PLANNING COMMISSION

Special Meeting Agenda

Council Chambers- Mercer Island City Hall
9611 SE 36TH STREET | MERCER ISLAND, WA 98040
PHONE: 206.275.7605 | www.mercergov.org

Wednesday, November 20, 2019

Planning Commissioners

Carolyn Boatsman

Tiffin Goodman, Chair

Daniel Hubbell

Jennifer Mechem

Lucia Pirzio-Biroli

Craig Reynolds, Vice-Chair

Ted Weinberg

CALL TO ORDER & ROLL CALL **6:00 PM**

APPROVAL OF MINUTES

Minutes from October 16, 2019
Minutes from October 30, 2019

APPEARANCES **6:05 PM**

This is the time set aside for members of the public to speak to the Commission about issues of concern. If you wish to speak, please consider the following points:

- Speak audibly into the podium microphone
- State your name and address for the record
- Limit your comments to three minutes

The Commission may limit the number of speakers and modify the time allotted. Total time for appearances: 15 minutes

REGULAR BUSINESS

Agenda Item #1: Community Facility Regulations **6:20 PM**

Discussion of Planning Commission recommendation following the August 20, 2019 City Council & Planning Commission joint study session

Agenda Item #2: Wireless Communication Facility /Small Cell code amendment **7:30 PM**

Introduction and discussion of Wireless Communication Facility/ Small Cell code amendment.

OTHER BUSINESS

Directors Report
Planned Absences for Future Meetings
Next Scheduled Meeting: December 4, 2019

ADJOURN **7:00 PM**

PLANNING COMMISSION

MEETING MINUTES

Wednesday, October 16, 2019

CALL TO ORDER

The Planning Commission was called to order by Chair Goodman at 6:05 pm in the City Hall Council Chambers at 9611 SE 36th Street, Mercer Island, Washington.

ROLL CALL

Chair Tiffin Goodman, Vice Chair Craig Reynolds, Commissioners, Carolyn Boatsman, Daniel Hubbell, Jennifer Mechem (arrived at 6:10pm), Lucia Pirzio-Biroli and Ted Weinberg were present.

STAFF PRESENT

Evan Maxim, CPD Director, Andrea Larson, Senior Administrative Assistant, and Mona Davis, Planning Manager.

MINUTES

It was moved by Weinberg, seconded by Hubble to:
Approve the October 2, 2019 minutes as amended.
Passed 5-0

APPEARANCES

Cheryl D'Amboisio 3712 E mercer Way. Has lived in this home for 40 year. She spoke to the impacts to her home from traffic and the safety issues it has presented from the facilities on East Mercer Way. She spoke to people driving down her street that shouldn't be that cannot find the facilities they are looking for. She spoke regarding the noise from leaf blowers in the fall and the disruption it causes to the neighborhoods. She asked about flood lights that are on all night long in parking lots that are not shielded. She spoke to decreasing property values as well. She spoke to her concerns on 37th St.

Peter Strauss, 9130 SE 54th St. He spoke to his concerns regarding Community Facilities. He spoke to how other community facilities have successfully used CUPs for year. He spoke to undesirable concerns that could come from continuation of the community facilities discussions rezone. He spoke to the three options presented in the staff report. He spoke regarding the joint study session with the City Council and to how the halt option could be the best option.

Amy Lavin 7835 SE 22nd Pl, CEO of SJCC. She spoke to her interest in working with the City and neighbors in in a welcoming and inclusive manner on this issue and coming to a solution that will let them be able to make updates to their facilities.

Matt Goldbach, 9840 SE 40th St. He spoke to his concerns regarding the problem statement that was listed in the staff report. He spoke that the problem statement doesn't define what the problem is currently in front of the Planning Commission. He spoke to how other facilities on the Island are successfully functioning under a

CUP. He spoke to the problem of most of the people using these facilities do not live on Mercer Island. He spoke to his concerns about traffic and the intensity of use. He spoke about parking, lighting, trees and that they need to be addressed. He stated that his preferred option is the halt option.

Dave Cutler, Partner at Northwest studios, 2206 E Crescent Drive, Seattle. He thanked the Commission for their commitment to this process. He spoke to the uncertainty that this process has caused for the students at FASPS. He spoke to how they cannot plan for a future with the current zoning and how the CUP process will be difficult under this process. He also spoke to the cost of this process. He spoke regarding aging facilities and how to make critical upgrades to them. He spoke to the City recommending they apply for the Comprehensive Plan amendment and rezone.

Ryan Rahlfs, 9703 SE 40th St. He spoke to how members of the Planning Commission have stated in the past that the CFZ was to protect the neighbors. He asked the Planning Commission to consider if this is still the case. He asked if these properties are in compliance. He spoke how other facilities you don't hear complaints about the zoning and how these are specific complaints specific to these facilities. He spoke to bus parking issues on a side street.

John Hall, 9970 SE 40th St. He spoke to how he has written to the PC many times over the last 18 months providing history. He spoke to how there was not supposed to be access to the facilities from SE 40th St. He spoke to how residential lots have been purchased by the applicants in anticipation to the regulations changing

Ira Appleman, Shorewood. He spoke to his involvement in city government for the last 22 years. He spoke to the problem of facilities being a regional facility on Mercer Island and how it becomes a political problem. He spoke to the MICEC bond in 1997-1998. He spoke to how the government wanted to make a regional facility, and how the bond failed due to this. He spoke to how Mercer Island does not want to become crowed with regional facilities. He asked the PC to keep this in mind that the community doesn't want regional facilities

Daniel Thompson, 7265 N Mercer Way. He spoke to land use is politics and how it will cause bonds to fail. He spoke to the community being sensitized to community facilities. He spoke to how a master plan is what is wanted by the applicants. He stated the community facility zone is now toxic. He spoke to how there are only 6 people on the island who understand what a master plan is. He spoke to the only regulatory limit. He spoke to the complaints of the neighbors. He spoke to the concern of intensity of use.

REGULAR BUSINESS

Agenda Item #1: Community Facility Regulations

Evan Maxim, CPD Director, gave a presentation on Community Facility Regulations for discussion following the August 20, 2019 City Council and Planning Commission joint study session.

The Commission took a break until 7:05pm.

The Commission discussed the problem statement.

The Commission requested more information on how the CUP process works, including typical costs, length of the process, how much discretion does staff have when approving a CUP, and what is the level of discretion regarding record keeping. They also requested more information on how the master plan process would be better and on how a CUP could be used to make exceptions to the development code. They requested to see specific examples of a CUP.

The Commission discussed that the problem statement should include "additional growth to neighborhoods and that these neighborhoods do not want more development."

The Commission discussed residential properties being bought by organizations that then want to combine these with their existing property.

The Commission discussed that there should be a way for the community to weigh in on potential changes to their neighborhoods, and that a clearly defined public engagement process needs to be included so that all stakeholders can be involved.

The Commission spoke to how the current problem statement does not address site aggregation or how current regulations don't allow for tradeoffs for site optimization.

The Commission requested that staff provide more explanation to which option provides more protection to neighbors.

The Commission discussed enforcement.

The Commission discussed the three options.

The Commission discussed the timeline for continuing the discussion. The Commission also requests more public outreach.

The Commission took a break until 8:35pm.

Agenda Item #2: 2020 Comprehensive Plan Amendment Preliminary Docket
Evan Maxim, CPD Director, provided a brief presentation and introduction to the 2020 Comprehensive Plan amendments preliminary docket.

The Commission reviewed the proposed docket.

The Commission recommended that an Economic Development Comprehensive Plan amendment should be added to the 2020 docket to establish economic development policies and goals that involve establishing building direction around priorities, values and strategies.

The Commission recommended that the Residential Development Standards review, should be pushed to the 2021 workplan to allow time for the discussion of the 2020 Comprehensive Plan docket.

The Commission recommended that an additional Comprehensive Plan amendment should be added to the docket regarding trees in the Right- of-Way.

The Commission discussed a vacancy tax.

OTHER BUSINESS

Evan Maxim, CPD Director, updated the Commission on City Councils first review of the 2019 Comprehensive Plan amendments.

PLANNED ABSENCES FOR FUTURE MEETINGS

Commissioners Pirzio-Biroli and Craig Reynolds will be absent on October 30, 2019

ANNOUNCEMENTS AND COMMUNICATIONS

The next Planning Commission meeting is on October 30, 2019 at 6:00PM.

ADJOURNMENT

The meeting was adjourned at 9:43pm.

PLANNING COMMISSION

MEETING MINUTES

Wednesday, October 30, 2019

CALL TO ORDER

The Planning Commission was called to order by Chair Goodman at 6:07 pm in the City Hall Council Chambers at 9611 SE 36th Street, Mercer Island, Washington.

ROLL CALL

Chair Tiffin Goodman, Commissioners, Carolyn Boatsman, Daniel Hubbell, Jennifer Mechem, Lucia Pirzio-Biroli and Ted Weinberg were present. Vice Chair Craig Reynolds was absent.

STAFF PRESENT

Evan Maxim, CPD Director and Mona Davis, Planning Manager

MINUTES

Revisions are needed before PC approves minutes.
Bring back revised minutes at next meeting.

APPEARANCES
There were no appearances.

PUBLIC HEARING
Agenda Item #1: Public Institution Code Amendment
Evan Maxim, CPD Director, gave a presentation on the Public Institution Code Amendment

Chair opened public hearing at 6:29 pm

Mark Hirayama, 7800 SE 27th St #501 (condo next door). Sent e-mail on Oct 21st. Disappointed that Craig Reynolds is absent to represent what they discussed. To highlight key items, frustration of lack of meaningful discussion on this project and how it will affect him in his home. Zero input into the design of the project (structural vs. visual) and discussion on the rezone. Chair Goodman confirmed receipt of the e-mail. Today's discussion is just compounding the frustration to modify the rezone area when they weren't involved in the rezone discussion to begin with.

Matt Goldbach, 9840 SE 40th St. The language about what can be done on this property is being ignored, particularly concerning the protection of the park. The language being removed takes that protection away.

Jim Schwab, 7800 SE 27th St, Unit 503 (president of 7800 HOA), adds he went to CC last July and asked the CC to include input from citizens in the area. He is adding to the frustration that Mark spoke to earlier. The mound on 80th would not obstruct anyone's view and has raised to CC without any satisfactory explanation. Instead of changing what we want to do, we change the law around it. Citizens are frustrated.

He appreciates the communication with Evan Maxim and his willingness to include the citizens, but it seems to late to change anything. Thanked the PC for their service to our community.

Closed public hearing at 6:37 pm

REGULAR BUSINESS
Agenda Item #2: Public Institution Code Amendment
Evan Maxim, CPD Director, characterized public comments with concerns around 1) the boundary of the rezone, 2) concern with communications and involvement with the neighbors, and 3) concern around uses allowed in the PI zone vs. TC zone. Audience unanimously agreed.

As Director Maxim understands GMHB decision, actions are legally binding, and we are resolving conflicts as part of the decision. We can't fix the concerns of the citizens through a code amendment.

Commissioner Mechem had clarifying questions around language being removed and what the background was.

Commissioner Pirzio-Biroli recommends we revisit the map. Is I-90 distinguished differently since it's a state and federal property? She noted the part of property in the park is owned by WSDOT.

It was moved by Hubbell; seconded by Boatsman to:
recommend approval of the Public Institution Code Amendment.

The Commission discussed removing the language as suggested in Item B.

The Commission discussed and agreed that they should make a recommendation to the City Council to that City Council listens to public comment around concerns with this property.

Called vote to decide if language in Item B should be deleted.
Approved 5-1

The Commission took a break until 7:24pm

Director Maxim read the proposed accompanying recommendation that he drafted on the break.

It was moved by Mechem; seconded by Boatsman to:
Open discussion on draft recommendation proposed by Director Maxim.

> It was moved by Mechem; seconded by Hubble to:
> Amend number 2 to include "Prioritize the protection of existing parkland and open space while maximizing the amount of commuter parking available."
> Passed 6-0
>
> It was moved by Weinberg; seconded by Pirzio-Biroli to:
> Amend number 2 to read "Direct the City to seek a solution that both proves commuter parking and protects existing parkland and open space.
> Passed 4-2
>
> It was moved by Mechem to:
> Broadly discuss the language in number 2.
>
> Motion withdrawn by Mechem.
>
> It was moved by Boatsman; seconded by Mechem to:

Amend number 2 to read “Direct the City to seek a solution that maximizes commuter parking and protects existing parkland and open space.
Passed 6-0

It was moved by Hubbell; seconded by Pirzio-Biroli to:
Add language to number 3 “to consider whether further modification to the Public Institution zone boundary is appropriate to achieve items 1 and 2.”
Passed 6-0

Director Maxim read the revised accompanying recommendation:
The Planning Commission heard public comment during the public hearing. After deliberation, the Planning Commission recommends that the City Council:

1) Direct the City to work with the neighbors during the design and project review of any project on the Tully’s / Parcel 12 / WSDOT property.
2) Direct the City to seek a solution that maximizes commuter parking and protects existing park land and open space.
3) Consider whether a further modification to the public institution zone boundary is appropriate to achieve items 1 and 2.

The Commission voted on the accompanying recommendation as amended
Passed 6-0.

OTHER BUSINESS

Evan Maxim, CPD Director, updated the Commission on current schedule and items on upcoming agendas. PC meeting November 6th cancelled. Next meeting November 20th. Meeting will be held on December 4th; December 18th and January 1st meetings cancelled. First meeting in 2020 will be on January 15th.

PLANNED ABSENCES FOR FUTURE MEETINGS
There were no planned absences.

ANNOUNCEMENTS AND COMMUNICATIONS

The next Planning Commission meeting is on November 20, 2019 at 6:00PM.

ADJOURNMENT

The meeting was adjourned at 7:52 pm.

CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT
9611 SE 36TH STREET | MERCER ISLAND, WA 98040
PHONE: 206.275.7605 | www.mercergov.org

PLANNING COMMISSION

To: Planning Commission

From: Evan Maxim, Director

Date: November 20, 2019

RE: Community Facility regulations

SUMMARY

On August 20, 2019, the City Council and Planning Commission held a joint study session to discuss the proposed Community Facility regulations and zoning designation. Following the joint study session, the City Council asked the Planning Commission to:

A. Review the "problem statement" and determine if an alternative approach is warranted;
B. Explore alternative decision-making processes; and
C. Report back to the City Council for further direction.

On October 16, the Planning Commission identified several different items that would aid in the development of a problem statement and in exploring alternative decision-making processes. Staff has prepared the following attachments as an initial response to the Planning Commission's questions:

1. Summary of the Conditional Use Permit (CUP) / Variance / Design review process and criteria;
2. Matrix of current development and design standards for the R-8.4 and Commercial Office zone;
3. Matrix of land use decision-making options;
4. Notice of Decision for Emmanuel Episcopal Church expansion (CUP03-002);
5. Notice of Decision for Mercer Island Country Club expansion (CUP05-001);
6. Staff Report for Mercerwood Shore Club demolition / rebuild (CUP13-001).

This material is intended to aid the Planning Commission in developing a sense of the current regulations and how they have worked to date.

Staff anticipates that the Planning Commission will continue its work to define the problem statement and determine if an alternative approach and decision-making process is warranted.

PROBLEM STATEMENT

The Planning Commission provided feedback on the problem statement on October 16. Based on the Planning Commission's comments on October 16, staff has identified the following components of a problem statement:

A. Location:
    a. Any residentially zoned property may be the subject of a CUP application – the City may wish to limit the location of certain uses currently allowed by a new CUP;
    b. Residential property adjacent to an existing CUP may be "targeted" for expansion;

B. Community input:
    a. The community does not have sufficient influence in the decision-making process;
    b. The community input is too late in the process to influence design;
C. Site aggregation should be encouraged to avoid "piece-meal" design;
D. The intensity of development is not sufficiently addressed by the existing decision-making process and standards;
E. Regulations that are adopted need to be enforceable.

The City understands that these components of the problem statement are under the current status quo and current regulations. Is this correct? Are there edits or corrections to the above components? City staff anticipate further exploring these components of the problem statement with the Planning Commission on November 20.

ALTERNATIVES

Three alternative approaches were identified on October 16 – specifically:

- Alternative 1: Halt work on the Community Facility regulations.
- Alternative 2: Continue review of the Community Facility code amendments and rezone.
- Alternative 3: Identify an alternative approach to address the problem statement.

As noted on October 16, the Planning Commission may recommend amendments to the City's development regulations as part of a recommended approach under alternative 2 or alternative 3. In evaluating the best approach to address the problem statement, the Planning Commission may recommend that the City establish new, or modified, development regulations related to:

A. Decision-making processes (e.g. a public comment period, a public hearing, decision-maker).
B. Decision-making criteria (e.g. criteria for approval of a CUP, Master Plan, etc).
C. Development or design standards (e.g. setbacks, height limits, screening, etc).

PROPOSED SCHEDULE

The Planning Commission is currently scheduled for further discussion as follows:

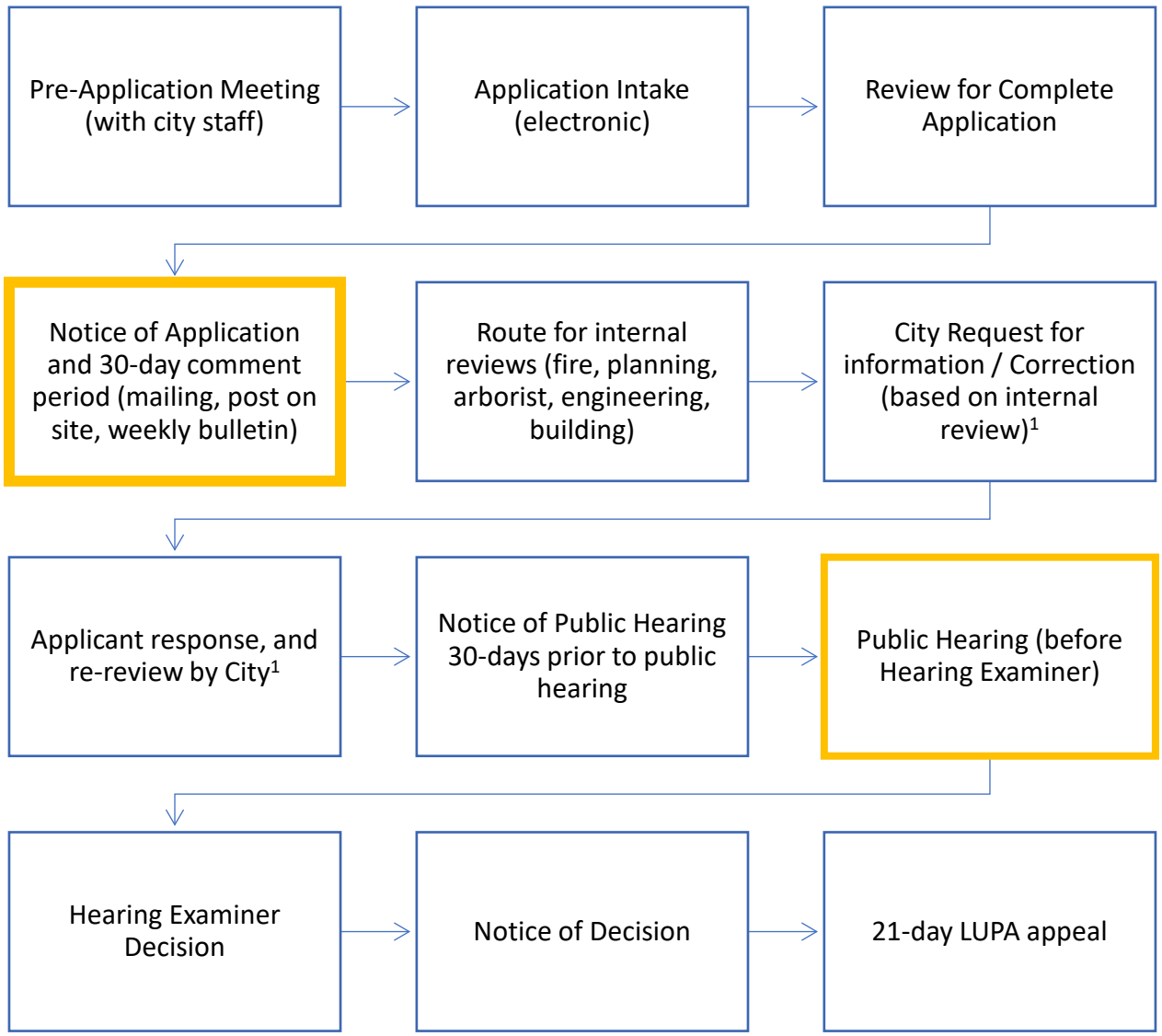
- November 20: Refine problem statement and identify additional information needed for alternative approach selection
- December 4: Confirm problem statement and identify alternative approach selection
- January 15: Final review of Planning Commission recommended problem statement and approach to City Council

NEXT STEPS

Planning Commissioners should review this memo and past material related to this subject. Staff anticipates that the Planning Commission will provide feedback and guidance to staff related to:

1. The identified components of the problem statement. Is the problem statement correct? If not, what corrections are appropriate to the problem statement? Is this a problem that warrants further action by the City?
2. The identified alternative approaches. Which alternative approach(s) should be further explored by the Planning Commission? Does the Planning Commission have proposed refinements to an alternative approach (e.g. focus on CUP "plus")? What additional information does the Planning Commission need from staff?
3. The schedule. Does the Planning Commission require additional time? Is additional public outreach desired?

Conditional Use Permit and Zoning Variance: Process

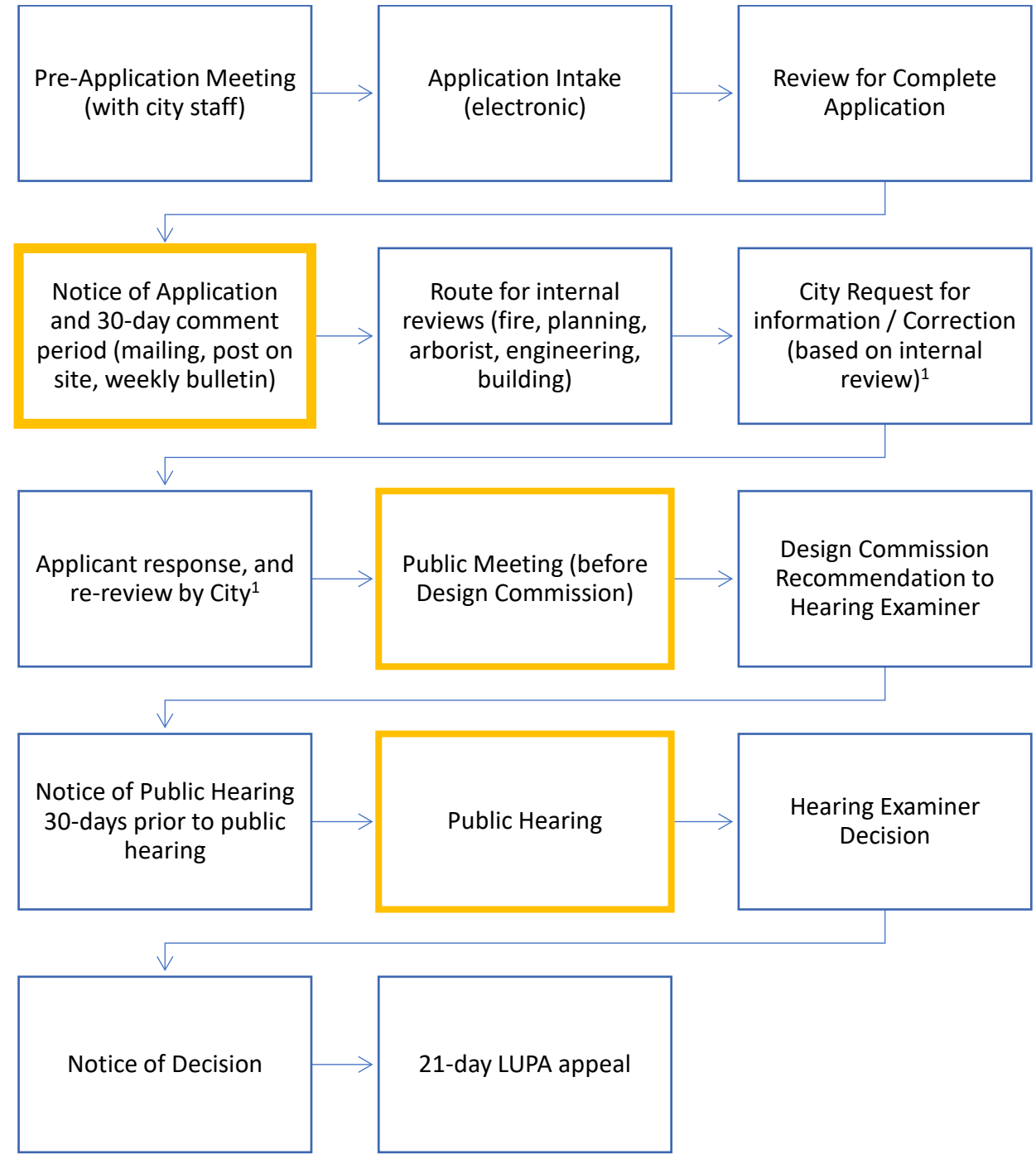


Indicates an opportunity for "formal" public comment by any interested person or party.

1. Steps 6 and 7 may be repeated as needed prior to proceeding to step 8.

Design Review: Process

When combined with Conditional Use Permit and/or Zoning Variance



Indicates an opportunity for "formal" public comment by any interested person or party.

1. Steps 6 and 7 may be repeated as needed prior to proceeding to step 8.

Conditional Use Permit: Criteria for Approval

Purpose.

A use may be authorized by a conditional use permit for those uses listed in Chapters 19.02 and 19.11 MICC. The intent of the conditional use permit review process is to evaluate the particular characteristics and location of certain uses relative to the development and design standards established in this title. The review shall determine if the development proposal should be permitted after weighing the public benefit and the need for the use with the potential impacts that the use may cause.

Criteria for Conditional Use Permits That Are Not Located in Town Center.

An applicant must demonstrate how the development proposal meets the following criteria:

a. The permit is consistent with the regulations applicable to the zone in which the lot is located;

b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;

c. The use is consistent with policies and provisions of the comprehensive plan; and

d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance. (19.06.110(A)(1) & (2)).

Variance: Criteria for Approval

Purpose.

An applicant or property owner may request a variance from any numeric standard, except for the standards contained within Chapter 19.07 MICC. A variance shall be granted by the city only if the applicant can meet all criteria in subsections (B)(2)(a) through (B)(2)(h) of this section. A variance for increased lot coverage for a regulated improvement pursuant to subsection (B)(2)(i) of this section shall be granted by the city only if the applicant can meet criteria in subsections (B)(2)(a) through (B)(2)(i) of this section.

Criteria for Variances.

An applicant must demonstrate how the development proposal meets the following criteria:

a. The strict enforcement of the provisions of this title will create an unnecessary hardship to the property owner. For the purposes of this criterion, in the R-8.4, R-9.6, R-12, and R-15 zoning designations, an "unnecessary hardship" is limited to those circumstances where the adopted standards of this title prevent the construction of a single-family dwelling on a legally created, residentially zoned lot;

b. The variance is the minimum necessary to grant relief to the property owner;

c. No use variance shall be allowed;

d. There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;

e. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated;

f. The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property;

g. The variance is consistent with the policies and provisions of the comprehensive plan and the development code;

h. The basis for requesting the variance is not the direct result of a past action by the current or prior property owner; and

i. Public and private schools, religious institutions, private clubs and public facilities in single-family zones with slopes of less than 15 percent may request a variance to increase the impervious surface to a maximum 60 percent impervious surface and such variance application will be granted if the hearing examiner determines that the applicant has demonstrated that the following criteria are satisfied:

    1. There will be no net loss of permeable surface from the existing permeable surface. No net loss will be determined by the code official and may be achieved by off-site

mitigation and/or by reconstructing existing parking areas to allow storm water penetration. This replacement will be an exception to MICC 19.02.060(C)(2), prohibiting parking areas from being considered as permeable surfaces;

2. All storm water discharged shall be mitigated consistent with the most recent Washington State Department of Ecology Stormwater Management Manual for Western Washington, including attenuation of flow and duration. Mitigation will be required for any and all new and replaced impervious surfaces. In designing such mitigation, the use of a continuous simulation hydrologic model such as KCRTS or WWHM shall be required; event based models will not be allowed. In addition, mitigation designs shall utilize flow control best management practices (BMPs) and low impact development (LID) techniques to infiltrate, disperse and retain storm water on site to mitigate the increased volume, flow and pollutant loading to the maximum extent feasible;
3. The director must approve a storm drainage report submitted by the applicant and prepared by a licensed civil engineer assuring the city that city infrastructure, in concert with the project design, is adequate to accommodate storm drainage from the project site, or identifying appropriate improvements to public and/or private infrastructure to assure this condition is met, at the applicant's expense; and
4. The variance may not be used with other provisions to exceed this maximum 60 percent impervious surface coverage.

Design Review: Criteria for Approval

Purpose.

These regulations are intended to implement and further the comprehensive plan of the city and are adopted for the following purposes:

1. To promote the public health, safety and general welfare of the citizens of the city.
2. To recognize that land use regulations aimed at the orderliness of community growth, the protection and enhancement of property values, the minimization of discordant and unsightly surroundings, the avoidance of inappropriateness and poor quality of design and other environmental and aesthetic objectives provide not only for the health, safety and general welfare of the citizens, but also for their comfort and prosperity and the beauty and balance of the community, and, as such, are the proper and necessary concerns of local government.
3. To protect, preserve and enhance the social, cultural, economic, environmental, aesthetic, and natural values that have established the desirable quality and unique character of Mercer Island.
4. To promote and enhance construction and maintenance practices that will tend to promote visual quality throughout Mercer Island.
5. To recognize environmental and aesthetic design as an integral part of the planning process.

Criteria for Design Review Decisions.

An applicant must demonstrate how the development proposal meets the following criteria:

1. The proposal conforms with the applicable design objectives and standards of the design requirements for the zone in which the improvement is located, provided further:

a. In the Town Center, particular attention shall be given to whether:

i. The proposal meets the requirements for additional building height, if the proposal is for a building greater than two stories; and

ii. The proposal adheres to the required parking standards and a parking plan has been provided that demonstrates that the proposal meets the objectives of MICC 19.11.130.

Development / Design Standards Matrix:

Development Regulation	**Residential (R-8.4)**	**Commercial Office (CO)**
Yard/ Setback	General: Front: 20 feet Rear: 25 feet Side: 5 feet (15 feet cumulative) School: Street: 45 feet Abutting property: 35 feet Noncommercial recreational areas: Abutting property: 20 feet for structures, ballfields	Street: 50 feet Rear: 50 feet Side yard: 25 feet (75 feet cumulative) Abutting residential development: 50 feet
Gross Floor Area (GFA)	40 percent of lot area[1]	None
Height	30 feet	36 feet
Lot Coverage	20 to 40 percent of lot area[2]	60 percent of total lot area: impervious surface 35 percent of total lot area: building
Screening[3]	Street: 20 feet Partial[4] Residential: 20 feet Full[5]	Street: 20 feet Partial Residential: 20 feet Full
Parking Stall Requirement	School: 1 stall per classroom plus 1 stall per 10 students (highschool)	1 stall per 4 seats (theater) 1 stall per 75 sqft of gross floor area
Parking Lot Design	Appendix A Parking Lot Dimensions	Appendix A Parking Lot Dimensions
Vehicle Access	Local and/or arterial thoroughfare	None specified
Lighting	Pursuant to MICC 19.12.070: • Full cutoff lighting • No limits on lighting lumens, candle foot illumination, color	Pursuant to MICC 19.12.070: • Full cutoff lighting • No limits on lighting lumens, candle foot illumination, color
Design Review[6]	Required, MICC 19.12	Required, MICC 19.12
Transportation Concurrency	Required, MICC 19.20	Required, MICC 19.20

[1] Capped at a total GFA of 5,000 square feet (R-8.4) or 8,000 square feet (R-9.6)
[2] Based on lot slope – ref. MICC 19.02.060
[3] Screening is provided between the community facility uses and the identified adjacent improvement (e.g. street, residential, etc)
[4] Partial screening (MICC 19.12.040) - A partial screen shall provide the desired screening function as seen at the pedestrian eye level in all seasons within three years of installation. The number of trees provided shall be proportionate to one tree for every 20 feet of landscape perimeter length.
[5] Full screening (MICC 19.12.040) - A full screen should block views from adjacent properties as seen at the pedestrian eye level in all seasons within three years of installation. The number of trees provided shall be proportionate to one tree for every 10 feet of landscape perimeter length.
[6] For non-residential development

Land Use Decision-Making: Options

	Conditional Use Permit (CUP) (currently)	Design Review (currently)	CUP "Plus" (option)	Development Agreement (option)	Master Plan (option)
Purpose	To evaluate the characteristics and location of a use relative to adopted development standards.	To ensure that building and site design meets the aesthetic objectives and other values articulated in the design standards.	To be determined	Development Agreement must be consistent with adopted regulations.	To promote superior site design that addresses neighborhood concerns, by allowing modifications to otherwise prescriptive design standards.
Focus of review	Is the proposed use compatible with surrounding uses?	Do the proposed building and site improvements reflect high quality design?	To be determined	To be determined	Is there a better site design that will address neighborhood concerns?
Assumptions	Proposed "use" is presumed to be allowed, subject to additional conditions of approval.	Review is focused on technical design components of physical improvements. Design Review is "in addition to" the decision of whether a use is "permitted" or a CUP.	Same as current CUP; additional conditions of approval may be created.	Use and physical improvements must be "consistent" with adopted regulations. Consistency does not mean the "same as".	Master Plan review is "in addition to" the decision of whether a use is "permitted" or a CUP. Review is focused on multi-phase build out of a large site. Intended to address major site design layout before specific physical improvements (i.e. Design Review)
Currently	Residential zones: • Government services • Schools • Places of worship • Noncommercial recreational areas • Retirement homes • B & B's Town Center: • Manufacturing • Large scale retail • Hotel / Motel	Design review is required for multifamily, mixed use, commercial, and non-residential buildings Not required: Single family homes, property owned / controlled by the City, and wireless facilities are exempt from design review.	Not used	Not used	Not used
Decision by:	Hearing Examiner	Design Commission	Hearing Examiner	City Council	To be determined

Notice of Decision for
Conditional Use Permit and Height Variance (CUP03-002 and VAR03-012)

These matters came before the Mercer Island Planning Commission on August 20, 2003 for a public hearing on a Conditional Use Permit and Height Variance for a proposed expansion of Emmanuel Episcopal Church. The proposed expansion includes 9,212 square feet of building area added to the narthex. The requested height variance would allow the addition to exceed the 30 foot maximum height limit by approximately 4 feet 3 inches. Bob Thorpe of R.W Thorpe and Associates and others listed below represented the applicant. City staff members Gabe Snedeker, Principal Planner, and Richard Hart, Director of Development Services, appeared on behalf of the City. After review of the staff report, supplemental material, written comments and considering the oral testimony presented during the course of the public hearing, the Planning Commission makes the following Findings of Fact and Conclusions of Law in these matters.

I. PROCEDURE SUMMARY

1. On June 6, 2003, R.W. Thorpe and Associates submitted a Conditional Use Permit application on behalf of Emmanuel Church to allow expansion of the facility.
2. On June 16, 2003, the applicant indicated that they would submit an application for a height variance and at that time requested that the variance review process be combined with the conditional use process. The applicant also requested that both applications be heard by the Planning Commission pursuant to MICC 19.15.020(I). On July 8, 2003, the applicant submitted the application fee for the variance and the application was determined to be complete.
3. Notice of the Conditional Use Permit and Height Variance application was included in the City's Permit Bulletin on July 15, 2003. Public notice was posted on site at 8607 SE 44th Street and mailed to all property owners within 300 feet of the subject property on July 24, 203.
4. On August 20, 2003, the Planning Commission, after reviewing the staff report and hearing testimony from the applicant and church users, approved with conditions the request for a Conditional Use Permit. The Planning Commission also approved a request for a 4 foot 3 inch Height Variance over the allowed 30 foot height limit for Emmanuel Episcopal Church.

II. RECORD

1. The Planning Commission considered the following in making its decision:

A. Staff Report, (Gabe Snedeker, Development Services Group), dated August 20, 2003, with the following Exhibits:

1. Applicable Criteria
   –MICC 19.02.010
   –MICC 19.15.020
2. Application material submitted by the applicant, dated June 6, 2003
3. Supplemental application material submitted by the applicant, dated August 5, 2003.
4. State Environmental Policy Act (SEPA) Threshold Determination – Mitigated Determination of Non-significance (MDNS) dated August 6, 2003
5. Public Comment Letters

B. The Planning Commission considered the testimony of the following individuals:

- Robert Thorpe, R.W. Thorpe and Associates, 5800 West Mercer Way, represented the applicant.
- Randy Gardner, Rector, Emmanuel Episcopal Church, 5704 91st Ave SE
- John Paulson, Dowel Engineering, 8320 154th Ave. NE, Redmond, represented the applicant.
- Mike Barthol, Dykeman Architects, 1716 West Marine View Drive, Everett, represented the applicant.
- Eugenie Isle, 4236 89th Ave. SE
- Amy Larossa, Youth Theater Northwest, 1703 Bellevue Ave., Seattle
- Anne Thompson-Rogerson, 4345 87th Ave., Seattle
- Laura Bursos, 4348 91st Ave. SE

III. FINDINGS OF FACT

1. The existing zoning of the property described in the application is Single Family Residential R-9.6.
2. The subject property is located at 8607 SE 44th Street.
3. The subject property is currently the site of the existing Emmanuel Episcopal Church.
4. The request is for a Conditional Use Permit and Height Variance to allow the Emmanuel Episcopal Church to modify and expand their facility. The proposed expansion includes 9,212 square feet of building area added to the narthex. The requested height variance would allow the addition to exceed the 30 foot maximum height limit by approximately 4 feet 3 inches.
5. The surrounding land uses consist primarily of developed residential lots to the north, south, east, and west.
6. All required time limits for public noticing and posting were met prior to the August 20, 2003 Planning Commission hearing on the request for a Conditional Use Permit and Height Variance.

IV. CONCLUSIONS OF LAW

1. The Planning Commission finds that the request for a Conditional Use Permit to allow modification and expansion of Emmanuel Episcopal Church meets the requirements of MICC 19.02 and the specific criteria in MICC 19.15.020(G)(3) and MICC 19.15.020(G)(4).
2. The Planning Commission hereby adopts the Criteria for Review and Staff Findings and Analysis contained in pages 4 through 7 of the Planning Commission Staff Report dated August 20, 2003.
3. The Planning Commission found that the proposed project is consistent with the goals and policies contained in the City's regulations and the Comprehensive Plan.

V. FINDINGS OF FACT/CONCLUSIONS OF LAW

Any finding of fact determined to be a conclusion of law is hereby adopted as such.

VI. DECISION

Based on the Findings of Fact contained in the staff report and testimony presented at the Planning Commission public hearing and the Conclusions of law listed above, the request for a Conditional Use Permit and Height Variance to allow modification and expansion of Emmanuel Episcopal Church as shown in the plans submitted with the application, date stamped June 6, 2003 and revised August 5, 2003, is approved. The conditions of the Conditional Use Permit are as listed below:

1. The applicant has voluntarily revised the project plans to delete the library addition from this proposal to minimize construction with the driplines of 34 inch diameter and 32 inch diameter mature oak trees. These oak trees help screen the existing 47 foot sanctuary and would also help screen the proposed 36 foot narthex addition from the residential area to the east. Prior to issuance of the CUP, the applicant shall identify additional measures for review and approval by the City to minimize impacts to the mature oak trees from the proposed construction. Measures may include, but are not limited to, alternative foundation designs and construction techniques, pruning, water infiltration measures, and removal of existing impervious surfaces within the driplines. The City shall require supervision of all excavation by a certified arborist, hand digging of the foundation within the driplines of the trees, monitoring measures, and a contingency plan. The City will specify additional standard tree protection conditions at the time of building permit. Please note that these two trees may be eligible for Landmark Tree Status if the property owner wishes to pursue such designation.

2. Emmanuel Episcopal Church shall designate a Transportation Coordinator for the site within three (3) months of issuance of the Certificate of Occupancy of the project. Duties of the Transportation Coordinators include:

    - Serve as a liaison for residents, parishioners, employees, and City staff regarding traffic, parking, and site issues.

- Notify all neighbors living within 300 feet of the property with the name and phone number of the Transportation Coordinator who will address traffic impact concerns for the Episcopal Church.
- Monitor and manage on-site parking and deliveries.
- Encourage ridesharing and public transit use by parishioners.
- Establish a transportation information center in a common area displaying information on ridesharing, parking, public transit routes, schedules, etc.
- Develop a transportation demand management and parking plan for the property and submit an annual report to the City by December 31st each year.

3. The applicant shall provide a gravel shoulder on SE 44th Street adjacent to the property frontage. The shoulder shall be constructed of 5/8 minus crushed rock and sloped to drain properly. The City shall inspect and approve the gravel shoulder prior to acceptance as an improvement to the public right-of-way. *Please note: as discussed at the public hearing, this condition does not preclude the possibility of the applicant and City entering into a voluntary agreement for the applicant to construct a trail separated from the street by landscaping along SE 44th Street.*
4. The applicant shall provide bicycle racks and/or covered and secured bicycle storage areas on-site.
5. The applicant shall provide off-site parking with shuttle service to the church if parking demand exceeds supply for large scheduled services and gatherings identified in Table 1 on page 8 of the TSI, Inc. Memo dated April 22, 2003.
6. The applicant shall maintain at least 108 parking stalls. Of the total number of stalls provided, only 50% of the stalls can be marked for compact vehicles. Parking spaces shall be reserved for vehicle parking at all times. Trash enclosures, donation bins or other materials cannot be stored in marked parking spaces.
7. The applicant shall work with Metro Transit to maintain the existing bus stop and service on 86th Avenue SE.
8. All truck deliveries, loading and unloading shall occur on-site and all driveways shall be designed to accommodate truck access into and out of the site.
9. To ensure that on-site parking is adequately maintained for users of this project, the applicant shall obtain City approval prior to entering into private parking lease or other arrangements involving the required number of on-site parking spaces on this property.
10. The applicant must submit plans and apply for a Right-of-Way Encroachment Agreement for any permanent private improvements in the public right of way. A Right of Way Use Permit will also be required for any work performed in the public right of way.
11. The applicant shall install a "Stop" sign with stop bar and "Caution, Watch for Pedestrians" sign at each exit driveway or City approved alternative pavement marking.

12. If additional street lights are requested or existing street lights relocated by the applicant, the applicant shall coordinate changes with Puget Sound Energy and the City. The applicant shall pay for the modifications.

13. The applicant shall submit to the City a schedule for coordinated construction phasing for the project. The applicant must coordinate lane and walkway closures with other project in the area. The applicant shall identify haul routes, traffic control, contractor parking, and equipment staging prior to the issuance of a building permit.

14. Construction parking and storage of equipment and materials will not be allowed on City streets. All parking must be accommodated on-site.

15. The City reserves the right to restrict turning movements from driveways, if the City receives persistent complaints of traffic or observes increased accidents involving church driveways.

16. All driveways shall be located in a manner to provide proper sight distance for a driver to safely enter and exit the roadway. Proposed landscaping, signage and other improvements shall not hinder a driver's ability to see on-coming vehicles or pedestrians.

Under State law and Mercer Island Code, you have the right to appeal this decision to the Mercer Island City Council. If you desire to file an appeal you must submit the appropriate form and fee, available from the Development Services, and file it with the City Clerk within fourteen (14) days from the date notice of this decision is given. Appeals must be received by the City Clerk no later than 5:00 PM on September 12, 2003. Upon receipt of a complete appeal application, an open record hearing will be scheduled.

DATE _____

_____	_____
Stephen D. Bryan	Gabe Snedeker, AICP
Planning Commission Chair	Principal Planner
City of Mercer Island	City of Mercer Island

Notice of Decision for
Conditional Use Permit (CUP05-001)

These matters came before the Mercer Island Planning Commission on March 2, 2005 for a public hearing on a Conditional Use Permit for the proposed second story addition and site improvements at the Mercer Island Country Club. The proposed expansion includes an 8,753 square foot second story addition to the existing main building to provide athletic space, additional landscaping, a new entry canopy, three fire hydrants, a big toy play area, screening around the existing trash area and storage shed, and replacement signage. There is no proposed increase above the current membership of 861 families. R.W. Thorpe & Associates represented the Mercer Island Country Club, the owner of the property. Associate Planner Shelley Bolser and Principal Planner Gabe Snedeker represented the City. After review of the staff report, supplemental material, written comments and consideration of the oral testimony presented during the course of the public hearing, the Planning Commission made the following Findings of Fact and Conclusions of Law in these matters.

I. PROCEDURE SUMMARY

1. On January 4, 2005, the Mercer Island Country Club submitted an application for a Conditional Use Permit for the items described in the preceding paragraph.
2. The application was deemed incomplete and a letter was sent to the applicant. Additional materials were submitted and the application was deemed complete on February 8, 2005 and notice was placed in the City Bulletin.
3. On February 18, 2005, a public notice was posted on site at 8700 SE 71st St and mailed to all property owners within 300 feet of the subject property. The public notice described the application and the public hearing before the Planning Commission on March 2, 2005.
4. On March 2, 2005, the Planning Commission, after reviewing the staff report and hearing testimony from the applicant and neighboring property owners, approved with conditions the request for a Conditional Use Permit for the Mercer Island Country Club.

II. RECORD

1. The Planning Commission considered the following in making its decision:
   - **A.** Staff Report, (Shelley Bolser, Development Services Group), dated March 2, 2005, with the following Exhibits:
     1. Applicable Criteria
        - MICC 19.02.010 (A)(6) and (C)(4)
        - MICC19.15.020(G)(3)
     2. Application material submitted by the applicant, dated January 4, 2005 and February 1, 2005.
     3. Comment letter from Paul Tiscornia, 8621 SE 71st St.

B. The Planning Commission considered the testimony of the following individuals:

- R.W. Thorpe, 705 2nd Ave Ste 710, Seattle, representative for the Mercer Island Country Club
- Jennifer Dischinger, R.W. Thorpe & Associates, 705 2nd Ave Ste. 710, Seattle
- Jay Peterson, Erickson McGovern Architects 120 131st St S, Tacoma
- Roger Schubert, 8521 SE 71st St, Mercer Island
- Ash Mitha, manager of Mercer Island Country Club, 8700 SE 71st St
- Richard Driscoll, 8750 SE 52nd Place, Mercer Island

III. FINDINGS OF FACT

1. The existing zoning of the property described in the application is Single Family Residential R-9.6.
2. The subject property is located at 8700 SE 71st St.
3. The total lot size is 242,629 square feet.
4. The subject property is currently the site for the Mercer Island Country Club.
5. The request is for a Conditional Use Permit for an expansion of existing facilities, including the following:
   - 8,753 square foot second story addition to the existing main building to provide athletic space
   - Additional landscaping
   - A new entry canopy
   - Three fire hydrants
   - A big toy play area
   - Screening around the existing trash area and storage shed
   - Replacement signage
6. The existing impervious surface coverage on site is approximately 70.5%. There is no proposed net increase in impervious surfaces and no new structures over existing non-structural impervious surface.
7. The site is accessed from two driveways adjacent to SE 71st St.
8. The surrounding land uses consist of developed residential lots to the north, south, and west. The South Mercer Village Shopping Center is located past existing single family residences to the north. The Pioneer Park Youth Club is adjacent to the northeast corner of the site. Pioneer Park is located to the east of the site.

IV. CONCLUSIONS OF LAW

1. All required time limits for public noticing and posting were met prior to the March 2, 2005 Planning Commission hearing of the Conditional Use Permit request.
2. The Planning Commission approves the issuance of a Conditional Use Permit for the additions listed in the Findings of Fact.
3. The request is consistent with the policies and provisions of the Mercer Island Comprehensive Plan.

4. The Planning Commission hereby incorporates the staff analysis contained on pages 2-4 of the staff report dated March 17, 2004, including recommendations to locate the "big toy" play area at least 20 feet from any property line (MICC 19.02.010(A)(6)) and gain final landscape plan approval from the City Arborist.

VI. DECISION

Based on the Findings of Fact and the Conclusions of law listed above, the request for a Conditional Use Permit to allow expansion of the Mercer Island Country Club as shown in the application date stamped January 7, 2005, February 1, 2005, and March 2, 2005 is hereby approved. The conditions of this approval are as listed below:

1. The City Arborist shall review and approve the proposed landscape plan for the parking area prior to installation of the landscaping to comply with MICC 19.15.020(G)(3)(d).
2. The proposed "big toy" shall be located at least 20 feet from any property line, per MICC 19.02.010(A)(6).
3. The hours of construction shall be prohibited between Saturday at 6pm and Monday at 7am per MICC 19.15.020(G)(3)(d).
4. The Design Commission shall apply the requirements of MICC 19.12.070(A) and (B) to proposed and existing lighting that has an adverse effect beyond the property lines at 8700 SE 71st St, to comply with MICC 19.02.010(A)(6)(b).
5. The Design Commission shall apply the requirements of MICC 19.12.060(B)(11), Landscaping - Maintenance Requirements to existing and proposed landscaping to comply with MICC 19.15.020(G)(3)(d).
6. This application sets the approved membership at 861 families.

Under State law and Mercer Island Code, you have the right to appeal this decision to the Mercer Island City Council. If you desire to file an appeal you must submit the appropriate form and fee, available from the Development Services, and file it with the City Clerk within fourteen (14) days from the date this decision is signed. Upon receipt of a complete appeal application, a closed record hearing will be scheduled.

DATE March 14, 2005

William Chapman
Planning Commission Vice-Chair

Shelley Bolser
Associate Planner

Shelley

Sign #6 + #8

City of Mercer Island
Development Services Group

FOR DSG USE ONLY
File no. SEP05-001; CUP05-001
Deposit Fee Receipt # 85025
π Transaction Code 3017 – Self Posting

Affidavit of Posting

Date Sign Pick-up 2/17/05
Date Sign Returned 3/23/05
(Account # DS 0000-2391059)

APPLICANT NAME RW Thorpe / Mercer Island Country Club PHONE NO. 232-5600 x30
PROPOSAL 8,753 sf 2nd story addition
POSTING PERIOD: From 2/17/05 To: 3/3/05

AFFIDAVIT OF POSTING:

On: February 17, 2005 (date), I will post the City of Mercer Island

Public Notice Board at 8750 SE 71st St. (location).

The Public Notice Board, with copies of information on the proposal, was posted for the required ~~ten~~ 14 day time period until March 3, 2005.

Wacky Hu (signature) 2/17/05 (date)

A $50 deposit is required for the use of the City of Mercer Island Public Notice Board, and will be refunded when the Notice Board has been returned to the city. If not returned within 30 days of the decision being issued, you will forfeit deposit.

SB

City of Mercer Island
Development Services Group

FOR DSG USE ONLY
File no. CUP05-001
Deposit Fee Receipt # _____
π Transaction Code 3017 – Self Posting

Affidavit of Posting

Date Sign Pick-up 2/18/05
Date Sign Returned _____
(Account # DS 0000-2391059)

APPLICANT NAME MI Country Club / RW Thorpe PHONE NO. 206-232-5600
PROPOSAL Conditional Use Permit - add 8,753 SF to ex. building
POSTING PERIOD: From 2/18/05 To: 2/28/05

AFFIDAVIT OF POSTING:

On: February 18, 2005 (date), I will post the City of Mercer Island Public Notice Board at 8700 SE 71st St (location).

The Public Notice Board, with copies of information on the proposal, was posted for the required ten day time period until February 28, 2005 (5pm).

Pamela Bussell
(signature)

2/18/05
(date)

A $50 deposit is required for the use of the City of Mercer Island Public Notice Board, and will be refunded when the Notice Board has been returned to the city. If not returned within 30 days of the decision being issued, you will forfeit deposit.

MITIGATED DETERMINATION OF NON-SIGNIFICANCE (MDNS)

Application No:	**SEP05-001**
Description of proposal:	**State Environmental Policy Act (SEPA) threshold determination for construction of an 8,753 square foot second story addition above an existing 12,077 square foot building. The addition will include new lockers, athletic use areas, an office, and a pro shop.**
Proponent:	**RW Thorpe and Associates for the Mercer Island Country Club**
Location of proposal:	**8700 SE 71st St**
Lead agency:	**CITY OF MERCER ISLAND**

The lead agency for this proposal has determined that the project, as conditioned by the required mitigation measures specified in this decision, will not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(c). This decision was made after review of a completed environmental checklist, traffic study, preliminary project plans and other information on file with the lead agency. This information is available to the public on request.

This may be your only opportunity to comment on the environmental impacts of the proposal and required SEPA mitigation measures. Issuance of this threshold determination does not constitute design review approval or building permit approval. In addition to the required SEPA mitigation measures listed below, the applicant will be required to meet all standards contained in the Mercer Island City Code and all required conditions of design review approval, building permit approval, and right-of-way use permit approval.

MITIGATION CONDITIONS
The following conditions are required pursuant to WAC 197-11-350 to address adverse environmental impacts identified for this proposal:

Parking and Traffic Impacts

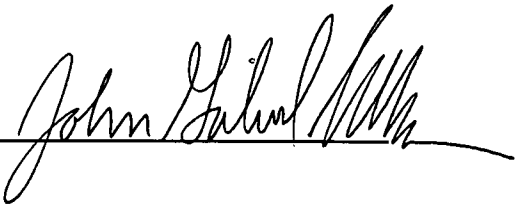
1. **The City reserves the right to restrict all driveways to be right-turn in/right turn out based on future, documented, traffic safety problems.**
2. **The owner shall designate a Transportation Coordinator for the site, within three (3) months of issuance of the Certificate Occupancy of the project. Duties of the Transportation Coordinator include:**
    - **Providing a report describing parking demand, visitor, employee parking passenger loading/drop off, and delivery activities at the site.**

- **Serving as a liaison for residents, employees, and City staff regarding traffic and parking issues Monitor and manage on-site activities, parking and deliveries.**
- **Encouraging ridesharing by members and employees.**
- **Examining the facility schedule to minimize and/or avoid overlapping events.**

3. **All new or relocated street lights shall be approved by Puget Sound Energy and the City of Mercer Island. The applicant shall pay for new installations or modifications.**
4. **If a scheduled event is expected to draw visitors in excess of the number of on-site parking spaces, the Country Club's Transportation Coordinator shall inform residents residing within 300 feet of the site of the event. The Transportation Coordinator shall also post the site with event information and the coordinator's phone number to receive resident comments. The City reserves the right to require the Country Club to hire an off-duty Mercer Island police officer for large, special events, if the City receives persistent complaints regarding event generated traffic and parking.**

Agencies, tribes, affected parties and the public are encouraged to submit written comments on the proposed project and its probable environmental impacts. Comments must be received by 5:00 PM on Wednesday, March 2, 2005.

Responsible Official: GABE SNEDEKER, AICP
CITY OF MERCER ISLAND
ENVIRONMENTAL OFFICER
9611 SE 36TH STREET
MERCER ISLAND, WA 98040
Phone: (206) 236-5300
FAX: (206) 236-3599

Date: **February 16, 2005** Signature 

This decision to issue a Mitigated Determination of non-significance (MDNS) rather than to require an EIS may be appealed within 14 days of the date of this decision listed above pursuant to Section 19.07 of the Mercer Island Unified Land Development Code, Administration Section. Comments will be accepted until 5:00 PM on March 2, 2005. Appeals of this DNS must be filed by 5:00 PM on March 2, 2005. Please contact the Responsible Official for further information.

Received
Jan 4, 2005

ENVIRONMENTAL CHECKLIST

FILE NO: SEP05-001
FEE: $1,092.00
RECEIPT: # 01-0083996

Purpose of Checklist:

The State Environmental Policy Act (SEPA), chapter 43.21C RCW, requires all governmental agencies to consider the environmental impacts of a proposal before making decisions. An environmental impact statement (EIS) must be prepared for all proposals with probable significant adverse impacts on the quality of the environment. The purpose of this checklist is to provide information to help you and the agency identify impacts from your proposal (and to reduce or avoid impacts from the proposal, if it can be done) and to help the agency decide whether an EIS is required.

Instructions for Applicants:

This environmental checklist asks you to describe some basic information about your proposal. Government agencies use this checklist to determine whether the environmental impacts of your proposal are significant, requiring preparation of an EIS. Answer the questions briefly, with the most precise information known, or give the best description you can.

You must answer each question accurately and carefully, to the best of your knowledge. In most cases, you should be able to answer the questions from your own observations or project plans without the need to hire experts. If you really do not know the answer, or if a question does not apply to your proposal, write *do not know* or *does not apply*. Complete answers to the questions now may avoid unnecessary delays later.

Some questions ask about governmental regulations, such as zoning, shoreline, and landmark designations. Answer these questions if you can. If you have problems, the governmental agencies can assist you.

The checklist questions apply to all parts of your proposal, even if you plan to do them over a period of time or on different parcels of land. Attach any additional information that will help describe your proposal or its environmental effects. The agency to which you submit this checklist may ask you to explain your answers or provide additional information reasonably related to determining if there may be significant adverse impact.

Use of checklist for nonproject proposals:

Complete this checklist for nonproject proposals, even though questions may be answered *does not apply*. **IN ADDITION**, complete the **SUPPLEMENTAL SHEET FOR NONPROJECT ACTIONS** (part D).

For nonproject actions, the references in the checklist to the words *project, applicant,* and *property or site* should be read as *proposal, proposer,* and *affected geographic area,* respectively.

A. BACKGROUND

1. Name of proposed project, if applicable: **Mercer Island Country Club**

2. Name of applicant: **Mercer Island Country Club**
8700 SE 71st St.
Mercer Island, WA 98040

3. Address and phone number of applicant and contact person:
Applicant: **Mercer Island Country Club**
8700 SE 71st St.
Mercer Island, WA 98040
Agent: **R.W. Thorpe & Associates**
705 2nd Ave. Suite 710
Seattle, WA 98104
Contacts: **Robert Thorpe, AICP**
Jennifer Dischinger, ASLA

4. Date checklist prepared: **December 13, 2004**

5. Agency requesting checklist: **City o f Mercer Island**

6. Proposed timing or schedule (*including phasing, if applicable*):

7. Do you have any plans for future additions, expansion, or further activity related to or connected with this proposal? If yes, explain.
This is a conditional use application for the country club. Approximately 8,753 sq. ft. floor area will comprise the second floor addition on the locker building (with 300 sq. ft. of deck on the second floor) of building area will be added as part of a 2nd story addition for new lockers/ athletic use above the existing locker building footprint. A remodel and reconfiguration of the roof above the existing lounge is also proposed and 612 square feet of the existing entry canopy will be removed and 400 sq. ft. of new canopy is proposed. Three new fire hydrants, a big toy play area and a screening wall around the existing dumpster are also proposed. The daycare is proposed to be moved from the north side of the building to the east side of the building. Future applications and review after conditional use application include City of Mercer Island Planning Commission Review, Design Commission Review and associated building permit applications.

8. List any environmental information you know about that has been prepared, or will be prepared, directly related to this proposal.

9. Do you know whether applications are pending for governmental approvals of other proposals directly affecting the property covered by your proposal? If yes, explain.
No other applications for other proposals are pending governmental approvals to the knowledge of the applicant.

10. List any government approvals or permits that will be needed for your proposal, if known. **Conditional use approval, building permits.**

11. Give brief, complete description of your proposal, including the proposed uses and the size of the project and site. There are several questions later in this

checklist that ask you to describe certain aspects of your proposal. You do not need to repeat those answers on this page. (Lead agencies may modify this form to include additional specific information on project description).

The subject site is 242,833 square feet (5.57 acres). There is approximately 82,345 gross square feet of building area on the site. One building that includes the existing locker rooms is 12,077 square feet building of wood frame and masonry construction and was built in five phases between 1964 and 1993. There are also two tennis buildings of wood frame construction. One building was built in 1976 and is 23,430 square feet. The other tennis building was built in 1983 and is 26,460 square feet. (King County Assessor) This is a proposal for adding a 2nd floor (8,453 sq. ft. floor area and 300 sq. ft. deck) to the existing locker building on existing lot cover at the Mercer Island Country Club. The existing 612 sq. ft. entry canopy will be removed and a new 400 sq. ft. entry canopy is proposed. Relocating the daycare area is also proposed as well as a new big toy play structure. A small area is proposed for additional landscaping to add upgrades to plant materials and provide seasonal color and a new screen wall around the existing dumpster is proposed. The proposal also includes repainting the existing structure and changing the color of the existing club outdoor sign and providing three new fire hydrants.

Location of the proposal. Give sufficient information for a person to understand the precise location of your proposed project, including a street address, if any, and section, township, and range, if known. If a proposal would occur over a range of area, provide the range or boundaries of the site(s). Provide a legal description, site plan, vicinity map, and topographic map, if reasonably available. While you should submit any plans required by the City, you are not required to duplicate maps or detailed plans submitted with the application related to this checklist.

The site is addressed as 8700 SE 71st Street, Mercer Island WA 98040.
The site is located in Section 36, Township 24 North, Range 4 E. The site is located south of Southend Shopping Center (QFC / Starbucks, etc.) east of Islander Middle School and north of Lakeridge Elementary School. Pioneer Park (a 113 acre park covering three 40 acre parcels) lies north, northeast and east of the existing Mercer Island Country Club

B. ENVIRONMENTAL ELEMENTS

1. Earth

a. General description of the site (*circle one*): Flat, rolling, hilly, steep slopes, mountainous, other: _

b. What is the steepest slope on the site (*approximate percent slope*)? ±5%

c. What general types of soils are found on the site (*for example, clay, sand, gravel, peat, muck*)? If you know the classification of agricultural soils, specify them and note any prime farmland. **AmB Arents, Alderwood material, 0-6 % slopes. This soil is moderately well drained. Permeability in the upper, distributed soil material is moderately rapid to moderately slow, depending on its compaction during construction. Available water capacity is low. Runoff is slow and the erosion hazard is slight. This soil is used for urban development. (USDA King County Soil Survey, 1972) (Mercer Island Environmental Factors Study 1973)**

d. Are there surface indications or history of unstable soils in the immediate vicinity? If so, describe. **None known.**

e. Describe the purpose, type, and approximate quantities of any filling or grading proposed. Indicate source of fill. **None proposed.**

f. Could erosion occur as a result of clearing, construction, or use? If so, generally describe. **Unlikely because the proposed construction / remodel area is over existing building footprint.**

g. About what percent of the site will be covered with impervious surfaces after project construction (*for example, asphalt or buildings*)? **The existing lot cover is ±70.5% per Erickson McGovern site plan.**

h. Proposed measures to reduce or control erosion, other impacts to the earth, if any: **N/A**

2. Air

a. What types of emissions to the air would result from the proposal (*ie, dust, automobile, odors, industrial wood smoke*) during construction and when the project is completed? If any, generally describe and give approximate quantities if known.
Building/ remodeling activities will generate some emissions typical of a club house upgrade.

b. Are there any off-site sources of emissions or odor that may affect your proposal? If so, generally describe.
There are no off-site sources of emissions or odor that would adversely affect the proposal.

c. Proposed measures to reduce or control emissions or other impacts to air, if any: **Short term emissions resulting from future construction activities could be controlled through the use of common dust-suppression techniques.**

3. Water

a. Surface

1) Is there any surface water body on or in the immediate vicinity of the site (*including year-round and seasonal streams, saltwater, lakes, ponds, wetlands*)? If yes, describe type and provide names. If appropriate, state what stream or river it flows into. **None**

2) Will the project require any work over, in, or adjacent to (*within 200 feet*) the described waters? If yes, please describe and attach available plans. **No**

3) Estimate the amount of fill and dredge material that would be placed in or removed from surface water or wetlands and indicate the area of the site that would be affected. Indicate the source of fill material.
None

4) Will the proposal require surface water withdrawals or diversions? Give general description, purpose, and approximate quantities if known.
No

5) Does the proposal lie within a 100-year floodplain? If so, note location on the site plan. **No. (Source FEMA map 1989)**

6) Does the proposal involve any discharges of waste materials to surface waters? If so, describe the type of waste and anticipated volume of discharge. **No**

b. Ground

1) Will ground water be withdrawn, or will water be discharged to ground water? Give general description, purpose, and approximate quantities if known. **No**

2) Describe waste material that will be discharged into the ground from septic tanks or other sources, if any (*for example, domestic sewage, industrial, containing the following chemicals..., agricultural, etc*). Describe the general size of the system, the number of such systems, the number of houses to be served (*if applicable*), or the number of animals or humans the system(s) are expected to serve. **The site is currently served by public sewer system.**

c. Water Runoff (*including storm water*)

1) Describe the source of runoff (*including storm water*) and method of collection and disposal, if any (*include quantities, if known*). Where will this water flow? Will this water flow into other waters? If so, describe.
Stormwater runoff is directed to drainlines and catch basins used to regulate and channel water flow.

2) Could waste materials enter ground or surface waters? If so, generally describe. **None anticipated**

d. Proposed measures to reduce or control surface, ground, and runoff water impacts, if any: **None proposed and no change in existing vehicle use area or lot cover proposed.**

4. Plants

a. Check or circle types of vegetation found on the site:

_x_ deciduous tree: alder, maple, aspen, other
_x_ evergreen tree: fir, cedar, pine, other
_x_ shrubs
_x_ grass/ lawn
___ pasture
___ crop or grain
___ wet soil plants: cattail, buttercup, bullrush, skunk cabbage, other
___ water plants: water lily, eelgrass, milfoil, other
_x_ other types of vegetation. **Mature landscaping.**

b. What kind and amount of vegetation will be removed or altered?
None anticipated

Adding vegetation per landscape plan SKB 2/15/05

c. List threatened or endangered species known to be on or near the site.
None known

d. Proposed landscaping, use of native plants, other measures to preserve or enhance vegetation on the site, if any: **Existing landscaping will remain and a small amount of landscaping with seasonal color will be added to the existing landscape area.**

5. Animals

a. Circle any birds and animals which have been observed on or near the site or are known to be on or near the site:

birds: **hawk**, heron, eagle, **songbirds**, other:
mammals: deer, bear, elk, beaver, other: **raccoons**
fish: bass, salmon, trout, herring, shellfish, other:

b. List any threatened or endangered species known to be on or near the site.
None known

c. Is the site part of a migration route? If so, explain.
No

d. Proposed measures to preserve or enhance wildlife, if any:
N/A

6. Energy and Natural Resources.

a. What kinds of energy (*electric, natural gas, oil, wood stove, solar*) will be used to meet the completed project's energy needs? Describe whether it will be used for heating, manufacturing, etc. **Gas is the primary heating source for the existing building and pool. Electric split system heat pumps are also currently in use. The energy source for the remodel and modernization will remain both gas and electric for heating and cooling.**

b. Would your project affect the potential use of solar energy by adjacent properties? If so, generally describe. **No**

c. What kinds of energy conservation features are included in the plans of this proposal? List other proposed measures to reduce or control energy impacts, if any: **Windows on south side of building have solar access.**

7. Environmental Health

a. Are there any environmental health hazards, including exposure to toxic chemicals, risk of fire and explosion, spill, or waste, that could occur as a result of this proposal? If so, describe. **None**

1) Describe special emergency services that might be required.

2) Proposed measures to reduce or control environmental health hazards, if any:

b. Noise

1) What types of noise exist in the area which may affect your project (*for example, traffic, equipment, operation, other*)?
Existing automobile noise from neighborhood not anticipated to affect the existing club use and proposal.

2) What types and levels of noise would be created by or associated with the project on a short-term or a long-term basis (for example: traffic, construction, operation, other)? Indicate what hours noise would come from the site.
Future construction noise on the subject site resulting from building improvements would occur on a short term basis (ie 9-12 months) on site between the hours of 7:00 a.m. to 7:00 p.m. weekdays.

3) Proposed measures to reduce or control noise impacts, if any: **None proposed.**

8. Land and Shoreline Use

a. What is the current use of the site and adjacent properties?
The site is a country club with tennis courts, swimming pool, buildings and parking. The adjacent land uses to the north is residential and commercial (planned business zone). The residential area to the north was added recently replacing the 75' buffer zone around the planned business (commercial) zone. (Formerly the open space was a transition area between the Mercer Island Country Club and the business uses, fire station and Pioneer park. The adjacent land use to the south and west is residential. The adjacent land use to the east is Pioneer Park (vacant residential-Mercer Island Conservation Trust). To the west of the site is the Islander Middle School, playfields and to the southwest is Lakeridge Elementary.

b. Has the site been used for agriculture? If so, describe. **(Possible 80 years ago)**

c. Describe any structures on the site. **There is approximately 82,345 gross square feet of building area on the site. One building that includes the existing locker rooms is 12,077 square feet building of wood frame and masonry construction and was built in five phases from 1964- 1993. There are also two tennis buildings of wood frame construction. One building was**

built in 1976 and is 23,430 square feet. The other tennis building was built in 1983 and is 26,460 square feet. (King County Assessor) There are 93 existing parking spaces on site.

d. Will any structures be demolished? If so, what? **600 sq. ft. of the existing entry canopy with be removed and 400 sq. ft. of entry canopy is proposed. A new big toy play structure and new screening wall around the existing dumpster is also proposed.**

e. What is the current zoning classification of the site?
R-9.6

f. What is the current comprehensive plan designation of the site?
Residential

g. If applicable, what is the current shoreline master program designation of the site?
N/A

h. Has any part of the site been classified as an *environmentally sensitive* area? If so, specify. **No.**

i. Approximately how many people would reside or work in the completed project? **The country club has 14 staff members. Employees of the club also include life guards, maintenance staff, snack bar attendant and child care providers- mostly part time.**

j. Approximately how many people would the completed project displace? **Zero.**

k. Proposed measures to avoid or reduce displacement impacts, if any:
None required.

l. Proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, if any: **None proposed.**

9. Housing

a. Approximately how many units would be provided, if any? Indicate whether high, middle, or low-income housing. **N/A**

b. Approximately how many units, if any, would be eliminated? Indicate whether high, middle, or low-income housing. **N/A**

c. Proposed measures to reduce or control housing impacts, if any: **None**

10. Aesthetics

a. What is the tallest height of any proposed structure(s), not including antennas; what is the principal exterior building material(s) proposed? **Maximum of new 2nd floor addition will be 30' above existing finished grade. Panel siding will be of painted fiber cement board. Horizontal lap siding will be either pre-finish metal or painted fiber cement board.**

b. What views in the immediate vicinity would be altered or obstructed?

Views of the existing country club would remain substantially similar after the proposed addition of ±8,753 sq. ft.

c. Proposed measures to reduce aesthetic impacts, if any:
Landscaping with seasonal color and new building materials.

and new enclosure for trash area SKB 2/15/05

11. Light and Glare
    a. What type of light or glare will the proposal produce? What time of day would it mainly occur? **Very little reflection.**

    b. Could light or glare from the finished project be a safety hazard or interfere with views? **Not anticipated.**

    c. What existing off-site sources of light or glare may affect your proposal? **None**

    d. Proposed measures to reduce or control light and glare impacts, if any:
    None proposed.

12. Recreation
    a. What designated and informal recreational opportunities are in the immediate vicinity? **Besides the private country club's recreational amenities there is Pioneer Park east of the site and Pioneer Park Youth Club to the north of the site.**

    b. Would the proposed project displace any existing recreational uses? If so, describe. **No- Proposal will add and upgrade the existing recreational use and services of the country club.**

    c. Proposed measures to reduce or control impacts on recreation, including recreation opportunities to be provided by the project or applicant, if any:
    N/A

13. Historic and Cultural Preservation
    a. Are there any places or objects listed on, or proposed for, national, state, or local preservation registers known to be on or next to the site? If so, generally describe. **None known.**

    b. Generally describe any landmarks or evidence of historic, archaeological, scientific, or cultural importance known to be on or next to the site.
    None known.

    c. Proposed measures to reduce or control impacts, if any: **None**

14. Transportation
    a. Identify public streets and highways serving the site, and describe proposed access to the existing street system. Show on site plans, if any.
    The site is accessed by SE 71st Street between 88th Ave SE (Island Crest Way) and 84th Ave SE. There are two existing curb cuts/ driveways on SE 71st Street.

    b. Is site currently served by public transit? If not, what is the approximate distance to the nearest transit stop? **Route MT 202 Downtown Seattle, and Route MT 204 & 205 South Mercer Island stop at Island Crest Way & SE**

71st Street. Route MT 201 and MT 891 Mercer Island High School stops .2 miles from the country club at SE 68th Street and Island Crest Way.

c. How many parking spaces would the completed project have? How many would the project eliminate? **There are ±93 existing parking spaces. There may be opportunities to add 9-10 spaces through restriping the stalls.**

d. Will the proposal require any new roads or streets, or improvements to existing roads or streets, not including driveways? If so, generally describe. (*indicate whether public or private*). NA

SKB 2/15/05 See traffic study

e. Will the project use (*or occur in the immediate vicinity of*) water, rail, or air transportation? If so, generally describe. **No**

f. How many vehicular trips per day would be generated by the completed project? If known, indicate when peak volumes would occur.

g. Proposed measures to reduce or control transportation impacts, if any: **To be determined.**

15. Public Services

a. Would the project result in an increased need for public services (for example: fire protection, police protection, health care, schools, other)? If so, generally describe.

b. Proposed measures to reduce or control direct impacts on public services, if any. **None proposed**

See traffic study

16. Utilities

a. Circle utilities currently available at the site: <u>electricity</u>, <u>natural gas</u>, <u>water</u>, refuse service, <u>telephone</u>, <u>sanitary sewer</u>, septic system, other.

b. Describe the utilities that are proposed for the project, the utility providing the service, and the general construction activities on the site or in the immediate vicinity which might be needed.

See traffic study

C. SIGNATURE

The above answers are true and complete to the best of my knowledge. I understand that the lead agency is relying on them to make its decision.

Signature: Jennifer K. Dischinger RW Thorpe & Assoc Inc

Date Submitted: 12/29/04

PROJECT NOTES SHEET

APPLICATION TYPE _____ APPLICATION NUMBER _____
ADDRESS(ES) _____
APPLICANT(S) _____

DATE	STAFF	NOTES
1/4/05	SKB	applied
1/11/05	SKB	letter of incomplete app - sent to app, owner, arch.
1/18/05	SKB	addn'l info received
1/11/05	SKB	~~Bulletin~~ 60 CI
2/1/05	"	addn'l inf received
2/8/05	"	Bulletin
2/18/05	"	PN post + mail
3/2/05	"	PC Hearing - approved CUP
2/10/05	"	Threshold Det

CITY OF MERCER ISLAND
PLANNING COMMISSION
STAFF REPORT

Agenda Item: 1
March 20, 2014

Project Numbers:	CUP13-001 (DSR13-022, DEV13-054, and SEP13-041)
Description:	A request for a conditional use permit (CUP) for the construction of a new two story, 8,185 square foot clubhouse upon demolition of the existing clubhouse at the Mercerwood Shore Club. Modifications will also be made to the club grounds and parking areas. This proposal is subject to design review for major new construction under MICC 19.12 (DSR13-022) and review under the State Environmental Policy Act (SEPA) (SEP13-041). The applicant has also applied for an impervious surface deviation (DEV13-054).
Applicant:	Adrienne Watkins and Ed Weinstein Weinstein/AU 121 Stewart Street, Suite 200 Seattle, WA 98121
Owner:	Mercerwood Shore Club 4150 East Mercer Way Mercer Island, WA 98040
Site Address:	4150 East Mercer Way, Mercer Island WA 98040; Identified by King County Assessor tax parcel numbers 182405-9001 and 413190-0075
Zoning District:	R-9.6
Staff Recommendation:	Staff recommends approval of the conditional use permit, subject to the recommended conditions of preliminary approval.
Staff Contact:	Shana Crick, Senior Planner
Exhibits:	1. Preliminary Plan Set prepared by Weinstein/AU and received by the City of Mercer Island Development Services Group on February 25, 2014 [including Cover Sheet (Sheet G001); Land Use Diagrams (Sheets G101 and G102); Scope of Work (Sheet G103); Parking Diagram (Sheet G104); Boundary and Topographic Survey (Sheets Sheets 1 – 3); Demo Site Plan (Sheet D100); Paving and Grading Plan (Sheet C1); Utility Plan (Sheet C2); Landscape Plan (Sheet L101); Plant List (Sheet L102); Enlarged Site Plan (Sheet AS001); Lower Level (Sheet A101); Main Level (Sheet A102); Roof Level *Sheet A103); North Elevation (Sheet A301); South Elevation (Sheet A302); East Elevation (Sheet A303); and West Elevation (Sheet A304)] 2. Development Application received by the City of Mercer Island Development Services Group on December 10, 2013 3. Conditional Use Project Supplemental Information received by the City of Mercer Island Development Services Group on December 10, 2013 [including Criteria Statement; Verified Statement; SEPA Checklist; Geotechnical Report and Statement of Risk; Traffic and Parking Analysis; and Existing Conditions Photograph)

4. Notice of Application for CUP13-001, DSR13-022, DEV13-054, and SEP13-041 Issued by the City of Mercer Island on January 21, 2014
5. Notice of Open Record Public Hearing for CUP13-001 Issued by the City of Mercer Island on February 18, 2014
6. State Environmental Policy Act (SEPA) Determination of Nonsignificance for SEP13-041 Issued by the City of Mercer Island on February 18, 2014
7. Notice of Decision for Impervious Surface Deviation DEV13-054 Issued by the City of Mercer Island on February 18, 2014
8. Lighting Site Plan prepared by Weinstein/AU and received by the City of Mercer Island Development Services Group on December 10, 2013
9. Re-Notice of Open Record Public Hearing for CUP13-001 Issued by the City of Mercer Island on March 10, 2014

I. SUMMARY

The applicant has requested a conditional use permit to construct a new two story, 8,185 square foot clubhouse upon demolition of the existing clubhouse at the Mercerwood Shore Club, which is located at 4150 East Mercer Way. Modifications will also be made to the club grounds and parking areas. The conditional use permit is required to allow for the continuation of the existing use of the site as a noncommercial recreational area. The Mercerwood Shore Club was established prior to the incorporation of Mercer Island, and has been subject to four previous conditional use permits to modify the site (CUP7706-001, CUP9106-024, CUP9202-052, and CUP9812-116).

The site currently contains a clubhouse, tennis courts, a pool with a temporary bubble, an access drive with parking, a pier, facilities for boat moorage, and several accessory structures. The lots slope down from the west to the east and are bounded by East Mercer Way and single family residential properties to the north and west; by Lake Washington and single family residences to the east; and single family residences to the south. The 233,455 square foot site currently contains approximately 107,623 square feet of impervious surfaces (46.1 percent lot coverage). As proposed, the site would contain 104,934 square feet of impervious surfaces (44.9 percent lot coverage). On February 18, 2014, the City issued an Impervious Surface Deviation (DEV13-054), to allow up to the proposed lot coverage of 45 percent. The project proposes 105 parking stalls (91 compact and 14 standard stalls). This is increased from the existing 94 stalls on site (Exhibit 1, Sheet G104).

On December 10, 2013, the applicant submitted a conditional use permit application along with proposed site plans, impervious surface calculations, and a written narrative of the proposed project. The conditional use permit was submitted in conjunction with applications for design review, an impervious surface deviation, and a SEPA Threshold Determination. Additional information for the conditional use permit was submitted on February 25, 2014. The application was determined complete on January 7, 2014.

Public Notice of Application for the conditional use permit, design review, and impervious surface deviation along with notice of SEPA Determination of Nonsignificance (DNS) Likely was published in the City's Weekly Permit Bulletin, mailed to parties within 300 feet of the subject site, and posted on the subject property on January 21, 2014 (Exhibit 4). A 14-day public comment period that extended from January 21, 2014 through February 4, 2014 was provided with the Notice of Application. No written comments were received during the 14-day public comment period.

Staff issued a Notice of Open Record Public Hearing for the conditional use permit on February 18, 2014, which was published in the City's Weekly Permit Bulletin, mailed to parties within 300 feet of the subject site, and posted on the subject property (Exhibit 5). The open record hearing is scheduled to be held in front of the Planning Commission on March 5, 2014. A State Environmental Policy Act (SEPA) Threshold

Determination of Non-Significance (MDNS) was issued by the City of Mercer Island on February 18, 2014 for file number SEP13-041 (Exhibit 6).

Due to a lack of quorum for the open record public hearing scheduled for March 5, 2014, the open record public hearing was rescheduled for a special Planning Commission meeting on March 20, 2014. Re-Notice of the Open Record Public Hearing was issued for the conditional use permit on March 10, 2014, which was published in the City's Weekly Permit Bulletin, mailed to parties within 300 feet of the subject site, and posted on the subject property (Exhibit 9). The open record hearing will now be held in front of the Planning Commission on March 20, 2014.

II. FINDINGS OF FACT

Mercer Island City Code (MICC) 19.02.010(C) and 19.15.020(G)(3) provide the criteria for approval of a conditional use permit (CUP). Proposals subject to a CUP must meet also all applicable requirements within MICC 19.02, as well as all other applicable legislation. The following is an analysis of the criteria for approval.

CRITERIA SPECIFIC TO CONDITIONAL USE PERMITS

MICC 19.02.010(C) states that certain uses are authorized within single family residential zones upon the issuance of a conditional use permit.

A. ***MICC 19.02.010(C)(4). Conditional Uses.*** *The following uses are permitted when authorized by the issuance of a conditional use permit when the applicable conditions set forth in this section and in MICC 19.15.020(G)(3) have been met:*

4. Noncommercial recreational areas, subject to the conditions contained in subsection (A)(6) of this section.

Staff Analysis:
The existing and proposed use of the subject properties is a noncommercial recreational area, which is defined by MICC 19.16.010(R) as "a recreational area maintained and operated by a nonprofit club or organization with specified limitations upon the number of members or limited to residents of a block, subdivision, neighborhood, community or other specific area of residence for the exclusive use of members and their guests." Therefore, the proposal is subject to the requirements of MICC 19.02.010(A)(6) as detailed below.

B. MICC 19.02.010(A)(6). Uses Permitted in Zones R-8.4, R-9.6, R-12, and R-15.

6. Public park subject to the following conditions:

a. Access to local and/or arterial thoroughfares shall be reasonably provided.

Staff Analysis:
The subject properties have direct access onto West Mercer Way, which is designated as a Secondary Arterial within the Transportation Element of the Mercer Island Comprehensive Plan (Figure 1).

b. Outdoor lighting shall be located to minimize glare upon abutting property and streets.

Staff Analysis:
Details for proposed outdoor lighting are shown in Exhibit 8. The Design Commission requires a full lighting plan for design review. The Design Commission will verify that the proposed lighting is located to minimize glare as specified above.

c. Major structures, ballfields and sport courts shall be located at least 20 feet from any abutting property.

Staff Analysis:

All major structures, which include the proposed clubhouse as well as the existing tennis courts and pool, are located a minimum of 20 feet from all abutting properties.

d. If a permit is required for a proposed improvement, a plot, landscape and building plan showing compliance with these conditions shall be filed with the city development services group (DSG) for its approval.

Staff Analysis:
The plans submitted (Exhibit 1) include a plot plan, proposed building plans, and landscaping plans. However, a building permit will be required for this proposal. At the time of building permit application, final plot and building plans shall be submitted to the City for review. Additionally, landscaping will be reviewed by the Design Commission as part of the project's design review.

C. MICC 19.15.020(G)(3). Conditional Use Permit.

a. The permit is consistent with the regulations applicable to the zone in which the lot is located;

Staff Analysis:
The proposal meets all applicable zoning requirements for the proposed conditional use and for the R-9.6 zoning designation that are detailed within MICC 19.02.010(A)(6), MICC 19.02.010(C)(4), and MICC 19.02.020. An analysis for conformance with zoning requirements is incorporated into this staff report.

b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;

Staff Analysis:
The proposed use is a noncommercial recreational area, which is the same as the present use of the site. This is also an established conditional use that is allowed under MICC 19.02.010(C)(4). The applicant is proposing modifications to the existing site, but not a change in the use or its intensity. The new clubhouse will be approximately 3,000 square feet larger than the existing clubhouse. However, the new clubhouse will be constructed in nearly the same location as the existing structure. The new building will not change the character of surrounding development, as it is the same type of structure and will be used for the same functions as the current clubhouse. Also, the new clubhouse does not increase the number of families allowed to join the club (currently set at 375), so there will not be an increase to traffic on adjacent streets. The same number of people will frequent the club as do presently.

c. The use is consistent with policies and provisions of the comprehensive plan; and

Staff Analysis:
Goal 9.4 within the Land Use Element of the Comprehensive Plan states:

Social and recreation clubs, schools, and religious institutions are predominantly located in single family residential areas of the island. Development regulation should reflect the desire to retain viable and healthy social, recreational, educational, and religious organizations as community assets which are essential for the mental, physical and spiritual health of Mercer Island.

The proposal satisfies this provision of the Comprehensive Plan, as it facilitates the retention of a viable recreational club within the City. Furthermore, approval of the proposal would satisfy Goal 11.5 of the Land Use element, which stipulates, "Future land use decisions should encourage the retention of private club recreational facilities as important community assets."

d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance.

Staff Analysis:
The existing use of the site is the same as the proposed use. The area of the new clubhouse (8,185 square feet) is larger than the existing clubhouse (approximately 5,000 square feet), but it does not appreciably enlarge the extent of development on the site. The footprint for the new building is in nearly the same location as the existing building. Consequently, the proposed clubhouse does not appear to constitute a nuisance. The Mercerwood Shore Club, which is a noncommercial recreational area, provides a service to the nearby residential area that is compatible with existing and proposed uses. By providing communal recreational facilities, it likely decreases the number of individual homes with their own facilities (swimming pools, boat moorage, tennis courts, etc.), thus providing a central location for the activity and focusing the impacts instead of multiplying them throughout the area. Conditions of approval are recommended within this staff report.

OTHER APPLICABLE LAND USE REQUIREMENTS

D. MICC 19.02.010(D). Building Height Limit. *No building shall exceed 30 feet in height above the average building elevation to the top of the structure except that on the downhill side of a sloping lot the building may extend to a height of 35 feet measured from existing grade to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.; provided, the roof ridge does not exceed 30 feet in height above the average building elevation. Antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces and other similar appurtenances may extend to a maximum of five feet above the height allowed for the main structure.*

Staff Analysis:
Sheet G102 provides average building elevation (ABE) calculations for the project and gives 103.5 feet as the ABE. The elevations on Sheets A301 – A304 of Exhibit 1 demonstrate that the proposed clubhouse will not exceed the maximum allowed height of 30 feet above the average building elevation.

E. MICC 19.02.020(D)(1). Lot Coverage.

1. Maximum Impervious Surface Limits for Lots. The total percentage of a lot that can be covered by impervious surfaces (including buildings) is limited by the slope of the lot for all single-family zones as follows:

Lot Slope	Lot Coverage (limit for impervious surfaces)
Less than 15%	***40%****
15% to less than 30%	35%
30% to 50%	30%
Greater than 50% slope	20%

Staff Analysis:
Sheet G101 states that the existing slope on the site is 14.8%, allowing for a maximum impervious coverage of 40% across the subject properties. The existing coverage is 46.1% while a final coverage of 44.9% is proposed. On February 18, 2014, the applicant was granted an impervious surface deviation (see DEV 13-054) permitting a maximum coverage of 45% for the properties (Exhibit 7). The proposed project appears to conform to this requirement.

III. RECOMMENDATION

Based on the analysis and findings included herein, staff recommends to the Design Commission the following:

Recommended Motion: Move to grant the Mercerwood Shore Club approval of a conditional use permit for a noncommercial recreational area at 4150 West Mercer Way allowing for: 1) the construction of a new two story, 8,185 square foot clubhouse upon demolition of the existing clubhouse; and 2) modifications to the existing club grounds and parking areas, as shown in Exhibit 1 of the March 20, 2014 Planning Commission meeting packet, and as conditioned by the March 20, 2014 staff report to the Planning Commission.

First Alternative Motion: Move to grant the Mercerwood Shore Club approval of a conditional use permit for a noncommercial recreational area at 4150 West Mercer Way allowing for: 1) the construction of a new two story, 8,185 square foot clubhouse upon demolition of the existing clubhouse; and 2) modifications to the existing club grounds and parking areas, as shown in Exhibit 1 of the March 20, 2014 Planning Commission meeting packet, and as conditioned by the March 20, 2014 staff report to the Planning Commission, provided that Exhibit 1 shall be modified as follows: [describe modifications].

Second Alternative Motion: Move to deny the Mercerwood Shore Club approval of a conditional use permit for a noncommercial recreational area at 4150 West Mercer Way.

IV. RECOMMENDED CONDITIONS OF APPROVAL

It is hereby recommended that the following conditions shall be binding on the "Applicant," which shall include owner or owners of the property, heirs, assign and successors.

1. If the applicant has not submitted a complete application for a building permit within one year from the date of the notice of decision, the conditional use permit approval shall expire. The applicant is responsible for knowledge of the expiration date.
2. A Building Permit and other associated permits from the City of Mercer Island are required for this project.
3. Design review by the City of Mercer Island Design Commission is required for this project.
4. The proposed and future development of this property shall comply with the zoning district, or as amended at the time of development.
5. The removal of native vegetation is to be minimized and limited to active construction areas.
6. The Mercerwood Shore Club shall not change the existing membership restriction to increase the number of allowed families to greater than 375 without applying for a new Conditional Use Permit.

CITY OF MERCER ISLAND

COMMUNITY PLANNING & DEVELOPMENT
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PHONE: 206.275.7605 | www.mercergov.org

PLANNING COMMISSION

To: Planning Commission

From: Robin Proebsting, Senior Planner

Date: November 14, 2019

RE: ZTR19-004 (Wireless Communication Facility Code Update)

SUMMARY

On January 15, 2019, the City Council unanimously passed Emergency Ordinance No. 19C-02 (excerpt in Attachment 1), establishing Interim Design and Concealment Standards for Small Cell Facilities deployments. The emergency ordinance was adopted in response to the Federal Communications Commission's (FCC) issuance of a "Declaratory Ruling and Third Report and Order" ("New Rules") related to the deployment of small cell facilities, which became effective January 14, 2019. The New Rules resulted in significant changes to the approach the City must use to regulate small cell deployment. Following adoption of the interim regulations, the City Council directed staff to work with the Planning Commission to develop new "permanent" regulations governing small cell facilities.

Since the City's regulations pertaining to wireless communication facilities, which include facilities such as cell phone towers and antennas underwent their last major update in 2011, there have been two major acts of federal rule-making by the FCC. An update to the City's wireless communication facility standards is necessary to remain consistent with federal rules.

On November 20, 2019, staff intend to provide the Planning Commission with background information and develop a recommended scope of the proposed amendments for City Council confirmation in early 2020.

BACKGROUND

Wireless communication facilities include different types of infrastructure, such as cell towers and antennas, that support wireless communication. As wireless technology has evolved over time, City code standards have been expanded and updated to regulate wireless communication facilities. The most recent type of technology developed to support wireless communications is "small wireless facilities" or "small cells", which are antenna units with dimensions typically of about 23" x 12" x 7" or a 29" cylinder with a radius of 6 inches that contain radios and antennas that transmit cell phone and data signals. Small cell "facilities" also include equipment designed to allow the small cell antenna to function, including equipment cabinets and cabling. Typically, these units are attached to existing utility poles within the right-of-way.

As is the case with some areas of regulation, the City is pre-empted by the federal government in the breadth of scope and substance of standards it may regulate. A summary of the latest rules from the

Federal Communications Commission (FCC) affecting cities' ability to regulate wireless facilities is summarized in Attachment 2 and the full declaratory ruling and order is in Attachment 3.

The existing City code is inconsistent with federal rules and will require an update. Staff have identified three general categories of updates that may be considered as part of the update, and have summarized them below with examples:

1. *Ensure compliance with newest FCC rules*
    a. Add a definition for the term "small wireless facility" that is consistent with FCC rules;
    b. Review standards to avoid effectively prohibiting small wireless facilities;
    c. Review and revise interim regulations related to the design of small cell facilities to ensure that the design standards adequately protect Mercer Island's character. The City anticipates reviewing design standards related to noise, undergrounding power, co-location, and possibly requiring hollow poles with internal equipment and antenna mounts;
2. *Update existing WCF regulations*
    a. Update Chapter 19.15 MICC - Administration to reflect the review timelines set forth if in latest FCC rules;
    b. Review terms used in existing code and those used in federal rules to ensure alignment and precision in terms, e.g. "base station", "antenna", "small wireless facility", "wireless facility";
    c. Specify the circumstances under which the City will require radiofrequency reports to be consistent with federal rules;
3. *Incorporate issues raised by the community*
    a. If additional topics are identified by the Planning Commission, these may be added to the proposed scope of the update

NEXT STEPS

Review the attached materials and provide a recommendation to staff on the scope of the update to the wireless communication facilities code. The Planning Commission recommendation may be taken to the City Council for confirmation. The substance of the code update will begin in early 2020.

ATTACHMENTS

1. Excerpt from Ord. 18C-08
2. FCC Fact Sheet: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, dated September 5, 2018
3. 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

CITY OF MERCER ISLAND
ORDINANCE NO. 18C-08

AN ORDINANCE OF THE CITY OF MERCER ISLAND AMENDING MERCER ISLAND CITY CODE TITLE 19 MICC REGARDING CODE AMENDMENTS TO CLARIFY LAND USE REVIEW AND APPROVAL PROCEDURES

WHEREAS, the Mercer Island City Code (MICC) establishes procedures for the processing of permits as part of its development regulations that are intended to result in the implementation of the Mercer Island Comprehensive Plan pursuant to RCW 36.70A.040; and,

WHEREAS, the Mercer Island City Council determined that amendments to the permit processing procedures were necessary to ensure that permit processing was clear to staff and to the public and was occurring consistent with the provisions of the Mercer Island Comprehensive Plan; and,

WHEREAS, the Mercer Island City Council directed the Planning Commission to periodically review Title 19 of the Mercer Island City Code and recommend amendments to clarify the regulations to the City Council; and,

WHEREAS, on April 16, 2018, a Public Notice of Application was published in the City of Mercer Island Permit Bulletin regarding the code amendment proposal to give public notice of the proposed text amendment; and

WHEREAS, a public comment period was provided from April 16, 2018 through May 16, 2018 to obtain public comments regarding the proposed code amendment; and

WHEREAS, the adoption of procedures related to the processing of permits is exempt from SEPA review pursuant to WAC 197-11-800(19)(a), which states that procedural actions relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment are exempt from SEPA review.

WHEREAS, on March 14, 2018, a Notice of Public Hearing was published in the Mercer Island Reporter, giving public notice of the open record hearing in front of the Planning Commission and encouraging public participation; and

WHEREAS, the Mercer Island Planning Commission held a public hearing on April 18, 2018, and held two public meetings to consider clarifying amendments to the procedural requirements of Title 19 of the Mercer Island City Code; and

WHEREAS, the Washington Department of Commerce granted expedited review of the proposed amendments to the development regulations on August 20, 2018;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MERCER ISLAND, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1: **Adoption of Amendments to Title 19 of the Mercer Island City Code.** The amendments to the Mercer Island City Code as set forth in Attachment "A" to this Ordinance are hereby adopted.

Section 2: **Codification of the Regulations.** The City Council authorizes the Development Services Group Interim Director and the City Clerk to correct scrivener's errors in Attachment A, codify the regulatory provisions of the amendment into Title 19 of the Mercer Island City Code, and publish the amended code.

Section 3: **Interpretation.** The City Council authorizes the Development Services Group Interim Director to adopt administrative rules, interpret, and administer the amended code as necessary to implement the legislative intent of the City Council.

Section 4: **Severability.** If any section, sentence, clause or phrase of this ordinance or any municipal code section amended hereby should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity of any other section, sentence, clause or phrase of this ordinance or the amended code section.

Section 5: **Ratification.** Any act consistent with the authority and prior to the effective date of this ordinance is hereby ratified and affirmed.

Section 6: **Effective Date.** This Ordinance shall take effect and be in force on 5 days after its passage and publication.

PASSED by the City Council of the City of Mercer Island, Washington at its regular meeting on the 17th day of September 2018 and signed in authentication of its passage.

CITY OF MERCER ISLAND

Debbie Bertlin

Debbie Bertlin, Mayor

Approved as to Form:

Kari L. Sand, City Attorney

ATTEST:

Deborah A. Estrada, City Clerk

Date of Publication: 9/26/18

Attachment A

RESIDENTIAL

19.02.030 Accessory dwelling units.

GENERAL REGULATIONS

19.06.040 Wireless communications.

19.06.110 Criteria for approval - conditional use permits, variances, and setback deviations. (New section)

19.06.120 Criteria for approval - design review. (New section)

ENVIRONMENT

19.07.040 Review and construction requirements.

19.07.060 Geologic hazard areas.

19.07.110 Shoreline master program.

SUBDIVISIONS

19.08.010 General provisions for long and short subdivisions.

19.08.020 Application procedures and requirements for long and short subdivisions.

19.08.050 Final plats.

19.08.070 Lot line revisions. (New section)

PROPERTY DEVELOPMENT

19.09.010 Preapplication and intake screening meetings.

TOWN CENTER DEVELOPMENT AND DESIGN STANDARDS

19.11.150 Administration.

DESIGN STANDARDS FOR OUTSIDE TOWN CENTER

19.12.010 General

ADMINISTRATION

19.15.010 Purpose, intent, and roles.

19.15.020 Land use review types.

19.15.030 Legislative actions. (New section)

19.15.040 Summary of reviews and authorities. (New section)

19.15.050 Review procedures.

19.15.060 Preapplication. (New section)

19.15.070 Application.

19.15.080 Determination of Completeness and Letter of Completion (New section)

19.15.090 Public notification. (New section)

19.15.100 Notice of Application (New section)

19.15.110 Notice of Public Hearing (New section)

19.15.120 Request for Information and Extensions (New section)

DEFINITIONS

"Normal Text" is existing code language
"~~Strikethrough Text~~" is existing code language that will be deleted
"<u>Underline Text</u>" is new code language that will be added
"…" represents that existing code language is omitted and will not be amended

GENERAL REGULATIONS

19.06.040 Wireless communications.

A. Town Center, Commercial/Office, Business and Planned Business Zones.

1. Permitted Use. Attached WCFs are permitted in the Town Center, commercial/office, business and planned business zones. WCFs with support structures are permitted in the commercial/office and planned business zone districts, and are not permitted in the Town Center district.

a. Town Center Zone (TC). The height of attached WCFs shall not exceed the height of the structure it is attached to by more than 15 feet. Wireless support structures are not allowed in the TC zone.

b. Commercial/Office Zone (C-O). The height of attached WCFs shall not exceed the height of the structure it is attached to by more than 10 feet. Structures shall not be located within front yard setbacks. Structures in the side and rear yards must be set back from adjacent property a distance equal to the height of the pole. New WCFs may be located on a monopole and shall not exceed 60 feet in height.

c. Planned Business Zone (PBZ) and Business Zone (B). The height of attached WCFs shall not exceed the height of the structure it is attached to by more than 10 feet. Structures shall not be located within the setbacks. New WCFs may be located on a monopole and shall not exceed 60 feet in height.

2. ~~Approval Process/Review~~Performance standards. Wireless communications facilities ~~are subject to review by the code official as outlined~~ shall comply with the standards in subsection E of this section~~ and MICC 19.15.010(E). When there are more than six antennas at one site, the code official may deem that site full and deny additional antennas~~.

B. Public Institution Zone (I-90 Corridor).

1. Permitted Use. Wireless communications facilities, including antenna support structures and equipment cabinets, are permitted. Facilities must meet all of the following criteria:

a. Antennas shall not project more than two feet in height over the nearest I-90 retaining wall, unless they are located on an existing structure, and must be screened as much as possible from public views;

b. Equipment cabinet dimensions shall not exceed 480 cubic feet, should be placed underground if feasible and shall be completely screened from pedestrian and park activities with landscaping;

c. Facilities shall be within 15 feet of the pedestrian side of the I-90 retaining wall, unless they are located on an existing structure. Facilities may be located between the retaining walls in the traffic corridor;

d. Facilities shall be at least 300 feet from any single-family dwelling, unless located between and below the top of the retaining walls in the traffic corridor;

e. Applicants shall demonstrate that they have attempted to collocate on existing structures such as other wireless support structures, rooftops, light poles, utility poles, walls, etc.

2. ~~Approval Process/Review~~Performance Standard and Location.

~~a.~~ Wireless communications facilities shall comply with the standards in ~~are subject to review by the code official as outlined in~~ subsection E of this section. ~~and MICC 19.15.010(E). When there~~

~~are more than six antennas at one site, the code official may deem that site full and deny additional antennas.~~

~~b.~~ No wireless communications facilities are allowed along the ~~Mercer Island Artway~~Greta Hackett Outdoor Sculpture Gallery, defined as the south side of I-90 between 76th Avenue SE and 80th Avenue SE.

C. Island Crest Way Corridor.

1. WCFs are permitted within the right-of-way boundary along Island Crest Way from SE 40th Street to SE 53rd Place and from SE 63rd to SE 68th Street. WCFs must be attached directly to and incline with existing utility poles, with minimal overhang. WCF antennas shall not exceed 96 inches in length, 12 inches in width, and 12 inches in depth. The WCF must not project over the height of the pole, but a pole with a height of up to 70 feet may replace an existing pole or a pole with a height of up to 110 feet may replace an existing pole if the WCF is being collocated with another WCF consistent with subsection F of this section. All WCFs shall be set back from adjacent residential structures by a minimum of 40 feet.

2. Performance Standards. ~~Approval Process/Review. WCFs in the Island Crest right-of-way must be reviewed and approved by the code official in accordance with~~ Wireless communications facilities shall comply with the standards in subsection E of this section. ~~and MICC 19.15.010(E) and be approved by the city engineer. When there are more than six antennas at one site, the code official may deem that site full and deny additional antennas.~~ Proponents ~~must~~ shall provide an agreement with the utility pole owner granting access to the pole.

D. Residential Districts.

…

~~2. Approval Process/Review. Wireless communications facilities are subject to review by the code official as outlined in subsection E of this section and MICC 19.15.010(E). When there are more than six antennas at one site, the code official may deem that site full and deny additional antennas.~~

…

H. When there are more than six antennas at one site, the code official shall deem that site full and deny additional antennas. ~~Height Variance. If strict application of these provisions would preclude an antenna from receiving or transmitting a usable signal, or, if the property owner believes that an alternative exists which is less burdensome to adjacent property owners, an application for a variance may be filed under the provisions of MICC 19.15.020. The code official may grant a height variance upon finding that the criteria in MICC 19.15.020(G)(4) are met, and that one of the following criteria are also met:~~

~~1. Compliance with the above provisions would prevent the antenna from receiving or transmitting a usable signal; and the alternative proposed constitutes the minimum necessary to permit acquisition or transmission of a usable signal; or~~

~~2. The alternative proposed has less impact on adjacent property owners than strict application of the above provisions; or~~

~~3. In Island Crest Park if the parks director supports the variance because there will be a significant benefit to the park by either the retention of trees and/or vegetation or improvement of park uses.~~

I. 6409 eligible facilities. 6409 eligible wireless facilities shall be reviewed in accordance with 47 CFR § 1.40001 Wireless Facility Modifications or as hereafter amended.

J. Removal of WCFs. If a WCF becomes obsolete or unused, it must be removed within six months of cessation of operation at the site.

~~J. Administration and Appeals. Applications to construct WCFs shall follow the permit review procedures in MICC 19.15.020. Appeals shall follow the appeal process outlined in MICC 19.15.020(J).~~

…

19.06.110 Criteria for approval - conditional use permits, variances, and setback deviations.

A. Conditional Use Permits

1. Purpose. A use may be authorized by a conditional use permit for those uses listed in chapters 19.02 and 19.11 MICC. The intent of the conditional use permit review process is to evaluate the particular characteristics and location of certain uses relative to the development and design standards established in this title. The review shall determine if the development proposal should be permitted after weighing the public benefit and the need for the use with the potential impacts that the use may cause.

2. Criteria for conditional use permits that are not located in Town Center. An applicant must demonstrate how the development proposal meets the following criteria.

a. The permit is consistent with the regulations applicable to the zone in which the lot is located;

b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;

c. The use is consistent with policies and provisions of the comprehensive plan; and

d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance.

3. Criteria for conditional use permits that also require design review and are located in Town Center. An applicant must demonstrate how the development proposal meets the following criteria.

a. General Criteria.

(i) The proposed use complies with all the applicable development and design provisions of this chapter.

(ii) The proposed use is consistent with the comprehensive plan.

(iii) The proposed use is harmonious and appropriate in design, character, and appearance with the existing or intended uses within the surrounding area.

~~d. Policy direction provided by the Mercer Island comprehensive plan;~~

~~e. Relevant judicial decisions;~~

~~f. Consistency with other regulatory requirements governing the same or similar situation;~~

~~g. The expected result or effect of the interpretation; and~~

~~h. Previous implementation of the regulatory requirements governing the situation.~~

~~2. The code official may also bring any issue of interpretation before the planning commission for determination. Anyone in disagreement with an interpretation by the code official may also appeal the code official's interpretation to the hearing examiner.~~

19.15.200 Permit review for 6409 eligible wireless communications facilities

A. Timeframe for review. Within 60 days of the date on which an applicant submits a request seeking approval under this section, the city shall approve the application unless it determines that the application is not covered by 47 CFR 1.40001.

B. Tolling of the timeframe for review. The 60-day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the city determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.

1. To toll the timeframe for incompleteness, the city must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (I)(1) of this section.
2. The timeframe for review begins running again when the applicant makes a supplemental submission in response to the city's notice of incompleteness.
3. Following a supplemental submission, the city will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in this paragraph (I)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

C. Failure to act. In the event the city fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the city in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

19.15.210 Revisions.

Revisions of approved permits are as follows. A complete application, filing fees and SEPA checklist, if applicable, shall be filed with the city on approved forms to ensure compliance with development codes and standards except for building permits which shall be reviewed in accordance with Title 17. All revisions shall be subject to the vesting provisions in MICC 19.15.170.

DEFINITIONS

19.16.010 Definitions.

Base station: A structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this subpart or any equipment associated with a tower.

1. The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.
2. The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).
3. The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in this section that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.
4. The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in this section.

…

Change of Use: When a change in the specified land use of a property, building, or portion of a building occurs

…

Eligible facilities request (6409 Wireless Communication Facility): Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

1. Collocation of new transmission equipment;
2. Removal of transmission equipment; or
3. Replacement of transmission equipment

…

Existing Wireless Communication Facility: A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

…

Substantial change, Wireless Communication Facility: A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

1. For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;

a. Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

2. For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

3. For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

4. It entails any excavation or deployment outside the current site;

5. It would defeat the concealment elements of the eligible support structure; or

6. It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.40001(b)(7)(i) through (iv).

…

Tenant Improvement: Changes made to the interior of a commercial or industrial property by its owner to accommodate the needs of a tenant such as floor and wall coverings, ceilings, partitions, air conditioning, fire protection, and security. A tenant improvement is not a change of use of the building or tenant space; however, it often occurs when a new tenant occupies a building.

…

Transmission equipment. Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

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

…

Wireless Communication Facility Tower. Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

September 5, 2018

FCC FACT SHEET[1]

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

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

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

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

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

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

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

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

DECLARATORY RULING AND THIRD REPORT AND ORDER*

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

By the Commission:

TABLE OF CONTENTS

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued….)

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

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

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

II. BACKGROUND

A. Legal Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] 47 U.S.C. § 253(a).

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

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

[12] 47 U.S.C. § 332(c)(7)(B)(i).

[13] 47 U.S.C § 332(c)(7)(B)(ii).

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

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

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

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

[15] 47 U.S.C. § 332(c)(7)(B)(v).

[16] 47 U.S.C. § 332(c)(7)(B)(v).

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

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

[19] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

[28] *Id*.

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

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

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

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

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

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

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

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

B. The Need for Commission Action

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

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

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

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

[37] *See generally Moratoria Declaratory Ruling*.

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

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

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

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

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

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

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

[42] Crown Castle Comments at 7.

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

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

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

[46] *See* Verizon Comments at 7.

[47] *See* Verizon Comments at 35.

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

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

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

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

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

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

[51] GCI Comments at 5-6.

[52] T-Mobile Comments at 21.

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

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

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

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

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

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

III. DECLARATORY RULING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[64] *Id.*

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

[65] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued….)

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

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

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

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

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

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

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

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

B. State and Local Fees

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

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

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

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

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

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

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

[95] *Id*. at 19.

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

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

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

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

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

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

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

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

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

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

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

[104] *Id*. at 1271.

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

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

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

(continued….)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[118] 47 U.S.C. § 253(a).

[119] 47 U.S.C. § 253(b).

[120] 47 U.S.C. § 253(c).

[121] 47 U.S.C. § 253(d).

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

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

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

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

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

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

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

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

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

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

[129] *See supra* note 62.

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

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

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

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

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

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

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

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

[136] *See infra* para. 55.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[159] *Id.*

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

[161] *Id*.

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

[163] Sprint Comments at 17.

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

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

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

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

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

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

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

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

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

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

[171] AT&T Comments at 19.

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

[173] Mobilitie Comments at 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

excavation permits.

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

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

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

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

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

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

[192] 47 U.S.C. § 253(c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[203] *See supra* para. 48.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[216] 47 U.S.C. § 253(b).

[217] 47 U.S.C. § 253(c).

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

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

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

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

(continued….)

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

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

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

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

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Extenet Comments at 37; CTIA Comments at 21-22; Sprint Comments at 38-40; T-Mobile Comments at 8-12; Verizon Comments at 5-8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[235] At a minimum, we conclude that Congress's language has not unambiguously pointed to such a distinction. *See* Letter from Tamara Preiss, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (filed Aug. 23, 2018) (Verizon Aug. 23, 2018 *Ex Parte* Letter). Furthermore, we contrast these statutes with those that do not expressly or impliedly preempt proprietary conduct. *Compare, e.g.*, *American Trucking*, 569 U.S. 641 (finding that FAA Authorization Act of 1994's provision that
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90. Specifically, Section 253(a) expressly preempts certain state and local "legal requirements" and makes no distinction between a state or locality's regulatory and proprietary conduct. Indeed, as the Commission has long recognized, Section 253(a)'s sweeping reference to "state [and] local statute[s] [and] regulation[s]" and "other State [and] local legal requirement[s]" demonstrates Congress's intent "to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services."[236] Section 253(b) mentions "requirement[s]," a phrase that is even broader than that used in Section 253(a) but covers "universal service," "public safety and welfare," "continued quality of telecommunications," and "safeguard[s for the] rights of consumers." The subsection does not recognize a distinction between regulatory and proprietary. Section 253(c), which expressly insulates from preemption certain state and local government activities, refers in relevant part to "manag[ing] the public rights-of-way" and "requir[ing] fair and reasonable compensation," while eliding any distinction between regulatory and proprietary action in either context. The Commission has previously observed that Section 253(c) "makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way;"[237] we conclude here that, as a general matter, "manage[ment]" of the ROW includes any conduct that bears on access to and use of those ROW, notwithstanding any attempts to characterize such conduct as proprietary.[238] This reading, coupled with Section 253(c)'s narrow scope, suggests that Congress's omission of a blanket proprietary exception to preemption was intentional and thus that such conduct can be preempted under Section 253(a). We therefore construe Section 253(c)'s requirements, including the requirement that compensation be "fair and reasonable," as applying equally to charges imposed via contracts and other arrangements between a state or local government and a party engaged in wireless facility deployment.[239] This interpretation is consistent with Section 253(a)'s reference to "State

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

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

Id. (internal citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[250] *See supra* para. 25.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[262] *Id*. at 18.

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

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

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

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

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

IV. THIRD REPORT AND ORDER

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

A. New Shot Clocks for Small Wireless Facility Deployments

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

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

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

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

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

[270] *See infra* para. 102.

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

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

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

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

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

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

[273] 47 U.S.C. § 332(c)(7)(ii).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[283] TIA Comments at 4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Batched Applications for Small Wireless Facilities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[308] *See infra* para. 116.

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

[310] *See infra* para. 139.

additional remedy for our new Small Wireless Facility shot clocks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[333] 47 U.S.C. § 332(c)(7)(B)(v).

[334] WIA Comments at 16.

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

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

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

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

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

[336] T-Mobile Comments at 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Codification of Section 332 Shot Clocks

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

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

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

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

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

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

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

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

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

(continued….)

3. Collocations on Structures Not Previously Zoned for Wireless Use

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

4. When Shot Clocks Start and Incomplete Applications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[404] 47 U.S.C. § 332(c)(7)(B)(ii).

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

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

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

V. PROCEDURAL MATTERS

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

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

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

VI. ORDERING CLAUSES

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

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

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

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

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

FEDERAL COMMUNICATIONS COMMISSION

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

[408] 47 U.S.C. § 332(c)(7)(B)(v).

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Streamlining State and Local Review of Wireless Facility Siting Applications

Part 1 – Practice and Procedure

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

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

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

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

§ 1.6001 Purpose.

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

§ 1.6002 Definitions.

Terms used in this subpart have the following meanings:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1.6003 Reasonable periods of time to act on siting applications

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

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

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

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

(c) *Presumptively reasonable periods of time*.

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

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

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

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

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

(2) *Batching*.

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

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

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

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

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

(2) The number of days from—

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

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

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

(3) The number of days from—

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

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

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

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

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

2. Remove subpart CC.

APPENDIX B
Comments and Reply Comments

Comments

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

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

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

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

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

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

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

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

APPENDIX C

Final Regulatory Flexibility Analysis

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

A. Need for and Objectives of the Rules

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

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

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

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

[411] *See* 5 U.S.C. § 604.

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

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

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

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

[416] *See supra* para. 138.

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

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

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

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

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

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

[418] *Id*.

[419] *See supra* para. 142.

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

[421] *See supra* para. 126.

[422] Smart Cities Coal. Comments at 81.

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

[424] *See supra id*.

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

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

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

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

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

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

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

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

[426] 5 U.S.C. § 604(a)(3).

[427] *See* 5 U.S.C. § 604(a)(3).

[428] 5 U.S.C. § 601(6).

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

[430] 15 U.S.C. § 632.

[431] *See* 5 U.S.C. § 601(3)-(6).

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

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

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

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

[434] 5 U.S.C. § 601(4).

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

[436] 5 U.S.C. § 601(5).

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

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

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

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

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

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

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

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

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

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

[444] *Id.*

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

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

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

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

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

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

[451] *See id*.

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

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

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[452] 47 CFR Part 90.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. According to the Commission's records, a total of approximately 400,622 licenses comprise PLMR users.[467] Of this number there are a total of 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz, which is the range affected by the *Third Report and Order*.[468] The Commission does not require PLMR licensees to disclose information about number of employees, and does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

19. *Multiple Address Systems***.** Entities using Multiple Address Systems (MAS) spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, Profit-based Spectrum use, the size standards established by the Commission define "small entity" for MAS licensees as an entity that has average annual gross revenues of less than $15 million over the three previous calendar years.[469] A "Very small business" is defined as an entity that, together with its affiliates, has average annual gross revenues of not more than $3 million over the preceding three calendar years.[470] The SBA has approved these definitions.[471] The majority of MAS operators are licensed in bands where the Commission has implemented a geographic area licensing approach that requires the use of competitive bidding procedures to resolve mutually exclusive applications.

20. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 Economic Area market area MAS authorizations. The Commission's licensing database also indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service. In 2001, an auction for 5,104 MAS licenses in 176 EAs was conducted.[472] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

21. With respect to the second category, Internal Private Spectrum use consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The closest applicable definition of a

[467] This figure was derived from Commission licensing records as of September 19, 2016. Licensing numbers change on a daily basis. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of PLMR licensees that have fewer than 1,500 employees.

[468] This figure was derived from Commission licensing records as of August 16, 2013. Licensing numbers change daily. We do not expect this number to be significantly smaller as of the date of this order. This does not indicate the number of licensees, as licensees may hold multiple licenses. There is no information currently available about the number of licensees that have fewer than 1,500 employees.

[469] *See Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, 12008 para. 123 (2000).

[470] *Id*.

[471] *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC (June 4, 1999).

[472] *See Multiple Address Systems Spectrum Auction Closes*, Public Notice, 16 FCC Rcd 21011 (2001).

small entity is the "Wireless Telecommunications Carriers (except Satellite)" definition under the SBA rules.[473] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[474] For this category, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year.[475] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[476] Thus under this category and the associated small business size standard, the Commission estimates that the majority of firms that may be affected by our action can be considered small.

22. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high-speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[477]

23. *BRS* - In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[478] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard).[479] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

24. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[480] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding

[473] 13 CFR § 121.201, NAICS Code 517210.

[474] *Id*.

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

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

[477] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[478] 47 CFR § 21.961(b)(1).

[479] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[480] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[481] Auction 86 concluded in 2009 with the sale of 61 licenses.[482] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

25. *EBS* - The Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.[483] The SBA's small business size standard for this category is all such firms having 1,500 or fewer employees.[484] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[485] Of this total, 3,083 operated with fewer than 1,000 employees.[486] Thus, under this size standard, the majority of firms in this industry can be considered small. In addition to Census Bureau data, the Commission's Universal Licensing System indicates that as of October 2014, there are 2,206 active EBS licenses. The Commission estimates that of these 2,206 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[487]

26. *Location and Monitoring Service (LMS).* LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $15 million.[488] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $3 million.[489] These definitions

[481] *Id.* at 8296 para. 73.

[482] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[483] U.S. Census Bureau, 2017 NAICS Definitions, "517311 Wired Telecommunications Carriers,", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2017.

[484] *See* 13 CFR § 121.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICs code as 517311 for Wired Telecommunications Carriers. *See*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[485] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[486] *Id.*

[487] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[488] *Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 CFR § 90.1103.

[489] *Id.*

have been approved by the SBA.[490] An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

27. *Television Broadcasting*. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound."[491] These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.[492] These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having $38.5 million or less in annual receipts.[493] The 2012 Economic Census reports that 751 firms in this category operated in that year.[494] Of that number, 656 had annual receipts of $25,000,000 or less, 25 had annual receipts between $25,000,000 and $49,999,999 and 70 had annual receipts of $50,000,000 or more.[495] Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

28. The Commission has estimated the number of licensed commercial television stations to be 1,377.[496] Of this total, 1,258 stations (or about 91 percent) had revenues of $38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on November 16, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 384.[497] Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. There are also 2,300 low power television stations, including Class A stations (LPTV) and 3,681 TV translator stations.[498] Given the nature of these services, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

29. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations must be included.[499] Our estimate, therefore likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of "small business" requires that an entity not be dominant in its field of

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[490] *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC (Feb. 22, 1999).

[491] U.S. Census Bureau, 2017 NAICS Definitions, "515120 Television Broadcasting," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017+NAICS+Search&search=2017.

[492] *Id*.

[493] 13 CFR § 121.201; 2012 NAICS Code 515120.

[494] U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515120.

[495] *Id*.

[496] *Broadcast Station Totals as of* June 30, 2018, Press Release (MB, rel. Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals Press Release), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[497] *Id*.

[498] *Id.*

[499] *See* 13 CFR § 21.103(a)(1) "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both."

operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and its estimates of small businesses to which they apply may be over-inclusive to this extent.

30. *Radio Stations.* This Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources."[500] The SBA has established a small business size standard for this category as firms having $38.5 million or less in annual receipts.[501] Economic Census data for 2012 show that 2,849 radio station firms operated during that year.[502] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[503] Therefore, based on the SBA's size standard the majority of such entities are small entities.

31. According to Commission staff review of the BIA/Kelsey, LLC's Publications, Inc. Media Access Pro Radio Database (BIA) as of January 2018, about 11,261 (or about 99.92 percent) of 11,270 commercial radio stations had revenues of $38.5 million or less and thus qualify as small entities under the SBA definition.[504] The Commission has estimated the number of licensed commercial AM radio stations to be 4,633 stations and the number of commercial FM radio stations to be 6,738, for a total number of 11,371.[505] We note, that the Commission has also estimated the number of licensed NCE radio stations to be 4,128.[506] Nevertheless, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

32. We also note, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.[507] The Commission's estimate therefore likely overstates the number of small entities that might be affected by its action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, to be determined a "small business," an entity may not be dominant in its field of operation.[508] We further note, that it is difficult at times to assess these criteria in the context of media entities, and the estimate of small businesses to which these rules may apply does not exclude any radio station from the definition of a small business on these basis, thus our estimate of small businesses may therefore be over-

[500] U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[501] 13 CFR § 121.201, NAICS Code 515112.

[502] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[503] *Id.*

[504] BIA/Kelsey, MEDIA Access Pro Database (viewed Jan. 26, 2018).

[505] Broadcast Station Totals as of June 30, 2018, Press Release (MB Jul. 3, 2018) (June 30, 2018 Broadcast Station Totals), https://docs.fcc.gov/public/attachments/DOC-352168A1.pdf.

[506] *Id*.

[507] 13 CFR § 121.103(a)(1). "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has power to control both."

[508] 13 CFR § 121.102(b).

inclusive. Also, as noted above, an additional element of the definition of "small business" is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

33. *FM Translator Stations and Low Power FM Stations.* FM translators and Low Power FM Stations are classified in the category of Radio Stations and are assigned the same NAICS Code as licensees of radio stations.[509] This U.S. industry, Radio Stations, comprises establishments primarily engaged in broadcasting aural programs by radio to the public.[510] Programming may originate in their own studio, from an affiliated network, or from external sources.[511] The SBA has established a small business size standard which consists of all radio stations whose annual receipts are $38.5 million dollars or less.[512] U.S. Census Bureau data for 2012 indicate that 2,849 radio station firms operated during that year.[513] Of that number, 2,806 operated with annual receipts of less than $25 million per year, 17 with annual receipts between $25 million and $49,999,999 million and 26 with annual receipts of $50 million or more.[514] Therefore, based on the SBA's size standard, we conclude that the majority of FM Translator Stations and Low Power FM Stations are small.

34. *Multichannel Video Distribution and Data Service (MVDDS).* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[515] These definitions were approved by the SBA.[516] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[517] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7,

[509] *See*, U.S. Census Bureau, 2017 NAICS Definitions, "515112 Radio Stations," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515112&search=2017+NAICS+Search&search=2017.

[510] *Id.*

[511] *Id*.

[512] 13 CFR § 121.201, NAICS code 515112.

[513] U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* NAICS Code 515112, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515112.

[514] *Id.*

[515] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[516] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (Feb. 13, 2002).

[517] *See* "*Multichannel Video Distribution and Data Service Spectrum Auction Closes; Winning Bidders Announced*," Public Notice, 19 FCC Rcd 1834 (2004).

2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[518]

35. *Satellite Telecommunications.* This category comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[519] Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $32.5 million or less in average annual receipts, under SBA rules.[520] For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.[521] Of this total, 299 firms had annual receipts of less than $25 million.[522] Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

36. *All Other Telecommunications.* The **"**All Other Telecommunications" category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[523] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.[524] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[525] The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of $32.5 million or less.[526] For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.[527] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 42 firms had annual receipts of $25 million to $49, 999,999.[528] Thus, a majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

37. *Fixed Microwave Services*. Microwave services include common carrier,[529] private-operational fixed,[530] and broadcast auxiliary radio services.[531] They also include the Local Multipoint

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[518] *See "Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,"* Public Notice, 20 FCC Rcd 19807 (2005).

[519] U.S. Census Bureau, 2017 NAICS Definitions, "517410 Satellite Telecommunications," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017.

[520] 13 CFR § 121.201, NAICS Code 517410.

[521] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517410, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517410.

[522] *Id.*

[523] *See* U.S. Census Bureau, 2017 NAICS Definitions, NAICS Code "517919 All Other Telecommunications", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

[524] *Id.*

[525] *Id*.

[526] 13 CFR § 121.201, NAICS Code 517919.

[527] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[528] *Id*.

[529] *See* 47 CFR Part 101, Subpart I.

Distribution Service (LMDS),[532] the Digital Electronic Message Service (DEMS),[533] the 39 GHz Service (39 GHz),[534] the 24 GHz Service,[535] and the Millimeter Wave Service[536] where licensees can choose between common carrier and non-common carrier status.[537] At present, there are approximately 66,680 common carrier fixed licensees, 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.[538] The Commission has not yet defined a small business size standard for microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.[539] U.S. Census Bureau data for 2012, show that there were 967 firms in this category that operated for the entire year.[540] Of this total, 955 had employment of 999 or fewer, and 12 firms had employment of 1,000 employees or more. Thus, under this category and the associated small business size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

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

39. *Non-Licensee Owners of Towers and Other Infrastructure*. Although at one time most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over

(Continued from previous page)

[530] Persons eligible under parts 80 and 90 of the Commission's rules can use Private-Operational Fixed Microwave services. *See* 47 CFR Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[531] *See* 47 CFR Parts 74, 78 (governing Auxiliary Microwave Service) Available to licensees of broadcast stations, cable operators, and to broadcast and cable network entities. Auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes TV pickup and CARS pickup, which relay signals from a remote location back to the studio.

[532] *See* 47 CFR §§ 101, 1001-101, 1017.

[533] *See* 47 CFR §§ 101, 101.501-101.538.

[534] *See* 47 CFR Part 101, Subpart N (reserved for Competitive bidding procedures for the 38.6-40 GHz Band).

[535] *See id.*

[536] *See* 47 CFR §§ 101, 101.1501-101.1527.

[537] *See* 47 CFR §§ 101.533, 101.1017.

[538] These statistics are based on a review of the Universal Licensing System on September 22, 2015.

[539] 13 CFR § 121.201.

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

200 feet in height or within the glide slope of an airport must register the tower with the Commission's Antenna Structure Registration ("ASR") system and comply with applicable rules regarding review for impact on the environment and historic properties.

40. As of March 1, 2017, the ASR database includes approximately 122,157 registration records reflecting a "Constructed" status and 13,987 registration records reflecting a "Granted, Not Constructed" status. These figures include both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.[541] Regarding towers that do not require ASR registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners that would be subject to the rules on which we seek comment. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all entities owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands. In addition, there may be other non-licensee owners of other wireless infrastructure, including Distributed Antenna Systems (DAS) and small cells that might be affected by the measures on which we seek comment. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

41. The closest applicable SBA category is All Other Telecommunications, and the appropriate size standard consists of all such firms with gross annual receipts of $32.5 million or less.[542] For this category, U.S. Census data for 2012 show that there were 1,442 firms that operated for the entire year.[543] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[544] Thus, under this SBA size standard a majority of the firms potentially affected by our action can be considered small.

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

42. The *Third Report and Order* does not establish any reporting, recordkeeping, or other compliance requirements for companies involved in wireless infrastructure deployment.[545] In addition to not adopting any reporting, recordkeeping or other compliance requirements, the Commission takes significant steps to reduce regulatory impediments to infrastructure deployment and, therefore, to spur the growth of personal wireless services. Under the Commission's approach, small entities as well as large companies will be assured that their deployment requests will be acted upon within a reasonable period of time and, if their applications are not addressed within the established time frames, applicants may seek injunctive relief granting their siting applications. The Commission, therefore, has taken concrete steps to relieve companies of all sizes of uncertainly and has eliminated unnecessary delays.

43. The *Third Report and Order* also does not impose any reporting or recordkeeping requirements on state and local governments. While some commenters argue that additional shot clock classifications would make the siting process needlessly complex without any proven benefits, the

[541] We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

[542] 13 CFR § 121.201, NAICS Code 517919.

[543] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS code 517919, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

[544] *Id*.

[545] *See supra* para. 144.

Commission concludes that any additional administrative burden from increasing the number of Section 332 shot clocks from two to four is outweighed by the likely significant benefit of regulatory certainty and the resulting streamlined deployment process.[546] The Commission's actions are consistent with the statutory language of Section 332 and therefore reflect Congressional intent. As a result, the additional shot clocks that the Commission adopts will foster the deployment of the latest wireless technology and serve consumer interests.

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

44. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."[547]

45. The steps taken by the Commission in the *Third Report and Order* eliminate regulatory burdens for small entities as well as large companies that are involved with the deployment of person wireless services infrastructure. By establishing shot clocks and guidance on injunctive relief for personal wireless services infrastructure deployments, the Commission has standardized and streamlined the permitting process. These changes will significantly minimize the economic impact of the siting process on all entities, including small entities, involved in deploying personal wireless services infrastructure. The record shows that permitting delays imposes significant economic and financial burdens on companies with pending wireless infrastructure permits. Eliminating permitting delays will remove the associated cost burdens, and enabling significant public interest benefits by speeding up the deployment of personal wireless services and infrastructure.

46. The Commission considered but did not adopt proposals by commenters to issue "Best Practices" or "Recommended Practices,"[548] and to develop an informal dispute resolution process and mediation program, [549] noting that the steps taken in the *Third Report and Order* address the concerns underlying these proposals to facilitate cooperation between parties to reach mutually agreed upon solutions.[550] The Commission anticipates that the changes it has made to the permitting process will provide significant efficiencies in the deployment of personal wireless services facilities and this in turn will benefit all companies, but particularly small entities, that may not have the resources and economies of scale of larger entities to navigate the permitting process. By adopting these changes, the Commission will continue to fulfill its statutory responsibilities, while reducing the burden on small entities by removing unnecessary impediments to the rapid deployment of personal wireless services facilities and infrastructure across the country.

Report to Congress

47. The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.[551] In addition, the Commission will

[546] *See supra* para. 106.

[547] 5 U.S.C. § 603(c)(1)-(4).

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

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

[550] *See supra* para. 127.

[551] 5 U.S.C. § 801(a)(1)(A).

send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order* and FRFA (or summaries thereof) also will be published in the *Federal Register*. [552]

[552] 5 U.S.C. § 604(b).