing wireless siting applications. State and localities did not honor this agreement and the courts have sadly enabled their efforts via harmful and wrongly decided cases. Accordingly, I would have preferred that the aesthetics related provisions in the item be deleted, but I will have to swallow it recognizing that I can't get the rest without it. At the very least, I do appreciate that, at my request, it was clarified that the aesthetic requirements, which must be published in advance, must be objective.

I am also concerned that by setting application and recurring fees that are presumed to be reasonable, the Commission is inviting localities to adopt these rates, even if they are not cost based. Providers should be explicitly provided the right to challenge these rates if they believe they are not cost based. Even if not stated, I hope that providers will challenge unreasonable rates. I thank my colleagues for agreeing to my edits that the application fee presumption applies to all non-recurring costs, not just the application fee.

****93** Further, I think there should be a process and standards in place if a locality decides that it needs more time to review batched applications. Objective criteria are needed regarding what are considered "exceptional circumstances" or "exceptional cases" warranting a longer review period for batch processing, when localities need to inform the applicant that they need more time, how this notification will occur, and how much time they will get. For instance, the item appears to excuse a locality that does not act within the shot clocks for any application if there are "extraordinary circumstances," but there are no parameters on what circumstances we are envisioning. Is a lack of adequate staff or having processing rules or policies in place a sufficient excuse? Such things should be determined upfront, as opposed to allowing courts to decide such matters. Without further clarity, I fear that we may be creating unnecessary loopholes, resulting in further delay.

Finally, I would have liked today's item to be broader and cover the remaining infrastructure issues in the record. First, the Commission's new interpretation of [sections 253](#) and [332](#) applies beyond small cells. While our focus has been on these newer technologies, there needs to be a recognition that macro towers will continue to play a crucial role in wireless networks. One tower provider states that "[m]acro cell sites will continue to be a central component of wireless infrastructure ...," because 80 [percent] of the population lives in suburban or rural areas where "macro sites are the most efficient way ***9235** to transmit wireless signals."¹⁴⁸ Further, many of the interpretations in today's item apply not only to these macro towers, but also to other telecommunications services, including those provided by traditional wireline carriers and potentially cable companies.

Second, the Commission needs to close loopholes in section 6409 that some localities have been exploiting. While these rules pertaining to the modification of existing structures are clear, some localities are trying to undermine Congress's intent and our actions. For instance, localities are refusing ancillary permissions, such as building or highway permits, to slow down or prevent siting; using the localities' concealment and aesthetic additions to increase the size of the facility or requiring that poles be replaced with stealth infrastructure for the purpose of excluding facilities from section 6409; placing improper conditions on permits; and forcing providers to sign agreements that waive their rights under section 6409. And, I have been told that some are

claiming that section 6409 does not apply to their siting processes. This must stop. I appreciate the Chairman's firm commitment to my request for an additional item to address such matters, and I expect that it will be coming in the very near future.

****94** Third, there is a need to harmonize our rules regarding compound expansion. Currently, an entity seeking to replace a structure is allowed to expand the facility's footprint by 30 feet, but if the same entity seeks to expand the tower area to hold new equipment associated with a collocation, a new review is needed. It doesn't make sense that these situations are treated differently. And while we are at it, the Commission should also harmonize its shot clocks and remedies. These issues should also be added to any future item.

Lastly, the Commission also must finish its review of the comments filed in response to the twilight towers notice, make the revisions to the program comment, and submit it to Advisory Council on Historic Preservation for their review and vote. These towers are eligible, yet not permitted, to hold an estimated 6,500 collocations that will be needed for next-generation services and FirstNet. It is time to bring this embarrassment, which started in 2001, to an end.

Not only do I thank the Chairman for agreeing to additional infrastructure items, but I also thank the Chairman and Commissioner Carr for implementing several of my edits to the item today. Besides those already mentioned, they include applying the aesthetic criteria, including that any requirements must be reasonable, objective, and published in advance, to undergrounding; stating that undergrounding requirements that apply to some, but not all facilities, will be considered an effective prohibition if they materially inhibit wireless service; and adding similar language to the minimum spacing section of the item. Further, the minimum spacing requirements will not apply to replacement facilities or prevent collocations on existing structures. Additionally, localities claiming that an application is incomplete will need to specifically state what rule requires the submission of the missing information.

With this, I approve.

***9236 STATEMENT OF COMMISSIONER BRENDAN CARR**

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

The United States is on the cusp of a major upgrade in wireless technology to 5G. The WALL STREET JOURNAL has called it transformative from a technological and economic perspective. And they're right. Winning the global race to 5G— seeing this new platform deployed in the U.S. first—is about economic leadership for the next decade. Those are the stakes, and here's how we know it.

Think back ten years ago when we were on the cusp of upgrading from 3G to 4G. Think about the largest stocks and some of the biggest drivers of our economy. It was big banks and big oil. Fast forward to today: U.S.-based technology companies, from FAANG (Facebook, Apple, Amazon, Netflix, and Google) down to the latest startup, have transformed our economy and our lives.

****95** Think about your own life. A decade ago, catching a ride across town involved calling a phone number, waiting 20 minutes for a cab to arrive, and paying rates that were inaccessible to many people. Today, we have Lyft, Uber, Via, and other options.

A decade ago, sending money meant going to a brick-and-mortar bank, standing in that rope line, getting frustrated when that pen leashed to the table was out of ink (again!), and ultimately conducting your transaction with a teller. Now, with Square, Venmo, and other apps you can send money or deposit checks from anywhere, 24 hours a day.

A decade ago, taking a road trip across the country meant walking into your local AAA office, telling them the stops along your way, and waiting for them to print out a TripTik booklet filled with maps that you would unfold as you drove down the highway. Now, with Google Maps and other apps you get real-time updates and directions right on your smartphone.

American companies led the way in developing these 4G innovations. But it's not by chance or luck that the United States is the world's tech and innovation hub. We have the strongest wireless economy in the world because we won the race to 4G. No country had faster 4G deployment and more intense investment than we did. Winning the race to 4G added \$100 billion to our GDP. It led to \$125 billion in revenue for U.S. companies that could have gone abroad. It grew wireless jobs in the U.S. by 84 percent. And our world-leading 4G networks now support today's \$950 billion app economy. That history should remind policymakers at all levels of government exactly what is at stake. 5G is about our leadership for the next decade.

And being first matters. It determines whether capital will flow here, whether innovators will start their new businesses here, and whether the economy that benefits is the one here. Or as Deloitte put it: "First-adopter countries ... could sustain more than a decade of competitive advantage."

We're not the only country that wants to be first to 5G. One of our biggest competitors is China. They view 5G as a chance to flip the script. They want to lead the tech sector for the next decade. And they are moving aggressively to deploy the infrastructure needed for 5G.

Since 2015, China has deployed 350,000 cell sites. We've built fewer than 30,000. Right now, China is deploying 460 cell sites a day. That is twelve times our pace. We have to be honest about this ***9237** infrastructure challenge. The time for empty statements about carrots and sticks is over. We need a concrete plan to close the gap with China and win the race to 5G.

We take this challenge seriously at the FCC. And we are getting the government out of the way, so that the private sector can invest and compete.

In March, we held that small cells should be treated differently than large, 200-foot towers. And we're already seeing results. That decision cut \$1.5 billion in red tape, and one provider reports that it is now clearing small cells for construction at six times the pace as before.

****96** So we're making progress in closing the infrastructure gap with China. But hurdles remain. We've heard from dozens of mayors, local officials, and state lawmakers who get what 5G means—they understand the economic opportunity that comes with it. But they worry that the billions in investment needed to deploy these networks will be consumed by the high fees and long delays imposed by big, "must-serve" cities. They worry that, without federal action, they may not see 5G. I'd like to read from a few of the many comments I've received over the last few months.

Duane Ankney is a retired coal miner from Montana with a handlebar mustache that would be the envy of nearly any hipster today. But more relevantly, he's a Member of the Montana State Legislature and chairs its Energy and Telecommunications Committee. He writes: "Where I see the problem is, that most of investment capital is spent in the larger urban areas. This is primarily due to the high regulatory cost and the cost recovery [that] can be made in those areas. This leaves the rural areas out."

Mary Whisenand, an Iowa commissioner, writes: "With 99 counties in Iowa, we understand the need to streamline the network buildout process so it's not just the big cities that get 5G but also our small towns. If companies are tied up with delays and high fees, it's going to take that much longer for each and every Iowan to see the next generation of connectivity."

Ashton Hayward, the Mayor of Pensacola, Florida, writes: "[E]xcessive and arbitrary fees ... result[] in nothing more than telecom providers being required to spend limited investment dollars on fees as opposed to spending those limited resources on the type of high-speed infrastructure that is so important in our community."

And the entire board of commissioners from a more rural area in Michigan writes: “Smaller communities such as those located in St. Clair County would benefit by having the [FCC] reduce the costly and unnecessary fees that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage. By making small cell deployment less expensive, the FCC will send a clear message that all communities, regardless of size, should share in the benefits of this crucial new technology.”

They're right. When I think about success—when I think about winning the race to 5G—the finish line is not the moment we see next-gen deployments in New York or San Francisco. Success can only be achieved when all Americans, no matter where they live, have a fair shot at fast, affordable broadband.

So today, we build on the smart infrastructure policies championed by state and local leaders. We ensure that no city is subsidizing 5G. We prevent excessive fees that would threaten 5G deployment. And we update our shot clocks to account for new small cell deployments. I want to thank Commissioner Rosenworcel for improving the new shot clocks with edits that protect municipalities from providers that submit incomplete applications and provide localities with more time to adjust their operations. Her ideas improved this portion of the order.

****97 *9238** More broadly, our decision today has benefited from the diverse views expressed by a range of stakeholders. On the local government side, I met with mayors, city planners, and other officials in their home communities and learned from their perspectives. They pushed back on the proposed “deemed granted” remedy, on regulating rents on their property outside of rights-of-way, and on limits to reasonable aesthetic reviews. They reminded me that they're the ones that get pulled aside at the grocery store when an unsightly small cell goes up. Their views carried the day on all of those points. And our approach respects the compromises reached in state legislatures around the country by not preempting nearly any of the provisions in the 20 state level small cells bills.

This is a balanced approach that will help speed the deployment of 5G. Right now, there is a cottage industry of consultants spurring lawsuits and disputes in courtrooms and city halls around the country over the scope of [Sections 253](#) and [332](#). With this decision, we provide clear and updated guidance, which will eliminate the uncertainty inspiring much of that litigation.

Some have also argued that we unduly limit local aesthetic reviews. But allowing reasonable aesthetic reviews—and thus only preventing unreasonable ones—does not strike me as a claim worth lodging.

And some have asked whether this reform will make a real difference in speeding 5G deployment and closing the digital divide. The answer is yes. It will cut \$2 billion in red tape. That's about \$8,000 in savings per small cell. Cutting these costs changes the prospects for communities that might otherwise get left behind. It will stimulate \$2.4 billion in new small cell deployments. That will cover 1.8 million more homes and businesses—97% of which are in rural and suburban communities. That is more broadband for more Americans.

* * *

In closing, I want to thank my colleagues for working to put these ideas in place. I want to thank Chairman Pai for his leadership in removing these regulatory barriers. And I want to recognize the exceptionally hard-working team at the FCC that helped lead this effort, including, in the Wireless Telecommunications Bureau, Donald Stockdale, Suzanne Tetrault, Garnet Hanly, Jonathan Campbell, Stacy Ferraro, Leon Jackler, Eli Johnson, Jonathan Lechter, Marcus Maher, Betsy McIntyre, Darrel Pae, Jennifer Salhus, Jiaming Shang, and David Sieradzki. I also want to thank the team in the Office of General Counsel, including Tom Johnson, Ashley Boizelle, Bill Richardson, and Anjali Singh.

***9239 STATEMENT OF COMMISSIONER JESSICA
ROSENWORCEL APPROVING IN PART, DISSENTING IN PART**

**Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to
Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband
Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84***

****98** A few years ago, in a speech at a University of Colorado event, I called on the Federal Communications Commission to start a proceeding on wireless infrastructure reform. I suggested that if we want broad economic growth and widespread mobile opportunity, we need to avoid unnecessary delays in the state and local approval process. That's because they can slow deployment.

I believed that then. I still believe it now.

So when the FCC kicked off a rulemaking on wireless infrastructure last year, I had hopes. I hoped we could provide a way to encourage streamlined service deployment nationwide. I hoped we could acknowledge that we have a long tradition of local control in this country but also recognize more uniform policies across the country will help us in the global race to build the next generation of wireless service, known as 5G. Above all, I hoped we could speed infrastructure deployment by recognizing the best way to do so is to treat cities and states as our partners.

In one respect, today's order is consistent with that vision. We shorten the time frames permitted under the law for state and local review of the deployment of small cells—an essential part of 5G networks. I think this is the right thing to do because the shot clocks we have now were designed in an earlier era for much bigger wireless facilities. At the same time, we retain the right of state and local authorities to pursue court remedies under Section 332 of the Communications Act. This strikes an appropriate balance. I appreciate that my colleagues were willing to work with me to ensure that localities have time to update their processes to accommodate these new deadlines and that they are not unfairly prejudiced by incomplete applications. I support this aspect of today's order.

But in the remainder of this decision, my hopes did not pan out. Instead of working with our state and local partners to speed the way to 5G deployment, we cut them out. We tell them that going forward Washington will make choices for them—about which fees are permissible and which are not, about what aesthetic choices are viable and which are not, with complete disregard for the fact that these infrastructure decisions do not work the same in New York, New York and New York, Iowa. So it comes down to this: three unelected officials on this dais are telling state and local leaders all across the country what they can and cannot do in their own backyards. This is extraordinary federal overreach.

I do not believe the law permits Washington to run roughshod over state and local authority like this and I worry the litigation that follows will only slow our 5G future. For starters, the Tenth Amendment reserves powers to the states that are not expressly granted to the federal government. In other words, the constitution sets up a system of dual sovereignty that informs all of our laws. To this end, [Section 253](#) balances the interests of state and local authorities with this agency's responsibility to expand the reach of communications service. While [Section 253\(a\)](#) is concerned with state and local requirements that may prohibit or effectively prohibit service, [Section 253\(d\)](#) permits preemption only on a case-by-case basis after notice and comment. We do not do that here. Moreover, the assertion that fees above cost or local aesthetic requirements in a single city are tantamount to a service prohibition elsewhere stretches the statute beyond what Congress intended and legal precedent affords.

****99 *9240** In addition, this decision irresponsibly interferes with existing agreements and ongoing deployment across the country. There are thousands of cities and towns with agreements for infrastructure deployment—including 5G wireless facilities—that were negotiated in good faith. So many of them could be torn apart by our actions here. If we want to encourage investment, upending commitments made in binding contracts is a curious way to go.

Take San Jose, California. Earlier this year it entered into agreements with three providers for the largest small cell-driven broadband deployment of any city in the United States. These partnerships would lead to 4,000 small cells on city-owned light poles and more than \$500 million of private sector investment. Or take Little Rock, Arkansas, where local reforms to the permitting process have put it on course to become one of the first cities to benefit from 5G service. Or take Troy, Ohio. This town of under 26,000 spent time and energy to develop streamlined procedures to govern the placement, installation, and maintenance of small cell facilities in the community. Or take Austin, Texas. It has been experimenting with smart city initiatives to improve transportation and housing availability. As part of this broader effort, it started a pilot project to deploy small cells and has secured agreements with multiple providers.

This declaratory ruling has the power to undermine these agreements—and countless more just like them. In fact, too many municipalities to count—from Omaha to Overland Park, Cincinnati to Chicago and Los Angeles to Louisville— have called on the FCC to halt this federal invasion of local authority. The National Governors Association and National Conference of State Legislatures have asked us to stop before doing this damage. This sentiment is shared by the United States Conference of Mayors, National League of Cities, National Association of Counties, and Government Finance Officers Association. In other words, every major state and municipal organization has expressed concern about how Washington is seeking to assert national control over local infrastructure choices and stripping local elected officials and the citizens they represent of a voice in the process.

Yet cities and states are told to not worry because with these national policies wireless providers will save as much as \$2 billion in costs which will spur deployment in rural areas. But comb through the text of this decision. You will not find a single commitment made to providing more service in remote communities. Look for any statements made to Wall Street. Not one wireless carrier has said that this action will result in a change in its capital expenditures in rural areas. As Ronald Reagan famously said, “trust but verify.” You can try to find it here, but there is no verification. That's because the hard economics of rural deployment do not change with this decision. Moreover, the asserted \$2 billion in cost savings represents no more than 1 percent of investment needed for next-generation networks.

****100** It didn't have to be this way. So let me offer three ideas to consider going forward.

First, we need to acknowledge we have a history of local control in this country but also recognize that more uniform policies can help us be first to the future. Here's an idea: Let's flip the script and build a new framework. We can start with developing model codes for small cell and 5G deployment—but we need to make sure they are supported by a wide range of industry and state and local officials. Then we need to review every policy and program—from universal service to grants and low- cost loans at the Department of Commerce, Department of Agriculture, and Department of Transportation and build in incentives to use these models. In the process, we can create a more common set of practices nationwide. But to do so, we would use carrots instead of sticks.

Second, this agency needs to own up to the impact of our trade policies on 5G deployment. In this decision we go on at length about the cost of local review but are eerily silent when it comes to the consequences of new national tariffs on network deployment. As a result of our escalating trade war with China, by the end of this year we will have a 25 percent duty on antennas, switches, and routers—the ***9241** essential network facilities needed for 5G deployment. That's a real cost and there is no doubt it will diminish our ability to lead the world in the deployment of 5G.

Finally, in this decision the FCC treats the challenge of small cell deployment with a bias toward more regulation from Washington rather than more creative marketplace solutions. But what if instead we focused our efforts on correcting the market failure at issue? What if instead of micromanaging costs we fostered competition? One innovative way to do this involves dusting off our 20-year old over-the- air-reception-device rules, or OTARD rules.

Let me explain. The FCC's OTARD rules were designed to protect homeowners and renters from laws that restricted their ability to set up television and broadcast antennas on private property. In most cases they accomplished this by providing a right to install equipment on property you control—and this equipment for video reception was roughly the size of a pizza box.

Today OTARD rules do not contemplate 5G deployment and small cells. But we could change that by clarifying our rules. If we did, a lot of benefits would follow. By creating more siting options for small cells, we would put competitive pressure on public rights-of-way, which could bring down fees through competition instead of the government ratemaking my colleagues offer here. Moreover, this approach would create more opportunities for rural deployment by giving providers more siting and backhaul options and creating new use cases for signal boosters. Add this up and you get more competitive, more ubiquitous, and less costly 5G deployment.

We don't explore these market-based alternatives in today's decision. We don't say a thing about the real costs that tariffs impose on our efforts at 5G leadership. And we don't consider creative incentive-based systems to foster deployment, especially in rural areas.

****101** But above all we neglect the opportunity to recognize what is fundamental: if we want to speed the way for 5G service we need to work with cities and states across the country because they are our partners. For this reason, in critical part, I dissent.

Footnotes

- 1 *See* Accenture Strategy, *Accelerating Future Economic Value from the Wireless Industry at 2* (2018) (*Accelerating Future Economic Value Report*), <https://www.ctia.org/news/accelerating-future-economic-value-from-the-wireless-industry>, attached to Letter from Scott K. Bergmann, Senior Vice Pres., Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed July 19, 2018).
- 2 *See* Accenture Strategy, *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities*, (2017) <http://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf>; attached to Letter from Scott Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 16-421, (filed Jan. 13, 2017).
- 3 *Accelerating Future Economic Value Report at 2.*
- 4 Letter from John T. Scott, Counsel for Mobilitee, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17- 79 at 2-3 (filed Sept. 12, 2018).
- 5 *See, e.g.*, Letter from Brian D. Hill, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 31, 2018) (“While the FCC and the Ohio Legislature have worked to reduce the timeline for 5G deployment, the same cannot be said for all local and state governments. Regulations written in a different era continue to dictate the regulatory process for 5G infrastructure”); Letter from Maureen Davey, Commissioner, Stillwater County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) (“[T]he Commission's actions to lower regulatory barriers can enable more capital spending to flow to areas like ours. Reducing fees and shortening review times in urban areas, thereby lowering the cost of deployment in such areas, can promote speedier deployment across all of America.”); Letter from Board of County Commissioners, Yellowstone County, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17- 79 at 1-2 (filed Sept. 21, 2018) (“Reducing these regulatory barriers by setting guidelines on fees, siting requirements and review timeframes, will promote investment including rural areas like ours.”); Letter from Board of Commissioners, Harney County, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 5, 2018) (“By taking action

to speed and reduce the costs of deployment across the country, and create a more uniform regulatory framework, the Commission will lower the cost of deployment, enabling more investment in both urban and rural communities.”); Letter from Niraj J. Antani, Ohio State Representative, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 4, 2018) (“[T]o truly expedite the small cell deployment process, broader government action is needed on more than just the state level.”); Letter from Michael C. Taylor, Mayor, City of Sterling Heights, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1-2 (filed Aug. 30, 2018) (“[T]here are significant, tangible benefits to having a nation-wide rule that promotes the deployment of next-generation wireless access without concern that excessive regulation or small cell siting fees slows down the process.”).

- 6 *See, e.g.*, Letter from Linda Morse, Mayor, City of Manhattan, KS to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 13, 2018) (City of Manhattan, KS Sept. 13, 2018 *Ex Parte* Letter); Letter from Ronny Berdugo, Legislative Representative, League of California Cities to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 18, 2018) (Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter); Letter from Damon Connolly, Marin County Board of Supervisors to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 17, 2018) (Damon Connolly Sept. 17, 2018 *Ex Parte* Letter).
- 7 *See* Letter from Thomas J. Navin, Counsel to Corning, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1, Attach. A at 2-3 (filed Sept. 5, 2018) (Corning Sept. 5, 2018 *Ex Parte* Letter).
- 8 *Id.*
- 9 “Small Wireless Facilities,” as used herein and consistent with section 1.1312(e)(2), encompasses facilities that meet the following conditions:
- (1) The facilities—
 - (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
 - (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
 - (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
 - (2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;
 - (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
 - (4) The facilities do not require antenna structure registration under part 17 of this chapter;
 - (5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and
 - (6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).
- 10 *Sprint Telephony PCS LP v. County of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (en banc) (*County of San Diego*) (quoting *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999)).
- 11 141 Cong. Rec. S8197 (daily ed. June 12, 1995).
- 12 H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (100 Stat. 5) 124.

- 13 S. Rep. No. 104-230, at 126 (1996) (Conf. Rep.).
- 14 Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (noting that the 1996 Act “fundamentally restructures local telephone markets” to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) (“The Telecommunications Act was an unusually important legislative enactment ... designed to promote competition.”).
- 15 47 U.S.C. § 253(a).
- 16 *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 11 n.7 (1st Cir. 1999).
- 17 *California Payphone Ass’n*, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*).
- 18 47 U.S.C. § 332(c)(7)(B)(i).
- 19 47 U.S.C § 332(c)(7)(B)(ii).
- 20 47 U.S.C. § 332(c)(7)(A) (stating that, “[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities”). The statute defines “personal wireless services” to include CMRS, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. § 332(c)(7)(C). In 2012, Congress expressly modified this preservation of local authority by enacting Section 6409(a), which requires local governments to approve certain types of facilities siting applications “[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] ... or any other provision of law.” Spectrum Act, 47 U.S.C. § 6409(a)(1).
- 21 47 U.S.C. § 332(c)(7)(B)(v).
- 22 47 U.S.C. § 332(c)(7)(B)(v).
- 23 *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009) (*2009 Declaratory Ruling*), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012) (*City of Arlington*), *aff’d*, 569 U.S. 290 (2013).
- 24 *2009 Declaratory Ruling*, 24 RCC Rcd at 14017-18, para. 61.
- 25 *Id.*
- 26 *Id.* at 14008, para. 37; *see also id.* at 14029 (Statement of Chairman Julius Genachowski) (“[T]he rules we adopt today ... will have an important effect in speeding up wireless carriers' ability to build new 4G networks— which will in turn expand and improve the range of wireless choices available to American consumers.”).
- 27 *Id.* at 14012, para. 45.
- 28 *Id.* at 14005, 14012, paras. 32, 45.
- 29 *Id.* at 14008-10, 14013-14, paras. 37-42, 49-50.
- 30 *Id.* at 14009, para. 38; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (proper remedies for Section 332(c)(7) violations include injunctions but not constitutional tort damages).
- 31 Specifically, the Commission determined that once a siting application is considered complete for purposes of triggering the Section 332(c)(7) shot clocks, those shot clocks run regardless of any moratoria imposed by state or local governments, and the shot clocks apply to DAS and small-cell deployments so long as they are or will be used to

provide “personal wireless services.” *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12966, 12973, paras. 243, 270, (2014) (*2014 Wireless Infrastructure Order*), *aff’d*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015) (*Montgomery County*); *see also* *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3339, para. 22 (2017) (*Wireless Infrastructure NPRM/NOI*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 and WT Docket No. 17-79, FCC 18-111, paras. 140-68 (rel. Aug. 3, 2018) (*Moratoria Declaratory Ruling*).

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

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

34 *Id.*

35 *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12872, para. 15.

36 *Id.* at 12922, 12956-57, paras. 135, 214-15.

37 *Id.* at 12961-62, paras. 226, 228.

38 *Montgomery County*, 811 F.3d at 129.

39 *See, e.g., City of Arlington*, 668 F.3d at 253-54; *County of San Diego*, 543 F.3d at 578; *RT Commc'ns., Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000).

40 *City of Arlington*, 668 F.3d at 254, 260-61.

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

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

43 *See generally* *Moratoria Declaratory Ruling*, FCC 18-111, paras. 140-68.

44 *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Twentieth Report, 32 FCC Rcd 8968, 8972, para. 20 (2017) (*Twentieth Wireless Competition Report*).

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

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

(2018) (Deloitte 5G Paper), available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5gdeployment-imperative.pdf>.

- 47 See *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3331, para. 2.
- 48 See, e.g., Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 10, 2018) (“Unfortunately, many municipalities are unable, unwilling, or do not make it a priority to act on applications within the shot clock period.”); Letter from Keith Buell, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Aug. 13, 2018) (Sprint Aug. 13, 2018 *Ex Parte* Letter); Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) (“[L]ocal permitting delays continue to stymie deployments.”); Letter from Kenneth J. Simon, Crown Castle, to Marlene H. Dortch, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018); Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 30, 2018) (CTIA Aug. 30, 2018 *Ex Parte* Letter).
- 49 Crown Castle Comments at 7; see also Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle International Corp., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1-2 (filed Sept. 19, 2018) (“In Hillsborough, California, Crown Castle submitted applications covering 16 nodes, and was assessed \$60,000 in application fees. Not only did Hillsborough go on to deny these applications, following that denial it also then sent Crown Castle an invoice for an additional \$351,773 (attached as Exhibit A), most of which appears to be related to outside counsel fees—all for equipment that was not approved and has not yet been constructed.”).
- 50 Letter from Henry Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 6, 2018) (AT&T Aug. 6, 2018 *Ex Parte* Letter).
- 51 AT&T Comments at 6-7.
- 52 T-Mobile Reply Comments at 7-9; see also CCA Reply Comments at 12; CTIA Reply Comments at 18; WIA Reply Comments at 22-23.
- 53 See Verizon Comments at 7.
- 54 See Verizon Comments at 35.
- 55 See, e.g., T-Mobile Comments at 8 (stating that “roughly 30% of all of its recently proposed sites (including small cells) involve cases where the locality failed to act in violation of the shot clocks.”). According to WIA, one of its members “reports that 70% of its applications to deploy Small Wireless Facilities in the public ROWs during a two- year period exceeded the 90-day shot clock for installation of Small Wireless Facilities on an existing utility pole, and 47% exceeded the 150-day shot clock for the construction of new towers.” WIA Comments at 7. A New Jersey locality took almost five years to deny a Sprint application. See *Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d 381, 383, 387 (D.N.J. 2014), *aff’d*, 606 Fed. Appx. 669 (3d Cir. 2015). Another locality took almost three years to deny a Crown Castle application to install a DAS system. See *Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 WL 3357169, *6-8 (S.D.N.Y. 2013), *aff’d*, 552 Fed. Appx. 47 (2d Cir. 2014).
- 56 WIA Comments at 8. WIA states that one of its “member reports that the wireless siting approval process exceeds 90 days in more than 33% of jurisdictions it surveyed and exceeds 150 days in 25% of surveyed jurisdictions.” WIA Comments at 8. In some cases, WIA members have experienced delays ranging from one to three years in multiple jurisdictions—significantly longer than the 90- and 150-day time frames that the Commission established in 2009.
- 57 See WIA Comments at 9 (citing and discussing AT&T’s Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).

- 58 GCI Comments at 5-6.
- 59 T-Mobile Comments at 21.
- 60 Lightower submits that average processing timeframes have increased from 300 days in 2016 to approximately 570 days in 2017, much longer than the Commission's shot clocks. Lightower states that “forty-six separate jurisdictions in the last two years had taken longer than 150 days to consider applications, with twelve of those jurisdictions—representing 101 small wireless facilities—taking more than a year.” Lightower Comments at 5-6. *See also* WIA Comments at 9 (citing and discussing Lightower's Comments in the 2016 Streamlining Public Notice, WT Docket No. 16-421).
- 61 WIA Comments at 8 (citing and discussing Crown Castle's Comments in 2016 Streamlining Public Notice, WT Docket No. 16-421).
- 62 BDAC Report of the Removal of State and Local Regulatory Barriers Working Group, <https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-01232018.pdf> (approved by the BDAC on January 23, 2018) (BDAC Regulatory Barriers Report); Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC, <https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-rates-fees-wg-report-07242018.pdf> (July 26, 2018) (Draft BDAC Rates and Fees Report); BDAC Model Municipal Code (Harmonized), <https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-harmonization-wg-model-code-muni.pdf> (approved July 26, 2018) (BDAC Model Municipal Code). The Draft Final Report of the Ad Hoc Committee on Rates and Fees to the BDAC was presented to the BDAC on July 26, 2018 but has not been voted by the BDAC as of the adoption of this Declaratory Ruling. Certain members of the Removal of State and Local Barriers Working Group also submitted a minority report disagreeing with certain findings in the BDAC Regulatory Barriers Report. *See* Minority Report Submitted by McAllen, TX, San Jose, CA, and New York, NY, GN Docket No. 17-83 (Jan 23, 2018); Letter from Kevin Pagan, City Attorney of McAllen to Marlene Dortch, Secretary, FCC (filed September 14, 2018).
- 63 *See, e.g.*, STREAMLINE Small Cell Deployment Act, S.3157, 115th Congress (2017-2018).
- 64 *See, e.g.*, Streamlining Permitting to Enable Efficient Deployment of Broadband Infrastructure Act of 2017 (SPEED Act), S. 1988, 115th Cong. (2017).
- 65 *See* BDAC Model Municipal Code; Draft BDAC Rates and Fees Report; BDAC Regulatory Barriers Report.
- 66 *See, e.g.*, Letter from Patricia Paoletta, Counsel to Deloitte Consulting LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) (“Deloitte noted that, as with many technology standard evolutions, the value of being a first-mover in 5G will be significant. Being first to LTE afforded the United States macroeconomic benefits, as it became a test bed for innovative mobile, social, and streaming applications. Being first to 5G can have even greater and more sustained benefits to our national economy given the network effects associated with adding billions of devices to the 5G network, enabling machine-to-machine interactions that generates data for further utilization by vertical industries”).
- 67 Letter from Montana State Senator Duane Ankney to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Duane Ankney July 31, 2018 *Ex Parte* Letter); Letter from Fred A. Lamphere, Butte County Sheriff, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 11, 2018) (Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter); Letter from Todd Nash, Susan Roberts, Paul Catstilleja, Wallowa County Board of Commissioners, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Aug. 20, 2018); Letter from Lonnie Gilbert, First Responder, National Black Growers Council Member, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79 at 1 (filed Sept. 12, 2018); Letter from Jason R. Saine, North Carolina House of Representatives, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed Sept. 14, 2018) (Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter) (minimal regulatory standard across the United States is critical to ensure that the United States wins the race to the 5G economy).

- 68 Letter from LaWana Mayfield, City Council Member, Charlotte, NC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (LaWana Mayfield July 31, 2018 *Ex Parte* Letter); *see also* Letter from South Carolina State Representative Terry Alexander to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed August 7, 2018) (“[P]olicymakers at all levels of government must streamline complex siting stipulations that will otherwise slow down 5G buildout for small cells in particular.”); Letter from Sal Pace, Pueblo County Commissioner, District 3, CO, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 30, 2018) (Sal Pace July 30, 2018 *Ex Parte* Letter) (“[T]he FCC should ensure that localities are fully compensated for their costs ... Such fees should be reasonable and non-discriminatory, and should ensure that localities are made whole. Lastly, the FCC should set reasonable and enforceable deadlines for localities to act on wireless permit applications. ... The distinction between siting large macro-towers and small cells should be reflected in any rulemaking.”)
- 69 Letter from Dr. Carolyn A. Prince, Chairwoman, Marlboro County Council, SC, to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79, at 1 (filed July 31, 2018) (Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter)
- 70 *See, e.g.*, City of Manhattan, KS Sept. 13, 2018 *Ex Parte* Letter at 1-2; Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 1-2; Damon Connolly Sept. 17, 2018 *Ex Parte* Letter at 1-2.
- 71 Fees charged by states or localities in connection with Small Wireless Facilities would be “compensation” for purposes of Section 253(c). This Declaratory Ruling interprets Section 253 and 332(c)(7) in the context of three categories of fees, one of which applies to all deployments of Small Wireless Facilities while the other two are specific to Small Wireless Facilities deployments inside the ROW. (1) “Event” or “one-time” fees are charges that providers pay on a non-recurring basis in connection with a one-time event, or series of events occurring within a finite period. The one-time fees addressed in this Declaratory Ruling are not specific to the ROW. For example, a provider may be required to pay fees during the application process to cover the costs related to processing an application building or construction permits, street closures, or a permitting fee, whether or not the deployment is in the ROW. (2) Recurring charges for a Small Wireless Facility's use of or attachment to property inside the ROW owned or controlled by a state or local government, such as a light pole or traffic light, is the second category of fees addressed here, and is typically paid on a per structure/per year basis. (3) Finally, ROW access fees are recurring charges that are assessed, in some instances, to compensate a state or locality for a Small Wireless Facility's access to the ROW, which includes the area on, below, or above a public roadway, highway, street, sidewalk, alley, utility easement, or similar property (including when such property is government-owned). A ROW access fee may be charged even if the Small Wireless Facility is not using government owned property within the ROW. AT&T Comments at 18 (describing three categories of fees); Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 11 (filed Aug. 10, 2018) (Verizon Aug. 10, 2018 *Ex Parte* Letter) (characterizing fees as recurring or non-recurring); *see also* Draft BDAC Rates and Fees Report at p. 15-16. Unless otherwise specified, a reference to “fee” or “fees” herein refers to any one of, or any combination of, these three categories of charges.
- 72 *See* 47 CFR §§ 1.1307, 1.1310. We disagree with commenters who oppose the Declaratory Ruling on the basis of concerns regarding RF emissions. *See, e.g.*, Comments from Judy Aizuss, Comments from Jeffrey Arndt, Comments from Jeanice Barcelo, Comments from Kristin Beatty, Comments from James M. Benster, Comments from Terrie Burns, Comments from EMF Safety Network, Comments from Kate Reese Hurd, Comments from Marilynne Martin, Comments from Lisa Mayock, Comments from Kristen Moriarty Termunde, Comments from Sage Associates, Comments from Elizabeth Shapiro, Comments from Paul Silver, Comments from Natalie Ventrice. The Commission has authority to adopt and enforce RF exposure limits, and nothing in this Declaratory Ruling changes the applicability of the Commission's existing RF emissions exposure rules. *See, e.g.*, Section 704(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104 (directing Commission to “prescribe and make effective rules regarding the environmental effects of radio frequency emissions” upon completing action in then-pending rulemaking proceeding that included proposals for, *inter alia*, maximum exposure limits); 47 U.S.C. § 332(c)(7)(B)(iv) (recognizing legitimacy of FCC's existing regulations on environmental effects of RF emissions of personal wireless service facilities, by proscribing state and local regulation of such facilities on the basis of such effects, to the extent such facilities comply with Commission

regulations concerning such RF emissions); 47 U.S.C. § 151 (creating the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service, ... for the purpose of [*inter alia*] promoting safety of life and property through the use of wire and radio communications”). See also H.R. Rep. No. 204(I), 104th Cong., 1st Sess. 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61 (1996) (in legislative history of Section 704 of 1996 Telecommunications Act, identifying “adequate safeguards of the public health and safety” as part of a framework of uniform, nationwide RF regulations); *Reassessment of FCC Radiofrequency Exposure Limits and Policies*, First Report and Order, Further Notice of Proposed Rulemaking and Notice of Inquiry, 28 FCC Rcd 3498, 3530-31, para. 103, n.176 (2013).

73 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

74 *Id.* The actions in this proceeding update the FCC's approach to Sections 253 and 332 by addressing effective prohibitions that apply to the deployment of services covered by those provisions. Our interpretations in this proceeding do not provide any basis for increasing the regulation of services deployed consistent with Section 621 of the Cable Communications Policy Act of 1984.

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

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

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

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

not only by the Commission but also many courts, those arguments do not persuade us to depart from the *California Payphone* standard here.

- 79 *See, e.g., City of White Plains*, 305 F.3d at 76; *Municipality of Guayanilla*, 450 F.3d at 18; *see also, e.g.,* Crown Castle June 7, 2018 *Ex Parte* Letter at 12. Because the clarifications in this order should reduce uncertainty regarding the application of these provisions for state and local governments as well as stakeholders, we are not persuaded by some commenters' arguments that an expedited complaint process is required. *See, e.g.,* AT&T Comments at 28; CTIA Reply at 21. We do not address, at this time, recently-filed petitions for reconsideration of our August 2018 *Moratoria Declaratory Ruling*. *See, e.g.,* Smart Communities Petition for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018); New York City Petition for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (filed Sept. 4, 2018). Nor do we address requests for clarification and/or action on other issues raised in the record beyond those expressly discussed in this order. These other issues include arguments regarding other statutory interpretations that we do not address here. *See, e.g.,* CTIA Reply at 23 (raising broader questions about the precise interplay of [Section 253](#) and [Section 332\(c\)\(7\)](#)); Crown Castle June 7, 2018 *Ex Parte* Letter at 16-17 (raising broader questions about the scope of “legal requirements” under [Section 253\(a\)](#)). Consequently, this order should not be read as impliedly taking a position on those issues.
- 80 *See, e.g.,* Crown Castle June 7, 2018 *Ex Parte* Letter at 11-12 (arguing that “[d]espite the Commission's efforts to define the boundaries of federal preemption under [Section 253](#), courts have issued a number of conflicting decisions that have only served to confuse the preemption analysis under [section 253](#)” and that “the Commission should clarify that the *California Payphone* standard as interpreted by the First and Second Circuits is the appropriate standard going forward”); *see also* BDAC Regulatory Barriers Report at p. 9 (“The Commission should provide clarity on what actually constitutes an “excessive” fee for right-of-way access and use. The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not “fair and reasonable.” The Commission should specifically clarify that “fair and reasonable” compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.”). Because our decision provides clarity by addressing conflicting court decisions and reaffirming that the “materially inhibits” standard articulated in the Commission's *California Payphone* decision is the appropriate standard for determining whether a state or local law operates as an effective prohibition within the meaning of [Sections 253](#) and [332](#), we reject arguments that our action will increase conflicts and lead to more litigation. *See e.g.,* Letter from Michael Dylan Brennan, Mayor, City of University Heights, Ohio, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 19, 2018) (stating that “...this framing and definition of effective prohibition opens local governments to the likelihood of more, not less, conflict and litigation over requirements for aesthetics, spacing, and undergrounding”).
- 81 *See infra* Part III.A, B.
- 82 *See County of San Diego*, 543 F.3d at 579 (“We see nothing suggesting that Congress intended a different meaning of the text ‘prohibit or have the effect of prohibiting’ in the two statutory provisions, enacted at the same time, in the same statute. * * * * As we now hold, the legal standard is the same under either [[Section 253](#) or [332\(c\)\(7\)](#)].”); *see also, e.g., Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning); *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam) (“[S]imilarity of language ... is ... a strong indication that the two statutes should be interpreted *pari passu*”); Verizon Comments at 9-10; AT&T Reply at 3-4; Crown Castle June 7, 2018 *Ex Parte* Letter at 15.
- 83 Common carrier wireless services meet the definition of “telecommunications services,” and thus are within the scope of [Section 253\(a\)](#) of the Act. *See, e.g., Moratoria Declaratory Ruling*, [FCC 18-111](#), [para 142 n.523](#); *see also, e.g.,* League of Minnesota Cities Comments at 11; Verizon Reply at 9-10. While some commenters cite certain distinguishing factual characteristics between wireline and wireless services, the record does not reveal why those distinctions would be material to whether wireless telecommunications services are covered by [Section 253](#) in the first instance. *See, e.g.,* City of San Antonio *et al.* Comments, Exh. A at 13; Virginia Joint Commenters Comments at 5, Exh. A at 45-46. To

the contrary, [Section 253\(e\)](#) expressly preserves “application of [section 332\(c\)\(3\)](#) of this title to commercial mobile service providers” notwithstanding [Section 253](#)—a provision that would be meaningless if wireless telecommunications services already fell outside the scope of [Section 253](#). 47 U.S.C. § 253(e). For this same reason, we also reject claims that the existence of certain protections for personal wireless services in [Section 332\(c\)\(7\)](#), or the phrase “nothing in this chapter” in [Section 332\(c\)\(7\)\(A\)](#), demonstrate that states' or localities' regulations affecting wireless telecommunications services must fall outside the scope of [Section 253](#). *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at iii, 45-46; Smart Communities Comments at 56. Even if, as some parties argue, the phrase “nothing in this chapter” could be construed as preserving state or local decisions on the placement, construction, or modification of personal wireless service facilities from preemption by other sections of the Communications Act, [Section 332\(c\)\(7\)\(A\)](#) goes on to make clear that such state or local decisions are *not* immune from preemption if they violate any of the standards set forth in [Section 332\(c\)\(7\)\(B\)](#)—including [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#)'s ban of requirements that “prohibit or have the effect of prohibiting” the provision of service, which is identical to the preemption provision in [Section 253\(a\)](#). Thus, states and localities may charge fees and dispose of applications relating to the matters subject to [Section 332\(c\)\(7\)](#) in any manner they deem appropriate, so long as that conduct does not amount to a prohibition or effective prohibition, as interpreted in this Declaratory Ruling or otherwise run afoul of federal or state law; but because [Sections 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) and [253\(a\)](#) use identical “effective prohibition” language, the standard for what is saved and what is preempted is the same under both provisions.

- 84 *See infra* para. 40 (discussing use of small cells to close coverage gaps, including voice gaps); *see also, e.g., Moratoria Declaratory Ruling*, FCC 18-111, para 145 n.531; *Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311, 425, para. 190 (2018); Letter from Andre J. Lachance, Associate General Counsel, Verizon to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 3 (filed Sept. 19, 2018) (confirming that “telecommunications services can be provided over small cells and Verizon has deployed Small Wireless Facilities in its network that provide telecommunications services.”); Letter from David M. Crawford, Senior Corporate Counsel, Fed. Reg. Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17- 79 at 1 (filed Sept. 19, 2018) (stating that “small wireless facilities are a critical component of T-Mobile's network deployment plans to support both the 5G evolution of wireless services, as well as more traditional services such as mobile broadband and even voice calls. T-Mobile, for example, uses small wireless facilities to densify our network to provide better coverage and greater capacity, and to provide traditional services such as voice calls in areas where our macro site coverage is insufficient to meet demand.”); Letter from Henry G. Hultquist, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 1 (filed Sept. 20, 2018) (“AT&T has operated and continues to operate commercial mobile radio services as well as information services from small wireless facilities...”); *see also, e.g., Coastal Communications Service v. City of New York*, 658 F. Supp. 2d 425, 441-42 (E.D.N.Y. 2009) (finding that a restriction on advertising on newly-installed payphones was subject to [Section 253\(a\)](#) where the advertising was a material factor in the provider's ability to provide the payphone service itself). The fact that facilities are sometimes deployed by third parties not themselves providing covered services also does not place such deployment beyond the purview of [Section 253\(a\)](#) or [Section 332\(c\)\(7\)\(B\)\(i\)](#) insofar as the facilities are used by wireless service providers on a wholesale basis to provide covered services (among other things). *See, e.g.*, T-Mobile Comments at 26. Given our conclusion that neither commingling of services nor the identity of the entity engaged in the deployment activity changes the applicability of [Section 253\(a\)](#) or [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) where the facilities are being used for the provisioning of services within the scope of the relevant statutory provisions, we reject claims to the contrary. *See, e.g., Colorado Communications and Utility Alliance et al. Comments* at 15-16; *City of San Antonio et al. Comments*, Exh. A at 12; *id.*, Exh. C at 13-15. Because local jurisdictions do not have the authority to regulate these interstate services, there is no basis for local jurisdictions to conduct proceedings on the types of personal wireless services offered over particular wireless service facilities or the licensee's service area, which are matters within the Commission's licensing authority. Furthermore, local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network. *See* 47 U.S.C. § 332(c)(3)(A); *see also Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000).

- 85 By “covered service” we mean a telecommunications service or a personal wireless service for purposes of [Section 253](#) and [Section 332\(c\)\(7\)](#), respectively.
- 86 *See, e.g.*, Crown Castle Comments at 54-55; Free State Foundation Comments at 12; T-Mobile Comments at 43- 45; CTIA Reply at 14; WIA Reply at 26; Crown Castle June 7, 2018 *Ex Parte* Letter at 13-14; Letter from Kara Romagnino Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17- 79, at 8-9 (filed June 27, 2018) (CTIA June 27, 2018 *Ex Parte* Letter). As T-Mobile explains, for example, a provider might need to improve “signal strength or system capacity to allow it to provide reliable service to consumers in residential and commercial buildings.” T-Mobile Comments at 43; *see also, e.g., Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, *et al.*, Notice of Proposed Rulemaking, [28 FCC Rcd 14238, 14253, para. 38 \(2013\)](#) (observing that “DAS and small cell facilities[] are critical to satisfying demand for ubiquitous mobile voice and broadband services”). The growing prevalence of smart phones has only accelerated the demand for wireless providers to take steps to improve their service offerings. *See, e.g., Twentieth Wireless Competition Report*, [32 FCC Rcd at 9011-13](#), paras. 62-65.
- 87 Our conclusion finds further support in our broad understanding of the statutory term “service,” which, as we explained in our recent *Moratoria Declaratory Ruling*, means “any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities.” *Moratoria Declaratory Ruling*, [FCC 18-111, para. 162 n.594](#); *see also Public Utility Comm’n of Texas Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, [13 FCC Rcd 3460, 3496, para. 74 \(1997\)](#) (*Texas PUC Order*) (interpreting the scope of “telecommunications services’ covered by [Section 253\(a\)](#) and clarifying that it would be an unlawful prohibition for a state or locality to specify “the means or facilities” through which a service provider must offer service); Crown Castle June 7, 2018 *Ex Parte* Letter at 10-11 (discussing this precedent). We find this interpretation of “service” warranted not only under [Section 253\(a\)](#), but [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#)'s reference to “services” as well.
- 88 Preamble to the Telecommunications Act of 1996, Pub. Law. No. 104-104, § 202, 110 Stat. 56 (1996). Consequently, we reject arguments suggesting that the provision of some level of wireless service in the past necessarily demonstrates that there is no effective prohibition of service under the state or local legal requirements that applied during those periods or that an effective prohibition only is present if a provider can provide no covered service whatsoever. *See, e.g.*, City and County of San Francisco Comments at 25-26; Virginia Joint Commenters Comments, Exh. A at 31-33. Nor, in light of these goals, do we find it reasonable to interpret the protections of these provisions as doing nothing more than guarding against a monopoly as some suggest. *See, e.g.*, Smart Communities Comments, WC Docket No. 17-84, at 8-9 (filed June 15, 2017) cited in Smart Communities Comments at 57 n.141.
- 89 *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Second Report and Order*, [FCC 18-30, para. 62 \(rel. Mar. 30, 2018\)](#) (*Wireless Infrastructure Second R&O*) (quoting 47 U.S.C. §§ 151, 309(j)(3)(A), (D)).
- 90 *California Payphone*, [12 FCC Rcd at 14206, para. 31](#).
- 91 *Texas PUC Order*, [13 FCC Rcd at 3466, 3498-500](#), paras. 13, 78-81; *see also, e.g.*, Crown Castle June 7, 2018 *Ex Parte* at 10-11, 13.
- 92 Crown Castle June 7, 2018 *Ex Parte* Letter at 13.
- 93 *See, e.g., Texas PUC Order*, [13 FCC Rcd at 3466, 3498-500](#), paras. 13, 78-81; *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities*, Declaratory Ruling, [15 FCC Rcd 15168, 15173](#), paras. 12-13 (2000) (*Western Wireless Order*); *Pittencrieff Communications, Inc. Petition for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act*

of 1995, Memorandum Opinion and Order, 13 FCC Rcd 1735, 1751-52, para. 32 (1997) (*Pittencrieff*), *aff'd*, *Cellular Telecomm. Indus. Ass'n v. FCC*, 168 F.3d 1332 (5th Cir. 1999); *City of White Plains*, 305 F.3d at 80.

- 94 Smart Communities seeks clarification of whether this Declaratory Ruling is meant to say that the “coverage gap” standard followed by a number of courts should include consideration of capacity as well as coverage issues. Letter from Gerard Lavery Lederer, Counsel, Smart Communities and Special Districts Coalition, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Att. at 17 (Sept. 19, 2018) (Smart Communities Sept. 19 *Ex Parte* Letter). We are not holding that prior “coverage gap” analyses are consistent with the standards we articulate here as long as they also take into account “capacity gaps”; rather, we are articulating here the effective prohibition standard that should apply while, at the same time, noting one way in which prior approaches erred by requiring coverage gaps. Accordingly, we reject both the version of the “coverage gap” test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show “not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try”) and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the “least intrusive means” for filling a coverage gap) *See supra* n. 75. We also note that some courts have expressed concern about alternative readings of the statute that would lead to extreme outcomes—either always requiring a grant under some interpretations, or never preventing a denial under other interpretations. *See, e.g., Willoth*, 176 F.3d at 639-41; *APT*, 196 F.3d at 478-79; *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (*City Council of Virginia Beach*); *see also, e.g.,* Greenling Comments at 2; City and County of San Francisco Reply at 16. Our interpretation avoids those concerns while better reflecting the text and policy goals of the Communications Act and 1996 Act than coverage gap-based approaches ultimately adopted by those courts. Our approach ensures meaningful constraints on state and local conduct that otherwise would prohibit or have the effect of prohibiting the provision of personal wireless services. At the same time, our standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities, as explained below. *See infra* III.B, C.
- 95 *See, e.g., Willoth*, 176 F.3d at 641-44; *360 Degrees Commc'ns Co. v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86-88 & n.1 (4th Cir. 2000) (*Albemarle County*); *see also, e.g.,* ExteNet Comments at 29; T-Mobile Comments at 42; Verizon Comments at 18; WIA Comments at 38-40. Even some cases that implicitly recognize the limitations of a gap-based test fail to account for those limitations in practice when applying Section 332(c)(7)(B)(i)(II). *See, e.g., Second Generation Properties v. Town of Pelham*, 313 F.3d 620, 633 n.14 (4th Cir. 2002) (discussing scenarios where a carrier has coverage but insufficient capacity to adequately handle the volume of calls or where new technology emerges and a carrier would like to use it in areas that already have coverage using prior-generation technology). Courts that have sought to identify limited set of characteristics of personal wireless services covered by the Act essentially allow actual or effective prohibition of many personal wireless services that providers wish to offer with additional or more advanced characteristics. *See, e.g., Willoth*, 176 F.3d at 641-43 (drawing upon certain statutory definitions); *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) (*Borough of Ho-Ho-Kus*) (concluding that it should be up to state or local authorities to assess and weigh the benefits of differing service qualities); *Albemarle County*, 211 F.3d at 87 (citing 47 CFR §§ 22.99, 22.911(b) as noting the possibility of some ‘dead spots’); *cf. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006) (describing as a “dubious proposition” the argument that a denial of a request to construct a tower resulting in “less than optimal” service quality could be an effective prohibition). An outcome that allows the actual or effective prohibition of some covered services is contrary to the Act. Section 253(a) applies to any state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing “any” interstate or intrastate telecommunications service, 47 U.S.C. § 253(a). Similarly, Section 332(c)(7)(B)(i)(II) categorically precludes state or local regulation of the placement, construction, or modification of personal wireless service facilities that prohibits or has the effect of prohibiting the provision of personal wireless “services.” 47 U.S.C. § 332(c)(7)(B)(i)(II). We find the most natural interpretation of these sections is that any service that meets the definition of “telecommunications service” or “personal wireless service” is encompassed by the language of each provision, rather than only some subset of such services or service generally. The notion that such state or local regulation permissibly could prohibit some personal wireless services, so long as

others are available, is at odds with that interpretation. In addition, as we explain above, a contrary approach would fail to advance important statutory goals as well as the interpretation we adopt. Further, the approach reflected in these court decisions could involve state or local authorities “inquir[ing] into and regulat[ing] the services offered—an inquiry for which they are ill-qualified to pursue and which could only delay infrastructure deployment.” Crown Castle June 7, 2018 *Ex Parte* Letter at 14. Instead, our effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.

- 96 *See generally, e.g., Twentieth Wireless Competition Report, 32 FCC Rcd at 8968; see also, e.g.,* T-Mobile Comments at 42-43; AT&T Reply at 4-5; CTIA Reply at 13-14; WIA Reply at 23-24; Crown Castle June 7, 2018 *Ex Parte* Letter at 15. We do not suggest that viewing wireless service as if it were a single, monolithic offering provided only via traditional wireless towers would have reflected an accurate understanding of the marketplace in the past, even if it might have been somewhat more understandable that courts held such a simplified view at that time. Rather, the current marketplace conditions highlight even more starkly the shortcomings of coverage gap- based approaches, which do not account for other characteristics and deployment strategies. *See, e.g., Twentieth Wireless Competition Report, 32 FCC Rcd at 8974-75, para. 12* (observing that “[p]roviders of mobile wireless services typically offer an array of mobile voice and data services,” including “interconnected mobile voice services”); *id. at 8997-97*, paras. 42-43 (discussing various types of wireless infrastructure deployment to, among other things, “improve spectrum efficiency for 4G and future 5G services,” “to fill local coverage gaps, to densify networks and to increase local capacity”).
- 97 Crown Castle June 7, 2018 *Ex Parte* Letter at 15; *see also id.* at 13 (“Densification of networks will be key for augmenting the capacity of existing networks and laying the groundwork for the deployment of 5G.”); *id.* at 15-16 (“When trying to maximize spectrum re-use and boost capacity, moving facilities by just a few hundred feet can mean the difference between excellent service and poor service. The FCC’s rules, therefore, must account for the effect siting decisions would have on every level of service, including increasing capacity and adding new spectrum bands. Practices and decisions that prevent carriers from doing either materially prohibit the provision of telecommunications service and thus should be considered impermissible under Section 332.”). Contrary approaches appear to occur in part when courts’ policy balancing places more importance on broadly preserving state and local authority than is justified. *See, e.g., APT, 196 F.3d at 479; Albemarle County, 211 F.3d at 86; City Council of Virginia Beach, 155 F.3d at 429; National Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14 (1st Cir. 2002); see also, e.g., League of Arizona Cities et al. Joint Comments at 45; Smart Communities Reply at 33.* As explained above, our interpretation that “telecommunications services” in Section 253(a) and “personal wireless services” in Section 332(c)(7)(B)(i)(II) are focused on the covered services that providers seek to provide—including the relevant service characteristics they seek to incorporate—not only is consistent with the text of those provisions but better reflects the broader policy goals of the Communications Act and the 1996 Act.
- 98 *See* WIA Comments at 39; T-Mobile Comments at 43-44.
- 99 *See, e.g., County of San Diego, 543 F.3d at 577, 579-80; City of St. Louis, 477 F.3d at 533-34; see also, e.g.,* Virginia Joint Commenters Comments, Exh. A at 39-41. Although the Ninth Circuit in *County of San Diego* found that “the unambiguous text of § 253(a)” precluded a prior Ninth Circuit approach that found an effective prohibition based on broad governmental discretion and the “mere possibility of prohibition,” that holding is not implicated by our interpretations here. *County of San Diego, 543 F.3d at 578; cf. City of St. Louis, 477 F.3d at 532.* Consequently, those decisions do not preclude the Commission’s interpretations here, *see, e.g., Verizon Reply at 7*, and we reject claims to the contrary. *See, e.g., Smart Communities Comments at 60.*
- 100 *City of White Plains, 305 F.3d at 76* (citing *RT Commc’ns, 201 F.3d at 1268*); *see also, e.g., Municipality of Guayanilla, 450 F.3d at 18* (quoting *City of White Plains, 305 F.3d at 76* and citing *City of Santa Fe, 380 F.3d at 1269*); Crown Castle June 7, 2018 *Ex Parte* Letter at 12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach at 5. Indeed, the Eighth Circuit’s *City of St. Louis* decision acknowledges that under Section 253 “[t]he plaintiff need not show a complete or

insurmountable prohibition,” even while other aspects of that decision suggest that an insurmountable barrier effectively would be required. *City of St. Louis*, 477 F.3d at 533 (citing *City of White Plains*, 305 F.3d at 76).

- 101 In *California Payphone*, the Commission concluded that the ordinance at issue “does not ‘prohibit’ the ability of any payphone service provider to provide payphone service in the Central Business District within the meaning of [section 253\(a\)](#),” but went on to evaluate the possibility of an effective prohibition by considering “whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” *California Payphone*, 12 FCC Rcd at 14205, 14206, paras. 28, 31. In the *Texas PUC Order*, the Commission found that state law build-out requirements would require “‘substantial financial investment’ and a ‘comparatively high cost per loop sold’ in particular areas, interfering with the ‘statewide entry’ plans that new entrants ‘may reasonable contemplate’ in violation of [Section 253\(a\)](#) notwithstanding claims that the specific new entrants at issue had ‘vast resources and access to capital’ sufficient to meet those added costs. *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78. The Commission also has expressed “‘great concern’ about an exclusive rights-of-way access agreement that “‘appear[[ed] to have the potential to adversely affect the provision of telecommunications services by facilities-based providers, in violation of the provision of [section 253\(a\)](#).” *Minnesota Order*, 14 FCC Rcd at 21700, para. 3. As another example, in the *Western Wireless Order*, the Commission stated that a “universal service fund mechanism that provides funding only to ILECs” would likely violate [Section 253\(a\)](#) not because it was insurmountable but because it would “effectively lower the price of ILEC-provided service relative to competitor-provided service” and thus “give customers a strong incentive to choose service from ILECs rather than competitors.” *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.
- 102 We discuss specific applications of the *California Payphone* standard in the context of certain fees and non-fee regulations in the sections below; we leave others to be addressed case-by-case as they arise or otherwise are taken up by the Commission or courts in the future.
- 103 *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added); see also, e.g., Level 3 Communications, Petition for a Writ of Certiorari, *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, at 13 (filed Nov. 7, 2008) (“[T]he term ‘[p]rohibit’ commonly has a less absolute meaning than that adopted below, and properly refers to actions that ‘hold back,’ ‘hinder,’ or ‘obstruct.’” (quoting Random House Webster’s Unabridged Dictionary 1546 (2d ed. 1998))). We thus are not compelled to interpret ‘effective prohibition’ to set the high bar suggested by some commenters based on other dictionary definitions. Smart Communities Petition for Reconsideration, WC Docket No. 17-84, WT Docket No. 17-79 at 7 (filed Sept. 4, 2018). Because we are unpersuaded that the statutory terminology requires us to interpret an effective prohibition as satisfied only by an insurmountable barrier to entry, we likewise reject commenters’ attempts to argue that “effective prohibition” must be understood to set a higher bar by comparison to the “impairment” language in Section 251 of the Act and associated regulatory interpretations of network unbundling requirements taken from that context. *Id* at 6. In addition, commenters do not demonstrate why the statutory framework and regulatory context of network unbundling under Section 251—and the specific concerns about access by non-facilities-based providers to competitive networks underlying the court precedent they cite—is sufficiently analogous to that of [Section 253](#) and [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) that statements from that context should inform our interpretation here. See, e.g., *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. at 392. In responding to these discrete arguments raised in a petition for reconsideration of the *Moratoria Declaratory Ruling* that bear on actions we take in this order we do not thereby resolve any of the petition’s arguments with respect to that order. The requests for relief raised in the petition remain pending in full.
- 104 47 U.S.C. § 253(a), (b), (c).
- 105 See, e.g., *Texas PUC Order*, 13 FCC Rcd at 3498, para. 78 (rejecting claims that there should be a higher bar to find an effective prohibition for providers with significant financial resources and recognizing that the effects of the relevant state requirements on a given provider could differ depending on the planned geographic scope of entry).

- 106 *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442, para. 106 (1997) (*TCI Cablevision Order*).
- 107 *See infra* Part III.B.
- 108 The Commission also has recognized the potential for fees to result in an effective prohibition. *See, e.g., Pittencrieff*, 13 FCC Rcd at 1751-52, para. 37 (observing that “even a neutral [universal service] contribution requirement might under some circumstances effectively prohibit an entity from offering a service”).
- 109 *Municipality of Guayanilla*, 450 F.3d at 18-19.
- 110 *Id.* at 19.
- 111 *Id.* (quoting *City of White Plains*, 305 F.3d at 76).
- 112 *Municipality of Guayanilla*, 450 F.3d at 17 (looking at the aggregate cost of fees charged across jurisdictions given the interconnected nature of the service).
- 113 *Id.* at 22 (“We need not decide whether fees imposed on telecommunications providers by state and local governments must be limited to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, related to the actual use of rights of way and that ‘the costs [of maintaining those rights of way] are an essential part of the equation.’”).
- 114 *City of White Plains*, 305 F.3d at 77.
- 115 *Id.* In this context, the court stated that the term “‘compensation’ is ‘flexible’ and capable of different meanings depending on the context in which it is used. *Id.*”
- 116 *City of White Plains*, 305 F.3d at 79. In particular, the court concluded that “‘fees that exempt one competitor are inherently not ‘competitively neutral,’ regardless of how that competitor uses its resulting market advantage,” *id.* at 80, and thus “[a]llowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the [1996 Act],” *id.* at 79.
- 117 *Id.*
- 118 *City of Santa Fe*, 380 F.3d at 1270-71.
- 119 *Id.* at 1271.
- 120 *Id.* at 1272 (observing that “[t]he City acknowledges ... that the rent required by the Ordinance is not limited to recovery of costs”).
- 121 *Compare, e.g., Municipality of Guayanilla*, 450 F.3d at 18-19 (finding that fees were significant and had the effect of prohibiting service); *City of Santa Fe*, 380 F.3d at 1271 (similar); *with, e.g., Qwest v. Elephant Butte Irrigation Dist.*, 616 F. Supp. 2d 1110, 1123-24 (D.N.M. 2008) (rejecting Qwest's reliance on preceding finding of effective prohibition from quadrupled costs where the fee at issue was a penny per foot); *Qwest v. City of Portland*, 2006 WL 2679543, *15 (D. Or. 2006) (asserting with no explanation that “a registration fee of \$35 and a refundable deposit of \$2,000 towards processing expenses ... could not possibly have the effect of prohibiting Qwest from providing telecommunications services”).
- 122 For example and as noted above, in *Municipality of Guayanilla* the First Circuit reserved judgment on whether the fair and reasonable compensation allowed under Section 253 must be limited to cost recovery or if it was sufficient if the compensation was related to the actual use of rights of way. *Municipality of Guayanilla*, 450 F.3d at 22. Other courts have found reasonable compensation to require cost-based fees. *XO Missouri v. City of Maryland Heights*, 256 F. Supp.

2d 987, 993-95 (E.D. Mo. 2003) (*City of Maryland Heights*); *Bell Atlantic—Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 818 (D. Md. 1999) (*Prince George's County*) vacated on other grounds, 212 F.3d 863 (4th Cir. 2000). Still other courts have applied a test that weighs a number of considerations when evaluating whether compensation is fair and reasonable. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000) (*City of Dearborn*) (considering “the amount of use contemplated ... the amount that other providers would be willing to pay ... and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it now was challenging as unfair”).

- 123 See CTIA June 27, 2018 *Ex Parte* Letter at 6 (“[s]mall cell technology is needed to support 4G densification and 5G connectivity.”); see also [Accelerating Wireless Deployment by Removing Barriers to Infrastructure Investment, Report and Order](#), 32 FCC Rcd 9760, 9765, para. 12 (2017) (*2017 Pole Replacement Order*) (recognizing that Small Wireless Facilities will be increasingly necessary to support the rollout of next-generation services).
- 124 See Verizon Comments at 3; AT&T Comments at 1.
- 125 See Letter from Keith C. Buell, Senior Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Feb. 21, 2018).
- 126 Accelerating Future Economic Value Report at 6; see also Deloitte 5G Paper.
- 127 [Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking and Notice of Inquiry](#), 32 FCC Rcd 3266, 3296-97, paras. 100 -101 and 3298-99, paras. 104-105 (2017).
- 128 *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3360, para. 87. In addition, in 2016, the Wireless Telecommunications Bureau released a public notice seeking comment on ways to expedite the deployment of next generation wireless infrastructure, including providing guidance on application processing fees and charges for use of rights of way. See [Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies](#), Public Notice, 31 FCC Rcd 13360 (WTB 2016).
- 129 *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3362, para. 90.
- 130 We do not find these fees to be taxes within the meaning of Section 601(c)(2) of the 1996 Act. See, e.g., Smart Communities Reply at 36 (quoting the savings clause for “State or local law pertaining to taxation” in Section 601(c)(2) of the 1996 Act). It is ambiguous whether a fee charged for access to ROWs should be viewed as a tax for purposes of Section 601(c)(2) of the 1996 Act. See, e.g., *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) (distinguishing “the price paid to rent use of public right-of-ways” from a “tax” and citing similar precedent). Given that Congress clearly contemplated in Section 253(c) that states' and localities' fees for access to ROWs could be subject to preemption where they violate Section 253—or else the savings clause in that regard would be superfluous—we find the better view is that such fees do not represent a tax encompassed by Section 601(c)(2) of the 1996 Act. We do not address whether particular fees could be considered taxes under other statutes not administered by the FCC, but we reject the suggestion that tests courts use to determine what constitute “taxes” in the context of such other statutes should apply to the Commission's interpretation of Section 601(c)(2) here in light of the statutory context for Section 601(c)(2) in the 1996 Act and the Communications Act discussed above. See, e.g., *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 & n.3 (9th Cir. 2006) (holding that particular fees at issue there were taxes for purposes of the Tax Injunction Act and stating in dicta that had the Tax Injunction Act not applied it would agree with the conclusion of the district court that it was covered by Section 601(c)(2) of the 1996 Act); *MCI Communications Services, Inc. v. City of Eugene*, 359 F. Appx. 692, 696 (9th Cir. 2009) (asserting without analysis that the same test would apply to determine if a fee constitutes a tax under both the Tax Injunction Act and Section 601(c)(2) of the 1996 Act).
- 131 By costs, we mean those costs specifically related to and caused by the deployment. These include, for instance, the costs of processing applications or permits, maintaining the ROW, and maintaining a structure within the ROW. See *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005) (*Guayanilla District Ct.*

Opinion), *aff'd*, 450 F.3d 9 (1st Cir. 2006) (“fees charged by a municipality need to be related to the degree of actual use of the public rights-of way” to constitute fair and reasonable compensation under Section 253(c)).

132 We explain above what we mean by “fees.” See *supra* note 71. Contrary to some claims, we are not asserting a “general ratemaking authority.” Virginia Joint Commenters Comments at 6. Our interpretations in this order bear on whether and when fees associated with Small Wireless Facility deployment have the effect of prohibiting wireless telecommunications service and thus are subject to preemption under Section 253(a), informed by the savings clause in Section 253(c). While that can implicate issues surrounding how those fees were established, it does so only to the extent needed to vindicate Congress’s intent in Section 253. We do not interpret Section 253(a) or (c) to authorize the regulation or establishment of state and local fees as an exercise in itself. We likewise are not persuaded by undeveloped assertions that the Commission’s interpretation of Section 253 in the context of fees would somehow violate constitutional separation of powers principles. See, e.g., Virginia Joint Commenters Comments, Exh. A at 52.

133 47 U.S.C. § 253(a).

134 47 U.S.C. § 253(b).

135 47 U.S.C. § 253(c).

136 47 U.S.C. § 253(d).

137 *Texas PUC Order*, 13 FCC Rcd at 3481, para. 44.

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

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

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

141 See *infra* paras. 62-63.

142 See, e.g., *Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64.

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

- 144 *See supra* note 71.
- 145 *Cf. Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (observing that the *expressio unius* canon is a “feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved,” and concluding there that “Congress’s mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion”).
- 146 For ROW compensation to be saved under Section 253(c) it must be “fair and reasonable,” while the *California Payphone* standard looks to whether a legal requirement “materially limits or inhibits” the ability to compete in a “fair” legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.
- 147 For ROW compensation to be saved under Section 253(c) it also must be “competitively neutral and nondiscriminatory,” while the *California Payphone* standard also looks to whether a legal requirement “materially limits or inhibits” the ability to compete in a “balanced” legal environment for a covered service. *California Payphone*, 12 FCC Rcd at 14206, para. 31.
- 148 *See infra* paras. 69-77; *see also, e.g., City of Maryland Heights*, 256 F. Supp. 2d at 993-95; *Bell Atlantic—Maryland*, 49 F. Supp. 2d at 818.
- 149 *See, e.g., NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) (statute did not unambiguously require the SEC to interpret “fair and reasonable” to mean cost-based, and the SEC’s reliance on market-based rates as “fair and reasonable” where there was competition was a reasonable interpretation).
- 150 *See, e.g., Life Technologies Corp. v. Promega Corp.*, 137 S. Ct. 734 (2017) (“A word is given more precise content by the neighboring words with which it is associated.” (internal alteration and quotation marks omitted)).
- 151 *See infra* para. 56.
- 152 *See, e.g., City of White Plains*, 305 F.3d at 80.
- 153 *City of Santa Fe*, 380 F.3d at 1269; *see also* Verizon Comments at 17.
- 154 *See, e.g., Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5878, 5882-83, paras. 1, 13; *Western Wireless Order*, 15 FCC Rcd at 16231, para. 8; *Petition of the State of Minnesota for a Declaratory Ruling regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707, para. 18 (*Minnesota Order*); *Hyperion Order*, 14 FCC Rcd at 11070, para. 13; *Texas PUC Order*, 13 FCC Rcd at 3480, para. 41; *TCI Cablevision Order*, 12 FCC Rcd at 21399, para. 7; *California Payphone*, 12 FCC Rcd at 14209, para. 38; *see also, e.g., AT&T Comm’ns of the Sw. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tx. 1998) (*AT&T v. City of Dallas*) (“[A]ny fee that is not based on AT&T’s use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry.”); Verizon Comments at 11-12; Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7. Because we view the *California Payphone* standard as reflecting a focus on barriers to entry, we decline requests to adopt a distinct, additional standard with that as an explicit focus. *See, e.g., T-Mobile Comments* at 35.
- 155 *See, e.g., Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240, 5301-03, paras. 142-45 (2011) (rejecting an approach to defining a lower bound rate for pole attachments that “would result in pole rental rates below incremental cost” as contrary to cost causation principles); *Investigation of Interstate Access Tariff Non-Recurring Charges*, Memorandum Opinion and Order, 2 FCC Rcd 3498, 3502, para. 34 (1987) (observing in the rate regulation context that “the public interest is best served, and a competitive marketplace is best encouraged, by policies that promote the recovery of costs from the cost-causer”). Our interpretation limiting states

and localities to the recovery of a reasonable approximation of objectively reasonable cost also takes into account state and local governments' exclusive control over access to the ROW.

- 156 For example, Verizon states that “[a]lthough *any* fee could be said to raise the cost of providing service,” Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 9, “[t]he Commission should interpret ... [Section 253\(a\)](#) to allow cost-based fees for access to public rights-of-way and structures within them, but to prohibit above-cost fees that generate revenue in excess of state and local governments' actual costs.” *Id.*, Attach. at 6.
- 157 *See, e.g., TCI Cablevision Order*, 12 FCC Rcd at 21441, para. 103; *see also, e.g.,* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). States' or localities' regulation premised on addressing effects of deployment besides these costs caused by facilities deployment are distinct issues, which we discuss below. *See infra* Part III.C.
- 158 The Supreme Court has recognized that land use regulation can involve an exercise of police powers. *See, e.g., Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). As that Court observed, “[i]t would ... be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity.” *Id.* at 292. At the same time, the Court also has held that “historic police powers of the States” are not to be preempted by federal law “unless that was the clear and manifest purpose of Congress.” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (internal quotation marks omitted). As relevant here, we see no clear and manifest intent that Congress intended to preempt publicly disclosed, objectively reasonable cost-based fees imposed on a nondiscriminatory basis, particularly in light of [Section 253\(c\)](#).
- 159 We disagree with suggestions that the Commission applied an additional and more stringent “commercial viability” test in *California Payphone*. *See, e.g.,* Crown Castle June 7, 2018 *Ex Parte* Letter at 10. Instead, the Commission was simply evaluating the [Section 253](#) petition on its own terms, *see, e.g., California Payphone*, 12 FCC Rcd at 14204, 14210, paras. 27, 41, and, without purporting to define the bounds of [Section 253\(a\)](#), explaining that the petitioner “ha[d] not sufficiently supported its allegation” that the provision of service at issue “would be ‘impractical and uneconomic.’” *Id.* at 14210, para. 41. Confirming that this language was simply the Commission's short-hand reference to arguments put forward by the petitioner itself, and not a Commission-announced standard for applying [Section 253](#), the Commission has not applied a “commercial viability” standard in other decisions, as these same commenters recognize. *See, e.g.,* Crown Castle June 7, 2018 *Ex Parte* Letter at 10.
- 160 *Texas PUC Order*, 13 FCC Rcd at 3466, 3498-500, paras. 13, 78-81.
- 161 *See infra* paras. 60-65.
- 162 *See, e.g., Western Wireless Order*, 15 FCC Rcd at 16231, para. 8.
- 163 *See, e.g.,* WIA Comments, Attach. 2 at 70.
- 164 WIA Comments, Attach. 2 at 70 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added)); *see also, e.g.,* Verizon Comments at 15 (similar); *City of Maryland Heights*, 256 F. Supp. 2d at 995-96.
- 165 141 Cong. Rec. H8460-01, H8460 (daily ed. Aug. 4, 1995).
- 166 We reject other comments downplaying the relevance of legislative statements by some commenters as inconsistent with the text and structure of the Act. *See, e.g.,* League of Arizona Cities *et al.* Joint Comments at 27- 28; NATOA Comments, Exh. A at 26-28; Smart Communities Reply at 57-58; Cities of San Antonio *et al.* Reply at 20-21; *see also, e.g., City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1071-72 (D. Or. 2005).
- 167 At a minimum, this analysis complements and reinforces the justifications for our interpretation provided above. While the relevant language of [Section 253\(a\)](#) and [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) is not limited just to Small Wireless Facilities, we proceed incrementally in our Declaratory Ruling here and address the record before us, which indicates that our

interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment.

- 168 For example, the precise amount of these resources might shift as a service provider encounters unexpected costs, recovers costs passed on to subscribers, or earns a profit above those costs.
- 169 As Verizon observes, “[a] number of states enacted infrastructure legislation because they determined that rate relief was necessary to ensure wireless deployment,” and thus could be seen as having “acknowledged that excessive fees impose a substantial barrier to the provision of service.” Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 7-8. In view of the evidence in the record regarding the effect of state and local fees on capital expenditures, *see, e.g.*, Corning Sept. 5, 2018 *Ex Parte* Letter (noting that cost savings from reduced small cell attachment and application fees could result in \$2.4 billion in capital expenditure and that 97% of this capital expenditure would go toward investments in rural and suburban areas), we disagree with arguments that fees do not affect the deployment of wireless facilities in rural and underserved areas. *See, e.g.*, Letter from Sam Liccardo, Mayor, City of San Jose, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed Sept. 18, 2018) (City of San Jose Sept. 18, 2018 *Ex Parte* Letter) (stating that “whether or not a provider wishes to invest in a dense urban area, including underserved urban areas, or a rural area is fundamentally based on the size of the customer base and the market demand for service—not on the purported wiles of a ‘must-serve’ jurisdiction somehow forcing investment away from rural areas because a right of way or attachment fee is charged.”); Letter from Joanne Hovis, Chief Executive Officer, Coalition for Local Internet Choice, James Baller, President, Coalition for Local Internet Choice, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 3 (filed Sept. 18, 2018) (“in lucrative areas, carriers will pay market fees for access to property just as they would any other cost of doing business. But they will not, as rational economic actors, necessarily apply new profits (created by FCC preemption) to deploying in otherwise unattractive areas.”).
- 170 *See, e.g.*, CTIA Comments at 32 (identifying “disparate interpretations” regarding the fees that are preempted and seeking FCC clarification to “dispel the resulting uncertainty”); Verizon Comments at 10 (similar); Letter from Cathleen A. Massey, Vice Pres.-Fed. Regulatory Affairs, T-Mobile, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, Attach. at 7 (filed Sept. 21, 2017) (seeking clarification of [Section 253](#)); BDAC Regulatory Barriers Report, p. 9 (“The FCC should provide guidance on what constitutes a fee that is excessive and/or duplicative, and that therefore is not ‘fair and reasonable.’ The Commission should specifically clarify that “‘fair and reasonable’ compensation for right-of way access and use implies some relation to the burden of new equipment placed in the ROW or on the local asset, or some other objective standard.”).
- 171 *Municipality of Guayanilla*, 450 F.3d at 19.
- 172 *See, e.g.*, AT&T Comments at 2; Conterra Broadband et al. Comments at 6; Mobilitie Comments at 3; Sprint Comments at 17; Letter from Courtney Neville, Associate General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2-3 (filed July 16, 2018) (CCA July 16, 2018 *Ex Parte* Letter); Letter from Henry Hultquist, Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 8, 2018) (AT&T June 8, 2018 *Ex Parte* Letter); Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Letter from Katharine R. Saunders, Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed June 21, 2018) (Verizon June 21, 2018 *Ex Parte* Letter); Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Oct. 30, 2017); Verizon Aug. 10, 2018 *Ex Parte* Letter, Attach. at 2-4. When developing capital budgets, companies rationally would account for anticipated revenues associated with the services that can be provided by virtue of planned facilities deployment, and the record does not reveal—nor do we see any basis to assume—that such revenues would be so great as to eliminate constraints on providers' capital budgets so as to enable full deployment notwithstanding the level of state and local fees.
- 173 AT&T Aug. 6, 2018 *Ex Parte* Letter at 2.

- 174 *Id.*
- 175 *Id.* (pausing or delaying deployments in Citrus Heights, CA, Oakland, CA and three Maryland counties; decreasing deployments in Lowell, MA and decreasing deployments from 98 to 25 sites in Escondido, CA).
- 176 *Id.*
- 177 Verizon Aug. 10, 2018 *Ex Parte* Letter at 5, Attach. at 2-4.
- 178 Sprint Comments at 17.
- 179 Sprint Aug. 13, 2018 *Ex Parte* Letter at 1-2.
- 180 Conterra Broadband *et al.* Comments at 6; *see also* Letter from John Scott, Counsel for Mobilitie, LLC to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (“high fees imposed by some cities hurt other cities that have reasonable fees, because they reduce capital resources that might have gone to those cities, and because they pressure other financially strapped cities not to turn away what appears to be a revenue opportunity”).
- 181 Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 4 (filed August 10, 2018) (Crown Castle Aug. 10, 2018 *Ex Parte* Letter).
- 182 *New England Public Comms. Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19717, para. 9 (1996) (1996 Act intent of “accelerat[ing] deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition.”); *see also* Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 7.
- 183 *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2.
- 184 *See, e.g.*, *Municipality of Guayanilla*, 450 F.3d at 17 (“Given the interconnected nature of utility services across communities and the strain that the enactment of gross revenue fees in multiple municipalities would have on PRTC’s provision of services, the Commonwealth-wide estimates are relevant to determining how the ordinance affects PRTC’s ‘ability ... to provide any interstate or intrastate telecommunications service’” under [Section 253\(a\)](#)).
- 185 *See, e.g.*, Letter from Sam Liccardo, Mayor of San Jose, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, Attachment at 1-2 (filed Aug. 2, 2018) (describing payment by providers of \$24 million to a Digital Inclusion Fund in order to deploy small cells in San Jose on city owned light poles).
- 186 AT&T Comments at 19.
- 187 AT&T Comments at 19-20.
- 188 Mobilitie Comments at 3.
- 189 Crown Castle Aug. 10, 2018 *Ex Parte* Letter at 2.
- 190 Sal Pace July 30, 2018 *Ex Parte* Letter at 1.
- 191 LaWana Mayfield July 31, 2018 *Ex Parte* Letter at 1
- 192 Dr. Carolyn Prince July 31, 2018 *Ex Parte* Letter at 2.
- 193 Letter from Ashton J. Hayward III, Mayor, Pensacola, FL to the Hon. Brendan Carr, Commissioner, WT Docket No. 17-79 at 1 (filed June 8, 2018).

- 194 Representative Terry Alexander Aug. 7, 2018 *Ex Parte* Letter at 1.
- 195 Senator Duane Ankney July 31, 2018 *Ex Parte* Letter at 1; *see also* Letter from Elder Alexis D. Pipkins, Sr. to the Hon. Brendan Carr, Commissioner, FCC at 1 (filed July 26, 2018) (“the race to 5G is global... instead of each city or state for itself, we should be working towards aligned, streamlined frameworks that benefit us all.”); Letter from Jeffrey Bohm, Chairman of the Board of Commissioners, County of St. Clair to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed August 22, 2018) (“Smaller communities, such as those located in St. Clair County would benefit from having the Commissions reduce the costly and unnecessary fee's that some larger communities place on small cells as a condition of deployment. These fees, wholly disproportionate to any cost, put communities like ours at an unfair disadvantage”); Letter from Scott Niesler, Mayor, City of Kings Mountain, to Brendan Carr, Commissioner, FCC, WT Docket 17-79 at 1-2 (filed June 4, 2018) (“the North Carolina General Assembly has enacted legislation to encourage the deployment of small cell technology to limit exorbitant fees which can siphon off capital from further expansion projects. I was encouraged to see the FCC taking similar steps to enact policies that help clear the way for the essential investment”).
- 196 *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 111-12; *but see, e.g.*, Letter from Nina Beety to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 at 5 (filed Sept. 17, 2018) (Nina Beety Sept. 17, 2018 *Ex Parte* Letter) (asserting that providers artificially under-capitalize their deployment budgets to build the case for poverty).
- 197 Letter from Larry Hanson, Executive Director, Georgia Municipal Association to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 17, 2018) (Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter).
- 198 47 U.S.C. § 253(a).
- 199 *See, e.g., Wireless Infrastructure Second R&O*, FCC 18-30, at para. 64. In addition, although one could argue that, in theory, a sufficiently small departure from actual and reasonable costs might not have the effect of prohibiting service in a particular instance, the record does not reveal an alternative, administrable approach to evaluating fees without a cost-based focus.
- 200 *See, e.g.*, AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2.
- 201 AT&T June 8, 2018 *Ex Parte* Letter at 1-2; Crown Castle June 7, 2018 *Ex Parte* Letter at 2; Verizon June 21, 2018 *Ex Parte* Letter at 2; CCA July 16, 2018 *Ex Parte* Letter at 2-3.
- 202 *See, e.g.*, Letter from Thomas J. Navin, Counsel to Corning, Inc. to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan 25, 2018), Attach. at 6-7 (comparing different effects on deployment between a base case and a high fee case, and estimating that pole attachment fees nationwide assuming high fees would result in 28.2M fewer premises passed, or 31 percent of the 5G Base case results, and an associated \$37.9B in forgone network deployment).
- 203 City of San Jose Sept. 18, 2018 *Ex Parte* Letter at 1-2.
- 204 *See, e.g., Building Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) (OTARD rules barring exclusivity provisions in lease agreements). As the D.C. Circuit has recognized, “[w]here the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law.” *Id.* at 96; *see also Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013).
- 205 For example, the City of Los Angeles asserts that fee provisions in its agreements with providers are not prohibitory and must be examined in light of a broader exchange of value contemplated by the agreements in their entirety. Letter from Eric Garcetti, Mayor, City of Los Angeles to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 (filed Sept 18, 2018). We agree that agreements entered into before this decision will need to be examined in light of their potentially

unique circumstances before a decision can be reached about whether those agreements or any particular provisions in those agreements are or are not impacted by today's FCC decision.

- 206 We reject the claims of some commenters that [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) is limited exclusively to decisions on individual requests and therefore must be interpreted differently than [Section 253\(a\)](#). *See, e.g.*, San Francisco Comments at 24-26. [Section 332\(c\)\(7\)\(B\)\(i\)](#) explicitly applies to “regulation of the placement, construction, and modification,” and it would be irrational to interpret “regulation” in that paragraph to mean something different from the term “regulation” as used in 253(a) or to find that it does not encompass generally applicable “regulations” as well as decisions on individual applications. Moreover, even assuming *arguendo* that San Francisco's position reflects the appropriate interpretation of the scope of [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#), the record does not reveal why a distinction between broadly-applicable requirements and decisions on individual requests would call for a materially different analytical approach, even if it arguably could be relevant when evaluating the application of that analytical approach to a particular preemption claim. In addition, although some commenters assert that such an interpretation “would make it virtually impossible for local governments to enforce their zoning laws with regard to wireless facility siting,” they provide no meaningful explanation why that would be the case. *See, e.g.*, San Francisco Reply at 16. While some local commenters note that the savings clauses in [Section 253\(b\)](#) and [\(c\)](#) do not have express counterparts in the text of [Section 332\(c\)\(7\)\(B\)\(i\)](#), *see, e.g.*, San Francisco Comments at 26, we are not persuaded that this compels a different interpretation of the virtually identical language restricting actual or effective prohibitions of service in [Section 253\(a\)](#) and [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#), particularly given our reliance on considerations in addition to the savings clauses themselves when interpreting the “effective prohibition” language. *See supra* paras. 57-65. We offer these interpretations both to respond to comments and in the event that some court decision could be viewed as supporting a different result.
- 207 [Section 253\(a\)](#) expressly addresses state or local activities that prohibit or have the effect of prohibiting “any entity” from providing a telecommunications service. [47 U.S.C. § 253\(a\)](#). In the *2009 Declaratory Ruling*, the Commission likewise interpreted [Section 332\(c\)\(7\)\(B\)\(i\)\(II\)](#) as implicated where the state or local conduct prohibits or has the effect of prohibiting the provision of personal wireless service by one entity even if another entity already is providing such service. *See 2009 Declaratory Ruling*, [24 FCC Rcd at 14016-19](#), paras. 56-65.
- 208 We acknowledge that a fee not calculated by reference to costs might nonetheless happen to land at a level that is a reasonable approximation of objectively reasonable costs, and otherwise constitute fair and reasonable compensation as we describe herein. If all these criteria are met, the fee would not be preempted.
- 209 *See, e.g.*, *Municipality of Guayanilla*, [450 F.3d at 21](#); *City of Maryland Heights*, [256 F. Supp. 2d at 993-96](#); *Prince George's County*, [49 F. Supp. 2d at 818](#); *AT&T v. City of Dallas*, [8 F. Supp. 2d at 593](#); *see also, e.g.*, CTIA Comments at 30, 45; *id.* Attach. at 17; ExteNet Comments, Exh. 1 at 41; T-Mobile Comments at 7; WIA Comments at 52-53.
- 210 *See, e.g.*, CCA Comments at 17-21 (asking the Commission to declare franchise fees or percentage of revenue fees outside the scope of fair and reasonable compensation and to prohibit state and localities from requiring service providers to obtain business licenses for individual cell sites). For example, although fees imposed by a state or local government calculated as a percentage of a provider's revenue are unlikely to be a reasonable approximation of cost, if such a percentage-of-revenue fee were, in fact, ultimately shown to amount to a reasonable approximation of costs, the fee would not be preempted.
- 211 [47 U.S.C. § 253\(c\)](#).
- 212 *Guayanilla District Ct. Opinion*, [354 F. Supp. 2d at 114](#) (“fees charged by a municipality need to be related to the degree of actual use of the public rights-of way” to constitute fair and reasonable compensation under [Section 253\(c\)](#)); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, [130 F. Supp. 2d 631, 638 \(D.N.J. 2001\)](#), *aff'd* [299 F. 3d 235 \(3d Cir. 2002\)](#) (*New Jersey Payphone*) (“Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry.”)

- 213 BDAC Regulatory Barriers Report, Appendix C, p. 3 (a “[ROW] burden-oriented [fee] standard is flexible enough to suit varied localities and network architectures, would ensure that fees are not providing additional revenues for other localities purposes unrelated to providing and maintaining the ROW, and would provide some basis to challenge fees that, on their face, are so high as to suggest their sole intent is to maximize revenue.”)
- 214 *See, e.g.*, Baltimore Comments at 15-16 (noting that local governments traditionally impose fees based on rent, and other ROW users pay market-based fees and arguing that citizens should not have to “subsidize” wireless deployments); Bellevue *et al.* Reply at 12-13 (stating that “the FCC should compensate municipalities at fair market value because any physical invasion is a taking under the Fifth Amendment, and just compensation is ““typically” calculated using fair market value.”); NLC Comments at 5 (“local governments, like private landlords, are entitled to collect rent for the use of their property and have a duty to their residents to assess appropriate compensation. This does not necessarily translate to restricting this compensation to just the cost of managing the asset—just as private property varies in value, so does municipal property.”); Smart Communities Reply at 7-10 (stating that “fair and reasonable compensation (i.e., fair market value) is not, as some commenters contend, measured by the regulatory cost for use of a ROW or other property; rather it is measured by what it would cost the user of the ROW to purchase rights from a local property owner.”).
- 215 Draft BDAC Rates and Fees Report, p. 10 (listing “Local Government Perspectives”).
- 216 *See, e.g.*, NLC Comments, Statement of the Hon. Gary Resnick, Mayor, Wilton Manors, FL Comments at 6-7 (“preemption of local fees or rent for use of government-owned light and traffic poles, or fees for use of the right-of-way amounts to a taxpayer subsidy of wireless providers and wireless infrastructure companies. There is no corresponding benefit for such taxpayers such as requiring the broadband industry to reduce consumer rates or offer advanced services to all communities within a certain time frame.”); Letter from Rondella M. Hawkins, Officer, City of Austin—Telecommunications & Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 7, 2018) at 1. These commenters do not explain why allowing recovery of a reasonable approximation of the state or locality's objectively reasonable costs would involve a taxpayer subsidy of service providers, and we are not persuaded that our interpretation would create a subsidy.
- 217 As discussed more fully above, Congress intended through [Section 253](#) to preempt state and local governments from imposing barriers in the form of excessive fees, while also preserving state and local authority to protect specified interests through competitively neutral regulation consistent with the Act. Our interpretation of [Section 253\(c\)](#) is consistent with Congress's objectives. Our interpretation of “fair and reasonable compensation” in [Section 253\(c\)](#) is also consistent with prior Commission action limiting fees, and easing access, to other critical communications infrastructure. For example, in implementing the requirement in the Pole Attachment Act that utilities charge “just and reasonable” rates, the Commission adopted rules limiting the rates utilities can impose on cable companies for pole attachments. Based on the costs associated with building and operation of poles, the rates the Commission adopted were upheld by the Supreme Court, which found that the rates imposed were permissible and not “confiscatory” because they “provid[ed] for the recovery of fully allocated cost, including the actual cost of capital.” *See FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Here, based on the specific language in the separate provision of [Section 253](#), we interpret the “effective prohibition” language, as applied to small cells, to permit state and local governments to recover only “fair and reasonable compensation” for their maintenance of ROW and government-owned structures within ROW used to host Small Wireless Facilities. Relatedly, Smart Communities errs in arguing that the Commission's Order “provides localities 60 days to provide access and sets the rate for access,” making it a “classic taking.” Smart Communities Sept. 19, 2018 *Ex Parte* Letter at 25. To the contrary, the Commission has not given providers any right to compel access to any particular state or local property. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There may well be legitimate reasons for states and localities to deny particular placement applications, and adjudication of whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis. In this regard, we note that the record in this proceeding reflects that the vast majority of local jurisdictions voluntarily accept placement of wireless, utility, and other facilities in their rights-of-way. And in any event, cost-based recovery of the type we provide here has been approved as just compensation for takings purposes in the context of such facilities. *See Alabama Power*

Co. v. FCC, 311 F.3d 1357, 1368, 1370-71 (11th Cir. 2002). See also *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (recognizing that alternative measure of compensation might be appropriate “with respect to public facilities such as roads or sewers”).

218 See *supra* Parts III.A, B.

219 See, e.g., *City of White Plains*, 305 F.3d at 78-79; *Guayanilla District Ct. Opinion*, 354 F. Supp. 2d at 114. We disagree with arguments that competition between municipalities, or competition from adjacent private landowners, would be sufficient to ensure reasonable pricing in the ROW. See e.g., Smart Communities Comments, Exh. 2, The Economics of Government Right of Way Fees, Declaration of Kevin Cahill, Ph.D at para. 15. We find this argument unpersuasive in view of the record evidence in this proceeding showing significant fees imposed on providers in localities across the country. See, e.g., AT&T Comments at 18; Verizon Comments at 6-7; see also BDAC Regulatory Barriers Report, Appendix. C, p. 2.

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

221 See also Draft BDAC Rates and Fees Report, p. 15-16. Although the BDAC Ad Hoc Rates and Fees Committee and municipal commenters only support a cost-based approach for one-time fees, we find no reason not to extend the same reasoning to ROW access fees or fees for the use of government property within the ROW, when all three types of fees are a legal requirement imposed by a government and pose an effective prohibition. The BDAC Rates and Fees Report did not provide a recommendation on fees for ROW access or fees for the use of government property within the ROW, and we disagree with suggestions that our ruling, which was consistent with the committee's recommendation for one-time fees, circumvents the efforts of the Ad Hoc Rates and Fees Committee. See Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 3.

222 See *supra* para. 50.

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

224 See *supra* note 71 (identifying three categories of fees charged by states and localities).

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

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

227 *TCI Cablevision of Oakland County*, 12 FCC Rcd. at 21443, para. 108 (1997).

228 *City of White Plains*, 305 F.3d 80.

229 City of Baltimore Reply at 15 (“The City does agree that rates to access the right of way by similar entities must be nondiscriminatory.”). Other commenters argue that nothing in Section 253 can apply to property in the ROW. City of

San Francisco Reply at 2-3, 19 (denying that San Francisco is discriminatory to different providers but also asserting that “[l]ocal government fees for use of their poles are simply beyond the purview of [section 253\(c\)](#)”).

- 230 *See, e.g.*, CFP Comments at 31-33 (noting that the City of Baltimore charges incumbent Verizon “less than \$.07 per linear foot for the space that it leases in the public right-of-way” while it charges other providers “\$3.33 per linear foot to lease space in the City’s conduit). Some municipal commenters argue that wireless infrastructure occupies more space in the ROW. *See* Smart Communities Reply Comments at 82 (“wireless providers are placing many of those permanent facilities in the public rights-of-way, in ways that require much larger deployments. It is not discrimination to treat such different facilities differently, and to focus on their impacts”). We recognize that different uses of the ROW may warrant charging different fees, and we only find fees to be discriminatory and not competitively neutral when different amounts are charged for similar uses of the ROW.
- 231 Our interpretation is consistent with principles described by the BDAC’s Ad Hoc Committee on Rates and Fees. Draft BDAC Rates and Fees Report at 5 (Jul. 24, 2018) (listing “neutral treatment and access of all technologies and communication providers based upon extent/nature of ROW use” as principle to guide evaluation of rates and fees).
- 232 BDAC Regulatory Barriers Report, Appendix C, p. 3.
- 233 These presumptive fee limits are based on a number of different sources of data. Many different state small cell bills, in particular, adopt similar fee limits despite their diversity of population densities and costs of living, and we expect that these presumptive fee limits will allow for recovery in excess of costs in many cases. [47 CFR § 1.1409](#); National Conference of State Legislatures, Mobile 5G and Small Cell Legislation, (May 7, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx> (providing description of state small cell legislation); Little Rock, Ark. Ordinance No. 21,423 (June 6, 2017); NCTA August 20, 2018 *Ex Parte* Letter, Attachment; *see also* H.R. 2365, 2018 Leg. 2d Reg. Sess. (Ariz. 2018) (\$100 per facility for first 5 small cells in application; \$50 annual utility attachment rate, \$50 ROW access fee); H.R. 189 149th Gen. Assemb. Reg. Sess. (Del. 2017) (\$100 per small wireless facility on application; fees not to exceed actual, direct and reasonable cost); S. 21320th Gen. Assemb. Reg. Sess. (Ind. 2017) (\$100 per small wireless facility); H.R. 1991, 99th Gen. Assemb. 2nd Reg. Sess. (Missouri, 2018) (\$100 for each facility collocated on authority pole; \$150 annual fee per pole); H.R. 38 2018 Leg. Assemb. 2d Reg. Sess. (N.M. 2018) (\$100 for each of first 5 small facilities in an application; \$20 per pole annually; \$250 per facility annually for access to ROW); S. 189, 2018 Leg. Gen. Sess. (Utah 2018) (\$100 per facility to collocate on existing or replacement utility pole; \$250 annual ROW fee per facility for certain attachments). *See also* Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, and D. Zachary Champ, Director, Government Affairs, WIA to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Aug. 10, 2018) Attach. (listing fees in twenty state small cell legislations) (CTIA/WIA Aug. 10, 2018 *Ex Parte* Letter); Letter from Scott K. Bergmann, Sen. Vice President, Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 4, 2018) at 3, Attach. (analyzing average and median recurring fee levels permitted under state legislation). These examples suggest that the fee levels we discuss above may be higher than what many states already allow and further support our finding that there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of [Section 253](#). We recognize that certain fees in a minority of state small cell bills are above the levels we presume to be allowed under [Section 253](#). Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.
- 234 Several state and local commenters express concern about the presumptively reasonable fee levels we establish, including concerns about the effect of the fee levels on existing fee-related provisions included in state and local legislation. *See e.g.*, Letter from Kent Scarlett, Exec. Director, Ohio Municipal League to Marlene H. Dortch, Secretary, FCC at 1 (filed Sept. 18, 2018); Letter from Liz Kniss, Mayor, City of Palo Alto to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84 at 1 (filed Sept. 17, 2018). As stated above, while the fee levels we establish reflect our presumption regarding the level of fees that would be permissible under [Section 253](#) and [332\(c\)\(7\)](#),

state or local fees that exceed these levels may be permissible if the fees are based on a reasonable approximation of costs and the costs themselves are objectively reasonable.

- 235 We emphasize that localities may charge fees to recover their objectively reasonable costs and thus reject arguments that our approach requires localities to bear the costs of small cell deployment or applies a one-size-fits-all standard. *See, e.g.,* Letter from Mike Posey, Mayor, City of Huntington Beach, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-2 (filed Sept. 11, 2018) (Mike Posey Sept. 11, 2018 *Ex Parte* Letter).
- 236 *California Payphone*, 12 FCC Rcd at 14206, para. 31; *see supra* paras. 34-42.
- 237 47 U.S.C. § 253(b).
- 238 47 U.S.C. § 253(c).
- 239 *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3362-66, paras. 90-92, 95, 97-99.
- 240 *See, e.g.,* CCIA Comments at 14-15 (discussing regulations enacted by Village of Skokie, Illinois); WIA Reply Comments (WT Docket No. 16-421) at 9-10 (discussing restrictions imposed by Town of Hempstead, New York); *see also* AT&T Comments at 14-17; PTA-FLA Comments at 19; Verizon Comments at 19-20; AT&T Aug. 6, 2018 *ex parte* at 3.
- 241 *See, e.g.,* CCIA Comments at 13-14 (describing regulations established by Skokie, Illinois that prescribe in detail the permissible colors of paint and their potential for reflecting light); AT&T Aug. 6, 2018 *ex parte* at 3 (“Some municipalities require carriers to paint small cell cabinets a particular color when like requirements were not imposed on similar equipment placed in the ROW by electric incumbents, competitive telephone companies, or cable companies,” and asserts that it often “is highly burdensome to maintain non-factory paint schemes over years or decades, including changes to the municipal paint scheme,” due to “technical constraints as well such as manufacture warranty or operating parameters, such as heat dissipation, corrosion resistance, that are inconsistent with changes in color, or finish.”); AT&T Comments at 16-17 (contending that some localities “allow for a single size and configuration for small cell equipment while requiring case-by-case approval of any non-conforming equipment, even if smaller and upgraded in design and performance,” and thus effectively compel “providers [to] incur the added expense of conforming their equipment designs to the approved size and configuration, even if newer equipment is smaller, to avoid the delays associated with the approval of an alternative equipment design and the risk of rejection of that design.”); *id.* at 17 (some local governments “prohibit the placement of wireless facilities in and around historic properties and districts, regardless of the size of the equipment or the presence of existing more visually intrusive construction near the property or district”).
- 242 *See, e.g.,* Crown Castle Comments at 14-15 (criticizing San Francisco's aesthetic review procedures that discriminate against providers and criteria and referring to extended litigation); CTIA Reply Comments at 17 (“San Francisco imposes discretionary aesthetic review for wireless ROW facilities.”); T-Mobile Comments at 40; *but see* San Francisco Comments at 3-7 (describing aesthetic review procedures). *See also* AT&T Comments at 13-17; Extenet Comments at 37; CTIA Comments at 21-22; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8.
- 243 *See, e.g.,* AT&T Comments at 13-17; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8. WIA cites allegations that an unnamed city in California recently declined to support approval of a proposed small wireless installation, claiming that the installations do not meet “Planning and Zoning Protected Location Compatibility Standards,” even though the same equipment has been deployed elsewhere in the city dozens of times, and even though the “Protected Location” standards should not apply because the proposals are not on “protected view” streets). WIA Reply Comments, WT Docket No. 16-421 at 9-10; *id.* at 8 (noting that one city changed its aesthetic standards after a proposal was filed); AT&T Comments at 17 (noting that a design approval took over a year); Virginia Joint Commenters, WT Docket No. 16-421 (state law providing discretion for zoning authority to deny application because of “aesthetics” concerns without additional guidance); Extenet Reply Comments at 13 (noting that some “local governments impose

aesthetic requirements based entirely on subjective considerations that effectively give local governments latitude to block a deployment for virtually any aesthetically- based reason”)

- 244 *See, e.g.*, NLC Comments, WT Docket No. 16-421 at 8-10; Smart Communities Comments, WT Docket No. 16- 421 at 35-36; New York City Comments at 10-15; New Orleans Comments at 1-2, 5-8; San Francisco Comments at 3-12; CCUA Reply Comments at 5; Irvine (CA) Comments at 2; Oakland County (MI) Comments at 3-5; Florida Coalition of Local Gov'ts Reply Comments at 6-12 (justifications for undergrounding requirements); *id.* at 16-421 (justifications for municipal historic-preservation requirements); *id.* at 22-16 (justifications for aesthetics and design requirements).
- 245 *See supra* paras. 55-56.
- 246 Our decision to adopt this objective requirement is supported by the fact that many states have recently adopted limits on their localities' aesthetic requirements that employ the term “objective.” *See, e.g.*, Letter from Scott Bergmann, Senior Vice President, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 19, 2018) (noting requirements enacted in the states of Arizona, Delaware, Missouri, North Carolina, Ohio, and Oklahoma, that local siting requirements for small wireless facilities be “objective”); *see also* Letter from Kara R. Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 8 (filed Sept. 4, 2018)
- 247 Some local governments argue that, because different aesthetic concerns may apply to different neighborhoods, particularly those considered historic districts, it is not feasible for them to publish local aesthetic requirements in advance. *See, e.g.*, Letter from Mark J. Schwartz, County Manager, Arlington County, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018) (Arlington County Sept. 18 *Ex Parte* Letter); Letter from Allison Silberberg, Mayor, City of Alexandria, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018). We believe this concern is unfounded. As noted above, the fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision. Moreover, the aesthetic requirements to be published in advance need not prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards.
- 248 *See, e.g.*, AT&T Comments at 14-15; Crown Castle Comments at 54-56; T-Mobile Comments at 38; Verizon Comments at 6-8; WIA Comments at 56; CTIA Reply at 16. *But see* Chicago Comments at 15; City of Claremont (CA) Comments at 1; City of Kenmore (WA) Comments at 1; City of Mukilteo (WA) Comments at 2; Florida Coalition of Local Gov'ts Comments at 6-12; Smart Communities Comments at 74.
- 249 *County of San Diego*, 543 F.3d at 580, *accord*, BDAC Model Municipal Code at 13, § 2.3.e (providing for municipal zoning authority to allow providers to deploy small wireless facilities on existing vertical structures where available in neighborhoods with undergrounding requirements, or if no technically feasible structures exist, to place vertical structures commensurate with other structures in the area).
- 250 *See, e.g.*, Verizon Comments at 8 (describing requirements imposed by Buffalo Grove, Illinois); CCIA Comments at 14-15 (“These restrictions stifle technological innovation and unnecessarily burden the ability of a provider to use the best available technological to serve a particular area. For example, 5G technology will require higher band spectrum for greater network capacity, yet some millimeter wave spectrum simply cannot propagate long distances over a few thousand feet—let alone a few hundred. Therefore, a local requirement of, for example, a thousand-foot minimum separation distance between small cells would unnecessarily forestall any network provider seeking to use higher band spectrum with greater capacity when that provider needs to boost coverage in a specific area of a few hundred feet.”). *See also* AT&T Comments at 15; CTIA Reply at 17.
- 251 47 U.S.C. § 253(a).

- 252 Another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an “in-kind” service or benefit to the municipality, such as installing a communications network dedicated to the municipality’s exclusive use. *See, e.g.*, Comcast Comments at 9-10 Verizon Comments at 7, Crown Castle Comments at 55-56. Such requirements impose costs, but rarely, if ever, yield benefits directly related to the deployment. Additionally, where such restrictions are not cost-based, they inherently have “the effect of prohibiting” service, and thus are preempted by [Section 253\(a\)](#). *See also* BDAC Regulatory Barriers Report, Appendix E at 1 (describing “conditions imposed that are unrelated to the project for which they were seeking ROW access” as “inordinately burdensome”); BDAC Model Municipal Code at 19, § 2.5a. (v)(F) (providing that municipal zoning authority “may not require an Applicant to perform services ... or in-kind contributions [unrelated] to the Communications Facility or Support Structure for which approval is sought”).
- 253 *See supra* paras. 50-91. Some have argued that Section 224 of the Communications Act’s exception of state- owned and cooperative-owned utilities from the definition of “utility,” “[a]s used in this section,” suggests that Congress did not intend for any other portion of the Act to apply to poles or other facilities owned by such entities. City of Mukilteo, et. al. Ex Parte Comments on the Draft Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from James Bradford Ramsay, General Counsel, NARUC to Marlene H. Dortch, Secretary, FCC, WT Docket 17-79 at 7 (filed Sept. 19, 2018). We see no basis for such a reading. Nothing in [Section 253](#) suggests such a limited reading, nor does Section 224 indicate that other provisions of the Act do not apply. We conclude that our interpretation of effective prohibition extends to fees for all government-owned property in the ROW, including utility poles. *Compare* 47 U.S.C. § 224 with 47 U.S.C. § 253. We are not addressing here how our interpretations apply to access or attachments to government-owned property located outside the public ROW.
- 254 *See, e.g.*, AASHTO Comments, Att. 1 (Del. DOT Comments) at 3-5; New York City Comments at 2-8; San Antonio et al. Comments at 14-15; Smart Communities Comments at 62-66; San Francisco Comments at 28-30; League of Arizona Cities et al. Comments, WT Docket No. 16-421 at 3-9; San Antonio et al. Comments, WT Docket No. 16-421 at 14-15. *See also* *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3364-65, para. 96 (seeking comment on this issue).
- 255 The market participant doctrine establishes that, unless otherwise specified by Congress, federal statutory provisions may be interpreted as preempting or superseding state and local governments’ activities involving regulatory or public policy functions, but not their activities as “market participants” to serve their “purely proprietary interests,” analogous to similar transactions of private parties. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 229, 231 (1993) (*Boston Harbor*); *see also* *Wisconsin Dept. of Industry, Labor, and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (*Gould*).
- 256 *See, e.g.*, *Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Distr.*, 498 F.3d 1031, 1042 (9th Cir. 2007); *Johnson v. Rancho Santiago Comm. College*, 623 F.3d 1011, 1022 (9th Cir. 2010).
- 257 *See Boston Harbor*, 507 U.S. at 231.
- 258 *See American Trucking Ass’n v. City of Los Angeles*, 569 U.S. 641, 650 (2013) (*American Trucking*).
- 259 At a minimum, we conclude that Congress’s language has not unambiguously pointed to such a distinction. *See* Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Aug. 23, 2018) (Verizon Aug. 23, 2018 *Ex Parte* Letter). Furthermore, we contrast these statutes with those that do not expressly or impliedly preempt proprietary conduct. *Compare, e.g.*, *American Trucking*, 569 U.S. 641 (finding that FAA Authorization Act of 1994’s provision that “State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property” expressly preempted the terms of a standard-form concession agreement drafted to govern the relationship between the Port of Los Angeles and any trucking company seeking to operate on the premises), and *Gould*, 475 U.S. at 289 (finding that NLRA preempted a state law

barring state contracts with companies with disfavored labor practices because the state scheme was inconsistent with the federal scheme), with *Boston Harbor*, 507 U.S. at 224-32. In *Boston Harbor*, the Supreme Court observed that the NLRA contained no express preemption provision or implied preemption scheme and consequently held:

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

Id. (internal citations omitted).

- 260 See *Minnesota Order*, 14 FCC Rcd at 21707, para. 18. We find these principles to be equally applicable to our interpretation of the meaning of “regulation[s]” referred to under Section 332(c)(7)(B) insofar as such actions impermissibly “prohibit or have the effect of prohibiting the provision of personal wireless services.” *Supra* paras. 34-42.
- 261 See *Minnesota Order*, 14 FCC Rcd at 21728-29, para. 60, quoting H. R. Rep. No. 104-204, U.S. Congressional & Administrative News, March 1996, vol.1, Legislative History section at 41 (1996).
- 262 Indeed, to permit otherwise could limit the utility of ROW access for telecommunications service providers and thus conflict with the overarching preemption scheme set up by Section 253(a), for which 253(b) and 253(c) are exceptions. By construing “manage[ment]” of a ROW to include some proprietary behaviors, we mean to suggest that conduct taken in a proprietary capacity is likewise subject to 253(c)’s general limitations, including the requirement that any compensation charged in such capacity be “fair and reasonable.”
- 263 Cf. *Minnesota Order*, 14 FCC Rcd at 21729-30, para. 61-62 (internal citations omitted) (“Moreover, Minnesota has not shown that the compensation required for access to the right-of-way is ‘fair and reasonable.’ The compensation appears to reflect the value of the exclusivity inherent in the Agreement [which provides the developer with exclusive physical access, for at least ten years, to longitudinal rights-of-way along Minnesota’s interstate freeway system] rather than fair and reasonable charges for access to the right-of-way. Nor has Minnesota shown that the Agreement provides for ‘use of public rights-of-way on a nondiscriminatory basis.’”)
- 264 Cf. Crown Castle June 7, 2018 *Ex Parte* Letter at 17 n.83 (“Section 253(c), which carves out ROW management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute’s sweep.”).
- 265 We acknowledge that the Commission previously concluded that “Section 6409(a) applies only to State and local governments acting in their role as land use regulators” and found that “this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt ‘non regulatory decisions[.]’” See 2014 *Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237-240. To the extent necessary, we clarify here that the actions and analysis there were limited in scope given the different statutory scheme and record in that proceeding, which did not, at the time, suggest a need to “further elaborate as to how this principle should apply to any particular circumstance” (there, in connection with application of Section 6409(a)). Here, in contrast, as described herein, we find that further elucidation by the Commission is needed.
- 266 *Minnesota Order*, 14 FCC Rcd at 21707, para. 18 (internal citations omitted) (emphasis omitted).
- 267 See *infra* Part IV.C.1 (Authorizations Subject to the “Reasonable Period of Time” Provision of Section 332(c)(7)(B)(ii)).
- 268 See also *infra* para. 134-36 and cases cited therein. Precedent that may appear to reach a different result can be distinguished in that it resolves disputes arising under Section 332 and/or 253(a) without analyzing the scope of Section 253(c). Furthermore, those situations did not involve government-owned property or structures within a public ROW. See, e.g., *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (declining to find preemption under Section 332 applicable to terms of a school rooftop lease); *Omnipoint Commc’ns, Inc. v. City of Huntington Beach*, 738 F.3d

192, 195-96, 200-01 (9th Cir. 2013) (declining to find preemption under Section 332 applicable to restrictions on lease of parkland).

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

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

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

272 Indeed, the Commission has long recognized that, in enacting Sections 253(c) and 332(c)(7), Congress affirmatively protected the ability of state and local governments to carry out their responsibilities for maintaining, managing, and regulating the use of ROW and structures therein for the benefit of the public. *TCI Cablevision Order*, 12 FCC Rcd at 21441, para. 103 (1997) ("We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way."); *Moratoria Declaratory Ruling*, FCC 18-111, para. 142 (same); *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling, and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103, para. 39 (1996) (same). We find these situations to be distinguishable from those where a state or locality might be engaged in a discrete, *bona fide* transaction involving sales or purchases of services that do not otherwise violate the law or interfere with a preemption scheme. Compare, e.g., *Cardinal Towing & Auto Repair, Inc., v. City of Bedford*, 180 F.3d 686, 691, 693-94 (5th Cir. 1999) (declining to find that the FAA Authorization Act of 1994, as amended by the ICC Termination Act of 1995, preempted an ordinance and contract specifications that were designed only to procure services that a municipality itself needed, not to regulate the conduct of others), with *NextG Networks of N.Y., Inc. v. City of New York*, 2004 WL 2884308 (N.D.N.Y., Dec. 10, 2004) (crediting allegations that a city's actions, such as issuing a request for proposal and implementing a general franchising scheme, were not of a purely proprietary nature, but rather, were taken in pursuit of a regulatory objective or policy). This action could include, for example, procurement of services for the state or locality, or a contract for employment services between a state or locality and one of its employees. We do not intend to reach these scenarios with our interpretations today.

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

274 See *supra* para. 25.

275 Cf. *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404.

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

277 We contrast this instance to others in which we either declined to act or responded to requests for action with respect to specific disputes. See, e.g., *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 237- 240; *Continental Airlines Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201, 13220, para. 43 (2006) (observing, in the context of a different statutory and regulatory scheme, that "[g]iven that the Commission intended to preempt restrictions [regarding restrictions on Continental's use of its Wi-Fi antenna] in private lease agreements, however, Massport would be preempted even if it is acting in a private capacity with regard to its lease agreement with Continental."); *Sandwich Isles Section 253 Order*, 32 FCC Rcd at 5883, para. 14 (rejecting argument that argument that Section 253(a) is inapplicable where it would affect

the state's ability to “deal[] with its real estate interests ... as it sees fit,” such as by granting access to “rights-of-way over land that it owns); *Minnesota Order*, 14 FCC Rcd at 21706-08, paras. 17-19; *cf. Amigo.Net Petition for Declaratory Ruling*, Memorandum Opinion and Order, 17 FCC Rcd 10964, 10967 (WCB 2002) (Section 253 did not apply to carrier's provision of network capacity to government entities exclusively for such entities' internal use); *T-Mobile West Corp. v. Crow*, 2009 WL 5128562 (D. Ariz., Dec. 17, 2009) (Section 332(c)(7) did not apply to contract for deployment of wireless facilities and services for use on state university campus). We clarify here that such prior instances are not to be construed as a concession that Congress did not make preemption available, or that the Commission lacked the authority to support parties' attempts to avail themselves of relief offered under preemption schemes, when confronted with instances in which a state or locality is relying on its proprietary role to skirt federal regulatory reach. Indeed, these instances demonstrate the opposite—that preemption is available to effectuate Congressional intent—and merely illustrate application of this principle. Also, we do not find it necessary to await specific disputes in the form of Section 253(d) petitions to offer these interpretations. In the alternative and as an independent means to support the interpretations here, we clarify that we intend for our views to guide how preemption should apply in fact-specific scenarios.

- 278 *See, e.g., Moratoria Declaratory Ruling*, FCC 18-111, paras. 161-68; 2009 *Declaratory Ruling*, 24 FCC Rcd at 14001, para. 23.
- 279 Targeted interpretations of the statute like those we adopt here fall far short of a “federal regulatory program dictating the scope and policies involved in local land use” that some commenters fear. League of Minnesota Cities Comments at 9.
- 280 We also reject claims that Section 601(c)(1) of the 1996 Act constrains our interpretation of these provisions. *See, e.g., NARUC Reply* at 3; Smart Communities Reply at 33, 35-36. That provision guards against implied preemption, while Section 253 and Section 332(c)(7)(B) both expressly restrict state and local activities. *See, e.g., Texas PUC Order*, 13 FCC Rcd at 3485-86, para. 51. Courts also have read that provision narrowly. *See, e.g., In re FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014); *Qwest Corp. v. Minnesota Pub. Utilities Comm'n*, 684 F.3d 721, 730-31 (8th Cir. 2012); *Farina v. Nokia Inc.*, 625 F.3d 97, 131 (3d Cir. 2010). Although the Ninth Circuit in *County of San Diego* asserted that there is a presumption that express preemption provisions should be read narrowly, and that the presumption would apply to the interpretation of Section 253(a), *County of San Diego*, 543 F.3d at 548, the cited precedent applies that presumption where “the State regulates in an area where there is no history of significant federal presence.” *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005). Whatever the applicability of such a presumption more generally, there is a substantial history of federal involvement here, particularly insofar as interstate telecommunications services and wireless services are implicated. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003); *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490-92 (2d Cir. 1968); 47 U.S.C., Title III.
- 281 *See, e.g., California PUC Comments* at 11; Verizon Comments at 31-33; CTIA Reply at 22-23; WIA Reply at 16- 18. We thus reject claims to the contrary. *See, e.g., City of New York Comments* at 8; Virginia Joint Commenters Comments, Exh. A at 41-44; City of New York Reply at 1-2; NATOA Reply at 9-10; Smart Communities Reply at 34. Indeed, the Fifth Circuit upheld just such an exercise of authority with respect to the interpretation of Section 332(c)(7) in the past. *See generally City of Arlington*, 668 F.3d at 249-54. While some commenters assert that the questions addressed by the Commission in the order underlying the Fifth Circuit's *City of Arlington* decision are somehow more straightforward than our interpretations here, they do not meaningfully explain why that is the case, instead seemingly contemplating that the Commission would address a wider, more general range of circumstances than we actually do here. *See, e.g., Virginia Joint Commenters Comments*, Exh. A at 44-45.
- 282 Consequently, we reject claims that relying on our general interpretative authority to interpret Section 253 and Section 332(c)(7) would render any provisions of the Act mere surplusage, *see, e.g., Smart Communities Reply* at 34-35, or would somehow “usurp the role of the judiciary.” Washington State Cities Reply at 14. We likewise reject other arguments insofar as they purport to treat Section 253(d)'s provision for preemption as more specific than, or otherwise controlling over, other Communications Act provisions enabling the Commission to authoritatively interpret the Act. *See, e.g., Virginia Joint Commenters Comments*, Exh. A at 43. To the contrary, “[t]he specific controls but only within

its self-described scope.” *Nat’l Cable & Telecomm. Ass’n v. Gulf Power*, 534 U.S. 327, 336 (2002). In addition, concerns that the Commission might interpret [Section 253\(c\)](#) in a manner that would render it a nullity or in a manner divorced from relevant context—things we do not do here—bear on the reasonableness of a given interpretation and not on the existence of interpretive authority in the first instance, as some contend. *See, e.g.*, Virginia Joint Commenters Comments, Exh. A at 43-44.

- 283 *See, e.g.*, City of San Antonio *et al.* Comments, Exh. B at 26-27; Fairfax County Comments at 20; Smart Communities Comments at 61. Some commenters assert that there are reasonable, material reliance interests arising from past court interpretations that would counsel against our interpretations in this order because “localities and providers have adjusted to the tests within their circuits” and “reflected those standards in local law.” Smart Communities Comments, WT Docket No. 16-141 at 67 (filed Mar. 8, 2017) cited in City of Austin Comments at 2 n.3. Arguments such as these, however, merely underscore the regulatory patchwork that inhibits the development of a robust nationwide telecommunications and private wireless service as envisioned by Congress. By offering interpretations of the relevant statutes here, we intend, thereby, to eliminate potential regional regulatory disparities flowing from differing interpretations of those provisions. *See, e.g.*, WIA Reply at 19-20.
- 284 *See* City of San Antonio *et al.* Comments, Exh. B at 27 (citing Brief for the United States as Amicus Curiae, *Level 3 Commc’ns v. City of St. Louis*, Nos. 08-626, 08-759 at 9, 11 (filed May 28, 2009) (Amicus Brief)).
- 285 Amicus Brief at 12-13. The brief also identified other specific areas of concern with those cases. *See, e.g., id.* at 13 (“The court appears to have accorded inordinate significance to Level 3’s inability to ‘state with specificity what additional services it might have provided’ if it were not required to pay St. Louis’s license fee. That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3’s case—is not central to a proper [Section 253\(a\)](#) inquiry.” (citation omitted)); *id.* at 14 (“Portions of the Ninth Circuit’s decision, moreover, could be read to suggest that a [Section 253](#) plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. As discussed above, limiting the preemptive reach of [Section 253\(a\)](#) to legal requirements that completely preclude entry would frustrate the policy of open competition that [Section 253](#) was intended to promote.” (citation omitted)).
- 286 *Id.* at 18.
- 287 Contrary to some claims, the need for these clarifications also is not undercut by prior determinations that advanced telecommunications capability is being deployed in a reasonable and timely fashion to all Americans. *See, e.g.*, Letter from Nancy Werner, General Counsel, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 21, 2018) (NATOA June 21, 2018 *Ex Parte* Letter) (citing *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 33 FCC Rcd 1660, 1707-08, para. 94 (2018) (2018 *Broadband Deployment Report*)). These commenters do not explain why the distinct standard for evaluating deployment of advanced telecommunications capability, *see* 2018 *Broadband Deployment Report*, 33 FCC Rcd at 1663-76, paras. 9-39, should bear on the application of [Section 253](#) or [Section 332\(c\)\(7\)](#). Further, as the Commission itself observed, “[a] finding that deployment of advanced telecommunications capability is reasonable and timely in no way suggests that we should let up in our efforts to foster greater deployment.” *Id.* at 1664, para. 13.
- 288 *See, e.g.*, City of San Antonio *et al.* Comments, Exh. A at 28; Smart Communities Comments at 77-78; Smart Communities Reply at 48-50; NATOA June 21, 2018 *Ex Parte* Letter at 3.
- 289 *Montgomery County*, 811 F.3d at 128; *see Printz v. United States*, 521 U.S. 898 (1997) (*Printz*); *New York v. United States*, 505 U.S. 144 (1992) (*New York*). These provisions preempting state law thus do not “compel the States to enact or administer a federal regulatory program,” *Printz*, 521 U.S. at 900, or “dictate what a state ... may or may not do.” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018) (*Murphy*).

- 290 *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. The Communications Act establishes its own framework for oversight of wireless facility deployment—one that is largely deregulatory, *see, e.g., Wireless Infrastructure Second R&O*, FCC 18-30, at para. 63; *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480-81, para. 182 (1994)—and it is reasonable to expect state and local governments electing to act in that area to do so only in a manner consistent with the Act's framework. *See, e.g., Murphy*, 138 S. Ct. at 1470-71, 1480. Thus, the application of Section 253 and Section 332(c)(7)(B) is clearly distinguishable from the statute the Supreme Court struck down in *Murphy*, which did not involve a preemption scheme but nonetheless prohibited state authorization of sports gambling. *Id.* at 1481. The application here is also clearly distinguishable from the statute in *Printz*, which mandated states to run background checks on handgun purchases, *Printz*, 521 U.S. at 904-05, and the statute in *New York*, which required states to enact state laws that provide for the disposal of radioactive waste or else take title to such waste. *New York*, 505 U.S. at 151-52.
- 291 *See, e.g., City of New York Comments* at 9-10; *Smart Communities Comments* at 78.; *see also, e.g., Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004) (identifying Tenth Amendment issues with the application of Section 253 where that application would implicate “state or local governmental self-regulation (or regulation of political inferiors)”).
- 292 For example, where a state or local law or other legal requirement simply sets forth particular fees to be paid, or where the legal requirement at issue is simply an exercise of discretion that governing law grants the state or local government, it is not clear that preemption would unconstitutionally interfere with the relationship between a state and its political subdivisions.
- 293 *2009 Declaratory Ruling*, 24 FCC Rcd at 13994.
- 294 *See infra* para. 106.
- 295 Chicago Comments at 7 (“[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists.”); New Orleans Comments at 3 (“City supports the concept proposed by the Commission ... to establish ... more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.”).
- 296 *See LaWana Mayfield July 31, 2018 Ex Parte Letter* at 2 (“However, getting this infrastructure out in a timely manner can be a challenge that involves considerable time and financial resources. The solution is to streamline relevant policies—allowing more modern rules for modern infrastructure.”); Letter from John Richard C. King, House of Representatives, South Carolina, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed Aug. 27, 2018) (“A patchwork system of town-to-town, state-to-state rules slows the approval of small cell installations and delays the deployment of 5G. We need a national framework with guardrails to streamline the path forward to our wireless future”); Letter from Andy Thompson, State Representative, Ohio House District 95, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Aug. 24, 2018) (“In order for 5G to arrive as quickly and as effectively as possible, relevant infrastructure regulations must be streamlined. It makes very little sense for rules designed for 100-foot cell towers to govern the path to deployment for modern equipment called small cells that can fit into a pizza box.”); Letter from Todd Nash, Wallowa County Board of Commissioners, Oregon, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed Sept. 10, 2018) (FCC should streamline regulatory processes by, for example, tightening the deadlines for states and localities to approve new network facilities).
- 297 47 U.S.C. § 332(c)(7)(ii).
- 298 The BDAC Model Municipal Code recommended, for certain types of facilities, shot clocks of 60 days for collocations and 90 days for new constructions on applications for siting Small Wireless Facilities. BDAC Model Municipal Code at §§ 2.2, 2.3, 3.2a(i)(B). Our approach utilizes the same timeframes set forth in the Model Municipal Code, and we disagree with comments that it is inconsistent with or ignores the work of the BDAC. GMA September 17 *Ex Parte Letter* at 4-5.

- 299 For instance, while the City of Chicago opposes the shot clocks adopted here, we note that the City has also stated that, “[d]espite th[e] complex review process, involving many utilities and other entities, CDOT on average processed small cell applications last year in 55 days.” Letter from Edward N. Siskel, Corp. Counsel, Dept. of Law, City of Chicago, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 19, 2018).
- 300 Just like the shot clocks originally established in 2009—later affirmed by the Fifth Circuit and the Supreme Court—the shot clocks framework in this Third Report and Order are no more than an interpretation of “the limits Congress already imposed on State and local governments” through its enactment of [Section 332\(c\)\(7\)](#). *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25. See also *City of Arlington*, 668 F.3d at 259. As explained in the *2009 Declaratory Ruling*, the shot clocks derived from [Section 332\(c\)\(7\)](#) “will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification,” and they “will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in [Section 332\(c\)\(7\)\(A\)](#).” *2009 Declaratory Ruling*, 24 FCC Rcd at 14002, para. 25.
- 301 CTIA Comments, WT Docket No. 16-421, at 33 (filed Mar. 8, 2017); Letter from Juan Huizar, City Manager of the City of Pleasanton, TX, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 1 (filed June 4, 2018) (describing the firsthand benefit of small cells and noting that communications infrastructure is a critical component of local growth); Letter from Sara Blackhurst, President, Action 22, to the Hon. Brendan Carr, Commissioner, FCC, WT Docket No. 17-79, at 2 (filed May 18, 2018) (*Action 22 Ex Parte*) (“While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.”); Letter from Maurita Coley Flippin, President and CEO, MMTC, to the Hon. Ajit Pai, Chairman, FCC, WT Docket No. 17-79 at 2 (filed Sept. 5, 2018) (encourages the Commission to remove unnecessary barriers such as unreasonable delays so deployment can proceed expeditiously); Fred A. Lamphere Sept. 11, 2018 *Ex Parte* Letter at 1 (It is critical that the Commission continue to remove barriers to building new wireless infrastructure such as by setting reasonable timelines to review applications).
- 302 T-Mobile Comments at 20; Crown Castle Reply at 5 (noting that the adoption of similar time frames by several states for small cell siting review confirms their reasonableness, and the Commission should apply these deadlines on a nationwide basis).
- 303 Alaska Dep’t of Natural Resources Comments at 2 (“[W]e are currently meeting or exceeding the proposed timeframe of the ‘Shot Clock.’”); see also CTIA Aug. 30, 2018 *Ex Parte* Letter at 5 (“Eleven states—Delaware, Florida, Indiana, Kansas, Missouri, North Carolina, Rhode Island, Tennessee, Texas, Utah, and Virginia—recently adopted small cell legislation that includes 45-day or 60-day shot clocks for small cell collocations.”); Jason R. Saine Sept. 14, 2018 *Ex Parte* Letter.
- 304 North Carolina requires its local governments to decide collocation applications within 45 days of submission of a complete application. [N.C. Gen. Stat. Ann. § 153A-349.53\(a2\)](#). The same 45-day shot clock applies to certain collocations in Florida. [Fla. Stat. Ann. § 365.172\(13\)\(a\)\(1\), \(d\)\(1\)](#). In New Hampshire, applications for collocation or modification of wireless facilities generally have to be decided within 45 days (subject to some exceptions under certain circumstances) or the application is deemed approved. [N.H. Rev. Stat. Ann. § 12-K:10](#). Wisconsin requires local governments to decide within 45 days of receiving complete applications for collocation on existing support structure that does not involve substantial modification, or the application will be deemed approved, unless the local government and applicant agree to an extension. [Wis. Stat. Ann. § 66.0404\(3\)\(c\)](#). Local governments in Indiana have 45 days to decide complete collocation applications, unless an extension is allowed under the statute. [Ind. Code Ann. § 8-1-32.3-22](#). Minnesota requires any zoning application, including both collocation and non-collocation applications, to be processed in 60 days. [Minn. Stat. § 15.99, subd. 2\(a\)](#). By not requiring hearings, collocation applications in these states can be processed in a timely manner.

- 305 Chicago Comments at 7 (“[T]he City has worked to achieve efficient processing times even for applications where no federal deadline exists.”); New Orleans Comments at 3 (“City supports the concept proposed by the Commission ... to establish ... more narrowly defined classes of deployments, with distinct reasonable times frames for action within each class.”); Action 22 *Ex Parte* at 2 (“While we understand the need for relevant federal rules and protections appropriate for larger wireless infrastructure, we feel these same rules are not well-suited for smaller wireless facilities and risk slowing deployment in communities that need connectivity now.”).
- 306 CCA Comments at 11-14; T-Mobile Comments at 20; Incompas Reply at 9; Sprint Comments at 45-47 (noting that Florida, Indiana, Kansas, Texas and Virginia all have passed small cell legislation that requires small cell application attachments to be acted upon in 60 days); T-Mobile Comments at 18 (arguing that the Commission should accelerate the Section 332 shot clocks for all sites to 60 days for collocations, including small cells).
- 307 2009 *Declaratory Ruling*, 24 FCC Rcd at 14012, para. 40.
- 308 TIA Comments at 4.
- 309 *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 42 (citing Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR Part 1, Appx. B, § VI (Collocation NPA)); *see also* 47 CFR § 1.1306(c)(1) (excluding certain wireless facilities from NEPA review).
- 310 2009 *Declaratory Ruling*, 24 FCC Rcd at 14012, para. 46.
- 311 DESHPO Comments at 2 (“opposes the application of separate time limits for review of facility deployments not covered by the Spectrum Act, as it would lead to confusion within the process for all parties involved (Applicants/Carrier, Consultants, SHPO)”).
- 312 CTIA Aug. 30, 2018 *Ex Parte* Letter at 6.
- 313 Letter from Richard Rossi, Senior Vice President, General Counsel, American Tower, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79, at 3 (filed Aug. 10, 2018) (“The reason to encourage collocation is straightforward, it is faster, cheaper, more environmentally sound, and less disruptive than building new structures.”).
- 314 League of Az Cities and Towns Comments at 13, 29 (arguing that many small cells or micro cells can be taller and more visually intrusive than macro cells).
- 315 *See, e.g.*, Letter from Geoffrey C. Beckwith, Executive Director & CEO, Mass. Municipal. Assoc., Boston, MA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, (filed Sept. 11, 2018) (Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter); Mike Posey Sept. 11, 2018 *Ex Parte* Letter; Letter from John A. Barbish, Mayor, City of Wickliffe, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 13, 2018); Letter from Pauline Russo Cutter, Mayor, City of San Leandro, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Sept. 12, 2018); Letter from Ed Waage, Mayor, City of Pismo Beach, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Scott A. Hancock, Executive Director, MML, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Sept. 18, 2018); Letter from Leon Towarnicki, City Manager, Martinsville, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018); Letter from Thomas Aujero Small, Mayor, City of Culver City, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1 (filed Sept. 18, 2018).
- 316 Philadelphia Comments at 4-5 (arguing that shorter shot clocks should not be implemented because “cities are already resource constrained and any further attempt to further limit the current time periods for review of applications will seriously and adversely affect public safety as well as diminish the proper role, under our federalist system, of state and local governments in regulating local rights of way”); Smart Communities Comments, Docket 16-421, at 13 (filed Mar. 8, 2017) (included by reference by Austin's Comments); Alaska Dept. of Trans. Comments at 2. *See, e.g.*, TX

Hist. Comm. Comments at 2 (current shot clocks are appropriate and that further shortening these shot clocks is not warranted); Arlington, TX Comments at 2; Letter from William Tomko, Mayor of Chagrin Falls, OH, to Marlene Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 1-2 (filed Sept. 17, 2018); Nina Beety Sept. 17, 2018 *Ex Parte* Letter; Georgia Municipal Association Sept. 17, 2018 *Ex Parte* Letter at 4.

- 317 League of Az Cities and Towns *et al.* Comments at 26-27, 29-35; Cities of San Antonio *et. al* Comments at 8; Philadelphia Comments at 4.
- 318 T-Mobile Comments at 22; Florida Coalition Comments at 9 (creating new shot clocks would result in “too many ‘shot clocks’ and both the industry and local governments would be confused as to which shot clock applied to what application”).
- 319 While several parties proposed additional shot clock categories, we believe that the any benefit from a closer tailoring of categories to circumstances is not outweighed by the administrative burden on siting authorities and providers to manage these categories. *See* TX Hist. Comm. Comments at 2 (stating that it “could support a shorter review period for new structures less than fifty (50) feet tall, or where structures are located within or adjacent to existing utility rights-of-way (but not transportation rights-of-way) with existing utility structures taller than the proposed telecommunications structure”); Georgia Dept. of Trans. Comments at 2 (stating that time frames based on the zoning area are reasonable).
- 320 Cities of San Antonio *et. al* Comments, Exh. A at 17-18. In the same vein, the Florida Department of Transportation contends that “[p]ermit review times should comply with state statutes,” especially if the industry insists on being treated similarly as other utilities. AASHTO Comments, Attach. at 13 (Florida Dept. of Trans. Comments); *see also* Alaska Dept. of Trans. Comments at 2; TX Dept. of Trans. Comments at 2 (explaining that variations in topography, weather, government interests, and state and local political structure counsel against standardized nationwide shot clocks). The Maryland Department of Transportation is concerned about the shortened shot clocks proposed because they would conflict with a Maryland law that requires a 90-day comment period in considering wireless siting applications and because certain applications can be complex and necessitate longer review periods. AASHTO Comments, Attach. at 40 (MD Dept. of Trans. Comments).
- 321 BDAC Model Municipal Code at § 3.2a(i)(B).
- 322 CTIA Comments, Attach. 1 at 38.
- 323 T-Mobile Comments at 19-20 (stating that some states already have adopted more expedited time frames to lower siting barriers and speed deployment, which demonstrates the reasonableness of the proposed 60-day and 90-day revised shot clocks); Incompas Reply at 9 (stating that there is no basis for differing time-periods for similarly- situated small cell installation requests, and the lack of harmonization could discourage the use of a more efficient infrastructure); CCA Comments at 14 n.52 (citing CCA Streamlining Reply at 7-8 that in Houston, Texas, the review process for small cell deployments “usually takes 2 weeks, but no more than 30 days to process and complete the site review. In Kenton County, Kentucky, the maximum time permitted to act upon new facility siting requests is 60 days. Louisville, Kentucky generally processes small cell siting requests within 30 days, and Matthews, North Carolina generally processes wireless siting applications within 10 days”).
- 324 CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities); CTIA Comments at 11-12 (asserting that the existing 150-day review period for new wireless sites should be shortened to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under [Section 332](#) at all); ExteNet Comments at 8 (asserting that the Commission should accelerate the shot clock for all other non-collocation applications, including those for new DNS poles, from 150 days to 90 days); WIA Reply at 2.
- 325 CCUA argues that the new shot clocks would force siting authorities to deny applications when they find that applications are incomplete. Letter from Kenneth S. Fellman, Counsel, CCUA, to Marlene H. Dortch, Secretary, FCC, WT Docket

No. 17-79 et al., at 3 (filed Sept. 18, 2018) (Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter). We disagree that this would be the outcome in such an instance because, as explained below, siting authorities can toll the shot clocks upon a finding of incompleteness.

326 STREAMLINE Small Cell Deployment Act, S. 3157, 115th Cong. (2018).

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

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

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

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

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

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

333 *See, e.g.*, Sprint Comments, Docket No. 16-421, at 43-44 (filed Mar. 8, 2017); Verizon Comments at 42; CTIA Comments at 17.

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

335 *See infra* paras. 117, 119. *See* Letter from Nina Beety, to Marlene Dortch, Secretary, FCC, WT Docket No. 17- 79 (filed Sept. 17, 2018); Letter from Dave Ruller, City Manager, City of Kent, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 at 2 (filed Sept. 18, 2018).

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

337 *See infra* para. 144.

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

339 *See supra* paras. 34-42.

340 *Id.*

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

- 342 See, e.g., *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 41 (1st Cir. 2014) (addressing claimed violation of Section 332(c)(7)(B)(i)(II) of the Act); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21-22 (1st Cir. 2002) (*Nat'l Tower*) (same); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999) (addressing violation of Section 332(c)(7)(B)(v) of the Act); *AT&T Mobility Servs., LLC v. Vill. of Corrales*, 127 F. Supp. 3d 1169, 1175-76 (D.N.M. 2015) (addressing violation of Section 332(c)(7)(B)(i)(II)); *Bell Atl. Mobile of Rochester v. Town of Irondequoit*, 848 F. Supp. 2d 391, 403 (W.D.N.Y. 2012) (addressing violation of Section 332(c)(7)(B)(ii)); *New Cingular Wireless PCS, LLC v. City of Manchester*, 2014 WL 79932, *8 (D.N.H. Feb. 28, 2014) (addressing violation of Section 332(c)(7)(B)(i)(II)).
- 343 See, e.g., *Nat'l Tower*, 297 F.3d at 21-22; *AT&T Mobility*, 127 F. Supp. 3d at 1176.
- 344 See, e.g., *Green Mountain Realty*, 750 F.3d at 41-42; *Nat'l Tower*, 297 F.3d at 24-25; *Cellular Tel. Co.*, 166 F.3d at 497; *Bell Atl. Mobile*, 848 F. Supp. 2d at 403; *New Cingular Wireless PCS*, 2014 WL 79932, *8.
- 345 See *Green Mountain Realty Corp.*, 750 F.3d at 41 (reasoning that remand to the siting authority “would not be in accordance with the text or spirit of the Telecommunications Act); *Cellular Tel. Co.*, 166 F.3d at 497 (noting “that injunctive relief best serves the TCA's stated goal of expediting resolution” of cases brought under 47 U.S.C. § 332(c)(7)(B)(v)).
- 346 See, e.g., *Nat'l Tower*, 297 F.3d at 23; *Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29, 32 (2d Cir. 2017) (Summary Order).
- 347 See, e.g., *Wireless Infrastructure Second R&O*, FCC 18-30 at para. 62; *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332, para. 5.
- 348 *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12978, para. 284.
- 349 *Pub. Serv. Tel. Co. v. Georgia Pub. Serv. Comm'n*, 755 F. Supp. 2d 1263, 1273 (N.D. Ga.), *aff'd*, 404 F. App'x 439 (11th Cir. 2010); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004); *Nat. Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990); *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914-15 (1st Cir. 1989). Note that the standards for permanent injunctive relief differ in some respects among the circuits and the states. For example, “most courts do not consider the public interest element in deciding whether to issue a permanent injunction, though the Third Circuit has held otherwise.” *Klay*, 376 F.3d at 1097. Courts in the Second Circuit consider only irreparable harm and success on the merits. *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004). The Third and Fifth Circuits have precedents holding that irreparable harm is not an essential element of a permanent injunction. See *Roe v. Operation Rescue*, 919 F.2d 857, 873 n. 8 (3d Cir. 1990); *Lewis v. S. S. Baune*, 534 F.2d 1115, 1123-24 (5th Cir. 1976). For the sake of completeness, our analysis discusses all of the elements that have been used in decided cases.
- 350 See *New Jersey Payphone*, 130 F. Supp. 2d at 640.
- 351 See *Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d at 225-26 (quoting *Nextel Partners, Inc. v. Town of Amherst, N.Y.*, 251 F. Supp. 2d 1187, 1201 (W.D.N.Y. 2003)); see *Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 318 (N.D.N.Y. 2017).
- 352 *New Jersey Payphone*, 130 F. Supp. 2d at 641.
- 353 *City of Arlington*, 668 F.3d at 234.
- 354 *Contra* 47 U.S.C. 332(c)(7)(B)(ii).

- 355 *New Jersey Payphone*, 130 F. Supp. 2d at 641.
- 356 See *Cellular Tel. Co*, 166 F.3d at 496. While our discussion here focused on cases that apply the permanent injunction standard, we have the same view regarding relief under the preliminary injunction standard when a locality fails to act within the applicable shot clock periods. See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (discussing the standard for preliminary injunctive relief).
- 357 Several commenters support this position, urging the Commission to reaffirm that adversely affected applicants must seek redress from the courts. See, e.g., League of Ar Cities and Towns *et al.* Comments at 14-21; Philadelphia Comments at 2; Philadelphia Reply at 4-6; City of San Antonio *et al.* Comments, Exh. B at 14-15; San Francisco Comments at 16-17; Colorado Munis Comments at 7; CWA Reply at 5; Fairfax County Comments at 12-15; AASHTO Comments at 20-21, 23 (ID Dept. of Trans. Comments); NATOA Comments, Attach. 3 at 53-55; NLC Comments at 3-4; Smart Communities Comments at 39-43. Our interpretation thus preserves a meaningful role for courts under [Section 332\(c\)\(7\)\(B\)\(v\)](#), contrary to the concern some commenters expressed with particular focus on alternative proposals we do not adopt, such as a deemed granted remedy. See, e.g., Colorado Comm. and Utility All. *et al.* Comments at 6-7; League of Az Cities and Towns *et al.* Comments at 14-23; Philadelphia Comments at 2; Baltimore Reply at 11; City of San Antonio *et al.* Reply at 2; San Francisco Reply at 6; League of Az Cities and Towns *et al.* Reply at 2-3. In addition, our interpretation of [Section 332\(c\)\(7\)\(B\)\(ii\)](#) does not result in a regime in which the Commission could be seen as implicitly issuing local land use permits, a concern that states and localities raised regarding an absolute deemed granted remedy, because applicants are still required to petition a court for relief, which may include an injunction directing siting authorities to grant the application. See Alexandria Comments at 2; Baltimore Reply at 10; Philadelphia Reply at 8; Smart Cities Coal Comments at ii, 4, 39.
- 358 *City of Arlington*, 668 F.3d at 250.
- 359 The likelihood of non-uniform or inconsistent rulings on what time frames are reasonable or what circumstances could rebut the presumptive reasonableness of the shot clock periods stems from the intrinsic ambiguity of the phrase “reasonable period of time,” which makes it susceptible of varying constructions. See *City of Arlington*, 668 F.3d at 255 (noting “that the phrase ‘a reasonable period of time,’ as it is used in [§ 332\(c\)\(7\)\(B\)\(ii\)](#), is inherently ambiguous”); *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (“Because ‘just,’ ‘unjust,’ ‘reasonable,’ and “‘unreasonable’ are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.”). See also Lightower Comments at 3 (“The lack of consistent guidance regarding statutory interpretation is creating uncertainty at the state and local level, with many local jurisdictions seeming to simply make it up as they go. Differences in the federal courts are only exacerbating the patchwork of interpretations at the state and local level.”).
- 360 47 U.S.C. [§ 332\(c\)\(7\)\(B\)\(v\)](#).
- 361 WIA Comments at 16.
- 362 *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360, 13363-64 (2016) (citing S&P Global Market Intelligence, John Fletcher, Small Cell and Tower Projections through 2026, SNL Kagan Wireless Investor (Sept. 27, 2016)).
- 363 T-Mobile Comments at 8.
- 364 These numbers would escalate under WIA's estimate that 70 percent of small cell deployment applications exceed the applicable shot clock. WIA Comments at 7.

- 365 See CTIA Comments at 9 (explaining that, “[p]articularly for small cells, the expense of litigation can rarely be justified); WIA Comments at 16 (quoting and discussing Lightower’s Comments in 2016 Streamlining Public Notice); T-Mobile Comment, Attach. A at 8.
- 366 See, e.g., AT&T Comments at 26; CCA Comments at 7, 9, 11-12; CCA Reply at 5-6, 8; Cityscape Consultants Comments at 1; CompTIA Comments at 3; CIC Comments at 17-18; Crown Castle Comments at 23-28; Crown Castle Reply at 3; CTIA Comments at 7-9, Attach. 1 at 5, 39-43, Attach. 2 at 3, 23-24; GCI Comments at 5-9; Lightower Comments at 7, 18-19; Samsung Comments at 6; T-Mobile Comments at 13, 16, Attach. A at 25; WIA Comments at 15-17.
- 367 See, e.g., Arizona Munis Comments at 23; Arizona Munis Reply at 8-9; Baltimore Reply at 10; Lansing Comments at 2; Philadelphia Reply at 9-12; Torrance Comments at 1-2; CPUC Comments at 14; CWA Reply at 5; Minnesota Munis Comments at 9; but see CTIA Reply at 9.
- 368 See, e.g., Chicago Comments at 2 (contending that wireless facilities siting entails fact-specific scenarios); AASHTO Comments, Attach. at 40 (MD Dept. of Trans. SHA Comments) (describing the complexity of reviewing proposed deployments on rights-of-way); AASHTO Comments, Attach. at 51 (Wyoming DOT Comments); Baltimore Reply at 11; Philadelphia Comments at 4; Alexandria Comments at 6; Mukilteo Comments at 1; Alaska Dept. of Trans. Comments at 2; Alaska SHPO Reply at 1.
- 369 See Fla. Stat. Ann. § 365.172(13)(d)(3.b); Ariz. Rev. Stat. Ann. § 9-594(C) (3); 53 Pa. Stat. Ann. § 11702.4; Cal. Gov’t Code § 65964.1; Va. Code Ann. § 15.2-2232; Va. Code Ann. § 15.2-2316.4; Va. Code Ann. § 56-484.29; Va. Code Ann. § 56-484.28; Ky. Rev. Stat. Ann. § 100.987; N.H. Rev. Stat. Ann. § 12-K:10; Wis. Stat. Ann. § 66.0404; Kan. Stat. Ann. § 66-2019(h)(3); Del. Code Ann. tit. 17, § 1609; Iowa Code Ann. § 8C.7A(3)(c)(2); Iowa Code Ann. § 8C.4(4)(5); Iowa Code Ann. § 8C.5; Mich. Comp. Laws Ann. § 125.3514. See also CCA Reply at 9.
- 370 See, e.g., CTIA Comments at 10-11; T-Mobile Comments at 15-18, Verizon Comments at 37, 39-41, WIA Comments at 17-20.
- 371 *City of Arlington*, 668 F.3d at 234 (noting that the purpose of Section 332(c)(7) is to balance the competing interests to preserve the traditional role of state and local governments in land use and zoning regulation and the rapid development of new telecommunications technologies).
- 372 See *supra* paras. 119-20 (explaining how the remedy strikes the proper balance between competing interests). Because our approach to shot clocks involves our interpretation of Section 332(c)(7)(B)(ii) and the consequences that flow from that—and does not rely on Section 253 of the Act—we need not, and thus do not, resolve disputes about the potential use of Section 253 in this specific context, such as whether it could serve as authority for a deemed granted or similar remedy. See, e.g., San Francisco Comments at 9-10; CPUC Comments at 10; Smart Communities Comments at 4-11, 21; Smart Communities Reply at 78-79; League of Az Cities and Towns *et al.* Reply at 4; Alexandria Comments at 5; Irvine Comments at 5; Minnesota Cities Comments at 11-13; Philadelphia Reply at 2, 7; Fairfax County Comments at 17; Greenlining Reply at 4; NRUC Reply at 3-5; NATOA June 21, 2018 *Ex Parte* Letter. To the extent that commenters raise arguments regarding the proper interpretation of “prohibit or have the effect of prohibiting” under Section 253 or the scope of Section 253, these issues are discussed in the Declaratory Ruling, see *supra* paras. 34-42.
- 373 See App Association Comments at 9; CCI Comments at 6-8; Conterra Comments at 14-17; ExteNet Comments at 13; T-Mobile Comments at 17; Quintillion Reply at 6; Verizon Comments at 8-18; WIA Comments at 9-10. WIA contends that adoption of a deemed granted remedy is needed because various courts faced with shot clock claims have failed to provide meaningful remedies, citing as an example a case in which the court held that the town failed to act within the shot clock period but then declined to issue an injunction directing the siting agency to grant the application. WIA Comments at 16-17. However, a number of cases involving violations of the “reasonable period of time” requirement of Section 332(c)(7)(B)(ii)—decided either before or after the promulgation of the Commission’s Section 332(c)(7)(B)(ii) shot clocks—have concluded with an award of injunctive relief. See, e.g., *Upstate Cellular Network*, 257 F. Supp. 3d at

318 (concluding that the siting authority's failure to act within the 150-day shot clock was unreasonable and awarding a permanent injunction in favor of the applicant); *Am. Towers, Inc. v. Wilson County*, No. 3:10-CV-1196, 2014 WL 28953, at *13-14 (M.D. Tenn. Jan. 2, 2014) (finding that the county failed to act within a reasonable period of time, as required under Section 332(c)(7)(B)(ii), and granting an injunction directing the county to approve the applications and issue all necessary authorizations for the applicant to build and operate the proposed tower); *Cincinnati Bell Wireless, LLC v. Brown County*, Ohio, No. 1:04-CV-733, 2005 WL 1629824, at *4-5 (S.D. Ohio July 6, 2005) (finding that the county failed to act within a reasonable period of time under Section 332(c)(7)(B)(ii) and awarding injunctive relief). *But see Up State Tower Co. v. Town of Kiantone*, 718 Fed. Appx. 29 (2d Cir. 2017) (declining to reverse district court's refusal to issue injunction compelling immediate grant of application). Courts have also held “that injunctive relief best serves the TCA's stated goal of expediting resolution of” cases brought under Section 332(c)(7)(B)(v). *Cellular Tel. Co.*, 166 F.3d at 497; *Brehmer v. Planning Bd. of Town of Wellfleet*, 238 F.3d 117, 121 (1st Cir. 2001). Under these circumstances, we do not agree with WIA that courts have failed to provide meaningful remedies to such an extent as would require the adoption of a deemed granted remedy.

374 *Zoning Bd. of Adjustment of the Borough of Paramus, N.J.*, 21 F. Supp. 3d at 383, 387 (more than four-and-a-half years for Sprint to prevail in court), *aff'd*, 606 F. App'x 669 (3d Cir. 2015); *Vill. of Corrales*, 127 F. Supp. 3d 1169 (nineteen months from complaint to grant of summary judgment); *Orange County—Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 84 F. Supp. 3d 274, 293 (S.D.N.Y.), *aff'd sub nom.*, *Orange County—County Poughkeepsie Ltd. P'ship v. Town of E. Fishkill*, 632 F. App'x 1 (2d Cir. 2015) (seventeen months from complaint to grant of summary judgment).

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

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

377 KS Rep. Sloan Comments at 2; Nokia Comments at 10.

378 NATOA *et al.* Comments at 16-17.

379 *See infra* paras. 145-46.

380 *See* 47 U.S.C. § 332(c)(7)(B)(ii).

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

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

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

384 *Implementation of Section 402(b)(1)(a) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 11233 (1996); *2002 Biennial Regulatory Review*, Report, 18 FCC Rcd 4726, 4731-32 (2003); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”); *Communications Assistance for Law Enft Act & Broadband Access & Servs.*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC

Rcd. 14989, 14992-93, para. 9 (2005) (interpreting an ambiguous statute by considering the “structure and history of the relevant provisions, including Congress's stated purposes” in order to “faithfully implement[] Congress's intent”); *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007) (using legislative history “to identify Congress's clear intent”); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (same).

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

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

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

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

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

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

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

392 *City of Arlington*, 668 F.3d at 234.

393 *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).

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

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

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

- 397 *PI Telecom Infrastructure V, LLC v. Georgetown—Scott County Planning Commission*, 234 F. Supp. 3d 856, 872 (E.D. Ky. 2017). *Accord T-Mobile Ne. LLC v. Lowell*, Civil Action No. 11-11551—NMG, 2012 WL 6681890, *6-7, *11 (D. Mass. Nov. 27, 2012) (directing the zoning board “to issue all permits and approvals necessary for the construction of the plaintiffs' proposed telecommunications facility”); *New Par v. Franklin County Bd. of Zoning Appeals*, No. 2:09—cv—1048, 2010 WL 3603645, *4 (S.D. Ohio Sept. 10, 2010) (enjoining the zoning board to “grant the application and issue all permits required for the construction of the” proposed wireless facility).
- 398 *See, e.g., New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 760 (E.D. Mich. 2001), *aff'd*, 301 F.3d 390 (6th Cir. 2002)
- 399 *See, e.g., Virginia Metronet, Inc. v. Bd. of Sup'rs of James City County*, 984 F. Supp. 966, 968 (E.D. Va. 1998); *Cellular Tel. Co.*, 166 F.3d at 491; *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1303 (10th Cir. 2008); *City of Anacortes*, 572 F.3d at 989; *Helcher*, 595 F.3d at 713-14; *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1152 (S.D. Cal. 2003); *PrimeCo Pers. Commc'ns L.P. v. City of Mequon*, 242 F. Supp. 2d 567, 570 (E.D. Wis.), *aff'd*, 352 F.3d 1147 (7th Cir. 2003); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1212 (11th Cir. 2002).
- 400 *See, e.g., Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005); *Cox Commc'ns PCS, L.P. v. San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002).
- 401 *See, e.g., Upstate Cellular Network*, 257 F. Supp. 3d at 319; *Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 395-96 (3rd Cir. 2007).
- 402 *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d 148, 150 (S.D.N.Y. 1999), *aff'd*, 283 F.3d 404 (2d Cir. 2002).
- 403 *See, e.g., Tennessee ex rel. Wireless Income Proprs., LLC v. City of Chattanooga*, 403 F.3d 392, 394 (6th Cir. 2005) (city public works department); *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 720 (9th Cir. 2009) (city public works director, city planning commission, and city council); *Sprint Spectrum, L.P. v. Mills*, 65 F. Supp. 2d at 150 (New York State Department of Education).
- 404 *See, e.g., Virginia Joint Commenters Comments* at 21-22 (stating that deployment of personal wireless facilities generally requires excavation and building permits); *San Francisco Comments* at 4-7, 12, 20-22 (describing the permitting process in San Francisco, the layers of multi-departmental review involved, and the required authorizations before certain personal wireless facilities can be constructed); *Smart Communities Comments* at 33- 34 (describing several authorizations necessary to deploy personal wireless facilities depending on the location, e.g., public rights-of-way and other public properties, of the proposed site and the size of the proposed facility).
- 405 *League of Az Cities and Towns et al. Reply* at 21-22.
- 406 *2009 Declaratory Ruling*, 24 FCC Rcd at 14012-013, paras. 45, 48.
- 407 *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3332-33, 3334, 3337-38, paras. 6, 9, 17-19.
- 408 *Chicago Comments* at 2 (supporting maintaining existing shot clocks); *Bellevue et al. Comments* at 13-14 (supporting maintaining existing shot clocks).
- 409 We also adopt a non-substantive modification to our existing rules. We redesignate the rule adopted in 2014 to codify the Commission's implementation of the 2012 Spectrum Act, formerly designated as section 1.40001, as section 1.6100, and we move the text of that rule from Part 1, Subpart CC, to the same Subpart as the new rules promulgated in this Third Report and Order (Part 1, Subpart U). This recognizes that both sets of requirements pertain to “State and local government regulation of the placement, construction, and modification of personal wireless service facilities” (the caption of new Subpart U). The reference in paragraph (a) of that preexisting rule to 47 U.S.C. § 1455 has been consolidated with new rule section 1.6001 to reflect that all rules in Subpart U, collectively, implement both § 332(c) (7) and § 1455. With those non-substantive exceptions, the text of the 2014 rule has not been changed in any way.

Contrary to the suggestion submitted by the Washington Joint Counties, *see* Letter from W. Scott Snyder et al., Counsel for the Washington Cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 6-7 (filed June 19, 2018), this change is not substantive and does not require advance notice. We find that “we have good cause to reorganize and renumber our rules in this fashion without expressly seeking comment on this change, and we conclude that public comment is unnecessary because no substantive changes are being made. Moreover, the delay engendered by a round of comment would be contrary to the public interest.” *See 2017 Pole Replacement Order*, 32 FCC Rcd at 9770, para. 26; *see also* 5 U.S.C. § 553(b)(B) (notice not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

- 410 CCIA Comments at 10; CCA Comments at 13-14; CCA Reply at 6 (arguing for 30-day shot clock for collocations and a 60-to-75-day shot clock for all other siting applications); WIA Reply at 21. *See also* Letter from Jill Canfield, NTCA Vice President Legal & Industry and Assistant General Counsel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed June 19, 2018) (stating that NTCA supports a revised interpretation of the phrase “reasonable period of time” as found in Section 332(c) (7)(B)(ii) of the Communications Act as applicable to small cell facilities and that sixty days for collocations and 90 days for all other small cell siting applications should provide local officials sufficient time for review of requests to install small cell facilities in public rights-of-way).
- 411 *Wireless Infrastructure Second R&O*, FCC 18-30 at paras. 74-76.
- 412 New Orleans Comments at 2-3; Samsung Comments at 4-5 (arguing that the Commission should reduce the shot clock applicable to new construction from 150 days to 90 days); Crown Castle Comments at 29 (stating that a 90-day shot clock for new facilities is appropriate for macro cells and small cells alike, to the extent such applications require review under Section 332 at all); TX Hist. Comm. Comments at 2 (arguing that the reasonable periods of time that the FCC proposed in 2009, 90 days for collocation applications and 150 days for other applications appear to be appropriate); WIA Comments at 20-23; WIA Reply at 11 (arguing for a 90-day shot clock for applications involving substantial modifications, including tower extensions; and a 120-day shot clock for applications for all other facilities, including new macro sites); CTIA Reply at 3 (stating that the Commission should shorten the shot clocks to 90 days for new facilities).
- 413 AT&T Comments at 10; AT&T Reply at 9; Verizon Reply at 32; WIA Comments at 22; ExteNet Comments at 9.
- 414 Bellevue *et al.* Reply at 6-7 (arguing that the Commission has rejected this argument twice and instead determined that a collocation occurs when a wireless facility is attached to an existing infrastructure that houses wireless communications facilities; San Francisco Reply at 7-8 (arguing that under Commission definitions, a utility pole is neither an existing base station nor a tower; thus, the Commission simply cannot find that adding wireless facilities to utility pole that has not previously been used for wireless facilities is an eligible facilities request). *See, e.g.*, Letter from Bonnie Michael, City Council President, Worthington, OH, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018); Letter from Jill Boudreau, Mayor, Mount Vernon, WA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 et al., at 2 (filed Sept. 18, 2018).
- 415 *2009 Declaratory Ruling*, 24 FCC Rcd at 14012, para 46.
- 416 47 CFR Part 1, App. B, NPA, Subsection C, Definitions.
- 417 *See* 47 CFR § 1.40001(b)(3), (4), (5) (definitions of eligible facilities request, eligible support structure, and existing). Each of these definitions refers to facilities that have already been approved under local zoning or siting processes.
- 418 *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, at para. 258.

- 419 *2009 Declaratory Ruling*, 24 FCC Rcd at 14014, paras. 52-53 (providing that the “timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information”).
- 420 *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12970, para. 259.
- 421 *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.
- 422 *See, e.g.*, Maine DOT Comments at 2-3; Philadelphia Comments at 6; League of Az Cities and Towns *et al.* at 4, 8-9; Letter from Barbara Coler, Chair, Marin Telecommunications Agency, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.*, at 2 (filed Sept. 4, 2018) (Barbara Coler Sept. 4, 2018 *Ex Parte* Letter); Letter from Sam Liccardo, Mayor, San Jose, CA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.*, at 5 (filed Sept. 18, 2018).
- 423 Verizon Comments at 43. *See* Sprint June 18 *Ex Parte* at 2 (asserting that the shot clocks should begin to run when the application is complete and that a siting authority should review the application for completeness within the first 15 days of receipt or it would waive the right to object on that basis).
- 424 *See, e.g.*, Barbara Coler Sept. 4, 2018 *Ex Parte* Letter at 2 (the pace of installation may be affected by incomplete applications); Kenneth S. Fellman Sept. 18, 2018 *Ex Parte* Letter at 3 (not uncommon to find documents not properly prepared and not in compliance with relevant regulations).
- 425 Most states have a 30-day review period for incompleteness. *See, e.g.*, Colo. Rev. Stat. Ann. § 29-27-403; Ga. Code Ann. § 36-66B-5; Iowa Code Ann. § 8C.4; Kan. Stat. Ann. § 66-2019; Minn. Stat. Ann. § 237.163(3c)(b); 53 Pa. Stat. Ann. § 11702.4(b)(1); Cal. Gov't Code § 65943. A minority of states have adopted either a longer or shorter review period for incompleteness, ranging from 5 days to 45 days. *See* N.C. Gen. Stat. Ann. § 153A-349.53 (45 days); Wash. Rev. Code Ann. § 36.70B.070 (28 days); N.H. Rev. Stat. Ann. § 12-K:10 (15 days); Del. Code Ann. tit. 17, § 1609 (14 days); Va. Code Ann. §§ 15.2-2316.4; 56-484.28; 56-484.29 (10 days); Wis. Stat. Ann. § 66.0404(3) (5 days).
- 426 *2009 Declaratory Ruling*, 24 FCC Rcd at 14014-15, para. 53.
- 427 *See, e.g.*, Geoffrey C. Beckwith Sept. 11, 2018 *Ex Parte* Letter at 1; Jessica DeWalt, Assistant Counsel, Illinois Municipal League, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 *et al.* at 1 (filed Sept. 14, 2018); Ronny Berdugo Sept. 18, 2018 *Ex Parte* Letter at 2.
- 428 *See* Sprint June 18 *Ex Parte* at 3; *cf.* Virginia Joint Commenters Comments at 21-22; San Francisco Comments at 4-7, 12, 20-22; CTIA Comments at 15 (“The Commission should declare that the shot clocks apply to the entire local review process.”).
- 429 *Wireless Infrastructure NPRM/NOI*, 32 FCC Rcd at 3338, para. 20.
- 430 *See, e.g.*, CCA Reply at 7 (noting also that some localities unreasonably request additional information after submission that is either already provided or of unreasonable scope); GCI Comments at 8-9; WIA Comments at 24; Crown Castle Comments at 21-22; CTIA Reply at 21; CIC Comments at 18; WIA Reply at 14; Conterra Comments at 2-3; Crown Castle Comments at 30-31; CTIA Comments at 15; ExteNet Comments at 4, 15-16; Mobilitie Comments at 6; T-Mobile Comments at 21-22; Verizon Comment at 42-43; AT&T Comments at 26.
- 431 *See, e.g.*, Philadelphia Reply at 9 (arguing that shot clocks should not run until a complete application with a full set of engineering drawings showing the placement, size and weight of the equipment, and a fully detailed structural analysis is submitted, to assess the safety of proposed installations); Philadelphia Comments at 6; League of Az Cities and Towns *et al.* Comments at 4 (arguing that the shot clock should not begin until after an application has been “duly filed,” because “some applicants believe the shot clock commences to run no matter how they submit their request, or how inadequate their submittal may be”); Colorado Comm. and Utility All. *et al.* Comments at 14 (explaining that the pre-application meetings are intended “to give prospective applicants an opportunity to discuss code and regulatory provisions with

local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision”); Smart Communities Comments at 15, 35 (pre-application procedures “may translate into faster consideration of individual applications over the longer term, as providers and communities alike, gain a better understanding of what is required of them, and providers submit applications that are tailored to community requirements”); UT Dept. of Trans. Comments at 5 (“The purpose of the pre-application access meeting is to help the entity or person with the application and provide information concerning the requirements contained in the rule.”); CCUA *at al.* Reply at 6 (“[Pre- application meetings] provide an opportunity for informal discussion between prospective applicants and the local jurisdiction. Pre-application meetings serve to educate, answer questions, clarify process issues, and ultimately result in a more efficient process from application filing to final action.”); AASHTO Comments, Attach. at 3 (GA Dept. of Trans. contending that pre-application procedures “should be encouraged and separated from an ‘official’ ‘application submittal’”); League of Az Cities and Towns *et al.* Comments at 5-7 (providing examples of incomplete applications).

432 *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12971, at para. 265.

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

434 47 U.S.C. § 332(c)(7)(B)(ii).

435 *See* CCUA *et al.* Comments at 14; Smart Communities Comments at 15, 35; UT Dept. of Trans. Comments at 5; CCUA *et al.* Reply at 6; Mukilteo Reply, Docket No. WC 17-84, at 1 (filed July 10, 2017).

436 *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

437 *2009 Declaratory Ruling*, 24 FCC Rcd at 14013-14, para. 50.

438 47 U.S.C. § 332(c)(7)(B)(v).

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

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

3 *See* 5 U.S.C. § 604.

4 *See supra* paras. 23-9.

5 *See supra* paras. 111-12.

6 *See supra* paras. 138-39; *2009 Declaratory Ruling*.

7 *See supra* paras. 132-37.

8 *See supra* para. 140.

9 *See supra* paras. 141-46.

10 *Id.*

- 11 *See supra* para. 147.
- 12 *See supra* paras. **Error! Reference source not found.**-131.
- 13 *See supra* para. 127.
- 14 Smart Communities Comments at 81; *see also* Letter from Gerard Lavery Lederer, Counsel, Smart Communities, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, *Ex Parte* Submission at 33 (filed Sept. 19, 2018).
- 15 Letter from Nancy Werner, NATOA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 4-5 (filed Sept. 19, 2018).
- 16 *See supra* para. 106.
- 17 *See supra* paras. 105-112.
- 18 *Id.*
- 19 *See supra* paras. 116-131.
- 20 5 U.S.C. § 604(a)(3).
- 21 *See* 5 U.S.C. § 604(a)(3).
- 22 5 U.S.C. § 601(6).
- 23 5 U.S.C. § 601(3) (incorporating by reference the definition of ““small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”
- 24 15 U.S.C. § 632.
- 25 *See* 5 U.S.C. § 601(3)-(6).
- 26 *See* SBA, Office of Advocacy, “Frequently Asked Questions, Question 1—What is a small business?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).
- 27 *See* SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small businesses are there in the U.S.?” https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (June 2016).
- 28 5 U.S.C. § 601(4).
- 29 Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than \$100,000. Of this number 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of \$50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of \$100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. *See* <http://nccs.urban.org/sites/all/nccs-archive/html/tablewiz/tw.php> where the report showing this data can be generated by selecting the following data fields: Report: “The Number and Finances of All Registered 501(c)

Nonprofits”; Show: “Registered Nonprofits”; By: “Total Revenue Level (years 1995, Aug to 2016, Aug)”; and For: “2016, Aug” then selecting “Show Results”.

30 5 U.S.C. § 601(5).

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

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

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

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

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

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

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

38 *Id.*

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

40 13 CFR § 121.201, NAICS Code 517210.

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

- 42 *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
- 43 *See* <http://wireless.fcc.gov/uls>. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.
- 44 *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf.
- 45 *See id.*
- 46 47 CFR Part 90.
- 47 The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 CFR Part 95.
- 48 13 CFR § 121.201, NAICS Code 517312.
- 49 U.S. Census Bureau, *2012 Economic Census of the United States, Table EC1251SSSZ5, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.
- 50 *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
- 51 *See* subparts A and B of Part 90 of the Commission's Rules, 47 CFR §§ 90.1-90.22. Police licensees serve state, county, and municipal enforcement through telephony (voice), telegraphy (code), and teletype and facsimile (printed material). Fire licensees are comprised of private volunteer or professional fire companies, as well as units under governmental control. Public Safety Radio Pool licensees also include state, county, or municipal entities that use radio for official purposes. State departments of conservation and private forest organizations comprise forestry service licensees that set up communications networks among fire lookout towers and ground crews. State and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Additional licensees include medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.
- 52 *See* 13 CFR § 121.201, NAICS Code 517210.
- 53 U.S. Census Bureau, *2012 Economic Census of the United States, Table EC1251SSSZ5, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012* NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.
- 54 *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
- 55 This figure was derived from Commission licensing records as of June 27, 2008. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number

of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of public safety licensees that have less than 1,500 employees.

- 56 Based on an FCC Universal Licensing System search of March 29, 2017. Search parameters: Radio Service = PA—Public Safety 4940-4990 MHz Band; Authorization Type = Regular; Status = Active.
- 57 U.S. Census Bureau, 2012 NAICS Definitions, “517210 Wireless Telecommunications Carriers (Except Satellite),” See <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.517210> (last visited Mar. 6, 2018).
- 58 See 13 CFR § 121.201, NAICS Code 517210.
- 59 U.S. Census Bureau, 2012 Economic Census of the United States, Table EC1251SSSZ5, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210. https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.
- 60 *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
- 61 This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.
- 62 This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.
- 63 See *Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008 para. 123 (2000).
- 64 *Id.*
- 65 See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).
- 66 See *Multiple Address Systems Spectrum Auction Closes*, Public Notice, 16 FCC Rcd 21011 (2001).
- 67 13 CFR § 121.201, NAICS Code 517210.
- 68 *Id.*
- 69 U.S. Census Bureau, 2012 Economic Census of the United States, Table EC1251SSSZ5, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.
- 70 *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”
- 71 *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

- 72 47 CFR § 21.961(b)(1).
- 73 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.
- 74 *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).
- 75 *Id.* at 8296 para. 73.
- 76 *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).
- 77 U.S. Census Bureau, 2017 NAICS Definitions, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2017>.
- 78 See 13 CFR § 121.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICS code as 517311 for Wired Telecommunications Carriers. See, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.
- 79 See U.S. Census Bureau, 2012 Economic Census of the United States, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkrmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.
- 80 *Id.*
- 81 The term “small entity” within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).
- 82 *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, Second Report and Order*, 13 FCC Rcd 15182, 15192 para. 20 (1998); see also 47 CFR § 90.1103.
- 83 *Id.*
- 84 See Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).
- 85 U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017>.
- 86 *Id.*
- 87 13 CFR § 121.201; 2012 NAICS Code 515120.
- 88 U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/bkrmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515120.
- 89 *Id.*

- 90 *Broadcast Station Totals as of June 30, 2018*, Press Release (MB, rel. Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals Press Release), <https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf>.
- 91 *Id.*
- 92 *Id.*
- 93 *See* 13 CFR § 21.103(a)(1) “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.”
- 94 U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.
- 95 13 CFR § 121.201, NAICS Code 515112.
- 96 U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 515112*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515112.
- 97 *Id.*
- 98 BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).
- 99 *Broadcast Station Totals as of June 30, 2018*, Press Release (MB Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals), <https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf>.
- 100 *Id.*
- 101 13 CFR § 121.103(a)(1). “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both.”
- 102 13 CFR § 121.102(b).
- 103 *See*, U.S. Census Bureau, 2017 NAICS Definitions, “515112 Radio Stations,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017>.
- 104 *Id.*
- 105 *Id.*
- 106 13 CFR § 121.201, NAICS code 515112.
- 107 U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 515112*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4/naics~515112.
- 108 *Id.*
- 109 *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

- 110 See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).
- 111 See “*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*,” Public Notice, 19 FCC Rcd 1834 (2004).
- 112 See “*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63*,” Public Notice, 20 FCC Rcd 19807 (2005).
- 113 U.S. Census Bureau, 2017 NAICS Definitions, “517410 Satellite Telecommunications,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017>.
- 114 13 CFR § 121.201, NAICS Code 517410.
- 115 U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517410, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517410.
- 116 *Id.*
- 117 See U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code “517919 All Other Telecommunications”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017>.
- 118 *Id.*
- 119 *Id.*
- 120 13 CFR § 121.201, NAICS Code 517919.
- 121 U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.
- 122 *Id.*
- 123 See 47 CFR Part 101, Subpart I.
- 124 Persons eligible under parts 80 and 90 of the Commission's rules can use Private-Operational Fixed Microwave services. See 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.
- 125 See 47 CFR Parts 74, 78 (governing Auxiliary Microwave Service) Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.
- 126 See 47 CFR §§ 101, 1001-101, 1017.
- 127 See 47 CFR §§ 101, 101.501-101.538.
- 128 See 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).
- 129 See *id.*

130 See 47 CFR §§ 101, [101.1501-101.1527](#).

131 See 47 CFR §§ [101.533](#), [101.1017](#).

132 These statistics are based on a review of the Universal Licensing System on September 22, 2015.

133 [13 CFR § 121.201](#).

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

135 We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

136 [13 CFR § 121.201](#), NAICS Code 517919.

137 U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

138 *Id.*

139 See *supra* para. 144.

140 See *supra* para. 110.

141 [5 U.S.C. § 603\(c\)\(1\)-\(4\)](#).

142 KS Rep. Sloan Comments at 2; Nokia Comments at 10.

143 NATOA *et al.* Comments at 16-17.

144 See *supra* para. 131.

145 [5 U.S.C. § 801\(a\)\(1\)\(A\)](#).

146 [5 U.S.C. § 604\(b\)](#).

147 American Tower Ex Parte Letter, WT Docket No. 17-79, n.6 (Aug. 10, 2018).

148 American Tower Ex Parte Letter, WT Docket No. 17-79, n.6 (Aug. 10, 2018).

33 FCC Rcd. 9088 (F.C.C.), 33 F.C.C.R. 9088, 2018 WL 4678555



September 9, 2022

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City of Rolla
Board of Adjustment
901 North Pine Street, 4th Floor
Rolla, MO 65401

Dear Rolla Board of Adjustment,

Thank you for the opportunity to address your questions. To aid in your consideration of Parallel Towers' application for a setback variance, I have provided some information that I think will be helpful to you.

Background of Tower Application

Parallel Towers and Collective Solutions applied to construct a telecommunications tower at 1900 Old Saint James Road. The City Council initially denied the application because the proposed tower would be taller than the City's ordinances allow for commercial zoning. However, the denial violated state and federal law. Earlier this year, the City Council reversed the denial.

The City Council approved the rezoning of a narrow, triangle-shaped portion of the property (zoned C-3) to an industrial classification (M-1), which is consistent both with the prior zoning classification of the parcel and with the zoning classification for the adjacent parcels (zoned M-2). For ease of reference, the rezoned part of the property will be referred to as the "Site," and the complete property at 1900 Old Saint James Road will be referred to as the "Property." The changed zoning classification for the Site accommodates the height needed to meet the coverage and service needs of AT&T.

The City Council then approved Parallel's tower application with the condition that Parallel obtain a variance from the Board of Adjustment because the tower does not meet the setback requirements set forth under the City's telecommunications tower ordinance.

The Larger Setbacks are Not Necessary

The City's telecommunications ordinance requires a setback from "rights-of-way, sidewalk or street, alley, parking area, playground, or other building, and from the property line of any adjacent property at least a horizontal distance equal to the height of the Support Structure, including any portions of any Wireless Communications Facilities thereon." The proposed tower will be 95 feet tall with a five-foot lightning arrester on top.

The setback requirement in the City's ordinances is very new—this is the first tower constructed in the City to actually be subject to this requirement. In fact, the tower constructed by SBA, who appeared at the last hearing to object to the tower, does not satisfy these setbacks. If you walk outside of City Hall, there are two towers on the other side of tenth street immediately adjacent to buildings. Neither SBA's tower nor the towers near City Hall are safety risks despite not satisfying the setbacks. Likewise, the proposed tower will not be a safety risk.

Mr. Russ Been explained at the last hearing that the tower is constructed to collapse upon itself and has a narrow fall zone. This means that even with this variance, there will not be a material risk to any of the adjacent properties or structures.

State and Federal Law Requires Approval of the Variance Application

State and federal law both require the approval of the variance application. I am attaching the applicable statutes that support Parallel's position. These are a few key legal bases for this position, but this list is not exhaustive.

Discrimination

As an initial matter, both state and federal law prohibit the unreasonable discrimination between providers of equivalent services. RSMo § 67.5094(15); 42 USC § 332(c)(7)(B)(i)(I). This means that the City cannot unreasonably treat Parallel's tower application differently from other towers in the City, including SBA's tower. Denying Parallel's variance application would be unreasonable discrimination between it and SBA because there is no reasonable basis to treat the two towers differently (particularly because there is no increased risk created by the construction of the proposed tower).

Effective Prohibition of Cell Service

The variance should also be approved because without this tower at this location, AT&T's wireless services will be effectively prohibited. Federal law prohibits a city from effectively prohibiting cell service. 42 USC § 332(c)(7)(B)(i)(II). The Federal Communications Commission in 2018 explained that a city effectively prohibits cell service when it prevents a telecommunications provider from either remedying a gap in its coverage *or* from providing a new or improved service to its customers. (The applicable FCC regulation is also included for your reference.)

I am including a federal case that dealt with a very similar set of facts. In *Cellco Partnership v. The White Deer Township Zoning Hearing Board*, the federal court located in the Middle District of Pennsylvania considered the denial of a variance application for a cell tower that did not satisfy the minimum lot size and setback requirements in the local ordinances. Cellco (known more popularly as Verizon) also did not satisfy the township's requirements for a variance. Even so, the court held that the township should have approved Verizon's application because without the tower, Verizon's service would be effectively prohibited in the area.

Similarly, here, the denial of Parallel's application for a variance would also effectively prohibit cell service and violate federal law. Cell towers do not operate in a silo. They communicate with one another and work together as a unified network. This means that the location and height of the tower is set to permit the new tower to communicate with the other towers on AT&T's network and to provide adequate service to AT&T's customers in a given area.

AT&T's equipment is presently located on SBA's flagpole tower in Schuman Park. This tower is designed so that the antennas are enclosed within the tower—or the flagpole.

AT&T is working to expand FirstNet in this area, which supports e911 services and first responders' abilities to respond in the event of an emergency, and to provide 5G coverage. AT&T cannot provide these services on SBA's tower. First, the new equipment will not fit inside the flagpole—it will be significantly larger than

the existing antennas. Second, SBA's business model makes it economically infeasible to continue to locate on the tower and impossible to rapidly and efficiently update the equipment on the tower.

Put simply, AT&T has a small radius in which the proposed tower can be located so that the tower can communicate with the other towers in its network and provide service to its customers in and around the proposed tower. Because AT&T is moving its antennas from SBA's tower, that radius is limited to the area nearby the existing tower.

Mr. Been explained at the prior hearing that he exhausted his efforts to find a property within AT&T's radius that would satisfy the City's telecommunications ordinances to no avail. Ultimately, the Property was the ideal location for the proposed tower. The owner of the Property was willing to lease the Site to Parallel for the proposed tower, and the tower would be constructed on commercial property in an industrial area. (This means that it will be located away from residential properties.)

Parallel Satisfies the Requirements for a Variance

But even if there were no state or federal law mandating the approval of the application, Parallel's application satisfies the requirements for a variance in Rolla.

The Site is a narrow industrially zoned property. There is no other economically viable use to which the Site could be put, and without the proposed tower, the Site will be deprived of the reasonable use of the Site. Moreover, this hardship is not common to the neighboring properties.

The property owner's inability to put the Site to another economically viable use was created by the size of the Site—it simply is not large enough to accommodate a use other than the proposed tower.

The purpose of the variance is not to enhance the value of the property or the return or income from the property. This is not to say that there will be no economic benefit to the landowner resulting from the variance, but the purpose of the *variance* is to permit AT&T to improve its services in the City, not to increase the value of the Property.

As described above, there is no risk associated with your approval of the variance. The tower will collapse upon itself—it will not fall over. There is nothing within the fall zone that would be damaged in the event of such a collapse. Rather, the construction of the proposed tower will benefit the safety and welfare of the citizens near the Site because it will provide those citizens with improved access to the services of first responders.

Parallel is requesting the minimum variance necessary to permit it to construct the proposed tower on the Site and improve services in the area. The proposed tower will also not alter the essential character of the industrial neighborhood in which it will sit.

Finally, the literal enforcement and strict application of the provisions of the telecommunications ordinances would result in an unnecessary hardship inconsistent with the general provisions and intent of the City's zoning ordinances. Specifically, the purpose of the City's ordinances is to 'promote the health, safety, morals, and the general welfare of the community.' As described above, the proposed tower will improve your citizens' access to services from first responders. It will also improve the service those citizens can utilize in this area, meaning greater ability to connect with loved ones, to work or learn remotely, or call for help in an emergency. Therefore, the spirit of the article will be preserved and substantial justice will be done by the approval of the variance.



Parallel and Collective remain committed to being a good corporate partner to the City of Rolla. To that end, we welcome the ability to address any questions or concerns you may have and appreciate your careful attention to and consideration of this matter.

Very truly yours,

/s/ Sasha Riedisser

Sasha D. Riedisser

SDR

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter III. Special Provisions Relating to Radio (Refs & Annos)
Part I. General Provisions

47 U.S.C.A. § 332

§ 332. Mobile services

Effective: March 23, 2018

[Currentness](#)

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with [section 151](#) of this title, whether such actions will--

- (1) promote the safety of life and property;
- (2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
- (3) encourage competition and provide services to the largest feasible number of users; or
- (4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of [part III of Title 5](#) or [section 1342 of Title 31](#).

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of [section 201](#), [202](#), or [208](#) of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of [section 201](#) of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part,

the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 of the corporation authorized by title III of such Act.

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of [section 310\(b\)](#) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of [section 310\(b\)](#) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

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

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

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in [section 303\(v\)](#) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

(1) the term “commercial mobile service” means any mobile service (as defined in [section 153](#) of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term “interconnected service” means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3) the term “private mobile service” means any mobile service (as defined in [section 153](#) of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

CREDIT(S)

(June 19, 1934, c. 652, Title III, § 332, formerly § 331, as added [Pub.L. 97-259, Title I, § 120\(a\)](#), Sept. 13, 1982, 96 Stat. 1096; renumbered § 332, [Pub.L. 102-385, § 25\(b\)](#), Oct. 5, 1992, 106 Stat. 1502; amended [Pub.L. 103-66, Title VI, § 6002\(b\)\(2\)\(A\)](#), Aug. 10, 1993, 107 Stat. 393; [Pub.L. 104-104, § 3\(d\)\(2\)](#), Title VII, §§ 704(a), 705, Feb. 8, 1996, 110 Stat. 61, 151, 153; [Pub.L. 115-141, Div. P, Title IV, § 402\(g\)](#), Mar. 23, 2018, 132 Stat. 1089.)

[Notes of Decisions \(417\)](#)

47 U.S.C.A. § 332, 47 USCA § 332

Current through P.L. 117-166. Some statute sections may be more current, see credits for details.

Vernon's Annotated Missouri Statutes

Title VI. County, Township and Political Subdivision Government [Chs. 46-70] (Refs & Annos)

Chapter 67. Political Subdivisions, Miscellaneous Powers (Refs & Annos)

Uniform Wireless Communications Infrastructure Deployment Act

V.A.M.S. 67.5096

67.5096. Permitted acts of authority--applicants for new structures, requirements--authority's duties--court review, when

Effective: August 28, 2014

Currentness

1. Authorities may continue to exercise zoning, land use, planning, and permitting authority within their territorial boundaries with regard to the siting of new wireless support structures, subject to the provisions of [sections 67.5090 to 67.5103](#), including without limitation [section 67.5094](#), and subject to federal law.

2. Any applicant that proposes to construct a new wireless support structure within the jurisdiction of any authority, planning or otherwise, that has adopted planning and zoning regulations in accordance with [sections 67.5090 to 67.5103](#) shall:

(1) Submit the necessary copies and attachments of the application to the appropriate authority. Each application shall include a copy of a lease, letter of authorization or other agreement from the property owner evidencing applicant's right to pursue the application; and

(2) Comply with applicable local ordinances concerning land use and the appropriate permitting processes.

3. Disclosure of records in the possession or custody of authority personnel, including but not limited to documents and electronic data, shall be subject to chapter 610.

4. The authority, within one hundred twenty calendar days of receiving an application to construct a new wireless support structure or within such additional time as may be mutually agreed to by an applicant and an authority, shall:

(1) Review the application in light of its conformity with applicable local zoning regulations. An application is deemed to be complete unless the authority notifies the applicant in writing, within thirty calendar days of submission of the application, of the specific deficiencies in the application which, if cured, would make the application complete. Upon receipt of a timely written notice that an application is deficient, an applicant may take thirty calendar days from receiving such notice to cure the specific deficiencies. If the applicant cures the deficiencies within thirty calendar days, the application shall be reviewed and processed within one hundred twenty calendar days from the initial date the application was received. If the applicant requires a period of time beyond thirty calendar days to cure the specific deficiencies, the one hundred twenty calendar days' deadline for review shall be extended by the same period of time;

(2) Make its final decision to approve or disapprove the application; and

(3) Advise the applicant in writing of its final decision.

5. If the authority fails to act on an application to construct a new wireless support structure within the one hundred twenty calendar days' review period specified under subsection 4 of this section or within such additional time as may be mutually agreed to by an applicant and an authority, the application shall be deemed approved.

6. A party aggrieved by the final action of an authority, either by its affirmatively denying an application under the provisions of this section or by its inaction, may bring an action for review in any court of competent jurisdiction within this state.

Credits

(L.2013, H.B. No. 331, § A, eff. Aug. 28, 2013. Amended by L.2014, S.B. No. 650, § A, eff. Aug. 28, 2014.)

Editors' Notes

VALIDITY

<For validity of this section, see [City of Liberty v. Missouri](#), 2013 WL 9839474 (Mo.Cir. Oct. 17, 2013) (No. 13AC-CC00505).>

V. A. M. S. 67.5096, MO ST 67.5096

Statutes are current through WID 37 of the 2022 Second Regular Session of the 101st General Assembly. Constitution is current through the November 3, 2020 General Election.

Vernon's Annotated Missouri Statutes

Title VI. County, Township and Political Subdivision Government [Chs. 46-70] (Refs & Annos)

Chapter 67. Political Subdivisions, Miscellaneous Powers (Refs & Annos)

Uniform Wireless Communications Infrastructure Deployment Act

V.A.M.S. 67.5094

67.5094. Prohibited acts by authority

Effective: August 28, 2014

[Currentness](#)

In order to ensure uniformity across the state of Missouri with respect to the consideration of every application, an authority shall not:

- (1) Require an applicant to submit information about, or evaluate an applicant's business decisions with respect to its designed service, customer demand for service, or quality of its service to or from a particular area or site;
- (2) Evaluate an application based on the availability of other potential locations for the placement of wireless support structures or wireless facilities, including without limitation the option to collocate instead of construct a new wireless support structure or for substantial modifications of a support structure, or vice versa; provided, however, that solely with respect to an application for a new wireless support structure, an authority may require an applicant to state in such applicant's application that it conducted an analysis of available collocation opportunities on existing wireless towers within the same search ring defined by the applicant, solely for the purpose of confirming that an applicant undertook such an analysis; for collocation to any certified historic structure as defined in [section 253.545](#), in addition to all other applicable time requirements, there shall be a thirty-day time period before approval of an application. During such time period, an authority shall hold one or more public hearings on collocation to a certified historic structure;
- (3) Dictate the type of wireless facilities, infrastructure or technology to be used by the applicant, including, but not limited to, requiring an applicant to construct a distributed antenna system in lieu of constructing a new wireless support structure;
- (4) Require the removal of existing wireless support structures or wireless facilities, wherever located, as a condition for approval of an application;
- (5) With respect to radio frequency emissions, impose environmental testing, sampling, or monitoring requirements or other compliance measures on wireless facilities that are categorically excluded under the Federal Communication Commission's rules for radio frequency emissions under [47 CFR 1.1307\(b\)\(1\)](#) or other applicable federal law, as the same may be amended or supplemented;
- (6) Establish or enforce regulations or procedures for RF signal strength or the adequacy of service quality;

(7) Establish or enforce regulations or procedures for environmental safety for any wireless communications facility that is inconsistent with or in excess of those required by OET Bulletin 65, entitled Evaluating Compliance with FCC Guidelines for Human Exposure to Radio Frequency Electromagnetic Fields, Edition 97-01, released August, 1997, and Supplement A: Additional Information for Radio and Television Broadcast Stations;

(8) In conformance with 47 U.S.C. Section 332(c)(7)(b)(4), reject an application, in whole or in part, based on perceived or alleged environmental effects of radio frequency emissions;

(9) Impose any restrictions with respect to objects in navigable airspace that are greater than or in conflict with the restrictions imposed by the Federal Aviation Administration;

(10) Prohibit the placement of emergency power systems that comply with federal and state environmental requirements;

(11) Charge an application fee, consulting fee, or other fee associated with the submission, review, processing, and approval of an application that is not required for similar types of commercial development within the authority's jurisdiction. Fees imposed by an authority for or directly by a third-party entity providing review or technical consultation to the authority must be based on actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of an application. Except when mutually agreeable to the applicant and the authority, total charges and fees shall not exceed five hundred dollars for a collocation application or one thousand five hundred dollars for an application for a new wireless support structure or for a substantial modification of a wireless support structure. Notwithstanding the foregoing, in no event shall an authority or any third-party entity include within its charges any travel expenses incurred in a third-party's review of an application and in no event shall an applicant be required to pay or reimburse an authority for consultation or other third-party fees based on a contingency or result-based arrangement;

(12) Impose surety requirements, including bonds, escrow deposits, letters of credit, or any other type of financial surety, to ensure that abandoned or unused facilities can be removed unless the authority imposes similar requirements on other permits for other types of commercial development or land uses;

(13) Condition the approval of an application on the applicant's agreement to provide space on or near the wireless support structure for authority or local governmental services at less than the market rate for space or to provide other services via the structure or facilities at less than the market rate for such services;

(14) Limit the duration of the approval of an application;

(15) Discriminate or create a preference on the basis of the ownership, including ownership by the authority, of any property, structure, or tower when promulgating rules or procedures for siting wireless facilities or for evaluating applications;

(16) Impose any requirements or obligations regarding the presentation or appearance of facilities, including, but not limited to, those relating to the kind or type of materials used and those relating to arranging, screening, or landscaping of facilities if such regulations or obligations are unreasonable;

(17) Impose any requirements that an applicant purchase, subscribe to, use, or employ facilities, networks, or services owned, provided, or operated by an authority, in whole or in part, or by any entity in which an authority has a competitive, economic, financial, governance, or other interest;

(18) Condition the approval of an application on, or otherwise require, the applicant's agreement to indemnify or insure the authority in connection with the authority's exercise of its police power-based regulations; or

(19) Condition or require the approval of an application based on the applicant's agreement to permit any wireless facilities provided or operated, in whole or in part, by an authority or by any entity in which an authority has a competitive, economic, financial, governance, or other interest, to be placed at or collocated with the applicant's wireless support structure.

Credits

(L.2013, H.B. No. 331, § A, eff. Aug. 28, 2013. Amended by L.2014, S.B. No. 650, § A, eff. Aug. 28, 2014.)

Editors' Notes

VALIDITY

<For validity of this section, see [City of Liberty v. Missouri](#), 2013 WL 9839474 (Mo.Cir. Oct. 17, 2013) (No. 13AC-CC00505).>

V. A. M. S. 67.5094, MO ST 67.5094

Statutes are current through WID 37 of the 2022 Second Regular Session of the 101st General Assembly. Constitution is current through the November 3, 2020 General Election.



August 29, 2022

Tim Coots, AICP
City of Rolla City Planner
901 North Elm Street
Rolla, MO 65401

Re: Existing 100 ft. Monopole Structure
SBA Site # MO13278-A
SBA Site Name: UMR - Schuman Park
420 B East 16th St.
Rolla, MO 65402
Phelps County
Latitude: 37.955858
Longitude: -91.766142

Mr. Tim Coots:

This letter will summarize the results of our engineering determination on the adequacy of the above-referenced structure to safely support the antenna and equipment changed as noted below. Specifically, the existing SBA tower in Schuman Park could be modified to support equipment upgrades accommodating 5G and FirstNet technologies.

Our engineering determination was based on an investigation of the antenna and equipment loading used in the recent previous passing structural analysis by TES (TES, Project # 20265 dated 03/23/2016) and the new proposed equipment:

The following information was used in the determination:

- Tower Drawings prepared by Sabre, Job # 06-05032 dated 06/07/2005
- Canister Expansion drawings prepared by TES, Job # 20265 dated 03/23/2016
- Foundation Drawings prepared by Sabre, Job # 06-05032 dated 06/07/2005
- Geotech report by Anderson Engineering, Inc., Site # MO-054, dated 06/06/2005
- Structural Analysis Report by TES, Project # 20265 dated 03/23/2016

Our engineering determination was based on a comparison of the antenna and equipment loading used in the original monopole structure design and the new existing and proposed antenna configuration.

Analysis Criteria:

- 108 mph Ultimate Design Wind Speed
- Exposure C
- Structural Category II
- Topography Category 1
- Crest Height of 0 ft.
- Elevation of 1,104.71 ft.
- TIA-222-H Standard

Final Antennas, Mounts and Transmission Lines

Information pertaining to the proposed carrier's final configuration of antennas and transmission lines was taken from the recent previous passing structural analysis by TES (TES, Project # 20265 dated 03/23/2016). **AT&T is currently installed at 64', 74', 84' and 94'.** For our review all of AT&T's existing equipment was consolidated to 91' and some as shown in the table.

Mount Elev. (ft)	CL Elev. (ft)	Type	Qty	Manufacturer	Model	Feed Line Size	Mount Type Qty.	Carrier
91	91	Panel	3	Quintel	QS66512-2	(18) 7/8"	Platform mount	AT&T
		Panel	3	Quintel	QS66512-2			
		Misc.	-	-	50 sq. ft. for 5G / FirstNet upgrades			
		TMA	6	CCI	DTMA1721VG14A			
		TMA	9	Commscope	ETW190VS12UB			
		TMA	3	Commscope	TMAQ23-11A			
		Diplexer	6	Kaelus	QBC0002F1V51			
		Diplexer	6	Kaelus	QBC0007F1V51-1			
		Diplexer	6	Kaelus	TBC0037F1V51-1			
81	81	-	-	-	125 sq. ft. Assumed loading	(12) 1-5/8"	Platform mount	Future Tenant
71	71	-	-	-	125 sq. ft. Assumed loading	(12) 1-5/8"	Platform mount	Future Tenant

Conclusion

The monopole structure will be structurally adequate after being modified/converted to a standard 92' monopole to hold AT&T's existing loading at one consolidated center of 91'. **This includes an extra 50 sq. ft. of loading for future 5G and FirstNet upgrades.** After the conversion of this structure, this pole can allow for two other carriers to collocate on this structure. The exact loading for the future equipment is not available at this time.

This PE Letter determination is based on the information outlined above. Deviation from the information will invalidate the determination and require further review.

If you have any questions, please do not hesitate to contact us.

Sincerely,



Nitesh Ahuja, P.E.



Buchheit, Zachary T.

From: Shawn Welter <SWelter@sbsite.com>
Sent: Monday, November 15, 2021 9:55 AM
To: mb5242@att.com
Subject: MO13278-A UMR - Schuman Park / AT&T# 10065790

Mike,

I know this might be out of your hands, but we have a site AT&T is located on and building next to us. I have not had anyone reach out to me in regards to upgrading or adding FirstNet to our site. It appears there is room on our site. Can you let me know if AT&T would consider adding FirstNet to our site vs building a site next to us?

Thank you!

Shawn Welter

Site Marketing Manager

228.596.6478 + T

be filled in the same manner as the original member was appointed.

(d) Chair

(1) Selection

The Secretary of Commerce shall select, from among the members of the Board appointed under subsection (b)(1)(D), an individual to serve for a 2-year term as Chair of the Board.

(2) Consecutive terms

An individual may not serve for more than 2 consecutive terms as Chair of the Board.

(e) Meetings

(1) Frequency

The Board shall meet—

- (A) at the call of the Chair; and
- (B) not less frequently than once each quarter.

(2) Transparency

Meetings of the Board, including any committee of the Board, shall be open to the public. The Board may, by majority vote, close any such meeting only for the time necessary to preserve the confidentiality of commercial or financial information that is privileged or confidential, to discuss personnel matters, or to discuss legal matters affecting the First Responder Network Authority, including pending or potential litigation.

(f) Quorum

Eight members of the Board shall constitute a quorum, including at least 6 of the members appointed under subsection (b)(1)(D).

(g) Compensation

(1) In general

The members of the Board appointed under subsection (b)(1)(D) shall be compensated at the daily rate of basic pay for level IV of the Executive Schedule for each day during which such members are engaged in performing a function of the Board.

(2) Prohibition on compensation

A member of the Board appointed under subparagraphs (A) through (C) of subsection (b)(1) shall serve without additional pay, and shall not otherwise benefit, directly or indirectly, as a result of their service to the First Responder Network Authority, but shall be allowed a per diem allowance for travel expenses, at rates authorized for an employee of an agency under subchapter I of chapter 57 of title 5, while away from the home or regular place of business of the member in the performance of the duties of the First Responder Network Authority.

(Pub. L. 112–96, title VI, § 6204, Feb. 22, 2012, 126 Stat. 208.)

Editorial Notes

REFERENCES IN TEXT

Level IV of the Executive Schedule, referred to in subsec. (g)(1), is set out under section 5315 of Title 5, Government Organization and Employees.

§ 1425. Advisory committees of the First Responder Network Authority

(a) Advisory committees

The First Responder Network Authority—

(1) shall establish a standing public safety advisory committee to assist the First Responder Network Authority in carrying out its duties and responsibilities under this subchapter; and

(2) may establish additional standing or ad hoc committees, panels, or councils as the First Responder Network Authority determines are necessary.

(b) Selection of agents, consultants, and experts

(1) In general

The First Responder Network Authority shall select parties to serve as its agents, consultants, or experts in a fair, transparent, and objective manner, and such agents may include a program manager to carry out certain of the duties and responsibilities of deploying and operating the nationwide public safety broadband network described in subsections (b) and (c) of section 1426 of this title.

(2) Binding and final

If the selection of an agent, consultant, or expert satisfies the requirements under paragraph (1), the selection of that agent, consultant, or expert shall be final and binding.

(Pub. L. 112–96, title VI, § 6205, Feb. 22, 2012, 126 Stat. 211.)

§ 1426. Powers, duties, and responsibilities of the First Responder Network Authority

(a) General powers

The First Responder Network Authority shall have the authority to do the following:

(1) To exercise, through the actions of its Board, all powers specifically granted by the provisions of this subchapter, and such incidental powers as shall be necessary.

(2) To hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the First Responder Network Authority considers necessary to carry out its responsibilities and duties.

(3) To obtain grants and funds from and make contracts with individuals, private companies, organizations, institutions, and Federal, State, regional, and local agencies.

(4) To accept, hold, administer, and utilize gifts, donations, and bequests of property, both real and personal, for the purposes of aiding or facilitating the work of the First Responder Network Authority.

(5) To spend funds under paragraph (3) in a manner authorized by the Board, but only for purposes that will advance or enhance public safety communications consistent with this chapter.

(6) To take such other actions as the First Responder Network Authority (through the Board) may from time to time determine necessary, appropriate, or advisable to accomplish the purposes of this chapter.

(b) Duty and responsibility to deploy and operate a nationwide public safety broadband network

(1) In general

The First Responder Network Authority shall hold the single public safety wireless license granted under section 1421 of this title and take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety broadband network, in consultation with Federal, State, tribal, and local public safety entities, the Director of NIST, the Commission, and the public safety advisory committee established in section 1425(a) of this title, including by, at a minimum—

(A) ensuring nationwide standards for use and access of the network;

(B) issuing open, transparent, and competitive requests for proposals to private sector entities for the purposes of building, operating, and maintaining the network that use, without materially changing, the minimum technical requirements developed under section 1423 of this title;

(C) encouraging that such requests leverage, to the maximum extent economically desirable, existing commercial wireless infrastructure to speed deployment of the network; and

(D) managing and overseeing the implementation and execution of contracts or agreements with non-Federal entities to build, operate, and maintain the network.

(2) Requirements

In carrying out the duties and responsibilities of this subsection, including issuing requests for proposals, the First Responder Network Authority shall—

(A) ensure the safety, security, and resiliency of the network, including requirements for protecting and monitoring the network to protect against cyberattack;

(B) promote competition in the equipment market, including devices for public safety communications, by requiring that equipment for use on the network be—

(i) built to open, non-proprietary, commercially available standards;

(ii) capable of being used by any public safety entity and by multiple vendors across all public safety broadband networks operating in the 700 MHz band; and

(iii) backward-compatible with existing commercial networks to the extent that such capabilities are necessary and technically and economically reasonable;

(C) promote integration of the network with public safety answering points or their equivalent; and

(D) address special considerations for areas or regions with unique homeland security or national security needs.

(3) Rural coverage

In carrying out the duties and responsibilities of this subsection, including issuing requests for proposals, the nationwide, interoperable public safety broadband network, consistent with the license granted under sec-

tion 1421 of this title, shall require deployment phases with substantial rural coverage milestones as part of each phase of the construction and deployment of the network. To the maximum extent economically desirable, such proposals shall include partnerships with existing commercial mobile providers to utilize cost-effective opportunities to speed deployment in rural areas.

(4) Execution of authority

In carrying out the duties and responsibilities of this subsection, the First Responder Network Authority may—

(A) obtain grants from and make contracts with individuals, private companies, and Federal, State, regional, and local agencies;

(B) hire or accept voluntary services of consultants, experts, advisory boards, and panels to aid the First Responder Network Authority in carrying out such duties and responsibilities;

(C) receive payment for use of—

(i) network capacity licensed to the First Responder Network Authority; and

(ii) network infrastructure constructed, owned, or operated by the First Responder Network Authority; and

(D) take such other actions as may be necessary to accomplish the purposes set forth in this subsection.

(c) Other specific duties and responsibilities

(1) Establishment of network policies

In carrying out the requirements under subsection (b), the First Responder Network Authority shall develop—

(A) requests for proposals with appropriate—

(i) timetables for construction, including by taking into consideration the time needed to build out to rural areas and the advantages offered through partnerships with existing commercial providers under paragraph (3);

(ii) coverage areas, including coverage in rural and nonurban areas;

(iii) service levels;

(iv) performance criteria; and

(v) other similar matters for the construction and deployment of such network;

(B) the technical and operational requirements of the network;

(C) practices, procedures, and standards for the management and operation of such network;

(D) terms of service for the use of such network, including billing practices; and

(E) ongoing compliance review and monitoring of the—

(i) management and operation of such network;

(ii) practices and procedures of the entities operating on and the personnel using such network; and

(iii) necessary training needs of network operators and users.

(2) State and local planning

(A) Required consultation

In developing requests for proposals and otherwise carrying out its responsibilities

under this chapter, the First Responder Network Authority shall consult with regional, State, tribal, and local jurisdictions regarding the distribution and expenditure of any amounts required to carry out the policies established under paragraph (1), including with regard to the—

- (i) construction of a core network and any radio access network build out;
- (ii) placement of towers;
- (iii) coverage areas of the network, whether at the regional, State, tribal, or local level;
- (iv) adequacy of hardening, security, reliability, and resiliency requirements;
- (v) assignment of priority to local users;
- (vi) assignment of priority and selection of entities seeking access to or use of the nationwide public safety interoperable broadband network established under subsection (b); and
- (vii) training needs of local users.

(B) Method of consultation

The consultation required under subparagraph (A) shall occur between the First Responder Network Authority and the single officer or governmental body designated under section 1442(d) of this title.

(3) Leveraging existing infrastructure

In carrying out the requirement under subsection (b), the First Responder Network Authority shall enter into agreements to utilize, to the maximum extent economically desirable, existing—

- (A) commercial or other communications infrastructure; and
- (B) Federal, State, tribal, or local infrastructure.

(4) Maintenance and upgrades

The First Responder Network Authority shall ensure the maintenance, operation, and improvement of the nationwide public safety broadband network, including by ensuring that the First Responder Network Authority updates and revises any policies established under paragraph (1) to take into account new and evolving technologies.

(5) Roaming agreements

The First Responder Network Authority shall negotiate and enter into, as it determines appropriate, roaming agreements with commercial network providers to allow the nationwide public safety broadband network to roam onto commercial networks and gain prioritization of public safety communications over such networks in times of an emergency.

(6) Network infrastructure and device criteria

The Director of NIST, in consultation with the First Responder Network Authority and the Commission, shall ensure the development of a list of certified devices and components meeting appropriate protocols and standards for public safety entities and commercial vendors to adhere to, if such entities or vendors seek to have access to, use of, or compatibility with the nationwide public safety broadband network.

(7) Representation before standard setting entities

The First Responder Network Authority, in consultation with the Director of NIST, the Commission, and the public safety advisory committee established under section 1425(a) of this title, shall represent the interests of public safety users of the nationwide public safety broadband network before any proceeding, negotiation, or other matter in which a standards organization, standards body, standards development organization, or any other recognized standards-setting entity addresses the development of standards relating to interoperability.

(8) Prohibition on negotiation with foreign governments

The First Responder Network Authority shall not have the authority to negotiate or enter into any agreements with a foreign government on behalf of the United States.

(d) Exemption from certain laws

Any action taken or decisions made by the First Responder Network Authority shall be exempt from the requirements of—

- (1) section 3506 of title 44 (commonly referred to as the Paperwork Reduction Act);
- (2) chapter 5 of title 5 (commonly referred to as the Administrative Procedures Act); and
- (3) chapter 6 of title 5 (commonly referred to as the Regulatory Flexibility Act).

(e) Network Construction Fund

(1) Establishment

There is established in the Treasury of the United States a fund to be known as the “Network Construction Fund”.

(2) Use of Fund

Amounts deposited into the Network Construction Fund shall be used by the—

- (A) First Responder Network Authority to carry out this section, except for administrative expenses; and
- (B) NTIA to make grants to States under section 1442(e)(3)(C)(iii)(I) of this title.

(f) Termination of Authority

The authority of the First Responder Network Authority shall terminate on the date that is 15 years after February 22, 2012.

(g) GAO report

Not later than 10 years after February 22, 2012, the Comptroller General of the United States shall submit to Congress a report on what action Congress should take regarding the 15-year sunset of authority under subsection (f).

(Pub. L. 112–96, title VI, §6206, Feb. 22, 2012, 126 Stat. 211.)

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in subsec. (c)(2)(A), was in the original “this Act”, and was translated as reading “this title”, meaning title VI of Pub. L. 112–96, Feb. 22, 2012, 126 Stat. 201, to reflect the probable intent of Congress. Title VI enacted this chapter and section 929 of this title, amended sections 309, 337, 614, 902, 923, 928, and 942 of this title, and enacted provisions set out as a note under section 1401 of this title.

§ 1427. Initial funding for the First Responder Network Authority

(a) Borrowing authority

Prior to the deposit of proceeds into the Public Safety Trust Fund from the incentive auctions to be carried out under section 309(j)(8)(G) of this title or the auction of spectrum pursuant to section 1451 of this title, the NTIA may borrow from the Treasury such sums as may be necessary, but not to exceed \$2,000,000,000, to implement this subchapter. The NTIA shall reimburse the Treasury, without interest, from funds deposited into the Public Safety Trust Fund.

(b) Prohibition

(1) In general

Administrative expenses of the First Responder Network Authority may not exceed \$100,000,000 during the 10-year period beginning on February 22, 2012.

(2) Definition

For purposes of this subsection, the term “administrative expenses” does not include the costs incurred by the First Responder Network Authority for oversight and audits to protect against waste, fraud, and abuse.

(Pub. L. 112–96, title VI, §6207, Feb. 22, 2012, 126 Stat. 215.)

Editorial Notes

REFERENCES IN TEXT

Section 1451, referred to in subsec. (a), was in the original “section 6401” and means section 6401 of Pub. L. 112–96, which enacted section 1451 of this title and amended section 309 of this title.

§ 1428. Permanent self-funding; duty to assess and collect fees for network use

(a) In general

Notwithstanding section 337 of this title, the First Responder Network Authority is authorized to assess and collect the following fees:

(1) Network user fee

A user or subscription fee from each entity, including any public safety entity or secondary user, that seeks access to or use of the nationwide public safety broadband network.

(2) Lease fees related to network capacity

(A) In general

A fee from any entity that seeks to enter into a covered leasing agreement.

(B) Covered leasing agreement

For purposes of subparagraph (A), a “covered leasing agreement” means a written agreement resulting from a public-private arrangement to construct, manage, and operate the nationwide public safety broadband network between the First Responder Network Authority and secondary user to permit—

- (i) access to network capacity on a secondary basis for non-public safety services; and
- (ii) the spectrum allocated to such entity to be used for commercial trans-

missions along the dark fiber of the long-haul network of such entity.

(3) Lease fees related to network equipment and infrastructure

A fee from any entity that seeks access to or use of any equipment or infrastructure, including antennas or towers, constructed or otherwise owned by the First Responder Network Authority resulting from a public-private arrangement to construct, manage, and operate the nationwide public safety broadband network.

(b) Establishment of fee amounts; permanent self-funding

The total amount of the fees assessed for each fiscal year pursuant to this section shall be sufficient, and shall not exceed the amount necessary, to recoup the total expenses of the First Responder Network Authority in carrying out its duties and responsibilities described under this subchapter for the fiscal year involved.

(c) Annual approval

The NTIA shall review the fees assessed under this section on an annual basis, and such fees may only be assessed if approved by the NTIA.

(d) Required reinvestment of funds

The First Responder Network Authority shall reinvest amounts received from the assessment of fees under this section in the nationwide public safety interoperable broadband network by using such funds only for constructing, maintaining, operating, or improving the network.

(Pub. L. 112–96, title VI, §6208, Feb. 22, 2012, 126 Stat. 215.)

§ 1429. Audit and report

(a) Audit

(1) In general

The Secretary of Commerce shall enter into a contract with an independent auditor to conduct an audit, on an annual basis, of the First Responder Network Authority in accordance with general accounting principles and procedures applicable to commercial corporate transactions. Each audit conducted under this paragraph shall be made available to the appropriate committees of Congress.

(2) Location

Any audit conducted under paragraph (1) shall be conducted at the place or places where accounts of the First Responder Network Authority are normally kept.

(3) Access to First Responder Network Authority books and documents

(A) In general

For purposes of an audit conducted under paragraph (1), the representatives of the independent auditor shall—

- (i) have access to all books, accounts, records, reports, files, and all other papers, things, or property belonging to or in use by the First Responder Network Authority that pertain to the financial transactions of the First Responder Network Authority and are necessary to facilitate the audit; and

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September 12, 2022

Rolla Board of Adjustment
P.O. Box 979
Rolla, MO 65401

Re: Conditional Use Permit Application Submitted by Collective Solutions and Parallel Infrastructure

Dear Rolla Board of Adjustment,

I represent the City of Rolla, but the Board of Adjustment is an independent body. Accordingly, as one of the attorneys for the City of Rolla, I do not represent you in this matter. However, the City of Rolla wants to make the City's position on some of the issues brought forth in the above-named application clear and state its position on the law in question in this matter.

The City of Rolla, Missouri received a request from Collective Solutions and Parallel Infrastructure for a conditional use permit for a wireless telecommunications tower to be located at 1900 N. Old St. James Road on August 10, 2021. Planning and Zoning Commission recommended approval to the City Council for the CUP as submitted by Collective Solutions and Parallel Infrastructure based on the findings required to be made by the Planning and Zoning Commission pursuant to Section 42-402. A public hearing was held by City Council on November 1 and November 15, 2021. On December 20, 2021 after due consideration the City Council voted in an 8 to 3 majority to approve Resolution No. 1998 to not approve the Collective Solutions and Parallel Infrastructure based on the Findings of Fact. On April 4, 2022 the City Council voted to rescind the resolution to deny the CUP and re-consider the ordinance. On April 12, 2022, after re-consideration of all the facts, opinions, and evidence offered to the City Council at said hearings and following a thorough review of State and federal laws pertaining to the placement of cellular towers and pending appeals filed by Collective Solutions and Parallel Infrastructure the Council found that the proposed Conditional Use Permit would promote public health, safety, morals, and the general welfare of the City of Rolla, Missouri, and would be for the best interest of said City subject to conditions. One condition was the property be re-zoned to M-1. On June 20, 2022, The City Council approved the re-zoning of the property. The City Council has now approved all of the conditions except for the deviation on the setbacks.

The City of Rolla required the applicant must apply for and be granted a variance from the Board of Adjustment allowing the deviation from the setbacks. 42-399 of the Rolla City Code requires in paragraph 8, requires all support structures, including any portions of any Wireless Communications Facilities thereon and associated structures, fences, and walls (except for parking associated with the Wireless Communications Facility) shall be separated from any rights-of-way, sidewalk or street, alley, parking area, playground, or other building, and from the property line of any adjacent property at least a horizontal distance equal to the height of the Support Structure, including any portions of any Wireless Communications Facilities thereon. The design by Collective Solutions and Parallel Infrastructure did not meet that requirement. The City Council could not waive that requirement which is why the City required a variance to be sought.

Exhibit D

As you are aware, Section 42-24.1 sets out the conditions for the Rolla Board of Adjustment to grant a variance. They are:

- (1) The granting of the variance would not be detrimental to the public safety, health, or welfare or be injurious to other property or improvements in the vicinity of the subject property; and
- (2) The conditions upon which the request for variance is based are unique to the property for which the variance is sought, are generally not applicable to other properties, and are not self-imposed; and
- (3) Because of the particular physical surroundings, shape or topographical feature of the specific property involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, depriving the owner of the reasonable use of his land should the strict interpretation of these regulations be enforced.
- (4) The variance will not in any manner abrogate the goals, objectives, or policies of the Rolla Comprehensive Plan.

In addition, Missouri law has limitations on what may be considered as part of a review or consideration of a new tower, as specifically described in § 67.5094 RSMo. (A copy of § 67.5094 RSMo is enclosed for your reference.) Missouri law, including specifically Sections 67.5090-67.5104 RSMo., places additional limitations on municipalities relating to telecommunications installations and infrastructure. Many of these limitations are expressly outlined in Section 67.5094 RSMo. Among these limitations are limits on certain lines of questioning regarding the proposed installation, and reliance on certain information as the basis for a decision relating to such proposed installation.

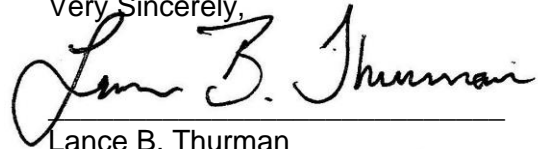
These limitations or prohibitions placed on Municipalities when considering an application to construct a new wireless support structure include:

- 1) Require application information relating to services provided § 67.5094(1) RSMo.
- 2) Evaluate based on other available sites (may only require statement that they looked) – Requiring Collocation prohibited! § 67.5094(2) RSMo.
- 3) Dictate type of wireless facility, infrastructure, or technology § 67.5094(3) RSMo.
- 4) Require removal of existing facilities as condition of application § 67.5094(4) RSMo.
- 5) Review for or condition based on environmental RF concerns § 67.5094(5)-(8) RSMo.
- 6) Impose airspace restrictions greater than FAA § 67.5094(9) RSMo.
- 7) Prohibit generators § 67.5094(10) RSMo.
- 8) Charge application fee different from other “commercial developments”; capped at \$500 for collocations and \$1500 for new or substantial modification (unless otherwise agreed) § 67.5094(11) RSMo.
- 9) Impose Surety requirement for abandonment (unless imposed for other types of “land uses”) § 67.5094(12) RSMo.
- 10) Require applicant:
 - a. to allow City use of applicant’s facilities § 67.5094(19) RSMo.
 - b. to use City facilities or services § 67.5094(17) RSMo.
 - c. to provide services at less than market value § 67.5094(13) RSMo.
- 11) Limit duration of approval (no timed CUP) § 67.5094(14) RSMo.
- 12) Discriminate based on ownership (public v. private or otherwise) § 67.5094(15) RSMo.
- 13) Impose any unreasonable appearance requirements § 67.5094(16) RSMo.
- 14) Require indemnification/insurance for City (non-lease situations) § 67.5094(18) RSMo.
- 15) No consideration or preference based on ownership or public control § 67.5094(15) RSMo.

16) Approve certified historic structures (RSMo. §253.545) without 30-day delay for hearing §67.5094(2) RSMo.

It is my hope that this information will aid you in your determination whether Collective Solutions LLC should be granted a variance based on their application before your board.

Very Sincerely,

A handwritten signature in black ink that reads "Lance B. Thurman". The signature is written in a cursive style with a large, looping initial "L".

Lance B. Thurman
Attorney at Law
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lthurman@teamlex.com

September 14, 2022

Sent via Email

Lance B. Thurman
Carolyn G. Buschjost
Rolla City Attorneys
LThurman@teamlex.com
CBuschjost@teamlex.com

Re: **Collective Solutions' Application for a Variance to Allow Reductions in Setback Requirements for Telecommunications Tower (ZV2022-05)**

Dear Counsel:

My law firm represents SBA Infrastructure, LLC ("SBA") in its opposition to the variance application (#ZV2022-05) submitted by Collective Solutions, LLC ("Collective"). **Please forward this letter to the Board of Adjustment and City Planner.**

Introduction

As you are aware, SBA owns and operates a 100-foot cell tower located in Schuman Park in Rolla, Missouri (the "Existing Tower"). The Existing Tower, built in 2005 and currently serving AT&T, is fully capable of supporting upgrades to accommodate 5G and FirstNet technologies. SBA commissioned a professional engineering study that determined the Existing Tower can accommodate an additional 50 sq. ft. of loading for future 5G and FirstNet upgrades. (See August 20, 2022 PE Letter, attached as Exhibit A).

The tower proposed by Collective to be built at 1850 Old Saint James Rd. (the "Proposed Tower") fails to follow clearly stated law in Rolla's Zoning Code (the "Code") stating that cell towers like the Proposed Tower must be set back from adjacent rights-of-way, streets, sidewalks, parking areas, and buildings by a minimum distance equal to the height of the tower. This distance is commonly referred to as a "fall zone" because it ensures the safety of surrounding property and people should the tower collapse. The Proposed Tower violates the setback provision in at least six different instances.

Collective has insisted on building the Proposed Tower at the Old Saint James Rd. location in order to meet AT&T's supposed "coverage objectives." Collective has argued that its purpose for seeking the variance is to build a tower capable of accommodating 5G and FirstNet technologies. However, that argument is directly undermined by the fact that the Existing Tower owned by SBA is fully capable of accommodating those technologies for AT&T. The argument holds even less water given that SBA reached out to AT&T as far back as November, 2021 to inform AT&T that the Existing Tower can accommodate 5G and FirstNet and to ask whether AT&T would like to consider upgrading its equipment.

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Lance B. Thurman
Carolyn G. Buschjost
September 14, 2022

(See November 15, 2021 Email from Shawn Welter, attached as Exhibit B). To date, SBA has not received a response from AT&T.

For the reasons outlined below, SBA requests that the Board of Adjustment (the “Board”) deny Collective’s request for variances because it fails to meet the Code’s criteria for approval. Collective does not have valid or sufficient reasons for failing to follow the Code. There are not special circumstances or conditions applying to the land where the variances are sought (in fact, the setback requirement could be satisfied if the landowner agreed to move the Proposed Tower closer towards the middle of its property), and any alleged hardship is due only to AT&T’s self-imposed, so-called “coverage objectives.”

The variances are not necessary for the reasonable use of the land, nor is it necessary for AT&T to upgrade to 5G or FirstNet. Unfortunately, however, granting these variances will open the flood gates for the other providers to seek variances that place economic interests ahead of safety. Notably, this is the first time a tower has been proposed to be built under the recently revised Code. Granting this variance with such little justification would set an alarming precedent under the new Code. Thus, SBA respectfully requests that the Board deny the variances.

The Requested Variances Fail to Meet the Criteria under Sec. 42-255.6

Collective seeks variances to the Code’s clear setback requirements in several different ways. While the Proposed Tower would be 95 feet tall, it fails to meet the setback requirements in at least each of the following instances: Old Saint James Road right-of-way; Old Saint James Road sidewalk; buildings located at 1850 Old Saint James Road, 1900 Old Saint James Road, and 801 E. 18th Street; and the property lines at 1850 Old Saint James Road, 801 E. 18th Street, and 809 E. 18th Street.

In considering each of the above instances of setback violations, the Board must deny the variance application if any of the below criteria are not met with respect to any one of the stated setback violations. For the reasons below, the variance application fails to meet the criteria outlined in Sec. 42-255.6 of the Code.¹

- 1. That there are special circumstances or conditions applying to the land or buildings for which the variance is sought, which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the same zone or neighborhood, and that said circumstances or conditions are such that the strict application of the*

¹ The September 12, 2022 letter from attorneys for the City of Rolla to the Board of Adjustment (See Exhibit D, attached hereto) recognizes that the Rolla City Council refused to approve the deviation from the Code’s setback requirements, instead requiring the requested variances to be approved by the Board of Adjustment. While we agree that Section 67.5097, RSMo. (Missouri’s “Siting Act”) applies here, we encourage the Board to examine the complete language of the statute. The letter also references Section 42-24.1 of the Rolla City Code, which applies to variances before the Planning and Zoning Commission but not the Board. Our position is that the Board should look to Sec. 42-255.6 of the Code in reaching a decision on Collective’s requested variances.

provisions of this Article shall create an unnecessary economic hardship by depriving the applicant of the reasonable use of such land or building, and;

Collective must point to some condition or circumstance that sets the subject property apart from surrounding lands in the same zone or neighborhood that would warrant a variance to avoid unnecessary economic hardship. However, there is nothing peculiar about the subject property that would cause a hardship, and Collective has not demonstrated how this property varies from surrounding properties. In fact, Collective has stated that the surrounding properties are actually similar to this one because none would accommodate AT&T's "coverage objectives" in its very limited self-imposed search area. The purported economic hardship is completely imposed by Collective itself – not the nature of the land. A strict application of the Code does not deprive the applicant of reasonable use of the land because the applicant's stated purpose for the variances is to accomplish its "coverage objectives," which can be accomplished without the variances.

Further, the property owner is not deprived of reasonable use of the land because he maintains an existing business on the land. Collective argues that an economic hardship would be created because by applying the setback requirements, "the tower would be placed in the center of the driveway in front of the landowner's garage bays." Apparently, Collective agrees that it can comply with the setback requirements but argues it would be unreasonable to do so. However, Collective has not provided evidence demonstrating how compliance would create an unreasonable hardship. For example, Collective has not provided aerial maps showing all relevant distances from potential locations where the Proposed Tower could satisfy the setback requirements. Likewise, it has failed to provide evidence that the proximity of a compliant tower to the existing business would cause an unreasonable interference. For example, Collective has not shown that a compliant tower would cut off access to the garage bays or that constructing an additional bay would not be feasible. Thus, Collective has again failed to show how complying with the Code's setback requirements would create an unreasonable hardship.

2. That the alleged hardship has not been created by any person presently having an interest in the property, and,

As stated above, the alleged hardship – that AT&T cannot accomplish its "coverage objectives" unless the Board grants several variances – is completely self-imposed by AT&T and Collective. Collective's stated reasoning that "the coverage objective need by AT&T and FirstNet was not created by anyone having interest in the property" does not stand to reason. The "coverage objective" is imposed by AT&T (and Collective, acting on its behalf), and clearly both AT&T and Collective have direct interests in the use of the property for the Proposed Tower. This cannot be disputed.

3. That the purpose of the variance is not based exclusively on a desire to enhance the value of the property, or increase the return or income therefrom, and;

Collective has stated as the sole reason for the variances: “The purpose of the variance is to allow for a wireless communications facility to be built that will allow for the latest technology to be built in the area and to enhance FirstNet coverage in the area.” As stated above and in the attached PE Letter, 5G and FirstNet technologies can be accommodated on the Existing Tower. Collective does not state any other reasons for needing the variances, which begs the question why the variances are actually needed.

4. *That the granting of such variance will not be detrimental to the public welfare or substantially or permanently injurious to the property or improvements in such zoning or neighborhood areas in which the property is located, and;*

Granting these variances sets a dangerous precedent. The setback requirements are in the new Code for good reason, primarily safety. The Code was passed in 2019 after the Missouri State Citing Act and the Federal Telecommunications Act, and nothing in those state or federal provisions prevents the Board from considering and following the Rolla Code’s setback requirements. Thus, federal and state law recognizes the importance of setback requirements in ensuring the safety of others and surrounding property. By asking the Board to disregard the Code’s setback requirements (in several instances), Collective is asking the Board to set a standard – for the first time under this Code – that providers and builders need not consider setback requirements when choosing locations for potential towers. This same argument might be used for setback requirements in applications for structures other than towers as well. Collective’s only argument on this point – that 5G and FirstNet will enhance public safety – ignores that these capabilities are possible on the Existing Tower. Thus, granting the variances will be substantially and permanently injurious to the many surrounding areas where the Proposed Tower’s fall zone infringes, and nothing in Collective’s application can prevent that potential danger.

5. *That the granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that will accomplish this purpose, and will not alter the essential character of the neighborhood; and;*

In essence, Collective is asking this Board for at least six different variances for the Proposed Tower, solely because AT&T has deemed the subject property the only property capable of meeting its purported “coverage objectives.” As stated above, this logic ignores that 5G and FirstNet technologies are capable on the Existing Tower. This line of thinking also ignores that the subject property already maintains a reasonable use through the existing business. There is no scenario where the only reasonable use of the subject property is to build the Proposed Tower, contrary to Collective’s arguments. Thus, the variances are not necessary for Collective (and AT&T) to achieve its stated purpose.

6. *That the literal enforcement and strict application of the provisions of this Article will result in an unnecessary hardship inconsistent with the general*

Lance B. Thurman
Carolyn G. Buschjost
September 14, 2022

provisions and intent of this Article and that in granting such variance the spirit of the Article will be preserved and substantial justice done. (Ord. 3414)

The Code's setback requirements are abundantly clear: The Proposed Tower "shall be separated from any rights-off-way, sidewalk or street, alley, parking area, playground, or other building, and from the property line of any adjacent property at least a horizontal distance equal to the height of the [Proposed Tower]..." See Code Sec. 42-399. Collective should have been aware of the Code's requirements when it decided to pursue the Proposed Tower on the subject property more than a year ago. Collective should not be given a free pass now simply because AT&T refuses to consider upgrading equipment on the Existing Tower or consider other locations to fulfill its so-called "coverage objectives." The intent of the Code's setback requirements is clear – to protect surrounding properties and people. There is no unnecessary hardship advanced in Collective's application that justifies setting that goal aside because none exists.

No Provision of State or Federal Law Prevents Consideration of Setback

The Missouri Wireless Communications Infrastructure Deployment Act, also known as the state "Siting Act" outline several factors that a local government cannot consider when deciding whether to approve or deny an application to build a new cell tower. See Sec. 67.5094, RSMo. However, nothing in the Siting Act prevents the Board from considering Rolla's setback requirements in deciding whether to grant the variances.

On the other hand, Collective's stated purpose for pursuing the variances is prohibited under the Siting Act. Specifically, Collective's entire purpose for seeking the variances is to achieve Collective's and AT&T's "coverage objectives." But the Siting Act expressly prohibits the Board from evaluating "an applicant's business decisions with respect to its designed service, customer demand for service, or quality of its service to or from a particular area or site." See Sec. 67.5094(1), RSMo. That is exactly what Collective is asking Board to do. Collective has asked the Board to justify these variances solely on the basis of AT&T's coverage objectives, i.e. its own self-imposed business decisions with respect to its service in the area. The Siting Act prohibits such a consideration.

Simply put, Collective's interpretation of federal law is misguided and incorrect. While Collective may argue otherwise, there can be no effective ban on cell service in this case when AT&T can accomplish all of its stated "coverage objectives" (i.e. 5G and FirstNet) on the Existing Tower. And contrary to Collective's representations, AT&T has failed to work with SBA to facilitate 5G and FirstNet on the Existing Tower. Furthermore, Congress encourages the deployment of FirstNet equipment on existing infrastructure – i.e. the Existing Tower. (See 47 U.S.C § 1426(b)(1)(C), attached hereto as Exhibit C). Finally, Collective may attempt to argue that denying its requested variances constitutes discrimination because the Existing Tower does not meet the new Code's setback requirements. However, the argument carries no weight because the Existing Tower was

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September 14, 2022

approved under a different set of regulations. The comparison should not be made when the Existing Tower was evaluated under criteria different than the requirements in the 2019 Code under which the Proposed Tower must be evaluated. Moreover, a federal court in Texas recently found that companies that build and manage telecommunications towers (like Parallel and SBA), but do not provide wireless communications services themselves, do not qualify as “providers” under the FTCA, and thus, there can be no discrimination against them, as Collective alleges. *See Alta Towers, LLC v. City of New Braunfels*, No. 5:16-CV-00726-XR, 2017 WL 2703585 (W.D. Tex. June 22, 2017).

The Board has a clear, legal path to denying the variances based on its own Code, specifically the setback requirements. For good reason, primarily safety concerns, neither state nor federal law prevent local governments from enacting setback requirements and relying on them to deny applications that so blatantly run afoul of them, as is the case here. Even after a year of pursuing its application for the Proposed Tower, Collective has yet to advance a valid reason to the City of Rolla or this Board to justify setting aside the setback requirements in the name of so-called “coverage objectives.”

Conclusion

The variances sought by Collective should be denied for many of the same reasons the City Council refused to approve the conditional use permit in the first place – Collective failed to advance sufficient justification and supporting evidence showing that the variances are warranted under the Code. Likewise, Collective failed to advance sufficient reasons to justify sacrificing the assurances of safety intended by the Code’s requirements. Collective’s application before the Board suffers from the same deficiencies. Collective cannot meet the criteria for approval of the variances outlined in Sec. 42-255.6 of the Code.

Simply put, Collective has not provided justification for this Board to set aside the Code’s clear setback requirements in the name of satisfying the economic objectives of AT&T and Collective. These self-imposed “coverage objectives” can be accommodated on the Existing Tower. Notably, the only parties stating coverage is an issue are those who stand to benefit from the variances – AT&T and Collective. However, surrounding property owners and the public in general stand to be harmed by the precedent set by granting the variances. Inevitably, future members of this Board and the City Council will face even more difficult decisions brought by other providers seeking to build in areas where setback requirements are not met, solely for their own economic benefit.

In light of the foregoing information, SBA respectfully requests that the Board deny the variances. SBA looks forward to continuing to work with the City of Rolla and conduct business as a member of the Rolla corporate community. Please let me know if you have any questions or concerns regarding the above information or would like to further discuss this matter. We greatly appreciate your consideration and attention to this matter.

Sincerely,

7700 Forsyth Boulevard, Suite 1100, St. Louis, MO 63105

STINSON LLP  STINSON.COM

Lance B. Thurman
Carolyn G. Buschjost
September 14, 2022

Zachary T. Buchheit
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September 14, 2022

Rolla Board of Adjustment
P.O. Box 979
Rolla, MO 65401

Re: Conditional Use Permit Application Submitted by Collective Solutions and Parallel Infrastructure

Dear Rolla Board of Adjustment,

I represent the City of Rolla, but the Board of Adjustment is an independent body. Accordingly, as one of the attorneys for the City of Rolla, I do not represent you in this matter. However, the City of Rolla wants to make the City's position on some of the issues brought forth in the above-named application clear and state its position on the law in question in this matter.

The City of Rolla, Missouri received a request from Collective Solutions and Parallel Infrastructure for a conditional use permit for a wireless telecommunications tower to be located at 1900 N. Old St. James Road on August 10, 2021. Planning and Zoning Commission recommended approval to the City Council for the CUP as submitted by Collective Solutions and Parallel Infrastructure based on the findings required to be made by the Planning and Zoning Commission pursuant to Section 42-402. A public hearing was held by City Council on November 1 and November 15, 2021. On December 20, 2021 after due consideration the City Council voted in an 8 to 3 majority to approve Resolution No. 1998 to not approve the Collective Solutions and Parallel Infrastructure based on the Findings of Fact. On April 4, 2022 the City Council voted to rescind the resolution to deny the CUP and re-consider the ordinance. On April 12, 2022, after re-consideration of all the facts, opinions, and evidence offered to the City Council at said hearings and following a thorough review of State and federal laws pertaining to the placement of cellular towers and pending appeals filed by Collective Solutions and Parallel Infrastructure the Council found that the proposed Conditional Use Permit would promote public health, safety, morals, and the general welfare of the City of Rolla, Missouri, and would be for the best interest of said City subject to conditions. One condition was the property be re-zoned to M-1. On June 20, 2022, The City Council approved the re-zoning of the property. The City Council has now approved all of the conditions except for the deviation on the setbacks.

The City of Rolla required the applicant must apply for and be granted a variance from the Board of Adjustment allowing the deviation from the setbacks. 42-399 of the Rolla City Code requires in paragraph 8, requires all support structures, including any portions of any Wireless Communications Facilities thereon and associated structures, fences, and walls (except for parking associated with the Wireless Communications Facility) shall be separated from any rights-of-way, sidewalk or street, alley, parking area, playground, or other building, and from the property line of any adjacent property at least a horizontal distance equal to the height of the Support Structure, including any portions of any Wireless Communications Facilities thereon. The design by Collective Solutions and Parallel Infrastructure did not meet that requirement. The City Council could not waive that requirement which is why the City required a variance to be sought.

As you are aware, Section 42-255.6 sets out the conditions for the Rolla Board of Adjustment to grant a variance. They are:

1. That there are special circumstances or conditions applying to the land or buildings for which the variance is sought, which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the same zone or neighborhood, and that said circumstances or conditions are such that the strict application of the provisions of this Article shall create an unnecessary economic hardship by depriving the applicant of the reasonable use of such land or building, and;
2. That the alleged hardship has not been created by any person presently having an interest in the property, and,
3. That the purpose of the variance is not based exclusively on a desire to enhance the value of the property, or increase the return or income therefrom, and;
4. That the granting of such variance will not be detrimental to the public welfare or substantially or permanently injurious to the property or improvements in such zoning or neighborhood areas in which the property is located, and;
5. That the granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that will accomplish this purpose, and will not alter the essential character of the neighborhood; and;
6. That the literal enforcement and strict application of the provisions of this Article will result in an unnecessary hardship inconsistent with the general provisions and intent of this Article and that in granting such variance the spirit of the Article will be preserved and substantial justice done.

In addition, Missouri law has limitations on what may be considered as part of a review or consideration of a new tower, as specifically described in § 67.5094 RSMo. (A copy of § 67.5094 RSMo is enclosed for your reference.) Missouri law, including specifically Sections 67.5090-67.5104 RSMo., places additional limitations on municipalities relating to telecommunications installations and infrastructure. Many of these limitations are expressly outlined in Section 67.5094 RSMo. Among these limitations are limits on certain lines of questioning regarding the proposed installation, and reliance on certain information as the basis for a decision relating to such proposed installation.

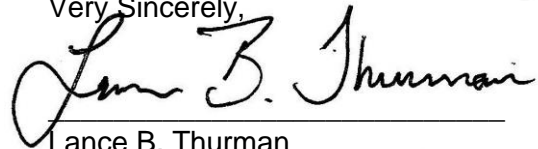
These limitations or prohibitions placed on Municipalities when considering an application to construct a new wireless support structure include:

- 1) Require application information relating to services provided § 67.5094(1) RSMo.
- 2) Evaluate based on other available sites (may only require statement that they looked) – Requiring Collocation prohibited! § 67.5094(2) RSMo.
- 3) Dictate type of wireless facility, infrastructure, or technology § 67.5094(3) RSMo.
- 4) Require removal of existing facilities as condition of application § 67.5094(4) RSMo.
- 5) Review for or condition based on environmental RF concerns § 67.5094(5)-(8) RSMo.
- 6) Impose airspace restrictions greater than FAA § 67.5094(9) RSMo.
- 7) Prohibit generators § 67.5094(10) RSMo.
- 8) Charge application fee different from other “commercial developments”; capped at \$500 for collocations and \$1500 for new or substantial modification (unless otherwise agreed) § 67.5094(11) RSMo.
- 9) Impose Surety requirement for abandonment (unless imposed for other types of “land uses”) § 67.5094(12) RSMo.
- 10) Require applicant:
 - a. to allow City use of applicant’s facilities § 67.5094(19) RSMo.
 - b. to use City facilities or services § 67.5094(17) RSMo.
 - c. to provide services at less than market value § 67.5094(13) RSMo.
- 11) Limit duration of approval (no timed CUP) § 67.5094(14) RSMo.
- 12) Discriminate based on ownership (public v. private or otherwise) § 67.5094(15) RSMo.

- 13) Impose any unreasonable appearance requirements § 67.5094(16) RSMo.
- 14) Require indemnification/insurance for City (non-lease situations) § 67.5094(18) RSMo.
- 15) No consideration or preference based on ownership or public control § 67.5094(15) RSMo.
- 16) Approve certified historic structures (RSMo. §253.545) without 30-day delay for hearing §67.5094(2) RSMo.

It is my hope that this information will aid you in your determination whether Collective Solutions LLC should be granted a variance based on their application before your board.

Very Sincerely,

A handwritten signature in black ink that reads "Lance B. Thurman". The signature is written in a cursive style with a large initial "L".

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